

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

TSB-A-92 (26)S
Sales Tax
March 19, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910621B

On June 21, 1991 a Petition for Advisory Opinion was received from Paul Carucci & Co., Tax Consultants, 9 Scott Drive, New City, New York 10956.

The issue raised by Petitioner, Paul Carucci and Co., is whether its client, a computer assisted real estate facilities management business, must collect sales tax on its charges for computer generated rent information and graphic presentation of rental property for lessors of real property.

Petitioner's client provides computer generated rent information and graphic presentation of rental property for lessors of real property.

Petitioner's client will create a rental plan of every floor from dimensioned architectural drawings. He will also verify the location of all demising walls and suite numbers, by field inspection.

Petitioner's client will calculate the area of every space in the building and produce tabulations showing the rentable area for every floor and tenant space based upon a choice of method of floor measurement. The lessor can specify either New York Real Estate Board method or Market Factor method as a specified add-on or loss factor. Petitioner's client will coordinate with these calculations tenant information supplied by the lessor such as suite number, tenant name, lease expiration date and details of any option space situations.

Petitioner's client will produce this information in the form of rental plan books (8 1/2 x 11" format) and on floppy disk which is a program for the lessor's use on any compatible PC computer system.

Petitioner's client will demonstrate the use of the disk on the lessor's own PC computer system showing how the program operates and how data is accessed and printed. Petitioner's client will provide the lessor with a copy of its User Guide Handbook, so the lessor may fully comprehend the program capacity for its on-going use.

Section 1101(b) of the Tax Law as amended effective September 1, 1991 provides, in part, as follows:

(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. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five, such term shall not include gas, electricity, refrigeration and steam. 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 1115(o) of the Tax Law as amended effective September 1, 1991 provides that:

(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.

Petitioner's sales of rental plan books constitute the sale of tangible personal property in accordance with the meaning and intent of Sections 1101(b)(5) and 1101(b)(6) of the Tax Law and thus are subject to the sales tax imposed by Section 1105(a) of the Tax Law.

With regard to Petitioner's clients sales of computer programs on floppy discs, updates or program modifications, pursuant to Section 1101(b)(14) of the Tax Law the sale of pre-written software or a pre-written portion thereof that is modified or enhanced to any degree to meet the

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specifications of a specific purchaser constitutes the sale of tangible personal property unless charges for the pre-written portion and the modifications are separately stated on an invoice or other statement given to the purchaser. Moreover, pursuant to Section 1115(o) of the Tax Law the entire charge for services performed under such agreement is subject to sales tax unless the charge is separately stated between the taxable and exempt services provided under the agreement. Arthur Anderson and Co., Adv Op Comm T & F, November 8, 1991, TSB-A-91(70)S.

DATED: March 19, 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.