

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

A-1 DATA SERVICE

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DECISION

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 March 1, 1982
through November 30, 1984.

Petitioner, A-1 Data Service, 3580 Lakeside Road, Syracuse, New York 13209, 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 March 1, 1982 through November 30, 1984 (File No. 63355).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on July 8, 1986 at 9:15 A.M. Petitioner appeared by August C. Griesel, C.P.A. The Audit Division appeared by John P. Dugan, **Esq.** (James Della Porta, **Esq.**, of counsel).

ISSUE

Whether the temporary transfer of diskettes to petitioner's customers, which transfers took place in connection with computer data entry services provided by petitioner to said customers, constituted retail sales of tangible personal property within the meaning of section 1105(a) of the Tax Law.

FINDINGS 3F FACT

1. On June 5, 1985, following an audit, the Audit Division issued to petitioner, A-1 Data Service, a Notice of Determination and Demand for Payment

of Sales and Use Taxes Due for the period March 1, 1982 through November 30, 1984 in the amount of \$1,890.03, together with interest thereon.

2. Petitioner is and was at all times relevant herein a sole proprietorship owned and operated by Myrlene G. Forbes, 3580 Lakeside Road, Syracuse, New York. During the period at issue, petitioner's business consisted of providing computer data entry services by transferring data stored on hard copy provided by the customer to a diskette, which was then transferred back to petitioner's customer who, in turn, transferred the information on the diskette to magnetic tape. The customer then returned the diskette to petitioner. Petitioner subsequently re-used the returned diskettes in connection with other similar jobs. Petitioner owned all of the diskettes used in its business.

3. Petitioner did not analyze the data supplied to it by its customers, nor did petitioner add any new information to the data supplied. Petitioner's services consisted solely of rearranging the data set forth on hard copy onto the diskette which could then be transferred onto magnetic tape.

4. The assessment issued herein was based upon the Audit Division's contention that petitioner's transfer of the diskettes to its customers constituted a taxable rental of tangible personal property within the meaning of section 1105(a) of the Tax Law.

5. Petitioner charged its customers for the service of transferring information from hard copy to the diskette. It did not charge its customers for their temporary use of the diskette to transfer data onto magnetic tape.

6. Upon their receipt of the diskette, petitioner's customers were expected to transfer the data thereon onto magnetic tape and to return the diskette to petitioner.

7. Petitioner's customers were not entitled to use the diskettes for any purpose other than to transfer the data thereon onto magnetic tape.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law generally provides for the imposition of tax upon every retail sale of tangible personal property, with certain exceptions not relevant herein. In addition, section 1101(b)(4) of the Tax Law defines retail sale as a sale of tangible personal property to any person for any purpose, with certain exceptions not relevant herein.

B. That it is well-settled that the mere conversion of data already possessed by a customer from one form or medium to another, without adding to the customer's sum of knowledge with respect to such data, constitutes a taxable sale of tangible personal property (Matter of Finserv Computer Corp. v. Tully, 94 AD2d 197; Matter of Ford Motor Co., Buffalo Stamping Plant, State Tax Commission, October 21, 1983). Petitioner's conversion of information already possessed by its customers from hard copy to diskette falls within this principle.

C. That a "sale" is defined for purposes of section 1105(a) of the Tax Law by section 1101(b)(5) of the Tax Law as follows:

"Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

D. That 20 NYCRR 526.7 provides, inter alia, the following with respect to section 1101(b)(5) of the Tax Law:

"(c) Rentals, leases, licenses to use. (1) The terms rental, lease, license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a 'sale' or a 'rental, lease or license to use' shall be determined in accordance with the provisions of the agreement."

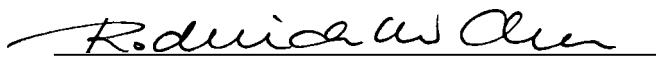
E. That petitioner's transfer of diskettes to its customers, albeit for a limited duration and purpose, is a taxable license to use tangible personal property. The instant situation is readily distinguishable from that addressed by regulation section 526.7(f) (20 NYCRR 526.7[f]), which provides that temporary possession of an original work (such as a painting) for purposes of making reproductions is not a license to use, where payment for the right of reproduction is in the nature of a royalty. Where some other use is made of the original work, however, the transaction becomes a license to use which is taxable.


F. That the petition of A-1 Data Service is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 5, 1985 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER