

Cite as 3 WTD 333 (1987)

BEFORE THE INTERPRETATION AND APPEALS SECTION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
for Correction of Assessment of)	
)	No. 87-222
)	
)	Registration No. . . .
. . .)	Tax Assessment No. . . .
.	
)	

RULE 155: RETAIL SALE -- MICROFILM SERVICE -- SOFTWARE. A taxpayer who, for a set monthly charge, sells microfilm updates to pharmacies is engaging in retail sales. The microfilm is not customized software. Rather, it is in the nature of "canned" or "off-the-shelf" software and, thus, a retail sale.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: June 17, 1987

NATURE OF ACTION

The taxpayer petitions for correction of an assessment of retail sales tax.

FACTS

Normoyle, A.L.J. -- The taxpayer is a drug wholesaler. Primarily, it sells drugs to pharmacies. As a service to its customers, the taxpayer prepares and sells a microfilm

service. The microfilm updates (usually 30-40 sheets) are sent every two weeks. Each time a buyer receives the new sheets he or she throws out the old. The microfilm costs \$15.00 per month, regardless of the number of sheets in each update.

The microfilm contains six broad categories of information:

1. Price and product data;
2. Pharmacy business data;
3. American Druggists Blue Book updates;
4. Medicaid information;
5. Drug interaction and patient counseling information; and
6. Warranty information to assist the pharmacist in complying with federal law.

The product is of general use and interest to pharmacists. That is, the information on the microfilm is not designed for any one particular store.

The taxpayer contends that the microfilm is provided as a service to its customers and is not a retail sale. The auditor took a contrary view.

ISSUE

Is the sale of this microfilm a non-taxable service or a retail sale? Put another way, is there a sale of tangible personal property?

DISCUSSION

The taxpayer's product could be considered to be akin to software. It could also be considered to be akin to a written report, with the words and numbers simply reduced in size and placed on microfilm. Either way, we conclude that this is a retail sale.

The Department of Revenue has drawn a distinction between "canned" or "off-the-shelf" software, on the one hand; and customized software on the other. The former is considered a retail sale of tangible personal property. The latter is

considered to be a tangible representation of a service, and not subject to retail sales tax. One way to distinguish between the two types is to determine if the end product is tailored to meet the needs of a specific, individual client. If it is, it is not a retail sale. An example is a computerized production of a feasibility study done by a consulting firm for an individual client. The "sale" in this example is of a non-taxable service. The computer software, although it is tangible personal property, is merely incidental to the service (in the same way that an architect's drawings are incidental to his or her services).

Here, the microfilm is not a customized service for any one individual pharmacist. Rather, it is sent to all subscribers, and is more like "off-the-shelf" software than it is a customized service designed to meet the needs of a specific individual. Even if we were not to consider the microfilm to be similar, for tax purposes, to software, this product would be considered a retail sale, in the nature of a bi-monthly report to subscribers. This approach is consistent with taxation of any sort of periodical supplement, such as "pocket parts" to a law book series.

Our conclusion that the taxpayer is making a retail sale is supported by Washington Administrative Code 458-20-155, which reads in pertinent part (with emphasis added):

Information and computer services. Persons rendering information or computer services and persons who manufacture, develop, process, or sell information or computer programs are subject to business and occupation taxes and retail sales or use taxes as explained in this rule.

DEFINITIONS

As used herein:

The term "information services" means every business activity, process, or function by which a person transfers, transmits, or conveys data, facts, knowledge, procedures, and the like to any user of such information through any tangible or intangible medium. The term does not include transfers of tangible personal property such as computer hardware or standard prewritten software programs. . . .

The term "software" means programs, procedures, rules, and any associated documentation pertaining to the operation of a computer system.

The term "custom program" means software which is developed and produced by a provider exclusively for a specific user, and which is of an original, one-of-a-kind nature.

The term "standard, prewritten program," sometimes referred to as "canned" or "off-the-shelf" software, means software which is not originally developed and produced for the user.

The term "provider" means the person who makes available information and computer services to a user.

The term "user" means a person for whom information and/or computer services are provided as a consumer.

DISTINCTION BETWEEN SALES AND SERVICES

Liability for sales tax or use tax depends upon whether the subject of the sale is a product or a service. If information services, computer services or data processing services are performed, such that the only tangible personal property in the transaction is the paper or medium which the information is printed or carried, the activity constitutes the rendering of professional services, similar to those rendered by a public accountant, architect, lawyer, etc., and the retail sales tax or use tax is not applicable to such charges. This includes the sales of software in connection with custom programs written to meet a particular customer's specific needs. The programs are considered to be the tangible evidence of a professional service rendered to a client and not subject to retail sales tax or use tax.

If, on the other hand, the sale, lease, or licensing of the computer program is a sale or lease of a product, even though produced through a computer system or process, it is taxable as a retail sale. Standard, prewritten software programs do not constitute professional services rendered to meet the particular needs of specific customers, but

rather, are essentially sales of articles of
tangible personal property. . . .

We have held that the taxpayer made retail sales. The next question is whether or not the Department may assess sales tax against it. The answer is yes, based on RCW 82.08.050. A retail seller is required to collect and remit retail sales tax. When there is a failure to do so, the Department may assess the unpaid tax on the seller, whose recourse then is against the buyer.

DECISION AND DISPOSITION

The taxpayer's petition for correction of Tax Assessment No. . . . is denied.

DATED this 30th day of June 1987.