

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

TSB-A-90(44)S
Sales Tax
August 29, 1990

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S900725C

On July 25, 1990 a Petition for Advisory Opinion was received from Astrogamma Inc., c/o Healy & Baillie, Esqs., 29 Broadway, New York, New York 10006.

The issue raised by Petitioner, Astrogamma Inc., is whether its sales of its Fenics software licenses are subject to sales tax under Section 1105(a) of the Tax Law.

Petitioner is a corporation duly organized and existing under the laws of the State of New York with its principal place of business at 3 Hanover Square, Apt. 3, New York, New York 10004. Petitioner licenses a software system called Fenics. Fenics is a specialized program that assists traders of options in foreign currencies to determine the theoretical fair price of an option. The most valuable feature of the program is its unique formula for the calculation of the theoretical fair price of the option. The Fenics program is sold throughout the world. The Fenics formula has become the worldwide industry standard for pricing of options.

Fenics is sold directly by Petitioner. It is not advertised and is not available in retail stores. To determine the appropriateness of the Fenics program and its various modules to a prospective customer's operations, Petitioner provides individualized consultation together with a fully functional demonstration copy of Fenics for use up to 3 months.

The Fenics program runs on DOS based micro-computers and is made available on 5.25" or 3.5" high or low density floppy diskettes, depending upon the customer's requirements. In order for the program to perform its specialized function (determining the theoretical fair price of an option), each user's time zone and the user's base currency must be set in the program. These programming adjustments are performed by Petitioner prior to shipment to the customer. Further, the name and address of the institutional user is imbedded in the program code prior to shipment. This identification process is necessary in order to maintain confidentiality and to prevent piracy of a customer's licensed program, as well as to assist in policing compliance by the customer's employees with the terms of the license agreement with Petitioner.

Petitioner does not seek to control the number of copies of the program at any single location. In fact, upon request by the customer, Petitioner provides multiple copies of the program (each with the required time zone, base currency and customer name and address imbedded in the program) at no additional charge.

The tax status of receipts from computer program ("software") sales and services is explained in Department of Taxation and Finance Technical Services Bulletin 1978-1(S), issued February 6, 1978:

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.

The software may be in the form of:

- a. Systems programs (except for those instruction codes which are considered tangible personal property in paragraph 1 above)--programs that control the hardware itself and allow it to compile, assemble and process application programs.
- b. Application programs--programs that are created to perform business functions or control or monitor processes.
- c. Pre-written programs (canned)--programs that are either systems programs or application programs and are not written specifically for one user.
- d. Custom programs--programs created specifically for one user.

Software, meeting the above criteria, whether placed on cards, tape, disc pack or other machine readable media, or entered into a computer directly, is deemed to be intangible personal property for sales tax purposes, and as such its sale is exempt from New York State and Local Sales and Use Taxes. Software or programs which do not meet the criteria are subject to tax. The person selling exempt software is required to pay the applicable sales or use tax on any tangible personal property transferred to the customer in connection with the exempt service. In addition, the hardware, utility services and supplies used to develop the exempt software are not eligible for any sales tax exemptions.

Accordingly, as the Fenics computer program developed by Petitioner requires an analysis of the customer's requirements and modification of the actual program for use by such customer, such program is considered to be intangible personal property and therefore is not subject to New

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York State and local sales and use taxes under Section 1105(a) of the Tax Law. Moreover, as intangible personal property, its sale, including licenses to use and renewals of licenses to use, is not subject to New York State and local sales and use taxes. Computer Language Research, Inc., Adv Op, Comm T & F, June 7, 1989, TSB-A-89(13)S.

DATED: August 29, 1990

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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