TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 00-34

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of Tennessee sales and use tax to purchases of computer training and consulting from a computer software vendor.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

> (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
> (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
> (C) The applicable law must not have been changed or amended;
> (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
> (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[TAXPAYER] purchases computer software from its vendor, [VENDOR]. The vendor also provides to the taxpayer computer training and consulting. The taxpayer and the

vendor have no written contract for the computer training and consulting[1], but the vendor generally provides the training and consulting at an hourly rate.

The taxpayer states that the training and consulting do not include any creation of new computer software, or any upgrading, modification, changes, repairs, or installation of any existing software or computer hardware.[2] The computer software has already been installed. The invoices provided by the vendor to the taxpayer are for charges for showing the taxpayer's employees how to use the existing software.[3] The vendor is not modifying or changing the software in any way.

QUESTION

Should the vendor charge Tennessee sales or use tax to the taxpayer for computer training and consulting?

RULING

If the services described as "computer training and consulting" do not include any creation of new computer software, or any upgrading, modification, changes, repairs, or installation of any existing software or computer hardware, the charges are not subject to tax.

ANALYSIS

Applicable Law

Retail sales in Tennessee are subject to sales and use tax under T.C.A. §67-6-101 et seq. T.C.A. §67-6-102(23)(A) defines a retail sale to include a "taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than resale." Also subject to tax are "any services that are a part of the sale of tangible personal property...." T.C.A. §67-6-102(25).

The term "sale" is defined to include:

> [the] transfer of customized or packaged computer software, which is defined to mean, information and directions loaded into a computer which dictate different functions to be performed by the computer whether

[1] Along with the ruling request, the taxpayer submitted a copy of [AGREEMENT] with the vendor. [AGREEMENT] provides that vendor will provide certain services to taxpayer "as specified on Attachment S, or as outlined in an engagement letter, scope of work, or exhibit, attached hereto." However, no attachment was provided with the copy of the agreement, and the taxpayer states there is no attachment covering the subject of training and consulting. The agreement does not otherwise mention the training and consulting which is the subject of the ruling.

[2] The agreement referred to in Footnote 1 does contain a provision regarding ownership of software provided to the customer pursuant to [PROVISIONS] of the agreement. [SEE AGREEMENT] It is presumed, for purpose of this ruling, that no software was provided as a part of the training and consulting services.

[3] A sample invoice provided by the taxpayer does not describe the services provided in detail. It merely states "CONSULTING" and gives the names of the vendor personnel involved. The description of what is involved in the training and consulting was provided by the taxpayer in the ruling request and subsequent correspondence with the Department of Revenue.

> contained on tapes, discs, cards, or other device or material. For such purpose, computer software shall be considered tangible personal property; however, the fabrication of software by a person for such person's own use or consumption shall not be considered a taxable "use"....

T.C.A. §67-6-102(24)(B). The Tennessee Supreme Court has held that the effect of this statutory provision is to treat computer software as tangible personal property. *University Computing Co. v. Olsen*, 677 S.W.2d 445 (Tenn. 1984).

A dealer's customization or modification of his customer's computer software is a sale within the definition set forth in this section. *Creasy Systems Consultants, Inc. v. Olsen*, 716 S.W.2d 35 (Tenn. 1986).

With respect to services, the Tennessee Court of Appeals has stated:

> Tennessee Code Annotated section 67-6-205, imposes sales taxes on "all services taxable under this part." Tenn. Code Ann. § 67-6-205(1989). The sales tax does not apply to all services; it applies only to those services specifically enumerated by the statute.

Ryder Truck Rental, Inc. v. Huddleston, 1994 Tenn. App. LEXIS 444.

T.C.A. §67-6-102(23)(F) lists the following services as specifically subject to tax in Tennessee:

> (i) The sale, rental, or charges for any rooms, lodgings, or accommodations furnished to transients by any hotel, inn, tourist court, tourist camp . . .
> (ii) Charges for services rendered by persons operating or conducting a garage, parking lot, or other place of business for the purpose of parking or storing motor vehicles . . .
> (iii) The furnishing, for a consideration, of either intrastate or interstate telecommunication services . . .
> (iv**) The performing for a consideration of any repair services** . . .
> (v) The laundering or dry cleaning of any kind of tangible personal property . . .
> (vi) **The installing of tangible personal property which remains tangible personal property after installation** . . .
> (vii) The enriching of uranium materials . . .
> (viii) The renting or providing of space to a dealer or vendor without a permanent location in this state . . .
> (ix) Charges for warranty or service contracts . . .

(Emphasis supplied.)

Services can become subject to tax, if the services are performed as a part of a taxable sale of tangible personal property (which as explained above includes the sale of

computer software). *See Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621 (Tenn. 1987), *Creasy Systems Consultants*, *supra*.

Analysis of Facts

The taxpayer acquires software from the vendor. This is clearly subject to tax, and is not the subject of this ruling.

If the services which are the subject of this ruling include any creation of new software, upgrading, customization, or modification of the taxpayer's computer software, the services would be taxable under the holding in *Creasy Systems Consultants*. Further, if the services constitute repair or installation of software, such services are taxable as taxable services. The taxpayer represents none of these services are a part of the training and consulting services.

The training and consulting services would also be taxable if performed as a part of the sale of computer software. Here, these services are not covered by the "license agreement" for the software and are separately contracted for and billed. There is no indication that these services are a necessary part of the sale of the software. Therefore, the training and consulting services are not taxable as a part of the sale of software.

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APPROVED: Ruth E. Johnson
Commissioner

DATE: 10/3/00