STATE OF NEW YORK

DIVISION OF TAX APPEALS

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| INSURANCE AUTOMATION SYSTEMS, INC. | : | DETERMINATION<br>DTA NO. 811672 |
| 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 June 1, 1988 through May 31, 1991. | : | |

Petitioner, Insurance Automation Systems, Inc., 4400-E Emery Industrial Pkwy., Warrensville Heights, Ohio 44128, filed a petition 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 June 1, 1988 through May 31, 1991.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 23, 1993 at 9:15 A.M., with all briefs to be submitted by November 11, 1993. Petitioner, appearing by Lombardi, Reinhard, Walsh & Harrison, P.C. (Dale F. Jeffers, Esq., and Mary Elizabeth Slevin, Esq., of counsel), submitted a brief on August 17, 1993. The Division of Taxation, appearing by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel), submitted a responding brief on October 19, 1993. Petitioner's reply brief was submitted on November 11, 1993.

ISSUES

I. Whether petitioner was engaged in providing customized computer software which was not subject to sales tax, or an information service subject to sales tax pursuant to Tax Law § 1105(c)(1).

II. Whether petitioner has established reasonable cause and an absence of willful neglect with regard to its failure to collect and pay over tax on its receipts thereby allowing for abatement of penalties imposed.

FINDINGS OF FACT[1]

In or about 1984, petitioner, Insurance Automation Systems, Inc. ("IAS"), first developed its computer software programs known as "The Solution" and "The Commercial Solution". This software was developed to assist independent insurance agents and insurance brokers[2] in calculating and providing insurance premium quotes to prospective insureds. Petitioner's software enables calculations of premium cost quotes for auto insurance, homeowners insurance and certain commercial lines of insurance. Petitioner's customers typically represent and offer premium quotes for between three to ten different insurance companies.

As the first step in developing its software, IAS obtains underwriting guidelines, underwriting policies and procedures, and rating factors (including risk factors) for the different types of insurance and coverage amounts offered by many different individual insurance companies. To date, petitioner has obtained and used this data as provided by over 70 individual insurance companies which operate in New York. IAS obtains this information directly from the insurance companies at no cost. While such information is not generally made available to the public, it is available

to IAS's competitors.[3] IAS employs rate analysts, described as experts in insurance rating, who utilize the insurance company data (methods and underlying principles) to prepare formulas used to determine premium amounts for various insurance coverages. The rate analysts' formulas are passed to petitioner's computer programmers who convert the formulas into

---

[1]With its brief, petitioner included four pages of unnumbered proposed findings of fact. The content of such proposed facts has been largely included herein.

[2]Insurance brokers would represent more than one insurance company.

[3]Presumably such information would be available to anyone seeking the same, although the value thereof to persons other than petitioner and its competitors is unknown.

computer-readable format. The formulas are then stored on hard drive on petitioner's computer system at its premises. Petitioner notes that the formulas, as initially developed and stored on its hard drive, are not "complete" such that they could function to provide a premium quote on behalf of a particular insurance company for a particular proposed insured by a particular agency or broker. Rather, petitioner must insert additional specific information, such as the agency or brokerage name, particular insurance companies and territories for and in which the agency or brokerage writes insurance, and the agency or brokerage (including individual agent) underwriting limitations, if any.

Each time a software system is prepared for license to a customer, petitioner's personnel make a field visit to the customer's location at which time the customer's computer assets (e.g., computer hardware, other software, etc.) are noted along with any particular computer requirements needed. From the information gleaned from petitioner's visit to the customer's site, petitioner then customizes its software system with the additional specific information described above (i.e., agency-specific information such as agency or brokerage name[s], underwriting limitation[s],

insurance companies included in the package, etc.), so as to enable its customer to input information into its computer system regarding a proposed insured and receive out, in turn, insurance premium quotes for the types and amounts of insurance coverage desired from the insurance companies for whom that agency or brokerage writes. Petitioner's software is generally further customized such that the quote(s) may be embodied in a customized proposal letter to be issued by the agency or brokerage to the proposed insured, and included on an application form to be submitted to the insurance company for approval. In addition, the software may be written to interact with a customer's data management system so as to allow data regarding premiums and other information to be transferred to the agency or brokerage accounting and billing system.

