

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

TSB-A-88 (54)S
Sales Tax
October 21, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880826A

On August 26, 1988, a Petition for Advisory Opinion was received from Cognos Corporation, 2 Corporate Place I-95, Peabody, MA 01960.

The issue raised is whether the sale of a license to use prepackaged software shipped to customers on magnetic diskettes for use on personal computers and technical support for the above product is subject to New York State and local sales taxes.

Petitioner is selling a license to use prepackaged software for a 99 year period. Petitioner retains ownership of the product. It is prepackaged software which must be used on an IBM PC AT or compatible equipment. Petitioner does not sell it through retail stores. It must be ordered through the mail or by telephone from a special sales unit at Petitioner's corporate headquarters. It is not easily transferable from one machine to another since it must be used on a specific system configuration. The main advantage to the user of the product is its compatibility with Petitioner's mid-range computer software and the ability to transfer data between the systems.

When purchased, a thirty day warranty is included in the original cost. The customer has the option to purchase a support contract which entitles him to an electronic bulletin board service providing helpful hints on how to use the product, technical newsletters, notification of new releases of the program and the right to acquire the new version at material cost. For an additional amount the customer may purchase extended support which includes all of the above plus telephone advice.

Section 1105(a) of the Tax Law imposes a tax on the receipts from every retail sale of tangible personal property. Sale, as defined in Section 1101(b)(5), includes any rental, lease or license to use tangible personal property. For sales tax application, computers and peripheral devices commonly described as "hardware" are considered tangible personal property.

The tax status of receipts from computer program ("software") sales and services is explained in Department of Taxation and Finance Technical Services Bulletin 1978-1(S), issued February 6, 1978:

Software [means] instructions and routines which, after analysis of the customer's specific data processing requirements, are determined necessary to program the customer's electronic data processing equipment to enable the customer to accomplish specific functions with his EDP system. To be considered exempt 'software' for purposes of this bulletin, one of the following elements must be present:

- A. Preparation or selection of the program for the customer's use requires an analysis of the customer's requirements by the vendor.

or

- B. The program requires adaptation, by the vendor, to be used in a specific environment i.e, a particular make and model of computer utilizing a specified output device. For example, a software vendor offers for sale a pre-written sort program which can be used in several computer models. Prior to operation, instructions must be added by the vendor which specify the particular computer model in which the program will be utilized.

The software may be in the form of:

- a. System programs (except for those instruction codes which are considered tangible personal property in paragraph 1 above) - programs that control the hardware itself and allow it to compile, assemble and process application programs.
- b. Application programs - programs that are created to perform business functions or control or monitor processes.
- c. Pre-written programs (canned) - programs that are either systems programs or application programs and are not written specifically for one user.
- d. Custom programs - programs created specifically for one user.

Software meeting the above criteria, whether placed on cards, tape disc pack or other machine readable media or entered into a computer directly, is deemed to be intangible personal property for sales tax purposes, and as such its sale is exempt from New York State and local sales and use taxes. Software or programs which do not meet the criteria are subject to tax.

[Example] E. A software supplier manufactures pre-packaged programs for use with home television games or other personal computer equipment. The programs are marketed through retail stores and the programs are fully usable by customers without modifications. In selecting or preparing the program, the supplier does not perform a detailed analysis of the customer's requirements. The program is viewed as tangible personal property for sales tax purposes.

Petitioner is selling a license to use prepackaged software. This software is not specifically written for one user and does not require analysis or adaptation. Rather, the software is designed for any IBM PC AT or compatible equipment. Accordingly, the software is regarded as tangible personal property, and thus, is subject to sales tax pursuant to Section 1105(a) of the Tax Law.

The technical support services offered by Petitioner involving software modification and helpful hints on how to use the product after its installation, accordingly, are subject to tax because they are rendered in connection with tangible personal property.

DATED: October 21, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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