

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

TSB-A-92 (8)S  
Sales Tax  
February 6, 1992

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910925A

On September 25, 1991 a Petition for Advisory Opinion was received from Garpac Corporation, 254 W. 35th Street, New York, New York 10001.

The issues raised by Petitioner, Garpac Corporation, are:

1. Whether the receipts from the sale of Petitioner's computer software are subject to sales tax.
2. Whether the receipts from the sale of maintenance agreements to continue to enhance computer software to customer's specifications are subject to sales tax.

Petitioner sells pre-written base packages of computer software. In addition, Petitioner customizes programs to meet certain specifications of customers. Charges for the pre-written program and custom program are separately stated on customers invoice. Petitioner charges \$150.00 per hour for custom programming. Other custom programmers charge as much as \$238.00 per hour for similar programming.

Petitioner writes software for one type of industry. Each customer signs a proposal and each program is written separately. A change or enhancement is not copied from a previously written program, even if several clients request the same change. There is no cross indexing of previously written programs to determine if the program could be transferred to another customer to satisfy his need. Petitioner rewrites each and every proposal.

Petitioner sells maintenance agreements to is customers to continue to enhance the software to the customer's exact written specification. Petitioner obtains a signed and written proposal before doing the customized program. Fees are not separately stated on the invoice as to the individual charge for each service performed under the maintenance agreement.

Petitioner also sells computer software to customers outside New York State.

Effective September 1, 1991, Section 1101(b) of the Tax Law was amended imposing sales tax on computer software as follows:

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the

author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

Section 1115 of the Tax Law was amended effective September 1, 1991, to add the following:

(o) Services otherwise taxable under subdivision (c) of section eleven hundred five or under section eleven hundred ten shall be exempt from tax under this article where performed on computer software of any nature; provided, however, that where such services are provided to a customer in conjunction with the sale of tangible personal property any charge for such services shall be exempt only when such charge is reasonable and separately stated on an invoice or other statement of the price given to the purchaser.

Section 525.3(a)(3) of the Sales and Use Tax Regulations provides as follows:

The sales tax is a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate.

Accordingly, pursuant to Section 1101(b) of the Tax Law the receipts from the sale of pre-written software or a pre-written portion thereof that is modified or enhanced to any degree to meet the specifications of a specific purchaser is entirely subject to sales tax unless there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement. The term "reasonable charge" is not defined by statute nor regulation. Neither is there a formula to establish whether the charge for a modification is reasonable. However, Petitioner charges of \$150.00 per hour for custom programming are under the circumstances described reasonable in nature. Therefore, since the Petitioner charges a reasonable, separately stated charge on its invoice for the custom programming, only charges for the pre-written portion of the program is subject to sales and use taxes.

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As for the sale of maintenance agreements, pursuant to Section 1115(o) of the Tax Law, the entire charge for services performed under a maintenance agreement is subject to sales tax unless the charge is separately stated between the taxable and exempt services provided under the agreement. Thus, since Petitioner does not separately state the charges for the services it provides under the maintenance agreement as required by Section 1115(o), the entire charge received from the sale of the maintenance agreement is subject to sales and use taxes.

Concerning Petitioner's sale of computer software and maintenance agreements to customers outside New York State, pursuant to Section 525.2(a)(3) of the Sales and Use Tax Regulations no sales or use tax must be collected where delivery or possession is transferred to a purchaser outside of New York State.

DATED: February 6, 1992

s/PAUL B. COBURN  
Deputy Director  
Taxpayer Services Division

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