When a software package is ready for delivery, IAS employees install the same at the

customer's site and thereafter train the customer's personnel in the operation of the software.

Petitioner charges its customers a basic licensing fee for its software plus a monthly maintenance fee, which latter amount increases based on the number of insurance companies included in the program. Petitioner charges additional fees based on different types (sizes) of computer disks used, the number of user stations involved (with higher fees for greater numbers of user stations), adding or switching insurance companies or types of insurance coverages (e.g., adding homeowners to existing auto coverages), etc. In addition, the software (including the basic rating formulas) is updated by petitioner when insurance companies change their underwriting information. Although unspecified, this latter item is presumably included as part of the monthly maintenance fee.

Petitioner offers support for the software it licenses in three ways. With regard to general questions, nontechnical personnel are available by phone via a toll-free number. Technical personnel are also available by phone to answer technical questions. The third level of support provided by petitioner involves on-site visits to the client's premises by IAS representatives.

During the period at issue herein, IAS did not collect or pay sales tax on any of the software systems it sold.[4] Petitioner's president, James Harris, testified that the reason IAS did not collect and remit tax on its software system sales was based on petitioner's investigation as to the need for such collection and payment. He explained that petitioner first raised the question of taxability when it began to license its software. More specifically, he testified that in connection with obtaining sales tax forms from the Division with regard to its taxable computer hardware sales, IAS also inquired as to the taxability of its software systems and was advised that such software was exempt. The record, however, does not specify the person(s) to whom this inquiry was directed or from whom such advice was received. Mr. Harris also testified that petitioner queried its competitors and was told of their belief that their similar

---

[4]Petitioner formerly also sold certain computer hardware, and did collect and remit tax with regard to such sales.

software was exempt. At some point in its corporate history, petitioner was purchased by Progressive Insurance Company which, as part of its purchase, allegedly conducted an independent investigation to confirm that the software was exempt. The record does not further detail such

investigation. Finally, petitioner notes that periodic review of its tax compliance by its outside auditing firm (KMPG Peat Marwick), as well as ongoing internal review by petitioner's controller, continued to confirm petitioner's belief that it was selling customized software not subject to tax. Petitioner also notes that it has, since the inception of its business, collected and paid sales tax to New York State with respect to any sales of computer hardware (see, footnote "4").

In May 1991, the Division conducted a sales tax audit of petitioner's receipts for the period at issue herein. In conjunction with this audit and at the suggestion of the auditor, petitioner sought an Advisory Opinion from the Division concerning the tax status of its software.

In its petition for Advisory Opinion, filed June 21, 1991, petitioner stated that its computer software program:

> "underwrites, calculates and ultimately quotes prices for commercial, homeowners and automobile insurance. In order for the program to perform its various functions, each user's insurance company contracts, computer hardware requirements, and existing computer software requirements have to be set in the program to design the software sold by petitioner.
>
> "When petitioner makes a sale to a customer, who is typically a licensed insurance agent, petitioner makes a field visit and analyzes the customer's computer requirements (i.e., model, hardware and software capabilities, etc.) and notes the individual companies the agent writes for. Each individual insurance company used by an agent has a unique rating structure that takes into account different territories of potential customers of the agent and other demographic data based on those territories. Prior to delivery to the customer, the program is created and customized to reflect these structures and requirements of the Buyer's need.
>
> "Upon delivery to the customer, petitioner installs on-site the software, further customizes it to fit the agent's specific computer needs, and trains appropriate personnel as to operation of the software. During this on-site installation, software modifications are made which include: (i) Creation of customized proposal letters, unique to the agency, (ii) Creation of unique quote

profiles matching the particular risk quoting requirements of the customer, (iii) Changes to the default settings of virtually all variables, based on projected quoting needs of the customer; and (iv) Creation of commercial rating factors which vary not only by company represented, but which also can vary by agency. At this point, the program is able to calculate insurance rates from individual companies, based on the prior data gathered from the agents combined with each insurance company's unique rating structure, and generate proposals for the agent's prospective customers.

