

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-95 (6)S
Sales Tax
February 15, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S940811C

On August 11, 1994 a Petition for Advisory Opinion was received from Moore Business Forms, Inc., 900 Buffalo Avenue, Niagara Falls, NY 14302.

The issue raised by Petitioner, Moore Business Forms, Inc., is whether Petitioner will be liable for collecting sales tax on the receipts from the various transactions enumerated below:

1. Conversion Services

This process entails the conversion of a paper form to an electronic image. Petitioner will take a customer's existing business form, such as a tax return, and convert it to an electronic image encoded on a disc through use of scanning equipment and software. Petitioner will also design a form for a customer through application of a software program specifically intended for forms development. The end product delivered to the customer, regardless of whether scanned or designed, will be an electronic file containing the form image. While the disc may be shipped to a customer within New York State, Petitioner's conversion service may be performed either within or outside New York State.

Answer

Where Petitioner converts a customer's existing form from paper to an electronic image on a disc through the use of scanning equipment and software, Petitioner is producing tangible personal property for sale. It is not performing an information service since Petitioner is not "integrating or recasting the information received from the customer so that the customer is given back some new information, or some new significant intelligence, concerning the data furnished" but is "converting the information received from the customer from one form or medium to another, without interpreting or recasting it, so that the form of the information changes but not the intelligence contained therein". (Finserv Computer Corp. v. Tully, 463 N.Y.S.2d 924, affd 61 N.Y.2d 947). In Finserv Computer Corp. v. Tully, *supra*, the court concluded that "petitioner's sales of microfiche or microfilm to its customers are thus sales of tangible personal property subject to tax under subdivision (a) of section 1105 of the Tax Law...."

In the instant matter, Petitioner is selling tangible personal property in the form of a disc containing data, and the total receipts from the sale will be subject to the sales tax imposed on the receipts from sales of tangible personal property under section 1105(a) of the Tax Law.

Where Petitioner designs a form for a customer through application of a software program specifically intended for forms development, and furnishes the disc on which the data is recorded, Petitioner is also selling tangible personal property and the receipts therefrom will also be subject to the sales tax imposed under section 1105(a) of the Tax Law.

However, in any instance where the customer supplies the disc upon which the data is encoded, Petitioner will be selling a fabrication service, the receipts from which will be subject to the sales tax imposed on receipts from the services of producing, fabricating, processing, printing or imprinting tangible personal property under section 1105(c)(2) of the Tax Law. (Taxability of Major Data Entry Techniques, TSB-M-81(3) S, Feb. 9, 1981).

2. Resale Products

Petitioner will purchase software from a third party and resell the software to customers. The software will be for use in designing forms and for use in scanning forms.

Answer

Petitioner's sales of software, which Petitioner has purchased from a third party supplier for the purpose of reselling to customers, will be considered to be sales of prewritten software. Accordingly, the receipts from the sales of this software will be subject to the tax imposed under section 1105(a) of the Tax Law, unless the customer presents Petitioner with a tax exemption form substantiating that the customer is purchasing the software for resale purposes or for use in an exempt manner such as equipment predominantly used in the production of forms for sale.

3. Documaster System

This system consists of software which will allow the customer to have an inhouse network for development of electronic forms. The software will allow network users to retrieve and edit any electronic forms saved on the system. Petitioner will charge customers a license fee for the Documaster System Software.

Answer

Petitioner's licensing fees charged to customers to use the Documaster System software will be considered as sales of tangible personal property in the form of prewritten software and the receipts from the licensing fees will be subject to the tax imposed under section 1105(a) of the Tax Law.

4. Maintenance Charge

Petitioner will offer customers who license a Documaster System an annual maintenance contract. Under the contract, customers will be entitled to user support and any upgrades made during the contract period. Petitioner will charge the customer an annual maintenance fee. The maintenance fee will be billed separately and will be renewable on an annual basis.

Answer

If the software maintenance agreement offered by Petitioner provides for the sale of both taxable elements (e.g., prewritten software upgrades) and nontaxable elements (e.g., training, consulting, diagnostic and troubleshooting support, etc.), the receipts from the charge for the entire maintenance agreement are subject to tax unless the charge for the nontaxable elements is reasonable and separately stated in the maintenance agreement and separately billed on the invoice or other document of sale given to the customer. (State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software, TSB-M-93 (3) S, Sales Tax, March 1, 1993)

5. Management Fee

Petitioner will also offer customers a management service contract which will include everything offered under the maintenance contract plus any new products or enhancements which are developed by Petitioner. In addition, the customers may receive consulting services in regard to the setting up and use of the Documaster System software. The consulting may continue on an on-going basis and involves the integration of the design and systems software. In summary, the management fee includes user support, upgrades, new products, enhancements and consulting.

Answer

The total receipts Petitioner receives from the sale of a management service contract which includes both taxable and non-taxable elements will be subject to the tax imposed under section 1105(a) of the Tax Law when the fees charged for the management service contract are billed to the customer as a lump sum. However, if the management service contract reasonably and separately states the charges for the nontaxable elements and if the charges for the nontaxable elements are separately billed on the invoice or other document of sale given to the customer the receipts from the charges for the nontaxable elements will not be subject to the tax imposed under section 1105(a) of the Tax Law. The nontaxable elements will include the charges for user support for software and consulting. The receipts from charges for upgrades, new products and enhancements are considered to be receipts from charges for taxable elements and are subject to the tax imposed under section 1105(a) of the Tax Law. (State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software, TSB-M-93(3)S, Sales Tax, March 1, 1993)

6. Consulting

Petitioner may also offer a consulting service to users of the Documaster System. This will include how to set up the system and how to retrieve and use electronic forms on file. The charge for the consulting service can be part of the management fee discussed in item 5, or can be charged separately for customers requesting a systems integration of the software packages. Petitioner will write the programming code and integrate the system for those customers who choose to use the design software in conjunction with the Documaster System in a network environment. This requires that the service be done on-site at the customer's location. Petitioner will be charged an hourly rate for this particular service.

Answer

Section 1105(c) of the Tax Law imposes sale's tax on certain enumerated services. Since consulting services are not included within the services enumerated under section 1105(c) of the Tax Law, the receipts from charges to customers for consulting services will generally be excluded from the tax. However, when the consulting services are included within a management service contract which includes both taxable and nontaxable elements, as discussed in item 5, above, the receipts from fees charged for the consulting service will be subject to the tax imposed under section 1105(a) of the Tax Law when the fees charged for the management contract are billed to the customer as a lump sum. Contrarily, if the management service contract reasonably and separately states the charges for the consulting service and if the charge for the consulting service is separately billed on the invoice or other document of sale given to the customer, the receipts from the charges for the nontaxable elements will not be subject to the tax imposed under section 1105(a) of the Tax Law. (State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software, TSB-M-93(3)S, Sales Tax, March 1, 1993)

The receipts from Petitioner's charges to customers requesting a systems integration of the software packages, for writing the programming code and integrating the system to enable customers to use the design software in conjunction with the Documaster System in a network environment will be given the same status as the receipts from charges for software for sales tax purposes.

DATED: February 15, 1995

/s/
PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.