

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

TSB-A-88(28)S
Sales Tax
May 26, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880128B

On January 28, 1988, a Petition for Advisory Opinion was received from Rock's Tire and Battery, Inc., 417 Oriskany Street West, Utica, New York 13502.

The issue raised is whether the purchases of software under the following conditions are subject to sales tax under Articles 28 and 29 of the Tax Law.

Petitioner, after months of detailed analysis by a vendor, purchased a computer system. Initially, most of the hardware and about half of the software were purchased. The initial billing did not segregate the price of software from the price of hardware.

Since the initial purchase, Petitioner has purchased program updates. The software updates are produced by a software company and sold through a local vendor and installed by such vendor. This particular software is used to keep Petitioner's computer system current with changes in the tax laws.

Petitioner is also planning to purchase the remainder of its accounting programs through the initial vendor. These programs are pieces of the whole system which was analyzed previously and which Petitioner is purchasing on a planned one-program-at-a-time basis. When Petitioner is ready for each succeeding piece of the system to be installed, he contacts the software supplier. The supplier makes a brief analysis of Petitioner's needs, sizes Petitioner's files and completes the installation process.

Technical Services Bureau Bulletin 1978-1 defines software as:

"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.

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Since Petitioner's software requires analysis of its computer equipment and certain modifications are necessary to make the software compatible to such equipment, the sale of such software is considered the sale of an intangible and thus not subject to sales tax.

However, the sale of computer hardware is the sale of tangible personal property and is subject to tax. If a vendor fails to segregate the charges for taxable hardware from exempt software, the vendor is required to collect sales tax on the entire charge.

Accordingly, Petitioner's initial purchase of hardware and software as a unit without segregation of the prices of each is subject to tax in its entirety. Subsequent purchases of software and software updates are exempt from sales tax if a separate charge is made for such software or software updates and if the vendor must perform analysis or modification before installation of the software or software updates.

DATED: May 26, 1988

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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