

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MANUFACTURERS AND TRADERS TRUST	:	
COMPANY	:	DECISION
	:	DTA NO. 818657
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 1991 through November 30,	:	
1999.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on May 22, 2003 with respect to the petition of Manufacturers and Traders Trust Company, One M & T Plaza, Buffalo, New York 14240. Petitioner appeared by David E. Werth, CPA and Christopher L. Doyle, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Jennifer A. Murphy and James Della Porta, Esqs., of counsel).

The Division of Taxation filed a brief in support of its exception, petitioner filed a brief in opposition and the Division of Taxation filed a reply brief. Oral argument, at the Division of Taxation's request, was heard on March 24, 2004 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on the purchase and installation of automated teller machines ("ATMs") on the basis that such purchase and installation of the ATMs did not constitute a capital improvement.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Manufacturers and Traders Trust Company ("M & T Bank"), is a banking corporation incorporated under the laws of the State of New York. M & T Bank's primary business is commercial and retail banking; it has branch offices throughout New York State.

On February 17, 2000, M & T Bank filed an application for credit or refund seeking a refund of sales and use taxes paid for the purchase and installation of ATM machines in the amount of \$356,743.00 for the period September 1, 1991 through November 30, 1999. A letter attached to the application indicated that the basis for the claim was that the ATM machines were capital improvements pursuant to Tax Law § 1101(b)(9) and, in addition, that the claim was based upon discussions with Barbara Wood of the Field Audit Management Group of the Division of Taxation ("Division"). An audit of M & T Bank had been conducted by the Division prior to filing of the application for credit or refund.

On March 28, 2000, the Division denied, in full, petitioner's refund claim. The denial letter stated, in pertinent part, as follows:

Claim for refund for the installation of ATM machines which you consider a capital improvement to real property are considered taxable. It is our

position that by law, ATM machines must be removed by the owner when they leave a location. Therefore, they cannot be considered a permanent installation. This claim for refund is therefore being disallowed in full.

M & T Bank recorded the purchase of these ATM machines in a computer hardware account which is a personal property account despite the fact that it maintains accounts for leasehold improvements and other real property classifications. The Division's auditor acknowledged that while he would inquire during an audit as to how a particular item was classified by a taxpayer on its books, i.e., whether it was recorded in a capital improvement account or in a repair and maintenance account, the item would be allowed as a capital improvement by the auditor if so warranted, regardless of the taxpayer's categorization of it in its books and records.

The ATM machines were purchased from and installed by Diebold, Inc. ("Diebold"). As part of the audit of M & T Bank's refund claim, the Division reviewed invoices from Diebold, a sample of standard installation agreements between Diebold and M & T Bank and M & T Bank's accounting records for its purchases of the ATM machines.

Attached to M & T Bank's petition was a sampling of 15 invoices from Diebold to the bank during the period at issue herein for installation of certain ATM machines. The contract price for each installation was between \$27,000.00 and \$29,000.00, exclusive of sales tax.

Diebold used a standard form agreement for the furnishing and installing of each ATM. This same agreement was used for all ATMs purchased by M & T Bank during the period at issue. The agreement stated, in part, that the "[p]urchaser agrees to buy and the Seller agrees to furnish to the Purchaser the following tangible personal property hereinafter described." The agreement also contained 17 "Additional Conditions."

Paragraph "2", entitled "INSTALLATION" stated, in part, as follows:

Purchaser shall provide without cost to Seller suitable foundations, shoring of floors, grouting around equipment, welding of equipment to reinforcing rods where required, surrounding masonry and concrete work, and necessary building openings prepared in accordance with drawings furnished to the Purchaser by the Seller, to receive equipment furnished by Seller.

Paragraph "3", entitled "TAXES" provided as follows:

No Federal, State or Local sales, use, excise or other tax based on the sale or purchase of materials under this agreement is included in the contract price. Any such tax must be paid by the Purchaser, and if by law the Seller is liable for the collection or payment thereof, the same shall be added as tax to the contract price and the Purchaser agrees to reimburse the Seller for such tax. It is understood and agreed that the Seller is acting as a vendor of personal property, and not as a construction contractor, and it is the intention of both parties that such sale and installation does not constitute an improvement to realty. Purchaser agrees that a certificate of capital improvement shall not serve to exempt such Purchaser from liability for such tax.

