

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

TSB-A-97(69)S
Sales Tax

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S951219A

On December 19, 1995, the Department of Taxation and Finance received a Petition for Advisory Opinion from Contemporary Computer Services, Inc., 200 Knickerbocker Avenue, Bohemia, New York 11716. Petitioner, Contemporary Computer Services, Inc., submitted additional information pertaining to the Petition on February 21, 1996.

The issues raised by Petitioner are as follows:

1. Whether the charges made by Petitioner to customers for its disaster recovery service are subject to sales tax.
2. Whether the amount paid by Petitioner for equipment purchased for use exclusively in providing the disaster recovery service is subject to sales tax.

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

Petitioner provides a number of services to its customers which include computer maintenance, computer refurbishing, equipment sales and disaster recovery. The disaster recovery service entails Petitioner providing a customer with backup computer capability in the event that the customer experiences a disaster. In order to provide this backup computer capability, Petitioner maintains designated computer equipment inside of a separate disaster recovery room located at Petitioner's facility in Bohemia, New York. Both the backup computer equipment and the disaster recovery room are used exclusively in providing the disaster recovery service. The customer provides the computer operators and programming necessary to make use of the backup computer equipment.

Petitioner bills the customer for the disaster recovery service in two ways. There is a subscription fee which is a basic monthly charge that covers access to and use of the backup computer equipment in the event the customer has a disaster. Petitioner indicates that the subscription fee also covers an agreed upon number of hours of access and use annually for the customer to test its disaster procedures. (During this "test time," Petitioner is only responsible for turning on the backup computer equipment and ensuring that it is operational.) There is also a usage fee which is a charge for the actual use of the backup computer equipment by the customer when a disaster occurs.

Petitioner charges sales tax when it bills its customers for both the subscription fees and the usage fees. Sales tax is not paid on the backup computer equipment that is used exclusively in the disaster recovery service when the equipment is purchased by Petitioner.

Petitioner's sample Disaster Recovery Services Agreement provides, in part:

USE OF CCSI BACKUP CAPABILITY

* * *

B. In the event of a Disaster to Customer's Computer Facility, Customer, subject to the provisions relating to Multiple Disasters, shall have access to and use of the CCSI Backup Capability within twenty-four (24) hours or less as requested, after delivery of a Disaster Notification to CCSI. If necessary, initial notification and request for access may be oral, but such oral notice must be followed by a written Disaster Notification within twenty-four (24) hours after initial notification

C. Customer shall continue to have the right of access to and use of the CCSI Backup Capability for up to six (6) consecutive weeks. After said six-week period, Customer shall be entitled to continued access to and use of CCSI Backup Capability, provided that Customer has made a good faith effort to remedy the Disaster at its Computer Facility, and provided that it continues to pay all applicable charges hereunder, provided further, however that if another Subscription Holder experiences a Disaster during this extended period of use by Customer, said Subscription Holder shall be entitled to priority use of the CCSI Backup Capability.

D. At no additional cost, Customer shall have access to and use of the CCSI Backup Capability during each twelve month period of the term of this Agreement for the number of hours set forth ... in order to test its Disaster procedure ("Test Time"). CCSI shall retain the right to unilaterally designate Customer's Test Time, provided that Customer shall receive at least ten (10) days notice prior to the designated Test Time. Scheduled Test Time may be cancelable by CCSI upon receipt of a Disaster Notification from a Subscription Holder. Attempts will be made by CCSI to reschedule Test Time, but no allowances or credits will be made for Test Time unused due to scheduling conflicts or cancellation

* * *

FEES

A. In consideration of the right of access to the CCSI Backup Capability, Customer shall pay the monthly Subscription Fee which shall be on the first day of each month during the term of this Agreement

B. Customer shall pay CCSI a Usage Fee ... for the period during which use is made of the CCSI Backup Capability During such period, Customer shall not be required to pay the Subscription Fee

* * *

METHOD AND TIME OF PAYMENT

The Subscription Fee for each calendar month during the term of this Agreement shall be invoiced to Customer in the preceding month, and shall be paid by Customer within thirty (30) days from the date of invoice.

All other fees and charges (including applicable taxes) incurred by Customer for Backup Capability in any calendar month will be invoiced by CCSI to Customer during the succeeding calendar month and shall be paid by the Customer within thirty (30) days from the date of the invoice.

MULTIPLE DISASTERS

In the event of a Disaster, Customer shall have the right of access to and use of the CCSI Backup Capability. However, the Backup Capability provided for herein is being offered by CCSI to other Subscription Holders and, to the extent it is possible that Multiple Disasters could be experienced by Customer and other Subscription Holders, none of the terms and conditions contained herein shall be interpreted or construed as a covenant, promise or guaranty of any kind that the Customer will have immediate and exclusive access to and use of the CCSI Backup Capability Customer shall cooperate with CCSI in accommodating other Subscription Holders who have delivered a Disaster Notification to CCSI.

