

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Taxpayer Guidance Division

TSB-A-08(40)S
Sales Tax
August 28, 2008

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S060726B

On July 26, 2006, the Department of Taxation and Finance received a Petition for Advisory Opinion from STF Services Corp., 26 Corporate Circle, East Syracuse, New York 13057. Petitioner, STF Services Corp., provided additional information pertaining to the Petition on August 11, 2006, and February 7, 2007.

The issues raised by Petitioner are:

1. Whether Petitioner's sale of access to scannable and nonscannable tax and business forms provided via Petitioner's software is a taxable sale of software.
2. Whether the computer system hardware purchased or leased by Petitioner and used or consumed predominantly (more than 50% of the use) in designing or developing the software that produces scannable and nonscannable tax and business forms are exempt from sales and use tax pursuant to section 1115(a)(35) of the Tax Law.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Petitioner is in the business of producing scannable and nonscannable tax and business form products. Petitioner has three specific product categories:

1. SuperForm Tax Forms
2. SuperForm Sales Tax Rates/Forms
3. SuperForm Doing Business Forms

The SuperForm Tax Forms product is offered to Petitioner's customers in a compact disc format and also through a direct Internet connection to Petitioner's server. The product is used to prepare federal, state, and local tax forms. Customers install the SuperForm Tax Forms on their computers by using the compact discs or downloading directly from the Internet. SuperForm Tax Forms users input information requested by the software and the software performs tax computations automatically. SuperForm Tax Forms generates government approved forms including scannable bar codes that the user can file with federal, state, and local tax authorities. The software includes additional functionality; for example, forms are linked to tax return instructions, pop-up notes and due dates, quick reference guides, IRS publications, state tax directories, practice aids and organizers, and prior years forms and instructions.

The SuperForm Sales Tax Rates/Forms product is offered to Petitioner's customers in a compact disc format and also through a direct Internet connection to Petitioner's server. The

product is used to prepare state and local sales and use tax forms and also includes a function to look up current sales and use tax rates for thousands of state and local taxing jurisdictions. Customers install the SuperForm Sales Tax Rates/Forms on their computers by using the compact discs or downloading directly from the Internet. The product enables users to input data directly on the computer-generated tax form, and the software automatically computes the tax on the form. The product generates government approved signature-ready forms which the user can file with state and local tax authorities. The software includes additional functionality such as fast form searching by keyword type or number, profiles that fill in client information without tedious re-keying, and official tax return instructions linked to forms.

The SuperForm Doing Business Forms product is offered to Petitioner's customers through a direct Internet connection to Petitioner's server. Petitioner's customers can download the product directly through the Internet connection from Petitioner's server. The product contains over 3,700 state-specific forms including articles of incorporation for a regular corporation, articles of organization for a limited liability company, business name reservation forms, annual report forms, forms covering mergers and consolidations, changes of registered agents, general partnership and limited liability company statements of dissolution, articles of dissolution, and other forms. SuperForm Doing Business Forms users input information to fill in the necessary areas of the required forms. Some information in certain fields on the forms may be entered once and saved by the software to be automatically filled in on other forms. The product generates government approved signature-ready forms.

Petitioner employs staff in various departments to develop its products. The analyst department is responsible for procuring government forms and verifying that Petitioner's software produces the forms according to government specifications. The programming staff writes the software that runs the forms programs including the calculations code that is embedded onto the individual forms. The desk-top publishing department manipulates the forms to look like the original government-approved forms. The proofreading department reviews the forms for typos and other errors. The technical support department assists customers with any software problems. Petitioner employees use or consume the computer system hardware (computers, external hard drives, printers, scanners, servers, monitors, keyboards, mice, network interfaces, network hubs, disc duplicator, and network routers) predominantly (more than 50% of the use) to design and develop the three products previously described.

Applicable law and regulations

Section 1101(b) of the Tax Law provides, in part:

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal 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. . . .

* * *

(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 1105 of the Tax Law provides, in part:

On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax . . . upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this article.