During the course of the audit of M & T Bank's refund claim, the Division's auditor had several discussions with Richard Harpster, Diebold's Director of Taxes. The initial discussion occurred on March 7, 2002. Mr. Harpster stated that the ATM machines do not require much installation. He indicated that telephone hookups are provided and an electrical outlet box is also provided. The installer connects the phone line and plugs the ATM into the electrical outlet. Mr. Harpster stated that the ATMs can be installed and removed with little or no damage to the property. Through-the-wall models are slid into place through an opening through the back of the wall. In some cases, a machine is installed into an existing window or door location; however, in such circumstances, it is often necessary to break out a wall or build a new wall to accommodate the footprint of the ATM. The ATM may be bolted to the floor, but it is often not required. The machines have four adjustable legs which serve to level the ATMs on a finished

floor. The electrical cord is plugged into a conventional wall socket; it is not hard wired into the building's electrical system. A facia plate is screwed to the front of the ATM.

On March 11, 2002, the auditor received a fax from Mr. Harpster which explained how Diebold's ATM machines were installed. This explanation stated:

- ATMs require minimal installation. Some are bolted to the floor but bolting is not required. Others are inserted through openings in walls and are clamped to secure them. Island ATM's are bolted to concrete, but can be removed by simply unbolting them.
- The installer hooks up the ATM to a phone line, electric line and verifies the unit is functioning properly before leaving the site.
- The ATM can be removed with little or no damage to the existing real property.
- The ATM is a self contained unit. Accessibility to the unit results in no damage to the real property.

After receiving the fax, the auditor again spoke with Richard Harpster about the software that goes into an ATM machine. Mr. Harpster stated that the software was basically the same for all financial institutions and that only very slight modifications were needed to the software for a specific location. Mr. Harpster sent to the auditor diagrams showing the installation of the various types of ATM machines. After receiving the diagrams, the auditor telephoned Richard Harpster to inquire about the useful life of ATMs. He was informed that, typically, they can last a long time but may be replaced when a "new generation comes out." Because today's models are modular, if a part malfunctions, that part is replaced.

Mr. Harpster stated that to his knowledge, ATMs are not left at a location when a bank or financial institution leaves such location. He indicated that it is probably less costly to remove an ATM and take it to a new location. When the auditor asked him how he knew this, Mr.

Harpster sent him an e-mail which stated that Diebold maintains an equipment file which provides the company with a significant amount of detailed information about the equipment that is under a maintenance contract. One such item of information is the equipment's physical location. When a financial institution closes or otherwise wants a piece of equipment removed, the equipment file is updated with that information. If the equipment is reinstalled in a new location, the equipment file will indicate the new location.

A purchaser of an ATM machine can obtain a credit if an old ATM machine is traded in. On the sample invoice in evidence (Division's Exhibit "G"), a charge was imposed for de-installing an ATM machine and installing a Diebold Model 1072I.

Diebold, like other manufacturers of full-service ATM machines, had, in recent years, been selling fewer newly manufactured machines which has reflected a focus on technology to upgrade existing machines instead of selling new ones. In an attempt to increase its market share, Diebold has focused on upgrading machines through enhanced technology.

In mid-1980, Diebold developed the first ATM using simple, plug-in modules which allow Diebold's technicians to upgrade a unit quickly and easily. An upgrade of an Interbold i series ATM takes less than a day and costs less than half that of a replacement. During an upgrade, electronic and mechanical components are exchanged for those with the latest technologies. The original installation and ATM chest remain intact.

There are 71 ATM machines which are at issue in this proceeding. They are Diebold models in the 1070 and 1060 series which are classified as either "drive-up" or "walk-up" units.¹ Walk-up units are usually installed in an interior wall of the structure (such as a vestibule wall)

¹ There are drive-up and walk-up units in both the 1070 and 1060 series of Diebold ATMs.

while drive-up units are normally installed in an exterior wall. The ATM models installed in most of the locations are the 1072i and 1073i models. Both are “through-the-wall” models, i.e., by design they are inserted into a wall rather than being freestanding.

Of the 71 ATM machines at issue, 19 were located in buildings which were owned by M & T Bank; the remaining 52 ATMs were located in buildings which were leased by M & T Bank.

