

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

TSB-A-94 (15)S
Sales Tax
April 6, 1994

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930504B

On May 4, 1993, a Petition for Advisory Opinion was received from Long Island Lighting Company, 175 East Old Country Road, Hicksville, New York 11801.

The issue raised by Petitioner, Long Island Lighting Company, is whether a monthly service fee paid by Petitioner for a computer disaster recovery service is subject to New York State and local sales and use taxes.

In the event any unplanned condition renders Petitioner unable to use its data processing equipment, Petitioner has contracted with Sungard Services Company (hereinafter "Sungard") to have immediate use of a backup computer facility provided by Sungard for a period of at least six weeks. The backup computer site, located in Philadelphia, consists of an installed, fully operational computer system equipped to Petitioner's specifications and technical requirements. In the event of a disaster, Petitioner's personnel will relocate to Sungard's facility. No equipment owned by Sungard will be delivered to Petitioner's facility in New York, nor will Petitioner received title to or ownership of a substitute computer. Petitioner will provide all software and personnel to operate the substitute system. However, the assistance of Sungard's Operations Staff is available for technical assistance without charge if needed. Petitioner will have use of the equipment configuration for testing their systems and applications. In addition, network diagnostics and installation assistance will be available to facilitate the testing and installation of Petitioner's backup network at the site.

Sungard is required to maintain an IBM-specified proper operating environment for the equipment configuration and will adhere to IBM recommended policies and procedures for proper maintenance of said equipment, in order to maintain the facility in a state of readiness at all times.

Petitioner is required to pay Sungard a monthly service fee of \$8,315 for providing access to the backup computer site in the event of a computer disaster. Sungard assumes no responsibility for repairing Petitioner's original computer equipment.

Section 525.2 of the Sales and Use Tax Regulations provides, in part, as follows:

Reg. Sec. 525.2. Nature of tax.--(a)(1) The sales tax is imposed on the receipts, unless specifically exempt, from every retail sale of tangible personal property, from every retail sale of specifically enumerated utility services, from every retail sale of other specifically enumerated services and from the sale of prepared or ready to be eaten food, for consumption on or off premises, drinks, restaurant and catered meals,

and from charges for hotel occupancy, admissions and dues. Each of the various types of transactions has statutory exemptions, exceptions and limitations.

* * *

(3) 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.

Section 526.7(e)(1) of the Sales and Use Tax Regulations provides, in part, as follows:

(e) Transfer of possession. (1) Except as otherwise provided in paragraph (3) of this subdivision, a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.

Example 1: A person purchases tangible personal property in New York State, and takes delivery at the time of purchase. As delivery occurred in New York State, the receipts from the sale is taxable. (emphasis added)

In the instant case, in the event of a computer disaster, Petitioner has contracted with Sungard for use of a backup computer facility located in Philadelphia, Pennsylvania. No equipment owned by Sungard will be delivered to Petitioner's facility in New York and Sungard assumes no responsibility for repairing Petitioner's original computer equipment in New York. Accordingly, since delivery and possession of all services provided by Sungard to Petitioner will take place outside of New York State, pursuant to Sections 525.2 and 526.7(e) of the Sales and Use Tax Regulations any portion of the fee paid by Petitioner to Sungard for computer disaster recovery services that would have been subject to sales tax if Sungard's facility were located in New York State, are not subject to New York State and local sales and use taxes.

DATED: April 6, 1994

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

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