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## Letter Ruling 81-41: Nexus: Computers and Data Processing

May 27, 1981

You inquire about the Massachusetts tax consequences of certain data processing and distribution transactions to be undertaken by your client, a corporation organized in the United Kingdom ("Corporation").

The Corporation will own or lease computer equipment ("US Computer") that will be operated by an independent contractor ("Operator") under an agreement with the Corporation. The equipment will be operated either in Massachusetts or in another state. (For purposes of this ruling it is assumed that the equipment will be operated in Massachusetts.)

All of the equipment was purchased or leased in the United Kingdom. Some of it was purchased or leased several years ago for use in the United Kingdom. The remainder was purchased or leased for use in the transactions about which you inquire, but at the time of purchase or execution of the lease the Corporation had not decided where in the United States the equipment would be located.

The data entered into the US Computer will be supplied not by the Corporation or the Operator but by third parties ("Information Providers") who, under contracts with the Corporation executed in the United Kingdom, will pay the Corporation in London for the right to have the information placed in the US Computer. (The information will also be placed in computers in the United Kingdom and elsewhere.)

The data will be entered into the US Computer (1) over telecommunications lines or (2) by use of magnetic tapes delivered to the Operator by the Information Providers.

Independent marketing organizations ("Marketing Organizations") will execute contracts in the United Kingdom with the Corporation for the right to market information in the computer system. Each Marketing Organization will sell access to the information to customers in its territory. It will pay the Corporation a charge for each customer's "accesses" to the computer system. In addition, it will collect customer payments for data and remit them to the Corporation, which will remit them in turn to Information Providers. The Marketing Organizations and the Corporation will receive commissions on such payments.

The data furnished to customers will range from information of general business interest to personal or individual information of interest only to a single customer. Customers will receive the data at computer terminals on their premises; the information will either be displayed on a screen or printed at the terminal, at the discretion of the customer.

The Corporation will not own or lease real property in Massachusetts, nor will it have any employees located in the Commonwealth.

There may be a Marketing Organization whose territory includes Massachusetts, and there may be customers located in Massachusetts.

(1) You inquire whether the Corporation's charges to Information Providers for the right to place information in the US Computer will be subject to Massachusetts sales or use taxes.

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Massachusetts General Laws Chapter 64H, Section 1(13)(c) provides that "sales" subject to tax do not include professional or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made.

Based on the foregoing, it is ruled that the Corporation's charges to Information Providers for the right to place information in the US Computer will not be subject to Massachusetts sales or use taxes.

(2) You inquire whether the use tax will apply to Information Providers' storage or use of data in Massachusetts.

Chapter 64I, Section 2 imposes an excise on the storage, use or other consumption in Massachusetts of tangible personal property purchased for storage, use or other consumption in Massachusetts, at the rate of five per cent of the sales price of the property. In determining the sales price, no deduction may be taken on account of the cost of materials used or labor or service cost, and any amount paid for any services that are a part of the sale must be included. Chapter 64H, Section 1(14).

It is presumed that tangible personal property shipped or brought into Massachusetts by a purchaser within six months after its purchase was purchased from a retailer for storage, use or other consumption in Massachusetts. Chapter 64I, Section 8(f).

For purposes of both the sales and use taxes, "sale" includes the producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used. Chapter 64H, Section 1(12)(b); Chapter 64I, Section 1(1).

Based on the foregoing, it is ruled that:

(a) Neither the entry of data into the US Computer over telecommunications lines nor the mere storage of information in the computer without the use of tangible media will be subject to tax.

(b) If magnetic tapes purchased for storage or use in Massachusetts are shipped or brought into Massachusetts by Information Providers, a five per cent use tax will apply. If the Information Provider buys a tape and itself records the information on it, the "sales price" on which the tax is based will be the charge to the Information Provider for the tape. If the Information Provider pays a second party to record information on a tape purchased by the Information Provider from a third party, the tax will be based on the third party's charge for the tape plus the second party's charge for recording the information on it. If a single party records the information on the tape and transfers the tape with the information recorded on it to the Information Provider, the tax will apply to the entire charge for the tape with the information recorded on it.

(3) You inquire whether the sales tax will apply to the Corporation's charges to Marketing Organizations for customer "accesses" to the US Computer or to Information Providers' charges to customers for the furnishing of information at terminals in Massachusetts.

Chapter 64H, Section 1(12)(f) defines "sale" as including

"[t]he furnishing of information by printed, mimeographed or multigraphed matter or by

duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons,"

but "sale at retail" does not include professional or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made. Chapter 64H, Section 1(13)(c).

Based on the foregoing, it is ruled that the Massachusetts sales tax will not apply to the Corporation's charges to Marketing Organizations for customer "accesses" to the US Computer or to Information Providers' charges for information provided at terminals in Massachusetts, whether the information is displayed on screens or printed at the terminals.