In evidence, as Division’s Exhibit “E”, are the 43 leases for the premises at which the 52 ATM machines were installed.² With the exception of lease nos. “27”, “36”, “39”, “40” and “43”, each of these leases contains language which, at the time of the expiration of the lease or upon surrender of the premises for other reasons, provides: (1) Tenant may or is required to remove trade fixtures or bank equipment (the leases require tenant to restore premises to original condition or be responsible for damage thereto); (2) Landlord/lessor has the option to require tenant to remove such fixtures or equipment; or (3) Such fixtures or equipment are defaulted to the landlord/lessor if not removed by the tenant.

Lease no. 27 provides that at the expiration of the lease, the fixtures or equipment become part of the real estate and the sole property of the landlord. Lease no. 36 contains no language which addresses the issue of removal of fixtures or property installed by the tenant during the term of the lease. Lease no. 39 states that the fixtures or equipment shall become the property of the landlord unless the landlord elects otherwise, in which case the tenant shall then be required to remove the same. Lease no. 40 provides that the fixtures or equipment shall remain the property of the tenant for the term of the lease and then shall become the property of the landlord

² Lease numbers “1”, “2”, “12”, “13”, “15”, “17”, “23”, “36” and “43” refer to premises leased by M & T Bank at which two ATM machines were installed.

upon expiration of the term thereof. Lease no. 43, applicable to two ATM machines, provides that the fixtures or equipment become the property of the landlord at the expiration of the lease.

John Kackmann is employed by M & T Bank as Assistant Vice President of Electronic Banking. His responsibilities include the procurement of ATMs and the coordination of the installation of the ATMs at M & T Bank's facilities.

M & T Bank rarely transfers or reuses an ATM machine after its original installation. During the period at issue, any ATM replacements typically involved replacing an IBM machine, which was no longer in production, with a Diebold machine. Because IBM machines had different design specifications (specifically relating to the thickness of the wall into which the machine was installed), extensive modification to the site or selection of a new site was often required to accommodate a Diebold ATM machine. Through 1999, approximately 90 percent of replacements which occurred were for IBM equipment that had different footprints and different wall requirements.

Formerly, ATMs were hard wired and, accordingly, replacements made during the 1990s required modification of the electrical system from such a set up to a more simplified plug-in set up.

Diebold's Model 1073, used by M & T Bank in a through-the-wall drive-up application, requires that the wall within which it is installed be no more than three to four inches in thickness, including any surrounding studs, drywall and decorative enclosures. The majority of walls in which drive-up machines are installed are at least four inches in thickness which necessitates that an entire section of the wall be removed and a new thinner wall be installed.

M & T Bank has an arrangement with Diebold wherein the bank pays higher installation fees in exchange for Diebold taking on more responsibility in the installation process. Such additional responsibilities could include running the electric, wiring modifications, connecting data lines and modifying the wall openings. At times, Diebold would handle the wall modifications through a subcontractor.

Some locations receive reinforced walls to house the ATMs rather than just drywall. On some occasions, there is a need to correct elevation differences between the interior floors and the exterior driveway in order for drive-up ATMs to accommodate motor vehicles.

Once in place, ATMs are sealed with caulking and trim and often require insulation to complete the installation. Removal of an ATM necessitates the repair of a hole in a wall and often causes new damage to the wall or other surrounding structures. Sometimes the wall surrounding the ATM must be cut or broken through in order for the ATM to be removed forward. In these cases, additional wall repairs are required.

Gary Siuda is employed by M & T Bank as Vice President of Construction and Space Planning. His responsibilities include the planning, management and coordination of construction services for all M & T Bank facilities including the coordination and planning of all ATM installations.

ATM installation is an integrated process which requires extensive planning and the coordination and deployment of varied resources, often including architects, electricians, construction contractors (drywallers, masons and carpenters) and Diebold technicians. To accomplish these installations requires extensive construction work as well as a significant dollar investment.

The installation of a drive-up ATM requires the creation of an opening in an exterior wall, internal cabinetry, modification to any system contained in the affected wall (i.e., radiant heat systems), construction of structures to separate the rear of the ATM from the branch, correction for elevation differences between the interior and exterior of the building and certain other tasks which vary with each installation. In some instances, a drive-up ATM will be installed in a manner that utilizes a portion of the pre-existing drive-up teller window; however, substantial modification to the existing opening is necessary to facilitate the installation of the ATM.

The installation of a walk-up ATM requires the construction of a vestibule room to house the ATM, thereby requiring modification to the facility's heating system, phone lines, security and electrical system as well as entrance modifications.