* * *

EQUIPMENT MODIFICATIONS

CCSI reserves the right to unilaterally change the Equipment Configuration, CCSI shall give Customer sixty (60) days prior written notice of any significant changes, and CCSI shall permit Customer a reasonable amount of additional free test time after such substantial changes

The sample Disaster Recovery Services Agreement defines "subscription fee" to mean "the basic monthly charge imposed by CCSI ... and payable by Customer, entitling Customer to access and use of the CCSI Backup Capability in the event Customer experiences a Disaster." "Usage fee" is defined to mean "the charge imposed by CCSI ... and payable by Customer for the period during which Customer makes use of the Equipment ... following delivery of a Disaster Notification." The sample Agreement provides for a subscription fee of \$1,500 per month for 36 months, a usage fee of \$2,500 per eight hour shift or portion thereof, and 40 hours of test time per year.

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:

* * *

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax

(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

Section 1105 of the Tax Law imposes sales tax on:

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

Section 526.6(c) of the Sales and Use Tax Regulations provides, in part:

Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Section 526.7 of the regulations provides, in part:

§526.7 Sale, selling or purchase. (Tax Law, § 1101(b)(5))

(a) *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, barters, rentals, leases or licenses to use or consume tangible personal property.

* * *

(c) *Rentals, leases, licenses to use.* (1) The terms *rental, lease and license to use* refer to all transactions in which there is a transfer for a consideration of possession of tangible personal property without a transfer of title to the property

* * *

(e) *Transfer of possession.*

* * *

(4) *Transfer of possession* with respect to a rental, lease or license to use, means that one of the following attributes of property ownership has been transferred:

(i) custody or possession of the tangible personal property, actual or constructive;

(ii) the right to custody or possession of the tangible personal property;

(iii) the right to use, or control or direct the use of, tangible personal property.

Section 526.8 of the regulations provides, in part:

§526.8 Tangible personal property. (Tax Law, § 1101(b)(6))

(a) *Definition.* The term *tangible personal property* means corporeal personal property of any nature having a material existence and perceptibility to the human senses

* * *

- (c) Tangible personal property does not include:
- (1) real property;
 - (2) intangible personal property.

Opinion

Issue 1.

Petitioner's monthly subscription fees for its disaster recovery service represent receipts from the sales of an intangible (similar to insurance) and are not subject to sales tax. Payment of the subscription fee merely grants a customer an imperfect or unfixed right, in common with all of Petitioner's customers, to access and use Petitioner's backup computer equipment only in the event that the customer suffers a disaster, delivers proper notification, cooperates with Petitioner's multiple disaster protocol and otherwise complies with the provisions in the Disaster Recovery Services Agreement. Petitioner does not guarantee that the customer will have immediate and exclusive access to or use of any specific piece of backup computer equipment. Nor is there any substantial certainty that the customer will ever need access to or the use of Petitioner's backup computer equipment.

Upon execution of the Agreement or payment of the monthly fees, the customer does not receive actual or constructive possession of (or title to) Petitioner's backup computer equipment, or the right to the use or control of this equipment. At no time prior to a disaster, proper notification, etc. does Petitioner transfer possession of the backup computer equipment to the customer or can the customer accept possession of the equipment. Thus, no transaction on which to impose the sales tax has taken place until these events have occurred.

Whether the subscription fee also covers test time or whether the test time is provided by Petitioner for no consideration is of no consequence. The test time is provided merely as an incident to Petitioner's disaster recovery service and does not change the nature of the intangible that is being sold. Moreover, the availability of 120 hours of test time over the three-year life of the Agreement is not sufficient to warrant the apportionment or taxation of the monthly subscription fees.

It is also noted that neither a disaster recovery service nor test time is a taxable service specifically enumerated in the Tax Law.

However, Petitioner's usage fees imposed during the time when a customer has possession and makes use of the backup computer equipment constitute receipts from the sale (i.e., a rental, lease or license to use) of tangible personal property and are subject to sales tax.

Issue 2.

The amount paid by Petitioner for its backup computer equipment is not subject to sales tax. Petitioner maintains the designated backup computer equipment inside of a separate disaster recovery room. This computer equipment

TSB-A-97(69)S
Sales Tax

was purchased and is used exclusively in providing Petitioner's disaster recovery service. Only purchases made for the exclusive purpose of resale come within the resale exclusion provided for in Section 1101(b)(4)(i) of the Tax Law. Because Petitioner's backup computer equipment is used only by its customers who pay usage fees for such use, the equipment is considered purchased exclusively for resale.

DATED: November 19, 1997

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

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