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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

COMPUTER NETWORK SYSTEMS, INC., Petitioner,	)	
v.	)	Docket No. 4352-90
DISTRICT OF COLUMBIA, Respondent.	)	

MEMORANDUM OPINION AND ORDER

This matter came before the Court for a hearing on the parties' cross-motions for summary judgment. Having considered the pleadings, the oral arguments of counsel, and the relevant case and statutory law, the Court finds that there is no genuine issue of material fact, and, for the reasons set forth herein, concludes that petitioner is entitled to summary judgment as a matter of law.

FACTS

1. Computer Network Systems, Inc. ("CNSI"), is a Delaware corporation in the business of providing computer and data processing services. Its principal place of business is in the District of Columbia.

2. The District of Columbia ("District"), a municipal corporation chartered by the federal government, is authorized to impose sales and use taxes pursuant to D.C. Code §§ 47-2001 et seq.

(1990)[1] ("District of Columbia Sales Tax Act"), and 47-2201 et seq. ("District of Columbia Use Tax Act").[2]

3. Pursuant to the D.C. Sales Tax Act and the D.C. Use Tax Act, as they existed prior to amendment in July, 1989,[3] the District imposed taxes upon retail sales of "tangible personal property." Prior to July, 1989, the sales and use tax statutes did not include data processing or computer software purchases as retail sales subject to taxation, nor did the statutes identify computer software as tangible personal property.[4]

4. For the period June 30, 1988, through February 28, 1989, CNSI voluntarily filed and paid monthly sales and use taxes. Of the D.C. sales and use taxes paid during that period, $27,483.41 was paid on the purchase of computer software.

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[1] Unless otherwise indicated, citations to the D.C. Code refer to the 1990 Replacement Volume.

[2] The "District of Columbia Sales Tax Act" and the "District of Columbia Use Tax Act" comprised titles I and II, respectively, of the "District of Columbia Revenue Act of 1949." 63 Stat. 112 (May 27, 1949).

[3] See D.C. Code §§ 47-2001 et seq., and 47-2201 et seq. (1987 Repl.)

[4] Respondent contends that prior to the 1989 amendment, the District of Columbia distinguished between "canned" (or prepackaged) software and customized software and taxed only canned software based on the reasoning that customized software was exempt from the tax because of its personal service component, pursuant to D.C. Code §47-2001 (n)(2)(B) (1987 Repl.) and DCMR §403.2 (1986)). This distinction in types of software, however, was not set forth in any statute or regulation. Further, respondent was unable to provide any documentation to support its claim that canned software had "always" been taxed. The District made a similar assertion in District of Columbia v. Acme Reporting Co., 530 A.2d 708, 710 (D.C. 1987), in which it argued, to no avail, that court reporting services were taxable as public stenographic services because DFR had "always taken the position" that they were taxable.

5. The Revenue Amendment Emergency Act of 1989,[5] enacted on July 1, 1989, amended D.C. Code §§ 47-2001 et seq., and 47-2201 et seq. (1987 Repl.), to include "the sale of or charges for data processing and information services" (including software purchases) as taxable retail sales transactions.[6]

6. The amendment and the accompanying public notices prompted CNSI to review its prior sales and use tax payments for overpayment. In August, 1989, pursuant to D.C. Code § 47-2020

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[5] Revenue Amendment Emergency Act of 1989 (D.C. Act 8-36, May 26, 1989, 36 DCR 4170).

[6] Specifically, D.C. Law 8-17 added the following language (as (n)(1)(N) to § 47-2001 and (a)(1)(K) to § 47-2201) to provide that the terms "retail sale" and "sale at retail" include:

> The sale of or charges for data processing and information services.
> (i) For the purposes of this paragraph, the term "data processing services" means the processing of information for the compilation and production of records of transactions; the maintenance, input and retrieval of information; the provision of direct access to computer equipment to process, examine or acquire information stored in or accessible to the computer equipment; the specification of computer hardware configurations, the evaluation of technical processing characteristics, computer programming or software, provided in conjunction with and to support the sale, lease, operation, or application of computer equipment or systems; word processing, payroll and business accounting, and computerized data and information storage and manipulation; the input or inventory control data for a company; the maintenance of records of employee work time; filing payroll tax returns; the preparation of W-2 forms; the computation and preparation of payroll checks; and any system or application programming or software.