Construction is required for every ATM installation regardless of whether the ATM machine is an original or a replacement. The circumstances and requirements involved in installing an ATM vary with each project. No two ATM installations are ever the same. Diebold is capable of controlling as much of the installation process as a customer is willing to permit. The extent of services provided by Diebold on behalf of M & T Bank varies with each installation. Such services may include site evaluations, managing implementation and physical preparation of the site. Site preparation services available from Diebold include creating wall openings, performing electrical work, kiosk and canopy construction, HVAC (heating, ventilation and air conditioning), masonry and certain other specialized construction functions.

The circumstance under which a transfer of ATMs is most likely to arise is where two M & T Bank branches are being consolidated. In such a situation, a drive-up ATM would be

transferred to a location which does not have a drive-up ATM. In that case, all of the preparation which goes into a new installation must be done.

Diebold prepared a brochure on installation and implementation solutions which set forth the site preparation tasks required for Diebold equipment and systems installation. These tasks include: wall openings; modular construction; signage/surround construction; kiosk and canopy construction; culverts, trenching and tubing; concrete islands and drive-ups; encasements; site modifications; conduit or PVC tubing installation; high/low voltage cabling and wire pulling; and cable and tubing specification and supply. In the brochure, Diebold also listed its available services as: electrical; paving; rigging; plumbing; tele/data communications; earthwork; concrete; masonry; plaster and drywall; HVAC; glazing and glass; steel; painting; and roofing.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's claim that the Division did not provide a valid basis for denying its refund claim. The Administrative Law Judge found that there was no provision in the Tax Law which requires that the Division provide a valid basis for denying a claim for refund of sales or use tax. Tax Law § 1139(b) requires only that the Division notify an applicant for a refund or credit of tax, by mail, within six months of receipt of such application.

The Administrative Law Judge observed that Tax Law § 1105(c)(3) provides that if tangible personal property, when installed, will constitute an addition or capital improvement to real property, its installation is not subject to sales tax. The Administrative Law Judge noted the criteria for a capital improvement imposed by Tax Law § 1101(b)(9)(i) and considered each of these criterion in relation to the ATM machines installed by petitioner.

Relying on the Division's Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, the Administrative Law Judge compared the listing of capital improvements therein to the ATMs purchased by petitioner. The Administrative Law Judge concluded that because the purchase price of an ATM, exclusive of installation, exceeded \$25,000.00, such ATM machines substantially added to the value of the real property and met the first criterion for capital improvement status.

The Administrative Law Judge next noted that although ATM machines do not become an integral part of the realty, the fact that the ATM machines retain their identity as tangible personal property does not bar a finding that they may be considered to be a capital improvement. The Administrative Law Judge found that certain items such as built-in dishwashers and ovens, attic fans and smoke detectors retain their identity as tangible personal property. However, if they become a part of the real property or are permanently affixed such that removal would cause material damage to the property or article itself, the Division considers such items to be capital improvements.

The Administrative Law Judge found that extensive preparatory work is required before an ATM can be installed. This preparatory work was to be performed by the purchaser (M & T Bank) prior to the installation by Diebold. The installation of a drive-up ATM requires creation of an opening in an exterior wall or modification of an existing opening as well as other construction work related thereto. Installation of a walk-up ATM requires construction of a vestibule room to house the ATM with resulting modification to the building's heating system, phone lines, entrance and security and electrical systems.

Based on a review of the physical preparation and construction work required prior to installation, the Administrative Law Judge concluded that these ATM machines do become part of the real property or are permanently attached to the real property so that removal would cause material damage to the property. Accordingly, the Administrative Law Judge determined that the ATMs met the second criterion for capital improvement status.

The Administrative Law Judge then considered whether the ATMs at issue were intended to become a permanent installation. The Administrative Law Judge noted that it is a well-settled principle that installations made for the purpose of conducting the business of one who is not the owner of the property (e.g., a tenant, licensee or franchisee) are presumed not to be permanent, but made for the sole use and enjoyment of the person who owns the business and not for the purpose of the landlord's estate. The Administrative Law Judge pointed out that most of the leases entered into by M & T Bank permitted or required the bank to remove its trade fixtures or bank equipment upon the expiration of the lease term. The Administrative Law Judge found no evidence in the record that rebutted the presumption of nonpermanence created by these lease provisions, except for four ATMs covered by lease nos. 27, 40 and 43.

