

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

TSB-A-92 (50) S
Sales Tax
June 22, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S920513A

On May 13, 1992 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 sale of its Fenics software licenses are subject to sales tax for taxable periods subsequent to August 31, 1991.

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.

Effective September 1, 1991, Section 1101(b) of the Tax Law was amended to impose sales tax on computer software as follows:

(b) 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:

* * *

(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.

In the instant case Petitioner's Fenics software is pre-written software that is modified or enhanced to meet the specifications of specific purchasers. Accordingly, pursuant to Section 1101(b)(14) and Section 1105(a) of the Tax Law the receipts from the sale of said pre-written software that has been modified or enhanced to meet the specifications of a specific purchaser is entirely subject to sales tax unless 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. However, if Petitioner charges a reasonable, separately stated charge on its invoice for the custom programming, only charges for the pre-written portion of the program are subject to sales and use taxes. Garpac Corporation, Adv Op Comm of T&F, February 6, 1992, TSB-A-92(8)S.

DATED: June 22, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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