Section 1115(a) of the Tax Law provides, in part:

Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten:

* * *

(35) Computer system hardware used or consumed directly and predominantly in designing and developing computer software for sale. . . .

Section 526.7(a) of the Sales and Use Tax Regulations provides, in part:

Definition. (1) The words *sale*, *selling* or *purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words *sale*, *selling* or *purchase* are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

Technical Services Bureau Memorandum entitled *State and Local Sales and Compensating Use Taxes Imposed on Certain Sales of Computer Software*, March 1, 1993, TSB-M-93(3)S provides, in part:

Effective September 1, 1991, State and local sales and compensating use taxes are imposed on the sale or use of prewritten computer software and certain related services.

* * *

Prewritten computer software is any computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.

The sale of prewritten software includes any transfer of title or possession, any exchange, barter, rental, lease or license to use, including merely the right to reproduce, for consideration. Thus, a payment made by a customer on or after September 1, 1991, for a license to use, or for the rental or lease of prewritten software is subject to sales or use tax. The transfer of public domain software without any charge is not taxable because there is no consideration.

* * *

Prewritten software is subject to tax whether sold as part of a package or separately. Software created by combining two or more prewritten programs or portions of prewritten programs is still prewritten software subject to tax. The medium by which the software is transferred to the purchaser has no effect on the software's taxability. Thus, prewritten software is taxable whether sold, for example, on a disk, tape or by electronic transmission over telephone lines.

Technical Services Bureau Memorandum entitled *Exemption for Computer System Hardware*, June 8, 1998, TSB-M-98(5)S, provides, in part:

Section 97 of Chapter 56 amended the New York State Tax Law to exempt from New York State and local sales and compensating use (use) taxes purchases, leases or rentals of computer system hardware that is used or consumed directly and predominantly in designing and developing computer software for sale. This exemption, which is provided for under Tax Law ' 1115(a)(35), is effective June 1, 1998.

* * *

Only the purchase of those components of the computer system hardware and associated parts that are used directly and predominantly in the design and development of computer software for sale is exempt from sales and use taxes under section 1115(a)(35).

Computer System Hardware. *Computer system hardware* is any organized assembly of physical equipment that is united and regulated by interaction or interdependence to accomplish a set of specific computer system functions. The term includes any connected or directly related device or equipment which enables the computer to store, retrieve or communicate to or from a person, another computer or another device, the results of computer operations, computer programs or computer data.

Examples of computer system hardware are: microcomputers; minicomputers; main-frame computers; personal computers; external hard drives; portable disk drives; compact disc read only memory (CD-ROM) drives; external modems; printers; scanners; servers; monitors; keyboards; mice; network interfaces; network hubs; and network routers.

* * *

Directly and Predominantly. The purchase of computer system hardware is eligible for the exemption only if the computer hardware meets the tests of direct and predominant use.

Directly means that the computer system hardware is actually used in designing and developing computer software for sale, or that the hardware has an active, causal relationship in the design and development of computer software for sale. For example, computer system hardware that is used to create, modify or store computer programs under the control of a developer is considered to be used directly in the design and development of computer software. Computer system hardware that is used to print the computer programs and documentation during the design and development stages is also considered to be used directly in the design and development of the computer software.

Computer system hardware used in activities that are collateral to the actual design and development process is not considered to be used directly in designing and developing computer software for sale. For example, use of computer system hardware in administration, production or distribution activities is not considered direct use for purposes of this exemption. *Administration* includes activities such as sales promotion, general office work, purchasing, maintenance, and clerical tasks (such as preparation of work, production and time records). *Production* includes those activities involved in the duplication of the finished software and packaging the software for sale. *Distribution* includes all operations subsequent to production, such as storing, displaying, selling, loading and shipping finished products.

Predominantly means that the computer system hardware must be used more than 50% of the time in the design and development of computer software for sale.

* * *

Designing and Developing. The term *designing and developing* includes systems analysis, program design, coding, testing, debugging and documentation that are part of the design and development of computer software for sale. Thus, the term includes activities carried on from the conceptual stage, through the planning, evaluation and testing stages of development.