As a result, the Administrative Law Judge determined that of the 52 ATM machines which were located in buildings which were leased by M & T Bank, only four were intended to become a permanent installation.

With respect to the 19 ATM machines which were located in buildings owned by M & T Bank, the Administrative Law Judge concluded that it is necessary to look at the intent of the manufacturer of the ATMs, i.e., Diebold, as well as at the intent of M & T Bank in order to ascertain whether their installation was intended to be permanent. The Administrative Law

Judge concluded that both Diebold and petitioner intended that the installation of the ATMs in these buildings was to be permanent.

The Administrative Law Judge rejected the Division's argument that ATMs are not intended to be permanently installed if they are plugged into an electric socket rather than hard wired into the building's electrical system. The Administrative Law Judge noted that electric garage door openers and controls are considered to be capital improvements by the Division even though they are sometimes hard wired, but are often designed to be plugged into an electrical outlet.

The Administrative Law Judge also rejected the Division's position that the intent of M & T Bank as to whether or not the installation was intended to be permanent can be ascertained by its treatment of the ATM machines in its books and records as fixed assets in a personal property account.

Accordingly, the Administrative Law Judge determined that the 19 ATM machines located in buildings owned by M & T Bank and four ATM machines located in buildings leased by M & T Bank (lease nos. 27, 40 and 43 [two ATM machines]) met the third criteria, as set forth in Tax Law § 1101(b)(9)(i), for qualification as capital improvements.

The Administrative Law Judge considered whether sales tax was lawfully imposed on the software component of petitioner's purchases from Diebold. The Administrative Law Judge pointed out that Tax Law § 1101(b)(6) imposes a tax upon "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."

The Administrative Law Judge found that Diebold's computer programs utilized in its ATM machines required an analysis of its customer's requirements and a modification of the actual program for use by such customer. Relying on an advisory opinion issued by the Division, the Administrative Law Judge concluded that the sale of the computer programs, i.e., the software, was an exempt sale of intangible personal property.

The Administrative Law Judge also considered the Division's claim that Diebold's charges included protective services: non-Diebold camera interface, alarm network interface and seismic detectors, which were taxable pursuant to Tax Law § 1105(c)(8). The Administrative Law Judge agreed with the Division that petitioner is not entitled to a refund of sales tax paid on those charges which specifically relate to protective services. However, the Administrative Law Judge found that the record contains no evidence as to whether there were amounts charged by Diebold to M & T Bank for such protective services on those ATM purchases which are the subject of this proceeding. Therefore, the Administrative Law Judge could not sustain the Division's assertion that petitioner is not entitled to a refund of sales tax paid on that portion of the charge relating to protective services. The Division did not take exception to this conclusion.

ARGUMENTS ON EXCEPTION

On exception, the Division argues that the Administrative Law Judge erred in concluding that 23 of the ATMs purchased by petitioner from Diebold qualified as capital improvements. The Division asserts that these ATM machines meet none of the qualifications for being considered capital improvements, in that they do not substantially add to the value of the real property or appreciably prolong the useful life of the property, they do not become part of the real property but retain their identity as tangible personal property after installation and the

ATMs are not permanently affixed to the real property such that their removal would cause material damage to the property or to the ATM itself.

The Division maintains that the ATMs can be unplugged and readily removed to another location without any damage to the ATM. Therefore, they are not affixed to realty and their removal does not materially damage the building. The Division also points out that the installation of an ATM is distinct from the construction done by petitioner in preparation for the ATM. The Division argues that work done by a contractor or petitioner has no bearing on the taxable status of the purchase and installation of the ATM. The Division also asserts that petitioner's own classification of the ATMs as personal property indicates an intention that they were not intended to be permanently installed.

The Division maintains that the software component of petitioner's purchases is subject to sales tax because it was modified pre-written software which is subject to tax.

In opposition, petitioner argues that the Administrative Law Judge correctly determined the taxable status of the ATMs at issue and was correct in finding that 23 of them qualified as capital improvements as well as that the software purchased by petitioner was not subject to tax because it was customized to meet the needs of petitioner.

OPINION

Tax Law § 1105(c)(3) imposes a sales tax on the installation of tangible personal property not held for sale in the regular course of business. Tax Law § 1105(c)(3)(iii) provides an exception to this general rule:

(iii) for installing property which, when installed, will constitute an addition or capital improvement to real property, property or land, as the terms real property, property or land are defined in the real property tax law as such term capital

improvement is defined in paragraph nine of subdivision (b) of section eleven hundred one of this chapter.