"Each report generated by the program is based on the prospective customer's individual needs, demographics, and territory, and therefore the proposal will be unique and useful only to that customer. For example, if a potential customer desires to buy automobile insurance, the agent will input into the computer such data as the customer's age, family status, type of car, traffic violation points, etc. The program combines this information with the data unique to the individual agent (based on the insurance companies they work with) that is already incorporated into the program by petitioner in his initial set-up and adaption, and it will produce a report and proposal unique to that customer.

"The program will also incorporate those proposals into a letter addressed to the prospective customer, and the letter includes an insurance price quote. If a customer decides to buy an insurance policy from the agent based on the program, the program will also produce the individual applications that are forwarded to the insurance company."

In response to its request for the Advisory Opinion, petitioner received from the Division Advisory Opinion No. S910621A, dated November 26, 1991. The Division concluded in this opinion that petitioner's system contained or consisted of two parts. According to the Division, the first part consisted of a database stored on electronic disks and containing the rating factors of individual insurance companies which operated in New York State. The Division concluded that this database of information was not personal or individual in nature since it was available to any insurance agent willing to purchase it from petitioner, that it was immaterial that petitioner's customer might in turn use the information to produce a different quote for each of its customers, and that this portion of the software system sold by petitioner was properly subject to tax pursuant to Tax Law § 1105(c) and 20 NYCRR 527.3(a)(1). The Division further concluded that the second part of petitioner's system represented customized application computer software (requiring analysis of the customer's computer equipment and modifications necessary to make petitioner's software compatible with such equipment and to the customer's individual needs). Hence, the Division concluded that, in accordance with its Technical Services Bulletin 1978-1(S) (dated February 6, 1978), the second part of petitioner's

system represented the type of prewritten application program entitled to exemption from tax as intangible personal property. Finally, in that petitioner's system was sold as a single unit, consisting of both a taxable information service and a nontaxable customized computer program, the Division concluded that tax was due on the total price thereof.

On March 2, 1992, following the field audit noted above, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax for the period spanning June 1, 1988 through May 31, 1991 in the amount of $231,490.72, plus penalty and interest.[5]

SUMMARY OF THE PARTIES' POSITIONS

At the commencement of proceedings, the parties agreed that the calculation of the dollar amount of tax assessed is not at issue. Rather, the core issue presented is whether petitioner provided a taxable information service within and through the sale of its software packages. In addition, and assuming any tax is due, petitioner also challenges the Division's imposition of penalty.

Petitioner maintains that the basic rating formulas created by its rate analysts do not by themselves produce quotes for insurance premiums and that the inclusion of such formulas within the software does not constitute the furnishing of an information service. In this regard, petitioner argues that the software it sells, while containing the formulas, also contains specific information relevant and pertinent only to the particular agency or brokerage to which that software package is sold. Petitioner argues that the formula portion of the software is merely a collection of instructions from which no information can be gleaned and which, when displayed on a computer screen, would only appear as incomprehensible symbols. Petitioner maintains that an accurate quote is produced only after the interaction of the formulas with specific

[5]Petitioner executed a series of validated consents with regard to the period of limitations on assessment, the latest of which allowed the Division to make its assessment at any time on or before March 20, 1992.

information it inputs into the program regarding the particular insurance agency or brokerage and additional information input thereafter by its customer(s) as to a particular proposed insured. Thus, petitioner claims it is selling a customized computer program representing intangible personal property not subject to sales tax.

Petitioner also argues, alternatively, that if it is held to be providing, in part, an information service, the same is not taxable because (a) no "report" is furnished and (b) even if either the disk on which the software system is stored or the ultimate quote given to the proposed insured is deemed to be the report, the same is excluded from sales tax as it is personal or individual in nature. In this regard, petitioner asserts that since the software must be customized in terms of the environment in which it will function, the same is therefore unique to each customer. Petitioner also notes that Tax Law § 1101(b) was amended in 1991 to specifically include prewritten software within the definition of tangible personal property subject to tax. In turn, petitioner maintains that prior to such amendment, its software was therefore exempt as intangible personal property. In this regard, petitioner points out that since such amendment regarding software, it has collected and remitted tax on its sales of software as taxable tangible personal property, without, however, conceding that the same encompasses or constitutes an information service. Finally, petitioner argues that it and others made a reasonable investigation as to the tax status of the software it sold, as described (see, Finding of Fact "7"), and on this basis argues for the abatement of penalties imposed by the Division.

