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## Opinion of the Tax Commissioner

Date Issued: August 27, 2007

Opinion No: 07-0003

Tax: Sales/Use

XXXX

Subject: Casual Sale/Customized Software

Attn: XXXX

Manager, Sales, Use, &amp; Excise Taxes

XXXX

XXXX

XXXX (“Taxpayer”), through its counsel, has requested an Opinion of the Tax Commissioner (“Opinion”) pursuant to Ohio Revised Code (“R.C.”) section 5703.53.

### FACTS

Taxpayer is contemplating the sale of one of its divisions (“Division”). The contemplated sale will involve the transfer of the assets assigned to and used by Division to the buyer (“Buyer”) for cash. Buyer is not related to Taxpayer. The assets that will be sold include computer hardware, software systems, and other intellectual property located at Taxpayer’s data center in Ohio. All of these assets located at the Ohio data center were obtained by Taxpayer for its own use in its business operations and were used by Taxpayer at that location. The assets at the Ohio data center will be transferred to Buyer in Ohio and will be used by Buyer in its operation of the acquired business unit.

The computer hardware is comprised of servers, and the software is located on those servers. Tax was paid to Ohio on Taxpayer’s acquisition of the servers and on any software that was not customized to the extent that the cost of customizing constituted more than fifty percent of the cost of the canned software and the customizing service. Taxpayer did not pay sales or use tax on customized software when the charge for customizing constituted more than fifty percent of the cost of the canned software and the customizing service. The software was acquired prior to the effective date of the change in the sales tax law regarding computer software enacted in Am. Sub. H.B. 95 of the 125<sup>th</sup> Ohio General Assembly.

### QUESTION

Whether the sale of the customized software (the software for which the charge for customizing constituted more than fifty percent of the cost of the canned software and the customizing service) to Buyer as part of the sale of all of the assets of Division qualifies as a “casual sale” under R.C. 5739.01(L) and for the exemption provided by R.C. 5739.02(B)(8).

## DISCUSSION

R.C. 5739.02(B)(8) provides that the sales tax does not apply to “casual sales,” with certain exceptions not relevant to the transaction described above. The term “casual sale” is defined in R.C. 5739.01(L) as “a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person’s own use and was previously subject to any state’s taxing jurisdiction on its sale or use . . . .”

To fall within the definition of “casual sale,” the person making the sale must have obtained the item for the person’s own use and the item must have been previously subject to any state’s taxing jurisdiction on its sale or use. In this case, the software was obtained by Taxpayer for its own use in the operations of Division. The software was stored on servers at Taxpayer’s data center in Ohio and was used by Taxpayer in Ohio. Sales or use tax was not paid on the acquisition or use of the customized software by Taxpayer because Ohio did not impose its sales or use tax on customized software at the time the software was acquired by Taxpayer. The “casual sale” definition does not require that the seller’s acquisition or use of the item have been previously taxed by any state, only that it was subject to any state’s taxing jurisdiction, i.e., a state had jurisdiction to tax the purchase or use of the item.

Because Taxpayer obtained the customized software for its own use and the software was previously subject to Ohio’s jurisdiction to tax its sale to or use by Taxpayer, the subsequent sale of the software by Taxpayer to Buyer as part of a sale of the assets of Division would qualify as a “casual sale” under R.C. 5739.01(L) and be exempt from sales or use tax pursuant to R.C. 5739.02(B)(8).

## OPINION

It is the opinion of the Tax Commissioner that the sale of the customized software in the circumstances described in Taxpayer’s request is a “casual sale” within the meaning of R.C. 5739.01(L) and would not be subject to Ohio sales tax pursuant to R.C. 5739.02(B)(8).

This Opinion is limited to the legal issue addressed in this Opinion. This Opinion applies only to Taxpayer and may not be transferred or assigned. In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of Taxpayer to be aware of such changes. See R.C. 5703.53(E).

Sincerely,

Richard A. Levin  
Tax Commissioner

cc: XXXX  
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