(1987 Repl.), petitioner filed a claim with the Audit Division of the District of Columbia Department of Finance and Revenue ("DFR") requesting a refund of those sales and/or use taxes paid.

7. In September, 1989, DFR denied petitioner's claim for a refund. Later that month, petitioner asked DFR to reconsider the ruling. By letter dated October 6, 1989, DFR affirmed its decision. Petitioner subsequently filed a complaint in this Court.[7]

DISCUSSION

The issue before the Court is whether canned computer software was tangible personal property subject to sales and use taxes under District of Columbia law prior to the amendment of the D.C. Sales and Use Tax Acts in July, 1989. That is, the Court must determine as a statutory matter of law what Congress intended by its use of the term "tangible personal property" in the original sales and use tax statute, known as the District of Columbia Revenue Act of 1949, specifically whether computer software was contemplated within the definition of that phrase.

This Court has jurisdiction over this appeal pursuant to D.C. Code §§ 47-825(i) and 47-3303. Superior Court's review of a tax assessment is de novo necessitating competent evidence to prove the issues. Wyner v. District of Columbia, 411 A.2d 59, 60 (D.C.

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[7] Petitioner's Appeal from DFR's Denial of Claim for Refund of Sales and Use Tax, originally filed in the Civil Division of the Superior Court, was certified to the Tax Division by order of the Honorable Nan R. Huhn, pursuant to D.C. Code § 11-1201 (1981).

1980). The taxpayer bears the burden of proving that the government's assessment is incorrect. Safeway Stores, Inc., v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987); Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986).

The parties have filed cross-motions for summary judgment. Parties moving for summary judgment must show that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). "The well-settled rule is that cross-motions for summary judgment do not warrant the court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts that are not genuinely disputed." 6 J. MOORE, W. TAGGART, & J. WICKER, MOORE'S FEDERAL PRACTICE, § 56.13; see also National Association of Government Employees v. Campbell, 192 U.S. App. D.C. 369, 593 F.2d 1023 (1978) (motion for summary judgment properly granted only when no material fact is genuinely disputed and when the movant is entitled to prevail as a matter of law). Moreover, "[p]resentation of an issue on cross-motions for summary judgment may signal that there are no material facts in dispute, allowing the judge to resolve the question as a matter of law." Beckman v. Farmer, 579 A.2d 618 (D.C. 1990). This course of action is appropriate where, as here, the motions "are based on the same material facts and address the same legal issue." Id. at 629 (citing Read v. Legg, 493 A.2d 1013, 1016 (D.C. 1985)).

Petitioner contends that computer software is not tangible personal property; that according to the language of the statute,

the purchase of any type of computer software was not a taxable event prior to July 1, 1989; and, that CNSI is therefore entitled to a refund for sales and use taxes paid between June 30, 1988 and February 28, 1989.

In support of its position, CNSI relies on District of Columbia v. Universal Computer Associates, Inc., 465 F.2d 615 (D.C. Cir. 1972), and cases from a majority of other states in which courts have held that computer software is intangible personal property and therefore is not subject to sales and use taxes levied upon the purchase of tangible personal property. In Universal the issue was whether computer software which transferred information to hardware via punch cards was subject to the sales tax on tangible personal property. Based on the reasoning that the purchaser paid for the intangible information stored on the cards and not for the material comprising the cards, the United States Court of Appeals for the District of Columbia Circuit held that computer software was intangible personal property, and therefore the sales transaction was not taxable.[8] Although Universal is on point with the instant case, petitioners correctly acknowledge that, pursuant to the doctrine enunciated in M.A.P. v. Ryan, 285

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[8] In the court's words:

> It is the information derived by the machine from the cards which stays in the computer, and which is employed repeatedly by the machine when it is used by Universal. What rests in the machine, then, is an intangible--'knowledge'--which can hardly be thought to be subject to a personal property tax. Universal, 465 F.2d at 618.