* * *

Supplies. This exemption does not apply to consumable supplies such as toner, ink, printer paper, floppy diskettes, removable disk cartridges, high capacity disks, portable disk drive disks, writeable and erasable CD-ROM drive disks, mouse pads, wrist pads, and the like.

Opinion

Petitioner's SuperForm Tax Forms and SuperForm Sales Tax Rates/Forms products are offered to customers in a compact disc format. These products as well as the SuperForm Doing

Business Forms are also offered through a direct Internet connection to Petitioner's server. Customers install the products on their computers by using the compact discs or downloading directly from the Internet. Users input information as requested by the software and the software uses the information to complete the required areas of the form and performs the necessary tax computations automatically. The software generates government approved forms including scannable bar codes that the user can file with federal, state and local authorities. The software also includes additional functionalities which provide the user access to additional information and instructions that assist the user in completing the required returns.

Customers purchase Petitioner's product to access various functional forms. The forms with additional functionalities necessary to complete the forms are provided to the customers via compact disc or the Internet. Once the customer installs the product on its computer the customer can access the fill-in forms with built-in calculations. Therefore, the consideration received by Petitioner is for the sale of software to the customer which provides access to computer generated fill-in and functional forms and the ability to complete the forms. The software is prewritten software since it is not designed and developed to the specifications of a specific purchaser. The fee paid for the lease or license to use or consume prewritten computer software, regardless of the medium by means of which such software is conveyed to the purchaser, is subject to New York State sales tax under section 1105(a) of the Tax Law. See sections 1101(b)(6) and (14) of the Tax Law and *Ernst & Young LLP*, Adv Op Comm T&F, June 24, 2003, TSB-A-03(28)S. Therefore, Petitioner's receipts from the sales of its products whether delivered in a compact disc format or via direct Internet connection are receipts from sales of software subject to New York State sales tax under section 1105(a) of the Tax Law.

Computer system hardware that is used directly and predominantly in the design and development of software products for sale is exempt from sales and use tax under section 1115(a)(35) of the Tax Law. See TSB-M-98(5)S, *supra*. *Directly* means that the computer system hardware is actually used in designing and developing computer software for sale, or that the hardware has an active, causal relationship in the design and development of computer software for sale. Use of computer system hardware in administration, production, or distribution activities is not considered direct use for purposes of this exemption. *Predominantly* means that the computer system hardware must be used more than 50% of the time in the design and development of computer software for sale. The term "designing and developing" includes activities carried on from the conceptual stage, through the planning, evaluation, and testing stages of development. See TSB-M-98(5)S, *supra*.

Petitioner's sales of its SuperForm Tax Forms, SuperForm Sales Tax Rates/Forms, and SuperForm Doing Business Forms products are sales of software. Therefore, computer system hardware purchased or leased by Petitioner which is used or consumed directly and predominantly in designing or developing these products is exempt from sales and use tax.

The functions of procuring and verifying government forms for which the analyst

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department is responsible, as well as the functions of the technical support department, are administrative, pre-production, and post production activities. For purposes of section 1115(a)(35) of the Tax Law, such functions are not performed directly in the creation, design, development, or testing of the software. Therefore, purchases of computer system hardware for use predominantly in these departments do not qualify for the exemption provided under section 1115(a)(35) and such purchases will be subject to the applicable State and local sales taxes.

Petitioner may use the same computer system hardware for its administrative, production (design, development, testing, etc.) and post-production (customer support) activities. Petitioner has not furnished enough information for this Opinion to make any determination as to whether any particular computer hardware purchased or leased by Petitioner is used both directly and predominantly (i.e., more than 50%) in the design and development of computer software for sale. The predominant (more than 50%) use of the computer hardware will determine the sales tax status of such purchase. See *Doubleclick, Inc.*, Adv Op Comm T&F, May 8, 2003, TSB-A-03(19)S.

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/s/
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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.