

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

TSB-A-95 (28)S
Sales Tax
July 13, 1995

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S941118B

On November 18, 1994, a Petition for Advisory Opinion was received from Steve Burnett, Inc., 39 East 20th Street, New York, New York 10003.

The issue raised by Petitioner, Steve Burnett, Inc., is whether Petitioner's receipts from sales of "Multi Media" are not subject to sales tax since the receipts qualify as receipts from nontaxable sales of intangibles in the form of custom software.

Petitioner is in the graphic arts business and is presently expanding into the multi media business. The following paragraphs contain petitioner's statement as to the nature of its activities.

Multi media is the creation of a customized software package for use in internal or external marketing purposes. Petitioner develops multi media software exclusively for its individual clients. Petitioner creates the software to the specifications of the client and does not reproduce or use the software in work for other clients.

The following items represent examples of Petitioner's multi media projects:

- (a) Petitioner will develop software for use in creating a graphical presentation on a computer. Such presentations might be college recruitment presentations showing the various divisions of a company, the company's future goals, etc.
- (b) Petitioner will develop software for creating a graphical presentation of particular printed matter, such as a company's annual financial statement. The software may allow the user to access specific information in the report without going through the whole report and to have the capability to export financial information from the report.
- (c) Some projects will possess a combination of items. For example, a project for the development of a graphical presentation of an annual report may include the development of the software, the design of the label to be placed on the disk, the design of a sleeve or cover for storing the disk and the design of an envelope for use in mailing the disk. In these instances Petitioner may do just the development of the software and design work, or also may be involved in the printing of the labels, the disk sleeve or cover, and the envelopes and the duplication of the computer disks.

- (d) Petitioner will develop software for use in creating a marketing library. This software will allow Petitioner to update the marketing data or information at the client's request. The software will allow the client to retrieve and customize any of the stored data for reproduction in any medium (i.e., paper copies, slides, overhead projections, computer presentations, etc.).

Section 1101(b)(6) of the Tax Law defines tangible personal property as "[c]orporeal personal property of any nature Such term shall also include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser."

Section 1101(b)(14) of the Tax Law defines prewritten computer software as:

[c]omputer 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 1105(a) of the Tax Law imposes sales tax on "[t]he receipts from every retail sale of tangible personal property"

In items (a), (b), (c) and (d) enumerated above, Petitioner is not selling prewritten nor custom software, but is selling tangible personal property in the form of disks containing data. Petitioner's receipts from the sale of the disks in items(a), (b), (c) and (d) and the sale of duplicated disks in item (c) will be subject to the sales tax imposed on the receipts from the sale of tangible personal property under section 1105(a) of the Tax Law.

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In item (c) Petitioner's receipts from the sale of the designs for the disk labels, designs for the sleeves or covers for disks and designs for the outside envelopes for use in mailing the disks will be receipts from sales of tangible personal property and will be subject to the sales tax imposed on receipts from sales of tangible personal property under section 1105(a) of the Tax Law.

When Petitioner also arranges for or performs the actual printing of the labels, sleeves or covers and the mailing envelopes, the total receipts from the charges to the customer applicable to the design, printing and sale of the labels, sleeves or covers and the mailing envelopes will be subject to the sales tax imposed on receipts from sales of tangible personal property under section 1105(a) of the Tax Law. Since the customer will not be selling the annual reports, the customer is not making purchases for resale purposes.

DATED: July 13, 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.