In contrast to the foregoing, the Division's position is that petitioner's software systems include two segments. First, the Division asserts that petitioner provides an information service by its creation of rating formulas from the insurance company data, storage thereof as a database on hard drive at petitioner's premises, and selection therefrom as needed for inclusion within the software ordered by and provided to petitioner's various customers. The Division maintains that the information obtained from the insurance companies is not personal or individual when obtained from the insurance companies or thereafter as analyzed and converted into rating formulas. The Division goes on to assert that petitioner incorporates these formulas (or parts

thereof) into a customized software system designed to the customer's needs and limitations. The Division concedes that a part of petitioner's system represented the sale of a customized application software system which, during the years at issue, was not taxable. However, the Division maintains that the availability and inclusion of the rating formulas, taken from a bank of such formulas, without allocation or apportionment of the selling price between such component thereof and the software customization portion thereof, renders the entire receipts from sales of the software taxable. The Division draws a distinction between the service of creating and furnishing information, the first described part of the system, and the creation and customization of the system itself so as to transfer this information in a useful manner, the second described part of the system. The Division thus argues, in sum, that tax on the information service component is not precluded merely because the service is provided via customized computer software. Finally, the Division maintains that there is no specific proof as to the nature of the inquiries made by petitioner regarding the taxability of its software or the specific answers given in response, thus urging support of the Division's imposition of penalties.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(1) provides that the receipts from every sale, except for resale, of the following services are subject to sales tax:

> "[T]he furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons . . . ."

B. 20 NYCRR 527.3 provides, in pertinent part, as follows:

> "(a) Imposition. (1) Section 1105(c)(1) of the Tax Law imposes a tax on the receipts from the service of furnishing information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any manner such as by tapes, discs, electronic readouts or displays.
>
> "(2) The collecting, compiling or analyzing information of any kind or nature and the furnishing reports thereof to other persons is an information service.
>
> "(3) Among the services which are information services are credit reports,

tax or stock market advisory and analysis reports and product and marketing surveys.

* * *

"(b) Exclusions. (1) Sales tax does not apply to receipts from sales of information services which are for resale as such.

"(2) The sales tax does not apply to the receipts from the sale of information which is personal or individual in nature and which is not or may not be substantially incorporated into reports furnished to other persons by the person who has collected, compiled or analyzed such information.

* * *

"(3) Sales tax does not apply to receipts from sales of information services which are only furnished orally . . . ."

C. Petitioner first claims that its software is simply intangible personal property not subject to tax. In contrast, the Division argues that the software sold by petitioner embodies two aspects, to wit, (a) a core of information represented as the rating formulas by which each insurance company's policy premium costs may be calculated, with (b) such core encompassed within and constituting a part of a customized computer application software system. The Division concedes that the latter aspect of petitioner's system constitutes intangible personal property not subject to tax, but argues that the former aspect constitutes the furnishing of a taxable information service pursuant to Tax Law § 1105(c)(1).

D. With respect to this initial argument, Tax Law § 1105(c)(1), as noted, makes taxable the service of "furnishing of information by printed, mimeographed or multigraphed matter or by duplicating written or printed matter in any other manner,[6] including the services of collecting,

compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons." In ADP Automotive Claims Services v. Tax Appeals Tribunal (188 AD2d 245, 594

[6]The simplistic answer in this case would be to conclude that petitioner is providing an information service by "duplicating written or printed matter in any other manner" (i.e., simply placing the insurance company data in computer format). However, this result would ignore the analysis provided by petitioner's employees in deriving the described rating formulas.

