
**BEFORE THE ISSUES RESOLUTION COMMITTEE
STREAMLINED SALES TAX GOVERNING BOARD**

IN THE MATTER OF INTERPRETATIVE
OPINION 2009-01 (SOFTEC)

DECISION

Appeal No. 2010-2

Presiding:

R. Bruce Johnson, Chair
Erica Mani
Tom Gillaspie
Robert Thompson

Appearances:

For SOFTEC: Mark Nebergall
For CRIC: Myles Vosburg

STATEMENT OF THE CASE

This matter came before the Issues Resolution Committee for a Hearing pursuant to the Section 1002.E. of the Streamlined Sales Tax Agreement (“the Agreement”). On May 12, 2009, pursuant to a properly listed agenda item, the Compliance Review and Interpretations Committee (CRIC) recommended to the Governing Board adoption of Interpretative Opinion 2009-01 (“the Opinion” or “Opinion 2001-01”). The Governing Board approved that recommendation. The Opinion had been issued in response to a request by the Software Finance and Tax Executives Council (“SoFTEC”).

By Petition dated July 10, 2009, Mark E. Nebergall, as President of SoFTEC, filed a Petition for Resolution and Reconsideration of the Governing Board action. On August 30, 2009, Scott Peterson, Executive Director of the Governing Board, published the Petition on the Governing Board website and requested public comment as required by Rule 1001.B. A telephonic hearing was held on December 14, 2009. Mark Nebergall represented SoFTEC. Myles Vosburg, represented the Compliance Review and

Interpretations Committee. No written comments from other parties were received and no oral comments were taken from any other parties.

ISSUE PRESENTED

Did the Governing Board properly adopt Opinion 2009-1 rejecting SoFTEC's request that "a software license upgrade (as opposed to an upgrade of the software itself) does not constitute "tangible personal property" or "computer software" where the only thing delivered to the purchaser is an alphanumeric code."¹

APPLICABLE LAW

The following definitions are found in the Streamlined Sales and Use Tax Agreement:

"Computer software" means a set of coded instructions designed to cause a "computer" or automatic data processing equipment to perform a task.

"Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. "Tangible personal property" includes electricity, water, gas, steam, and prewritten computer software."

DISCUSSION

The hypothetical facts, as outlined in SoFTEC's original request are as follows:

"Purchaser acquires prewritten computer software under a license that limits its ability to use the software in one of three ways: (1) the license only permits the purchaser to make a set number of copies, (2) the license only permits a set number of users to use the software concurrently, or (3) the license only permits the purchaser to load the software onto a computer with a specified computing power. If the purchaser wants to make additional copies of the software, allow additional users to use the software concurrently, or to migrate the software to more powerful computer, it must upgrade the license and pay an additional license fee. Once the fee is paid, the seller provides the purchaser by telephone with an alphanumeric code which, when entered into the computer, permits the making of additional copies of the software, permits additional concurrent users, or causes the software to function on the more powerful machine. The seller delivers no additional software to the purchaser."

¹ SoFTEC Interpretation/Definition Request dated January 11, 2007, par. 6.

The request proposed that “[a] software license upgrade (as opposed to an upgrade of the software itself) does not constitute ‘tangible personal property’ or ‘computer software’ where the only thing delivered to the purchaser is an alphanumeric code.” As noted, CRIC declined to accept the proposal and the Governing Board approved CRIC’s recommendation. SoFTEC’s supplemental memorandum, filed with the Committee on December 7, 2009, restates the question in the context of a sale, i.e., “whether a sale involving a license upgrade, unaccompanied by a transfer of computer software or other tangible property is a sale involving tangible personal property.”

We agree with the Board’s decision. SoFTEC would have us treat the second transaction, the license upgrade, as completely independent of the first transaction in which the pre-written software, which is clearly tangible personal property, is transferred to the consumer. The hypothetical facts establish that the upgrade is not independent. It provides additional rights that are only useful in connection with the software previously transferred. SoFTEC concedes that consideration for those rights would have been included in the consideration for the sale of the software itself if they had occurred at the time of the initial sale. We do not believe the result should be different, as a matter of law, if the additional rights are transferred the next day, the next week or the next year.

Ownership is always a question of rights. For purposes of the Agreement, prewritten software is tangible personal property. No one would seriously argue that an extension of an automobile lease would have different consequences for sales tax purposes than the lease itself. Under SoFTEC’s reasoning, however, the extension of the lease would merely be “intangible” rights to use the automobile for another year. There would be no transfer of tangible personal property involved. SoFTEC has cited no legal authority from the sales tax area that would support such a contention, either involving prewritten software or any other tangible personal property. We must reject their reasoning.

We further note that SoFTEC’s proposed approach would defeat any legislature’s intent in taxing transfers of prewritten software. No well-advised taxpayer would enter into a license for any longer than the minimum period possible, or for more than the

minimum package of rights, knowing that it could extend or enlarge its contract at any time without any sales tax consequences.

DECISION

Pursuant to Article X of the Agreement, and the rules promulgated thereunder, we recommend that the Governing Board deny SoFTEC's request for reconsideration of the Governing Board's decision of May 12, 2009, adopting Interpretative Opinion 2009-1.

Signed in counterparts on the dates indicated.

R. Bruce Johnson
February __, 2010

Erica Mani
February __, 2010

Thomas Gillaspie
February __, 2010

Robert Thompson
February __, 2010