TSB-A-01(2)S
Sales Tax
January 10, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

<u>ADVISORY OPINION</u>   <u>PETITION NO. S000623A</u>

On June 23, 2000, the Department of Taxation and Finance received a Petition for Advisory Opinion from Citibank, N.A., 80 Baylis Road, Melville, New York 11747.

The issue raised by Petitioner, Citibank, N.A., is whether the sale of Petitioner's auto finance business to another bank will subject the transfer of the rights to an incomplete and unused software program to State and local sales and use taxes.

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

In November 1997, Petitioner entered into a contract with a third party computer software company ("XYZ"). Pursuant to the contract, XYZ would provide Petitioner with a customized credit application processing software for its auto finance business. The contract contained a payment schedule which established that Petitioner would make payments to XYZ after the completion of certain stages in the customization process. Petitioner made one payment to XYZ pursuant to the payment schedule, when the contract was executed.

In April 1999, Petitioner sold its auto finance business to another bank ("ABC"). The software customization contract between Petitioner and XYZ had not been completed, implemented, or paid in full by Petitioner at the time of the sale of the auto finance business to ABC. Petitioner had not received any version of the custom software developed by XYZ or component part of such software, either in completed form or in an intermediate testing stage.

As part of the sale agreement, ABC provided Petitioner an assumption letter stating that ABC would assume the remainder of the software customization contract with XYZ, releasing Petitioner from the contract. ABC also assumed the remaining payments due on the contract, and agreed to compensate Petitioner for payments already made. ABC, by assuming the contract entered into between Petitioner and XYZ, has the right to have the software developed and designed to its specifications.

Applicable Laws

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:

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(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...

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(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....

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(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) <u>which is not software designed and developed by the author or other creator to the specifications of a specific purchaser</u>. 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)

Section 1105(a) of the Tax Law provides for the imposition of sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided in Article 28 of the Tax Law.

Opinion

In this case, Petitioner entered into a contract with XYZ to purchase customized credit application processing software for its auto finance business. Petitioner later sold its auto finance business to ABC before the contract between Petitioner and XYZ had been completed, implemented, or paid in full by Petitioner. Petitioner had not received any version of the custom software developed by XYZ. As part of the sale agreement, ABC provided Petitioner an assumption letter stating that ABC would assume the remainder of the software customization contract with XYZ, releasing Petitioner from the contract.

Pursuant to Section 1101(b)(14) of the Tax Law, the sale of computer software which is designed and developed by the author or other creator to the specifications of a specific purchaser is not subject to State and local sales and use taxes. The incomplete and unused custom software which was designed for Petitioner did not lose its identity as custom software upon the transfer of the rights from Petitioner to ABC, since the contract between Petitioner and XYZ had not been completed, implemented, or paid in full by Petitioner, and Petitioner had not received any version of the custom software developed by XYZ. ABC, by assuming the contract entered into between Petitioner and XYZ, assumed the rights to have the software developed and designed to its specifications. Therefore, the transfer by Petitioner to ABC of the rights to the contract with XYZ was not subject to State and local sales and use taxes. Moreover, the transfer of the custom software from XYZ to ABC pursuant to the contract will not be subject to sales tax.

DATED: January 10, 2001

/s/
Jonathan Pessen
Tax Regulations Specialist III
Technical Services Division

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