

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

TSB-A-93 (51)S
Sales Tax
October 4, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S930526A

On May 26, 1993, a Petition for Advisory Opinion was received from Control Systems Assoc. of CNY, Inc., 6 South Street, Cazenovia, New York 13035.

The issue raised by Petitioner, Control Systems Assoc. of CNY, Inc., is whether the receipts from the sale of custom software and from updating and modification services are subject to sales and use taxes.

Petitioner installs and modifies custom software in industrial and commercial applications. These systems are a combination of custom firmware and custom software whose function is to manage energy and control processes while operating under certain environmental rules and/or conditions. The rules and/or conditions are subject to change based on a number of variables caused by both the user and the environment.

The software needs to be continually modified when conditions requiring modification are discovered or requested by the user. Petitioner's customers chose to either employ Petitioner on an occurrence basis or contract on annual basis for the modification/updating of their custom software.

Effective September 1, 1991, Section 1101(b) of the Tax Law was amended imposing sales tax on computer software as follows:

(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. (emphasis added)

Technical Services Bureau Memorandum, TSB-M-93(3)S, March 1, 1993, pertaining to the taxability of computer software and certain related services provides, in part, as follows:

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.

The effect of this change in the Tax Law is to broaden the types of computer software that are subject to sales and use taxes. Prior to September 1, 1993, "custom" software was exempt from tax as described in Technical Services Bulletin 1978-1(S). However, certain software previously considered "custom" may now be considered prewritten computer software and subject to such taxes. References in the 1978 bulletin to exempt software are largely obsolete and should be disregarded. The only software that is exempt from sales and use taxes under the new law is software designed and developed to the specifications of a specific purchaser.

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Software that was originally designed and developed to the specifications of a specific purchaser (i.e., "custom" software) loses its identity as such and becomes prewritten software, subject to tax, if and when it is sold to someone other than the person for whom it was specifically designed and developed. (emphasis added)

Moreover, New York State Department of Taxation and Finance Sales Tax Newsletter, Vol. 19 No. 1, March, 1992, pertaining to recent legislative changes, provides, in pertinent part, that "[c]harges for custom software and charges for modifying prewritten computer software remain exempt from sales and use taxes."

In the instant case, Petitioner installs and modifies custom software. In accordance with Section 1101(b)(14) of the Tax Law, TSB-M-93(3)S, supra, and Sales Tax Newsletter, Vol. 19 No. 1, supra, the receipt from the sale of software designed and developed to the specifications of a specific purchaser and subsequent modifications to such custom software are exempt from sales and use taxes. Therefore, Petitioner's receipts from the sale of its custom software and any charges to modify such custom software whether charged on an occurrence or annual basis are not subject to sales and use taxes.

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It is noted, however, that if Petitioner sells software that was originally designed and developed to the specifications of a specific purchaser to someone other than the person for whom it was specifically designed and developed that such software is deemed prewritten software and the receipts therefrom are subject to sales and use taxes.

DATED: October 4, 1993

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

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