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## Directive 01-3: Sales Tax Consequences of Computer Software "Load and Leave" Transactions

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**FACTS:** A computer software vendor sells pre-written "canned" software to its customers. Sometimes the software can be transferred to these customers electronically, but the download can be time-consuming and costly. Further, in the case of a large software program, the download of the software can sometimes be impossible. For these reasons, the vendor may travel to the customer's site and install the software directly onto the customer's computer using tangible storage media (e.g., a floppy disk). This is commonly known as a "load and leave" transaction. In a load and leave transaction, the vendor does not transfer the tangible medium used to load the software to its customer as part of the sale. Rather, the vendor retains the tangible medium to be used in similar subsequent transactions.

**ISSUE 1:** Whether the sale of pre-written "canned" software using the load and leave method is subject to sales tax?

**DIRECTIVE 1:** The sale of pre-written "canned" software using the load and leave method is not subject to sales tax since no tangible personal property is transferred to the customer.

**DISCUSSION:** In general, the sales tax applies to the sale of tangible personal property and not, for example, to the transfer of intangible property or the performance of a service. See G.L. c. 64H, §§ 1, 2. Applying this distinction, the Computer Industry Services and Products Regulation concludes that the physical transfer of pre-written "canned" software for a consideration is subject to sales tax, whereas the sale of custom software or the electronic transfer of software (i.e., without any physical transfer of the software) is not. See generally 830 CMR 64H.1.3(6), (12). [\(1\)](#) A load and leave transaction, like the sale of custom software or the electronic transfer of software, does not result in the sale of tangible personal property.

**ISSUE 2:** Whether the physical transfer of instructional materials and similar tangible personal property incidental to a load and leave transaction is subject to sales tax when the price for these materials is not separately stated on the bill to the customer? Also, whether the transfer of similar materials is subject to tax when the transfer occurs electronically or using the load and leave method?

**DIRECTIVE 2:** The transfer of instructional materials and similar tangible personal property incidental to a load and leave transaction is not subject to sales tax in cases in which the price for the materials is not separately stated on the customer's bill when the materials constitute an inconsequential component of the overall sale. In general, the Department will consider the transfer of instructional materials and similar tangible personal property as an inconsequential component of a load and leave transaction when the price for these materials is less than 10% of the total sales price. The transfer of instructional materials and similar property either electronically or through the use of the load and leave method is not taxable.

**DISCUSSION:** The physical transfer of instruction books, manuals or similar property in connection with the sale of software generally constitutes the taxable sale of tangible personal property. See 830 CMR 64H.1.3(11). Consequently, in any case in which these materials are provided in connection with the sale of software and the price for these materials is separately stated on the bill

to the customer, the price for the materials is taxable. On the other hand, when the instructional materials are provided as part of a non-taxable sale of software and the materials are not separately stated on the bill, the materials will not be subject to tax when they are an inconsequential component of the overall transaction. In general, the Department will consider the transfer of instructional materials and similar tangible personal property as an inconsequential component of a software transaction, including a load and leave transaction, when the value of these materials is less than 10% of the total sales price. See 830 CMR 64H.1.3(6)(c). Conversely, when the transfer of the materials has a value of 10% or more of the total sales price, and the price for these materials is not separately stated on the customer's bill, the entire transaction is taxable. However, when the transfer of the materials has a value of 10% or more of the total sales price, and the price for these materials is separately stated on the customer's bill, only the separately stated portion for these materials is taxable. The transfer of instructional materials and similar property either electronically or through the use of the load and leave method is not taxable for the reasons discussed in the context of Directive 1.

ISSUE 3: Whether the sale of an optional maintenance agreement purchased in connection with software obtained through the load and leave method is taxable when the agreement provides for upgrades and technical support to be provided by phone, the internet or through a follow-up load and leave transaction?

DIRECTIVE 3: The sale of an optional maintenance agreement purchased in connection with software obtained through the load and leave method is not taxable when the agreement provides that any upgrades thereunder will be provided either through the internet or a subsequent load and leave transaction. The sale of an optional maintenance agreement that provides only for technical support and not upgrades, however provided, is not taxable.

DISCUSSION: In general, the sale of services and the purchase of a service contract are not subject to tax. See 830 CMR 64H.1.3(7)(c)1. However, when a customer is required to purchase a service contract as part of the purchase of software, the price of the service contract is taxed in the same manner as the software itself and, if the software is taxable, the purchase of the contract is likewise taxable. See 830 CMR 64H.1.3(7)(a). On the other hand, the purchase of an optional service contract is not taxable, whether or not the contract is purchased in connection with taxable software. See 830 CMR 64H.1.3(7)(a), (c).

A contract for services and upgrades purchased in connection with the sale of software is treated differently than the sale of a service contract because the sale of software upgrades, unlike the sale of a service, may be subject to tax. When a software customer purchases an optional contract for technical services and software upgrades and the reasonably estimated price for the services and upgrades are separately stated, only the price for the upgrades is taxable. See 830 CMR 64H.1.3(7)(d)(2). On the other hand, when a software customer purchases an optional contract for services and software upgrades, and the price for the services and the upgrades is not separately stated, the entire contract price is taxable unless the reasonably estimated price for the upgrades is an inconsequential component of the total price. See 830 CMR 64H.1.3(7)(b), (d). The rule for when the price of software upgrades will constitute an inconsequential component of a contract for technical services and upgrades is the same as that discussed above in the context of Directive 2.

The above analysis assumes that the sale of upgrades to be provided in connection with the sale of software will constitute a taxable transaction. However, upgrades that are provided electronically or in the form of a load and leave transaction are not taxable for the reasons stated above in the context of Directive 1. Therefore, when a vendor sells a customer a service and upgrade contract in connection with the sale of software that is transferred either electronically or through a load and leave transaction, the price for the contract is not taxable when the contract provides that the upgrades will be provided either electronically or through the load and leave method. For purposes of the transactions referenced in the preceding sentence, it is not relevant whether the service and upgrade contract is a mandatory or an optional component of the sale of software.

Frederick A. Laskey,  
Commissioner of Revenue

May 8, 2001

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Footnotes:

<sup>1</sup>"Canned software" is defined by the regulation as "a software program held for general or repeated sale or lease, including a program developed for in-house use which is subsequently offered for sale

or lease to others, and including any standard documentation or manuals designed to facilitate the use of the program by the customer." 830 CMR 64H.1.3(2). ([return to text](#))