07-0118
AUDIT
SIGNED 08-13-09

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, v. AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 07-0118 Account No. ##### Tax Type: Sales and Use Tax Audit Period: 07/01/03 – 03/31/06 Judge: Chapman

Presiding:
Pam Hendrickson, Commission Chair
R. Bruce Johnson, Commissioner
D'Arcy Dixon Pignanelli, Commissioner
Kerry R. Chapman, Administrative Law Judge

Appearances:
For Petitioner: PETITIONER REP 1, Owner
PETITIONER REP 2, Witness
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, from Auditing Division
RESPONDENT REP 3, from Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on March 4, 2009. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax at issue is sales and use tax.

2. The audit period is July 1, 2003 through March 31, 2006.

3. On December 29, 2006, Auditing Division ("Division") issued a Statutory Notice – Sales and Use Tax ("Statutory Notice") to PETITIONER ("Petitioner" or "taxpayer"). Exhibit R-1. In the

Statutory Notice, the Division imposed $$$$$ in additional sales and use tax, plus interest in the amount of $$$$$ (computed to January 28, 2007), for a total assessment of $$$$$. No penalties were imposed.

4. On March 28, 2008, the Commission issued an Initial Hearing Order in the matter.

5. On April 28, 2008, the taxpayer timely requested a Formal Hearing.

6. At issue is the Division's assessment of sales tax on amounts paid for services that the taxpayer performed on computers and for which it did not collect sales tax. The Division deemed the services it assessed to be either: 1) the taxable repair or renovation of tangible personal property; or 2) the taxable installation or attachment of tangible personal property. The Division based its determinations on the taxpayer's descriptions of its services, as found on the invoices that the taxpayer provided the Division.

7. PETITIONER REP 1 is the owner and operator of the taxpayer and testified on its behalf. PETITIONER REP 1 states that he has worked on computers since he was 12 years old and that he has fixed thousands of computers and seen every type of computer problem. He also states that he has taken numerous computer courses, including ones dealing with programming and servers. PETITIONER REP 1 contends that the Division's assessment is incorrect. Specifically, he believes that the services he performs should not be considered taxable repairs or renovations or taxable installations or attachments. Furthermore, the taxpayer contends that data should not be considered "tangible personal property" for purposes of repairs and installations. In addition, the taxpayer argues that the Commission should reverse the Division's assessment because an employee of the Commission told him when he went into business in 2001 that his computer services were nontaxable as long as he did not open a computer.

8. The taxpayer submitted a list of services that it performs on computers and asked the Commission to determine whether the services were taxable or not. Exhibit P-2. The list of services was divided into 14 separate sections.

a. The parties agreed that the all services described in Sections 5, 7, 8, 11 and 13 of Exhibit P-2 are nontaxable. The parties also agreed that all services described in Section 12 are nontaxable, with the exception of the service described in Subsection 12.1.

b. The taxpayer stated at the hearing that he agreed that all services described in Section 10 are taxable. The Division agreed, with two minor exceptions. The Division stated that the services described in Subsections 10.3 and 10.4 would be taxable only if performed in connection with the taxable repair or renovation of a computer. As a result, the Commission finds that the parties are in agreement that all services in Section 10 are taxable, except that the services described in Subsections 10.3 and 10.4 are taxable only if performed in connection with the repair or renovation of a computer.

c. The parties agreed that the services described in Sections 9 and 14 would be taxable if they were performed in conjunction with a taxable service and that they would be nontaxable if performed in conjunction with a nontaxable service.

d. Remaining at issue for the Commission to rule on are all services described in Sections 1, 2, 3, 4, and 6, as well as the services described in Subsection 12.1.

9. The Division reviewed the taxpayer's invoices for the audit period and imposed tax on more than 1,300 separate invoice items on which tax was not charged. The taxpayer did not provide information about each of the items that the Division assessed. However, the taxpayer submitted three invoices that, collectively, included nine of the charges on which the Division imposed tax.[1] Exhibit P-3.

10. PETITIONER REP 1 testified that prior to starting his computer business, he telephoned the Commission to obtain advice concerning the taxability of the computer services he would be

[1] In this exhibit, the taxpayer provided a fourth invoice for charges made subsequent to the audit period, which were not included in the Division's audit assessment.

providing. PETITIONER REP 1 states that he spoke to a person in Technical Research named EMPLOYEE. PETITIONER REP 1 stated in his Petition for Redetermination that EMPLOYEE instructed him, as follows:

> [I]f I sell pre-written software, I should charge sales tax on both the time to install it and the software itself. However, I was told that if the software was "free" ("freeware", "free-of-charge", "no cost"), then there should be no cost tax on the software or the labor, because if there is no sale, there is "no taxable event", and therefore no tax may be charged.

At the Formal Hearing, PETITIONER REP 1 testified that he decided from this advice that he should charge sales tax if he opened the computer and added items or if he sold software. Otherwise, he did not charge tax, including when he worked on a computer without opening it.

11. PETITIONER REP 2, who also works in the computer services field, testified on behalf of the taxpayer. He testified that he understood the tax code as PETITIONER REP 1 did. Specifically, he stated that he understood that if you open the computer, you charge tax and that if you don't open the computer, you don't charge tax.

12. The Commission notes that the criterion of "opening the computer" does not appear in rule or statute. Nevertheless, for purposes of the prospective compliance ruling later in this decision, the Commission finds that certain services described in Exhibit P-2 involve software or data only and do not involve "opening the computer," specifically all services described in Section 1, Section 2, Section 3, Section 4 and Section 6 of the exhibit.

13. PETITIONER REP 1 wrote in the Petition for Redetermination that he is "very frustrated, confused, and upset by [the Tax Commission's] inability to provide clear and consistent advice." At the hearing, he further explained that he does not believe that Utah laws, when enacted, contemplated computers and the services performed on them. To support his contention, he submitted a partial transcript of a conversation he had had with RESPONDENT REP 2, a Division employee, in which RESPONDENT REP 2 described the difficulty in applying sales tax laws to computer services. Exhibit P-1.

14. The Division stated that it did not challenge the Commission's rulings in the Initial Hearing Order for this appeal. The taxpayer also did not challenge those rulings in the Initial Hearing Order where the Commission found a transaction to be nontaxable. However, the taxpayer challenged most, if not all, of the rulings where the Commission found a transaction to be taxable.

APPLICABLE LAW[2]

I. Taxation of Repair or Renovation Services, Installation Services and Cleaning Services.

1. Until July 1, 2005, Utah Code Ann. §59-12-103(1)(g) (2003) provided for the imposition of sales and use tax on certain repair or renovation services and installation services, as follows in pertinent part:

> A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:
> . . . .
> (g) amounts paid or charged for services:
> (i) for repairs or renovations of tangible personal property . . . .; or
> (ii) to install tangible personal property in connection with other tangible personal property . . . .

2. Section 59-12-103(1)(g) was amended effective July 1, 2005, and for the remainder of the audit period, provided as follows:

> A tax is imposed on the purchaser as provided in this part for amounts paid or charged for the following transactions:
> . . . .
> (g) amounts paid or charged for services for repairs or renovations of tangible personal property . . . .

3. Throughout the audit period, Section 59-12-103(h) provided that a tax is imposed on "amounts paid or charged for cleaning or washing of tangible personal property[.]"[3]

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[2] All cites will refer to the 2005 version of Utah law, unless otherwise indicated.

[3] Effective July 1, 2006, several months after and not applicable to the audit period in this appeal, this subsection was amended to impose tax on amounts paid or charged "for *assisted* cleaning or washing of tangible personal property" (emphasis added). Also effective July 1, 2006, a definition of "assisted cleaning or washing of tangible personal property" was added to Section 59-12-102.

4. Also effective July 1, 2005, UCA §59-12-102 was amended to provide definitions of "installation charge," "permanently attached to real property" and "repairs or renovations of tangible personal property," as follows:

> (35) (a) Except as provided in Subsection (35)(b), "installation charge" means a charge for installing tangible personal property.
>
> (b) Notwithstanding Subsection (35)(a), "installation charge" does not include a charge for repairs or renovations of tangible personal property.
>
> . . . .
>
> (52) (a) "Permanently attached to real property" means that for tangible personal property attached to real property:
>
> (i) the attachment of the tangible personal property to the real property:
>
> (A) is essential to the use of the tangible personal property; and
>
> (B) suggests that the tangible personal property will remain attached to the real property in the same place over the useful life of the tangible personal property; or
>
> (ii) if the tangible personal property is detached from the real property, the detachment would:
>
> (A) cause substantial damage to the tangible personal property; or
>
> (B) require substantial alteration or repair of the real property to which the tangible personal property is attached.
>
> (b) "Permanently attached to real property" includes:
>
> . . . .
>
> (ii) a temporary detachment of tangible personal property from real property for a repair or renovation if the repair or renovation is performed where the tangible personal property and real property are located; or
>
> . . . .
>
> (c) "Permanently attached to real property" does not include:
>
> (i) the attachment of portable or movable tangible personal property to real property if that portable or movable tangible personal property is attached to real property only for:
>
> (A) convenience;
>
> (B) stability; or
>
> (C) for an obvious temporary purpose; or
>
> (ii) the detachment of tangible personal property from real property other than the detachment described in Subsection (52)(b)(ii).
>
> . . . .
>
> (67) "Repairs or renovations of tangible personal property" means:
>
> (a) a repair or renovation of tangible personal property that is not permanently attached to real property; or
>
> (b) attaching tangible personal property to other tangible personal property if the other tangible personal property to which the tangible personal property is attached is not permanently attached to real property.

5. Until July 20, 2005, Utah Administrative Rule R865-19S-78 ("Rule 78") provided as follows in pertinent part:

> A. Charges for installation labor.
> 1. Amounts paid or charged for labor for installing tangible personal property in connection with other tangible personal property are subject to tax.
> . . . .
> B. Charges for labor to repair, renovate, wash, or clean.
> 1. Charges for labor to repair, renovate, wash, or clean tangible personal property are subject to sales tax. . . .
> 2. Charges for labor to service, repair or renovate real property, improvements, or items of personal property that are attached to real property as to be considered real property are not subject to sales tax. . . .
> a) For purposes of B., fixtures, trade fixtures, equipment, or machinery permanently attached to real property shall be treated as real property while so attached, but shall revert to personal property when severed from the real property.
> b) Mere physical attachment is not enough to indicate permanent attachment. Portable or movable items that are attached merely for convenience, stability or for an obvious temporary purpose are considered personal property, even when attached to real property.

6. Rule 78 was amended, effective July 20, 2005, to delete the sections of the rule cited above. Similar forms of these sections now appear in statute, as cited earlier.

II. Computer Software.

7. Effective July 1, 2004, definitions of "computer software" and "prewritten computer software" were added to Section 59-12-102 and for the remainder of the audit period, provided as follows:

> (18) "Computer software" means a set of coded instructions designed to cause:
> (a) a computer to perform a task; or
> (b) automatic data processing equipment to perform a task.
> . . . .
> (58) (a) Except as provided in Subsection (58)(b)(ii) or (iii), "prewritten computer software" means computer software that is not designed and developed:
> (i) by the author or other creator of the computer software; and
> (ii) to the specifications of a specific purchaser.
> (b) "Prewritten computer software" includes:
> (i) a prewritten upgrade to computer software if the prewritten upgrade to the computer software is not designed and developed:
> (A) by the author or other creator of the computer software; and
> (B) to the specifications of a specific purchaser;

(ii) notwithstanding Subsection (58)(a), computer software designed and developed by the author or other creator of the computer software to the specifications of a specific purchaser if the computer software is sold to a person other than the purchaser; or

(iii) notwithstanding Subsection (58)(a) and except as provided in Subsection (58)(c), prewritten computer software or a prewritten portion of prewritten computer software:

(A) that is modified or enhanced to any degree; and

(B) if the modification or enhancement described in Subsection (58)(b)(iii)(A) is designed and developed to the specifications of a specific purchaser.

(c) Notwithstanding Subsection (58)(b)(iii), "prewritten computer software" does not include a modification or enhancement described in Subsection (58)(b)(iii) if the charges for the modification or enhancement are:

(i) reasonable; and

(ii) separately stated on the invoice or other statement of price provided to the purchaser.

8. Prior to June 29, 2004, Utah Admin. Rule R865-19S-92 ("Rule 92"), which concerns the sale of computer software and other related transactions, provided as follows in pertinent part:

A. Definitions:

1. "Canned computer software" or "prewritten computer software" means a program or set of programs that can be purchased and used without modification and has not been prepared at the special request of the purchaser to meet their particular needs.

2. "Custom computer software" means a program or set of programs designed and written specifically for a particular user. The program must be customer ordered and can incorporate preexisting routines, utilities or similar program components. The addition of a customer name or account titles or codes will not constitute a custom program.

. . . .

5. "Tangible personal property" includes canned computer software.

B. The sale, rental or lease of canned or prewritten computer software constitutes a sale of tangible personal property and is subject to the sales or use tax regardless of the form in which the software is purchased or transferred. Payments under a license agreement are taxable as a lease or rental of the software package. Charges for software maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of canned or prewritten software are taxable.

C. The sale, rental or lease of custom computer software constitutes a sale of personal services and is exempt from the sales or use tax, regardless of the form in which the software is purchased or transferred. Charges for services such as software maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of custom software are not taxable.

> D. Charges for services to modify or adapt canned computer software or prewritten computer software to a purchaser's needs or equipment are not taxable if the charges are separately stated and identified.

9. