

OKLAHOMA TAX COMMISSION

TAX POLICY AND RESEARCH DIVISION
TONY MASTIN, DIRECTOR

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August 13, 2004

Re: Our File No. LR-04-093

Dear

This is in response to your inquiry of April 15, 2004, wherein you describe [redacted] business operations and pose questions regarding the taxability of certain sales of software and support. A restatement of the facts outlined in your inquiry, the questions posed therein along with the responses thereto are set forth below:

FACTS

Current customers who have purchased software prior to 2003 have received the original software and all subsequent updates on a tangible medium.

With the initial purchase of the software license, support is mandatory and is separately stated on the invoice.

Subsequent software support is optional. It should be noted, however, that should the customer choose not to renew its support contract for the second year, but then chooses to renew the support contract in the third year, he must pay for both the second and third year support to bring his software to the current version.

For purposes of this letter it is assumed that the computer software sold by [redacted] is prewritten as defined in 68 O.S. §1352(19).¹

¹This assumption is based on the statement in your correspondence of April 15, 2004, that Sybase sells most of its software 'out of the box'.

QUESTIONS AND RESPONSES

1. Is the purchase of software taxable when delivered solely over the Internet?

- a. If it is the initial purchase of a product?
- b. If it is the purchase of the ability to deploy additional users to a previously purchase of product?
- c. If it is the purchase of the ability to deploy additional users to a **previously physical** purchase of product?

Sales of prewritten computer software that is delivered electronically, by other than tangible storage media, are not subject to sales or use tax. 68 O.S. §1357(30).

2. Is mandatory bundled support (i.e. future bug fixes, enhancements, new releases combined with telephone support) taxable when purchased with electronically delivered software?

The mandatory bundled support would not be subject to tax if the bug fixes, updates, and enhancements included in the bundled support are delivered electronically. However, should these items be delivered in a tangible media then the entire sales or purchase price for the bundled support would be subject to tax. 68 O.S. §1352(11)(a)(6) and 68 O.S. §1401(3).

3. Does the fact that the initial software is itemized separately from the bundled maintenance support and priced as individual lines on one invoice impact the taxability of the two products?

In the case where the purchase of the bundled maintenance support is not required to purchase the initial software, then the taxability of the two separately stated items would be determined independently of each other.

4. If a customer purchases multiple software products and support plans with the use of no product purchased dependent upon any other product purchased, and requests that certain products be delivered electronically and others physically using a third party shipper:

- a) If a single invoice itemizes each product, would the state recognize the products delivered electronically as exempt and the products delivered on a physical media as taxable?

Yes.

- b) Based on our business model of mandatory support with the initial purchase of software, if an invoice reflects mixed deliveries, how would the mandatory support be taxed?

The charges for the mandatory support when sold with tangible prewritten computer software are subject to tax. OAC 710:65-19-52(d). Charges for the new releases, enhancements, and bug fixes included in the mandatory support delivered in a tangible media format when sold with electronically delivered computer software would be subject to tax. Additionally, charges for telephone support if not separately stated would be subject to tax.

5. Is optional software support that includes the right to updates delivered solely through electronic means subject to tax?

No. See 710:65-19-52(d).

Copies of the referenced statutory and administrative code provisions are enclosed for your information. This response applies to the circumstances discussed in your correspondence of April 15, 2004. Pursuant to Commission Rule 710:1-3-73(e) this Letter Ruling may be generally relied upon only by the entity to whom it is issued, assuming that all pertinent facts have been accurately and completely stated, and that there has been no change in applicable law.

Sincerely,

OKLAHOMA TAX COMMISSION

A handwritten signature in cursive script that reads "Christy J. Caesar".

Christy J. Caesar
Tax Policy Analyst