NYS2d 96, lv denied 82 NY2d 655, 602 NYS2d 804), the court held that the business at issue (furnishing reports on the cost of repairing collision damage to automobiles) was an information service because the reports generated "contain[ed] intelligence that the customer did not have originally" (ADP Automotive Claims Services v. Tax Appeals Tribunal, supra, 594 NYS2d at 98). Similarly, in Finserv Computer Corp. v. Tully (94 AD2d 197, 463 NYS2d 923, affd 61 NY2d 947, 475 NYS2d 279), the court stated:

> "[o]ne cannot collect, compile or analyze the data of a customer without in some way significantly adding to the sum of knowledge of the customer with respect to that data" (Finserv Computer Corp. v. Tully, supra, 463 NYS2d at 924).

E. In this case, it is clear that petitioner's customers came to petitioner to obtain a software system under which premium quotes could be determined quickly and efficiently. In order to provide such quotes, it is necessary that the system include the data or information on which the quotes are based. Petitioner does not simply provide customized application software enabling its customers' computers to interact, calculate or utilize information already in the customers' possession or input by such customers.[7] Rather, petitioner also provides within each software

package a core of information (taken from its general bank of information) from which premium rates for various types of insurance can be obtained for any of the insurance companies selected by petitioner's customer. These available formulas are derived by petitioner through its employees' analysis of information obtained from many different insurance companies. To conclude that petitioner does not provide information to its customers would ignore reality and common sense by deciding that the rating formulas were a minor and

---

[7]The record does not disclose whether petitioner's customers have premium cost information available to them in some other format (e.g., tabular or chart). However, there is a distinct difference between insurance companies providing rating guides or books to their agents or to brokers versus petitioner, a third party, obtaining such information from multiple insurance companies, analyzing the same to derive formulas which allow calculation of premium quotes, and selling such information as part of a computer program which allows input of additional data to be acted upon and results in a premium quote.

inconsequential part of what petitioner's customers wanted. Stated differently, such a conclusion would minimize the importance of the formulas from which quotes can be derived, and leave petitioner's software largely indistinguishable from any other office management software system. Petitioner's software would hold no apparent unique claim and there would be no reason to expect petitioner's customers to pursue petitioner's product in favor of any other such software. In comparison, it seems far more reasonable to accept that petitioner's clients purchased petitioner's software so as to obtain both the information from which premium quotes could be generated as well as a system allowing the same to be done quickly and efficiently and in a manner compatible with that customer's own computer system. In sum, petitioner provides both the information needed and the specific means of access thereto.

F. Having concluded that petitioner's software system encompassed in part the provision of an information service potentially subject to tax leads to several additional questions, including: (a) whether the

information must be and is furnished as a "report", (b) whether the information furnished is nonetheless not subject to tax as "personal and individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons", and (c) whether the Division is entitled to subject petitioner's entire receipts from software sales to tax, notwithstanding that a portion of such sales receipts were concededly derived from the sale of nontaxable customized software.

G. Petitioner argues that while it collects and analyzes the underwriting information provided by the insurance companies for the purpose of developing the rate formulas, it provides no "reports" as any part of its services. Petitioner's argument is premised on the position that the software, before it is installed at a customer's site, is incapable of generating any reports (i.e., rate quotes) prior to input of additional information regarding both the particular customer as well as, ultimately, each customer's proposed insured clients (see, Findings of Fact "3" and "8"). Petitioner maintains that its software programs offer no

information, as a commodity in and of itself, but rather only provide a vehicle through which insurance premium quotes may be obtained. Petitioner's argument, however, overlooks the fact that the program itself, contained on a computer disk which, as described above, encompasses both the basic desired information and the system for accessing and interacting with the same, is the means of furnishing the desired information in the desired format to petitioner's customers. As the Division points out, petitioner provides the means, its software system, by which its customers can access the information, the formulas, from which a quote can be derived. Storage and transfer of the formulas or parts thereof (the collected, compiled and analyzed information) via the computer disk carrying the entire software program, suffices to constitute a "report" furnished to petitioner's customers for purposes of Tax Law § 1105(c)(1) (see, Murphy Heating Service v. Chu, 124 AD2d 907, 508 NYS2d 323). In fact, where information is conveyed by any means other than orally, it can be said that there is an integration of the information and the tangible medium by which it is conveyed. However, the tax is imposed on the service rendered (i.e., supplying information), not the medium by which such information is transmitted (see, Mertz v. State Tax Commn., 89 AD2d 396, 456 NYS2d 501, 502-503, citing Matter of Alan Drey Co. v. State Tax Commn., 67 AD2d 1055, 413 NYS2d 516, lv denied 47 NY2d 708, 418 NYS2d 1027). Thus, petitioner's argument that the tax may not be imposed because no "report" is furnished is rejected.

H. Petitioner also maintains that if it is held to be providing an information service, the same is not subject to tax because the information furnished is personal or individual in nature and is not or may not be substantially incorporated in reports furnished to other persons. On this front, petitioner claims that each software package is unique to the customer for whom it is prepared, including specific routines and instructions to enable the system to function compatibly within the customer's own computer hardware and existing software system. Petitioner notes that the programs are modified such that the rating formulas will produce quotes, taking into consideration the particulars of each individual customer vis-a-vis territories in which that customer quotes insurance, underwriting limitations (if any) placed on that

customer by the insurance companies for which it quotes, etc. Petitioner also points out that the system is customized by incorporating the agency's name, its customized proposal letters, etc., into the software. In sum, petitioner argues that each customer receives a software package customized to its own particular personnel and operations, and thus the system sold to any customer would not function at all, or at best, would not function properly or accurately, for any other customer.

I. The exclusionary portion of Tax Law § 1105(c)(1) is phrased using the conjunctive "and", and thus presents a two-fold standard which must be met in order to allow an information service to escape taxation. That is, no tax is due on "the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons . . ." (Tax Law § 1105[c][1]; emphasis added). Petitioner's software fails to meet either of these tests. First, there is no evidence that the basic rating formulas, as developed by petitioner's rate analysts, are themselves changed for each customer. Rather, it would appear that the basic formulas are written to accept additional limiting (or default) information specific to each customer as a variable input into such formulas, in turn causing the formulas to calculate resulting rate quotes accordingly (see, Finding of Fact "8" at its single spaced paragraphs "2" and "3"). In this regard, each insurance company provides rating factors and underwriting guidelines to petitioner constituting the general bases under which each such insurance company will write insurance in the various territories and jurisdictions in which each operates. Thereafter, when a particular agency orders a program from petitioner, the specifications of that agency's underwriting limitations are embedded as default variables in the program.[8] Such customizing does not change the basic formula itself or render the information conveyed personal or individual. Also noted are territorial limitations whereby likely quoting territories and related demographic information is included in a specific

[8]An example of this circumstance would be the embedding of default variables in the program relating to a particular customer's dollar underwriting limitations. Such variables would not change the basic company formulas, but rather would only confine the result of accessing such formulas to whatever dollar limitations are imposed on the particular agency.

program for a specific customer. Again, this level of customizing does not render the information in the program personal or individual, for the rating considerations for such territories are available within petitioner's compiled data bank of such information and would presumably be used for any other customer(s) which quote insurance for common insurance companies in common or overlapping territories. In this regard, for different agencies to produce the same premium quote on behalf of the same insurance company for the same proposed insured, they must receive identical company information from a common source (i.e., petitioner's basic formulas). The record does not show that the basic information is changed for each customer. In fact, to do so would be inconsistent with the generation of consistent quotes in overlapping situations -- a result almost certainly not desired by the insurance companies. Where, as here, the information comes from a common source or data repository that is readily available (for a fee) and is not confidential, it is not "personal" or "individual" (see, ADP Automotive Claims Services v. Tax Appeals Tribunal, supra). Finally, the addition of each agency's name, customized proposal letters, etc. to the system, and the

programming of the system to interact within the customer's own computer system (i.e., the "external environment"), would be done for any individual customer, would not cause any apparent change to the basic information (the formulas), and does not render such basic information personal or individual (id.).

Turning to the second part of the test, it appears clear that the basic formulas are incorporated into software systems prepared for other customers. On this score, it is admitted that petitioner has developed rating formulas relating to approximately 70 different insurance companies, that some of its customers quote insurance for more than one company (typically ranging from three to ten different companies), and that some agencies may quote insurance for common companies. As discussed above, the basic formulas are not changed (i.e., there is no evidence that petitioner's rate analysts start from scratch with the information furnished by the insurance company to derive a new basic rating formula for each new software request).

Rather, such basic formulas appear to be included in the programs and then limited by insertion of default variables appropriate to that customer. It follows then that the same basic formulas (or portions thereof) would be incorporated into different customers' software programs wherever such different customers quote insurance for companies in common, especially where such customers quote within common or overlapping territories. As in Matter of Rich Products Corp. v. Chu (132 AD2d 175, 521 NYS2d 865, lv denied 72 NY2d 802, 530 NYS2d 554), such likelihood of "substantial incorporation" is enough to disqualify the information service aspect of petitioner's software from exclusion. In sum, the basic core of information maintained and provided by petitioner is not personal or individual in nature, and is or may be substantially incorporated in programs furnished to more than one customer. As the Division points out, any part of the basic information is available to any agent needing the same and willing to buy it. Hence, the information service aspect of petitioner's software packages does not escape taxation under Tax Law § 1105(c)(1).

J. Petitioner also argues that its software was not properly subject to tax prior to a 1991 amendment to Tax Law § 1101(b) pursuant to which all prewritten software was specifically included within the definition of tangible personal property subject to tax (see, L 1991, ch 166, §§ 154, 155, eff September 1, 1991). However, the conclusion above that petitioner's software system encompassed, in part, a taxable information service renders petitioner's argument unavailing. Simply put, petitioner's software was taxable as an information service, and it is now also taxable in its entirety as prewritten software constituting taxable tangible personal property (as noted petitioner now collects and remits sales tax on its software systems).

K. Petitioner also challenges the Division's inclusion of its entire receipt as subject to tax. However, it is well established that in the absence of any allocation between taxable and nontaxable portions of a receipt, the Division may impose sales tax upon the entire unallocated receipt (see, Matter of Valley Welding Supply Co. v. Chu, 131 AD2d 917, 516 NYS2d 366; see also, Dynamic Telephone Answering Systems v. State Tax Commn., 135 AD2d 978, 522 NYS2d 386, lv denied 71 NY2d 801, 527 NYS2d 767; Matter of ADP Automotive Claims

Services v. Tax Appeals Tribunal, supra, 594 NYS2d at 99). Here, there is no allocation presented, nor is any portion of petitioner's receipts readily discernible as relating to either aspect of its software systems. Thus the Division properly subjected the entire amount of receipts to tax.

L. Given the circumstances of this case, penalty abatement is warranted. It is not unreasonable to accept the proposition that petitioner believed it was selling only customized application software not subject to tax. This is especially true in light of the fact that the Division's primary interpretational document (Technical Services Bulletin 1978-1[S]), relied upon directly by the Division in formulating its Advisory Opinion issued to petitioner, speaks most directly and specifically to the taxability of different types of software, with only its final paragraph mentioning information services in the form of simply quoting Tax Law § 1105(c)(1). Moreover, under the circumstances of its unique and limited field of operation, petitioner made reasonable efforts to ascertain whether its software was taxable, via inquiries to its competitors and to the Division (see, Finding of Fact "7"). In fact, petitioner's inquiries to the Division were made in conjunction with voluntarily obtaining requisite sales tax forms in order to comply with its obligation to collect and remit sales tax on its related sales of computer hardware. The tenor of the testimony supports the conclusion that petitioner most probably did not even consider the possibility that it was providing an information service, but rather viewed itself as selling software and simply questioned whether it was selling the type of software qualified for exemption. Such being the case, and notwithstanding the lack of details as to who within the Division may have advised petitioner that its software was exempt, petitioner has established entitlement to abatement of penalties. (This result seems especially appropriate given that petitioner's failure to allocate its receipts leaves petitioner to pay tax on a portion of its receipts which would otherwise concededly not be subject to tax.)

M. The petition of Insurance Automation Systems, Inc. is granted to the extent indicated in Conclusion of Law "L" but is otherwise denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 2, 1992, as modified to reflect

elimination of penalties imposed, is sustained.

DATED: Troy, New York
May 10, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE