

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-00(9)S
Sales Tax
February 10, 2000

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S990311A

On March 11, 1999, the Department of Taxation and Finance received a Petition for Advisory Opinion from Measurisk, LLC, 331 Madison Avenue, 12th Floor, New York, New York, 10017. Petitioner, Measurisk, LLC submitted additional information with respect to the Petition on April 21, 1999.

The issues raised by Petitioner are:

1) Whether Petitioner has to pay sales tax on the purchase of software to be reconfigured into a larger software system, where the software system is used to produce its services that are sold to businesses.

2) Whether the services provided by Petitioner, which will be accessed through the Internet, are subject to sales tax.

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

Petitioner is a company whose principal business is to provide a portfolio Risk Analysis to institutional investors. Clients of Petitioner receive regular reports which they pay for. These reports provide an analysis of all major financial risks in a client's portfolio, i.e., market, credit and liquidity risk. Algorithmics software, which is pre-written computer software, is purchased and used to produce the market and credit risk numbers as described in Step (e) below. Performing the Risk Analysis involves processing the portfolio through the following steps:

- a) receiving the portfolio file from a client;
- b) using custom software to load the client's data;
- c) using custom software and 3rd party data providers to supplement the client supplied data with the necessary security and market data ;
- d) using custom software to format the client supplied data for analysis;
- e) running the formatted data through the Algorithmics software to produce market and credit risk numbers;
- f) running the formatted data through custom analytics to produce liquidity risk numbers;

g) using the custom software to take the output from the Algorithmics software and produce formatted client reports; and

h) using custom software to distribute those reports to the clients via the Internet.

Risk Analysis reports may be furnished to a client on a daily, weekly, monthly, quarterly, semi-annual or annual basis. According to a sample contract that Petitioner submitted with its Petition, the fee that Petitioner charges for the Risk Analysis is based on the frequency of the reports, as well as the number and type of securities in a client's portfolio.

Once Petitioner has performed a full Risk Analysis on a client's portfolio, the portfolio is staged on Petitioner's servers for the purpose of running an Interactive Scenario Analysis (Stress Test). In a Stress Test, a client specifies its own market views and examines the profit or loss that is likely to occur in its portfolio if the market were to move as indicated. One of the most popular forms of the Stress Test is to use historical scenarios. For example, a client may choose the market crash of October, 1987 as the scenario, and would be interested in knowing what the impact would be to the portfolio today, if a similar market event occurred. In order to provide this capability to clients, Petitioner is building a Web interface that allows clients to choose and define scenarios. The Web will capture the client's scenario and transmit the information back to Petitioner's risk servers for processing. Once the scenario has been run, the results are passed back to the Web server for display to the client. The Stress Test is considered a necessary element for proper risk management. Petitioner anticipates that clients will be interested in running a few dozen scenarios on their portfolios each month. In Petitioner's sample contract, the fee for the Stress Tests is \$100.00 per request for use.

Applicable Law and Regulations

Section 1101(b) of the Tax Law provides in part:

(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. 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 1105 of the Tax Law provides, in part:

Imposition of sales tax. On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:

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

Section 1110(a) of the Tax Law provides, in part:

Imposition of compensating use tax. (a) Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail,...

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

Retail sale. (Tax Law, S 1101(b)(4)) (a) The term retail sale or sale at retail means the sale of tangible personal property to any person for any purpose, except as specifically excluded.

* * *

(c) 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.

* * *

(6) Tangible personal property purchased for use in performing services which are taxable under section 1105(c)(1), (2), (3) and (6) of the Tax Law is purchased for resale and not subject to tax at the time of purchase, where the property so sold (i) becomes a physical component part of the property upon which the services are performed, or (ii) is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

* * *

(7) Tangible personal property purchased for use in performing a service not subject to tax is not purchased for resale.

Opinion

Petitioner receives an investment portfolio from a particular client. From the information contained in the portfolio, Petitioner provides its clients with a Risk Analysis report relating to the

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major financial risks associated with the particular portfolio. In addition, Petitioner provides its clients, for an additional fee, the capability of performing Stress Tests related to a particular investment portfolio.

Issue #1

The Algorithmics software that Petitioner purchases in conjunction with providing its services to its customers constitutes pre-written computer software which is included in the definition of tangible personal property in accordance with Sections 1101(b)(6) and 1101(b)(14) of the Tax Law.

Such software is not purchased for resale but, rather, is used by Petitioner in performing the services discussed below. Therefore, the purchase of such software is subject to sales and compensating use tax under Sections 1105(a) and 1110(a) of the Tax Law.

Issue #2

The services of Risk Analysis relating to the financial risks associated with investment portfolios and providing the capability to perform Stress Tests with respect to particular investment portfolios are in essence electronic financial consulting services, which are not services which are enumerated as taxable under Section 1105(c) of the Tax Law. See Deloitte & Touche, LLP, Adv Op Comm T&F, December 3, 1999, TSB-A-99(58)S. Accordingly, Petitioner is not required to collect sales tax on charges to its clients for the services of providing the Risk Analysis reports and providing the capability to perform Stress Tests with respect to particular investment portfolios.

DATED: February 10, 2000

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

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