A.2d 310 (D.C. 1971), the ruling in Universal is not binding precedent in the Superior Court of the District of Columbia.[9]

Despite significant changes in technology over the past two decades, the question of whether computer software is tangible or intangible personal property has not been considered in the District of Columbia since Universal. This issue, however, has been addressed in numerous other jurisdictions, the majority of which have followed the decision in Universal.[10] Therefore, while Universal is not binding upon this Court, it is nonetheless

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[9] By legislation enacted in 1970, Congress narrowed the jurisdiction of the United States Court of Appeals and established the District of Columbia Court of Appeals as the highest court in the District of Columbia. See District of Columbia Court Reform and Criminal Procedure Act of 1970. Pub. Law 91-358. In M.A.P., the District of Columbia Court of Appeals held that as of February 1, 1971, it was the highest court of the District of Columbia, no longer subject to review by the United States Court of Appeals, and not bound by decisions of the United States Court of Appeals made after February 1, 1971. As decisions of the Superior Court are subject to review by the District of Columbia Court of Appeals, the Superior Court is not bound by decisions of the United States Court of Appeals.

[10] State of Alabama v. Central Computer Services, Inc., 349 So. 2d 1156 (Ala.Civ.App. 1977); Northeast Datacom, Inc., v. et al. v. City of Wallingford, 563 A.2d 688, 212 Conn. 839 (1989); First National Bank of Springfield v. Department of Revenue, 421 N.E. 2d 175, 85 Ill.2d 84 (1981); Appeal of AT&T Technologies, Inc., 749 P.2d 1033, 242 Kan. 554 (1988); Spencer Gifts, Inc. v. Director, Division of Taxation, 440 A.2d 104, 182 N.J. Super 179 (1981); Compuserve, Inc. v. Lindley, 535 N.E.2d 360, 41 Ohio App. 260 (1987); Commerce Union Bank v. Tidwell, 538 S.W.2d 405 (Tenn. 1976); First National Bank of Fort Worth v. Bullock, 584 S.W.2d 548 (Tex. 1979); Janesville Data Center, Inc. v. Wisconsin Department of Revenue, 267 N.W.2d 656, 84 Wis.2d 341 (1978); but see Measurex Systems, Inc. v. State Tax Assessor, 490 A.2d 1192 (Me. 1985); Comptroller of the Treasury v. Equitable Trust Co., 296 Md. 459, 464 A.2d 248 (1983); Hasbro Industries, Inc. v. Norberg, 487 A.2d 125 (R.I. 1985); Citizens and Southern Systems, Inc. v. South Caroline Tax Commission, 280 S.C. 138, 311 S.E. 2d 717 (1984); Pennsylvania and West Virginia Supply Corporation v. Rose, 368 S.E. 2d 101 (W.Va. 1988).

entitled to great deference and, in that regard, is considered by this Court to be persuasive authority. See Stewart v. United States, 490 A.2d 619, 626 (D.C. 1985) (decisions of the District of Columbia Circuit Court are not binding authority in the Superior Court of the District of Columbia but are entitled to "great respect") (quoting M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971)).

Moreover, petitioner contends that the holding in Universal is supported by District of Columbia v. Acme Reporting Co., 530 A.2d 708 (D.C. 1987), a case which provides some useful insights for the instant case. In Acme, the District of Columbia appealed from an order holding that Acme, a privately-owned business that provided court reporting services, was improperly assessed for sales and use tax deficiencies. DFR took the position that court reporting services were public stenographic services for the purpose of the sales and use tax statutes, which were amended in 1969 to include stenographic services. The DFR-promulgated regulation defining public stenographic services stated only that "the term public stenographic services includes typing services." Id. at 710 (quoting 9 DCMR § 468.3 (1986)). At trial, the manager of the Tax Audit and Liability Division of DFR testified that DFR had "always taken the position that the term public stenographic services include[d] court reporting services . . ." Id. (Emphasis added). In its opinion, the Court of Appeals noted that the witness "did not specifically refer to any written or oral interpretation by the Department which included court reporters within the term 'public stenographic services'." Id. (Emphasis added). Having heard that

testimony, the court employed rules of statutory construction and rejected the District's interpretation of the statute, affirming the tax court's decision.[11] In a footnote, the Court of Appeals considered decisions from other jurisdictions and noted that even though there was no case precedent in District of Columbia that addressed the particular statute at issue in Acme, the holding in Universal was consistent with the idea that the sale of a court reporter's services constituted the sale of personal or professional services rather than the sale of tangible personal property. Id. at 714, note 8.