Tax Law § 1101(b)(9)(i) defines the term “capital improvement” as “[a]n addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

It is a question of fact whether the installation of tangible personal property qualifies as a capital improvement and the Administrative Law Judge, after thoroughly analyzing the purchase and installation of 71 “drive-up” or “walk-up” ATMs by petitioner, concluded that 23 of them met each of the above-stated qualifications for being capital improvements.

In doing so, the Administrative Law Judge relied on the Division’s own Publication 862, Sales and Use Tax Classifications of Capital Improvements and Repairs to Real Property, and analogized the ATMs at issue to other types of installations conceded by the Division to be capital improvements.

The Division’s main argument is that we must look at the installed ATMs in isolation. The Division focuses on the fact that once the sites are prepared, some ATMs may be installed with minimal connectivity requirements and removed with little effort. The Division ignores the fact that in order for the ATMs to be installed in the first place, significant modifications had to be made to each installation site - either a hole had to be made through an outer wall or a vestibule room had to be constructed in the interior of a building. As the Administrative Law

Judge noted, the installation of every ATM machine, regardless of whether the ATM machine is an original or a replacement, requires some level of construction that varies with each project.

Thus, while the ATMs themselves may have been easily installed by Diebold, it is impossible to ignore the modifications and alterations to the building sites required to be performed in order for the ATMs to be installed. Similarly, it is difficult to envision how the removal of an ATM from the exterior wall of a bank, for example, would not be considered material damage to the bank structure. In the Division's Publication 862, "through-the-wall" air conditioning units are considered capital improvements. We agree with the Administrative Law Judge's statement: "Certainly, the installation of these ATMs, which are also 'through-the-wall' installations, is more complicated and costly than the installation of air conditioning units which have been held to be capital improvements based upon the manner in which they are affixed to the property" (Determination, conclusion of law "E"). Therefore, we affirm that portion of the Administrative Law Judge's determination which held that 23 of petitioner's ATMs qualified as capital improvements when installed.

Tax Law § 1101(b)(6) imposes a tax upon "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." The Division contends that even if the ATM machines are determined to be capital improvements, the software component of petitioner's purchases from Diebold is subject to sales tax.

The Administrative Law Judge found that because Diebold's computer programs utilized in its ATM machines required an analysis of its customer's requirements and a modification of the actual program for use by such customer, the sale of the computer programs, i.e., the

software, was an exempt sale of intangible personal property. The Administrative Law Judge based his determination on a 1985 advisory opinion of the Division (*Matter of Avant-Garde Computer Sys.*, TSB-A-85[23]S) which addressed this issue. That advisory opinion, in turn, was based on a 1978 Technical Services Bulletin issued by the Division which considered the taxability of software.

However, in 1991, the Tax Law was amended by the addition of paragraph (14) to § 1101(b). That section, effective September 1, 1991, defines “pre-written computer software” as:

Pre-written computer software. Computer software (including prewritten 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 prewritten 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.

Following the enactment of Tax Law §1101(b)(14), the Division issued TSB-M-93(3)S which stated that “References in the 1978 bulletin to exempt software are largely obsolete and should be disregarded.” As the Division stated therein, “the effect of this change in the Tax Law is to broaden the types of computer software that are subject to sales and use tax.”

We note that pursuant to Tax Law § 1101(b)(14), pre-written software that is modified to the specifications of a specific purchaser remains pre-written software. However, where there is a reasonable, separately stated charge given to the purchaser for such modification, the modification does not constitute pre-written computer software.

Petitioner has provided no evidence that would cause us to hold that the ATM software provided by Diebold is other than pre-written software that is modified to the specifications of petitioner. Nor do the charges for software separately stated on Diebold's invoices demonstrate that such charges are solely for the modification or enhancement of the software. As a result, we reverse so much of the Administrative Law Judge's determination as holds that petitioner is entitled to a refund of that portion of sales tax paid for computer software.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that the sale of the computer software is taxable as pre-written software, but is otherwise denied;
2. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph "1" above, but is otherwise sustained;
3. The petition of Manufacturers and Traders Trust Company is granted to the extent indicated in conclusion of law "I" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Division of Taxation is directed to compute and grant petitioner a refund in accordance with conclusion of law “I” of the Administrative Law Judge’s determination.

DATED: Troy, New York
September 23, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner