

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

TSB-A-85(23)S
Sales Tax
June 24, 1985

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S840503A

On May 3, 1984, a Petition for Advisory Opinion was received from Avant-Garde Computer Systems, Inc., 5 Herbert Drive, Latham, New York 12210.

The issue raised is whether computer programs developed by Petitioner for use in its customers' Automatic Teller Machines qualify as intangible personal property exempt from New York State and Local Sales and Use Tax.

Petitioner has developed basic computer programs which are licensed primarily to financial institutions for use in "driving" such institutions' Automatic Teller Machines.

These basic programs cannot be utilized by the licensees without certain modifications performed by Petitioner which include:

1. changes in screen
2. changes in account type
3. changes in transactions handled
4. separate identification number for each institution
5. separate identification number for each ATM terminal
6. address/location for ATM terminal.

Petitioner is required to analyze each licensee's needs and requirements in order to ascertain the appropriate modifications to each licensee's basic program.

The Department of Taxation and Finance issued an interpretive bulletin on February 6, 1978 which discusses the application of sales tax to receipts from sales of computer programs as follows:

"Software- Instructions and routines (programs) which, after an 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. Systems 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. The person selling exempt software is required to pay the applicable sales or use tax on any tangible personal property transferred to the customer in connection with the exempt service. In addition, the hardware, utility services and supplies used to develop the exempt software are not eligible for any sales tax exemptions." Taxpayer Services Bureau Bulletin, 1978-1(S).

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Accordingly, as the computer programs (software) developed by Petitioner require an analysis of the customer's requirements and modification of the actual program for use by such customer, such programs are considered to be intangible personal property and therefore not subject to New York State and local sales and use tax.

DATED: May 30, 1985

FRANK J. PUCCIA
Director
Technical Services Bureau

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