(4) You inquire whether the use tax will apply to the Corporation's storage or use of the US Computer in Massachusetts.

Based on Chapter 64I, Sections 2 and 8(f) (see Question (2)), it is ruled that:

(a) The use tax will apply to the Corporation's use in Massachusetts of any portion of the US Computer leased in the United Kingdom. Each lease payment coming due (whether or not payment is actually made) will constitute a separate "sale" for purposes of the tax; the tax will be imposed on each lease payment that comes due while the equipment is in Massachusetts, as well as any payment that comes due before the equipment is brought into Massachusetts, if the payment is for a period during which the equipment will be brought into Massachusetts.

(b) The use tax will not apply to the Corporation's use of that portion of the US Computer purchased several years ago for use in the United Kingdom.

(c) If a portion of the US Computer is stored or used in Massachusetts within six months of its purchase by the Corporation, it will be presumed that its storage or use is subject to tax. The Corporation can rebut this presumption by establishing that at the time of purchase it did not contemplate storing or using the equipment in Massachusetts.

(5) You inquire whether the sales tax will apply to the Operator's charges to the Corporation for operating the US Computer in Massachusetts.

Based on Chapter 64H, Section 1(13)(c) (see Questions (1) and (3)), the Massachusetts sales tax will not apply to the Operator's charges for the service of operating the US Computer in Massachusetts.

(6) You inquire whether the Corporation will be subject to the Massachusetts corporate excise if it undertakes the described transactions.

Every foreign corporation exercising its charter, or qualified to do business or actually doing business in Massachusetts, or owning or using any part or all of its capital, plant or any other property in Massachusetts, must pay a Massachusetts corporate excise. Chapter 63, Section 39. "Foreign corporation" means every corporation, association or organization established, organized or

chartered under laws other than those of the Commonwealth (with exceptions not here relevant), for purposes for which Massachusetts corporations may be organized under Chapter 156, 156A, 156B or 180 of the General Laws, which has privileges, powers, rights or immunities not possessed by individuals or partnerships. Chapter 63, Section 30(2). The excise is due and payable on any one of three incidents, including "[t]he owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity." Chapter 63, Section 39.

Based on the foregoing, it is ruled that if the Corporation undertakes the transactions described herein, it will be subject to the Massachusetts corporate excise. The excise equals the greater of (1) \$228 or (2) the sum of:

(a) 9.5 per cent of net income allocated to Massachusetts; and

(b) \$2.60 per \$1,000 upon the value of its tangible property not subject to local taxation and situated in Massachusetts on the last day of the taxable year in the case of a tangible property corporation, or its net worth allocable to Massachusetts in the case of an intangible property corporation. Chapter 63, Section 39. (Enclosed are copies of Chapter 63, Section 38, which explains how corporate income is apportioned to Massachusetts, and Chapter 63, Section 30, paragraphs (10) and (11), which distinguish tangible and intangible property corporations.)

(7) You inquire whether personal property tax will be assessed against the US Computer owned or leased by the Corporation.

All real and personal property situated in Massachusetts is subject to local taxation unless expressly exempt. Chapter 59, Section 2.

Chapter 59, Section 5, Sixteenth (2)(b) provides that all property owned by a foreign corporation is exempt from local taxation, except for:

"real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term...shall not be deemed to include stock in trade or any personal property directly used...in any purchasing, selling, accounting or administrative function."

The Supreme Judicial Court of Massachusetts has held that a computer memory drum owned by a taxpayer and used at its place of business to receive and store stock market information and to transmit the information to its customers through remote computer terminals was neither "stock in trade" nor machinery "directly used in any purchasing, selling, accounting or administrative function," within the meaning of the cited exemption. Ultron Systems Corporation v. Board of Assessors of Boston, 355 Mass. 284 (1969). However, office equipment leased by a domestic business or foreign corporation in the business of leasing such equipment is "stock in trade" exempt from local taxes. New England Mutual Life Insurance Co. v. City of Boston, 321 Mass. 683 (1947).

All property owned by a domestic or foreign manufacturing corporation as defined in Chapter 63 is exempt from local taxation except for real estate, poles and underground conduits, wires and pipes. Chapter 59, Section 5, Sixteenth (3). A computer "time-sharing" business is not a manufacturing corporation within the meaning of this exemption. First Data Corporation v. State Tax Commission, 371 Mass. 444 (1976).

Based on the foregoing, it is ruled that

(a) any part of the US Computer situated in the Commonwealth and owned by the Corporation

will be subject to Massachusetts local taxation; but

(b) any part of the US Computer leased to the Corporation will be exempt from Massachusetts local taxation.

Very truly yours,

/s/L. Joyce Hampers

L. Joyce Hampers

Commissioner of Revenue

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