CNSI further argues that its interpretation of the statute is consistent with federal tax law, which, for the relevant time period, defined software as intangible personal property, Ronnen v. Commissioner, 90 T. C. 74 (1988). Federal tax policy regarding computer software was one of the factors considered by the court in Universal. 465 A.2d at 619.

The District of Columbia contends that the sale and purchase of canned computer software programs has always constituted the sale and purchase of tangible personal property;[12] that such transactions were, therefore, subject to taxation prior to the 1989

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[11] The District of Columbia Court of Appeals concluded that reversal of the tax court's decision was not warranted since the proper result was reached. But the Court of Appeals distinguished its own ruling as being decided as a matter of law, on a basis not adopted by the tax court. In this regard, the Court adopts the approach followed by the Court of Appeals in its resolution of the issues.

[12] "'Tangible personal property' means corporeal personal property of any nature." D.C. Code § 47-2001 (s) (1987 Repl.).

amendment; and, that the amount of taxes paid by CNSI was correct. Despite the absence of any language referring to computer software in the earlier version of the statute, respondent avers that even before the statute was amended "all sales, uses, and purchases of tangible personal property were presumed to be taxable unless specifically stated otherwise [in the statute]." See Respondent's Memorandum of Points and Authorities in Support of Respondent's Cross-Motion for Summary Judgment and Opposition to Petitioner's Motion for Summary Judgment, p. 13.[13] The Court recognizes that there is a statutory presumption of taxability, but this presumption does not address the question of whether computer software is tangible or intangible. Hence, in the matter at hand, the presumption is meaningless. Aside from the assertions of its attorneys, respondent does not provide any support for its interpretation that software is tangible personal property. As a result, the District's argument is tautological, leaving a central question unanswered: On what basis did DFR initially determine that computer software was tangible personal property when 1) computer software was not mentioned in the statute; 2) the only pertinent case in this jurisdiction, Universal, held that software was intangible; and, 3) a majority of courts in other jurisdictions followed the reasoning set forth in Universal? In response, the District of Columbia presents no compelling reason for the Court to

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[13] In a letter dated September 5, 1989, DFR informed CNSI that "[t]he cost for the purchase, lease, or rights to use canned, licensed, off-the-shelf computer programs has always been held to be a taxable transaction." See Petitioner's Exhibit 5. (Emphasis added).

adopt the minority view that computer software is tangible personal property.

The statute's failure to define the meaning of "tangible personal property" more precisely and the resulting ambiguity with regard to computer software make it necessary for the Court to examine the statute's legislative history. An examination of the legislative history is appropriate where, as here, there is ambiguity in the statute. American Cetacean Society v. Baldridge, 604 F. Supp. 1398 (D.D.C. 1985); Barber By and Through Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982). In this case, however, the legislative history of the statute provides the Court with little direct guidance, as it is highly improbable that computer software was contemplated when the statute was enacted in 1949.

A decade prior to the passage of the District of Columbia Revenue Act of 1949, 63 Stat. 112 (1949), Congress appropriated funds to provide for a survey of the entire tax structure of the District of Columbia. 52 Stat. 354 (1938). In the resulting study and recommendation, the director of the survey, Dr. Chester B. Pond of the Bureau of Research Statistics of the Department of Taxation and Finance for the State of New York, concluded that, "[a]lthough it is without parallel among political units in the United States, the District of Columbia is more like a State than any other type of government. . . . In order to meet the increasing demands of the District budget . . . a retail-sales tax, supplemented by a use tax, is proposed." S. Rep. No. 260, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S. Code Congressional Service 1297, 1300.

Moreover, Congress vaguely defined tangible personal property as "corporeal property of any nature."[14]

The legislative background of the 1989 amendment provides no additional guidance on the intended meaning of "tangible personal property." The Council Committee Report explains only that the "expansion of the sales and use tax base reflects the reality that the District's economy, like that of much of the nation, is becoming increasingly service oriented. In response to this trend, a number of states have begun to expand their sales tax base into the service area . . . ." Report of the Committee on Finance and Revenue on Bill 8-224, "Revenue Act of 1989," p. 7. In sum, the legislative history indicates that the purpose of the statute was and is to raise revenue, which, though not dispositive, is useful information for purposes of statutory construction.

The general rule of statutory construction is that "an agency's interpretation of the statute it administers is binding . . . unless it conflicts with the plain meaning of the statute or its legislative history." Smith v. Department of Employment Services, 548 A.2d 95, 97 (D.C. 1988). In the case of revenue statutes, however,

> It is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the government, and in favor of the citizen.

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[14] In its usual accepted sense, corporeal property is that which is palpable or tangible material and physical in its nature. 63 Am. Jur. 2d, Property, § 11.

Estate of Renick v. United States, 687 F.2d 371, 376 (Ct. Cl. 1982) (quoting Gould v. Gould, 245 U.S. 151 (1917)) (Emphasis added).[15] This principle bolsters the Court's decision in favor of CNSI. The general language in the District of Columbia sales and use tax statutes prior to 1989 and the city's failure to promulgate regulations to clarify the scope of the statute prior to 1989 should not be construed to the detriment of the taxpayer.

CONCLUSION

In view of the absence of binding precedent on this subject in this jurisdiction; the ruling in Universal that software is intangible personal property; the persuasive holdings by numerous other courts that have followed Universal; federal tax policy that software is intangible personal property; the District of Columbia's failure to provide any reasonable explanation for DFR's determination that computer software is tangible personal property; and, DFR's failure to promulgate regulations with regard to the application of the sales and use taxes to the purchase of computer software, the Court holds that for purposes of the sales and use

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[15] Accord, Western Electric Company, Inc. v. United States, 564 F.2d 53 (Ct.Cl. 1977) (If there is a serious doubt as to taxability, the doubt should be resolved in favor of the taxpayer); see also Sutherland Stat. Const. § 66.04 at 309 (4th Ed) ("Informal or unauthoritative administrative rulings, like interpretive regulations, are given weight in the construction of doubtful language. However, since such rulings are made without the authority, care and deliberation with which ordinary interpretive regulations are promulgated, their efficacy is reduced."); Kleibomer v. District of Columbia, 458 A.2d 731 (D.C. 1983) (tax statutes are to be strictly construed).

taxes statutes as they existed prior to amendment in 1989, Congress did not intend for canned computer software to be classified as intangible personal property, subject to sales and use taxes prior to July, 1989.

ORDER

WHEREFORE, it is on this 8th day of August 1991, **ORDERED, ADJUDGED, AND DECREED,**

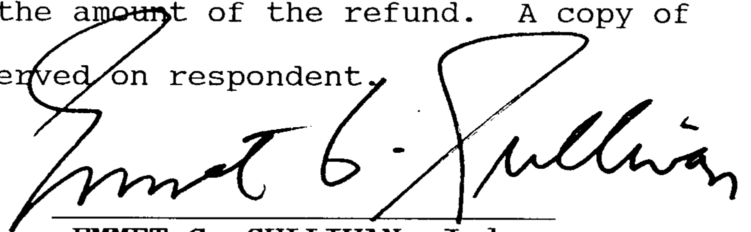
That the Motion for Summary Judgment of Petitioner is hereby GRANTED;

That the Motion for Summary Judgment of Respondent is DENIED;

That the District of Columbia's assessment against CNSI for the time period as stated herein is void;

That petitioner is entitled to a refund of the sales and use taxes it paid, including any penalties and interest;

That the District of Columbia shall refund to Computer Network Systems, Inc., those sales and use taxes paid by the petitioner (on computer software purchases) during the period of June 30, 1988 to February 28, 1989. Accordingly, within twenty (20) days of the signing of this Order, petitioner shall submit to the Court a proposed order setting forth the amount of the refund. A copy of the proposed order shall be served on respondent.



EMMET G. SULLIVAN, Judge
Signed in chambers

Date: August 8, 1991

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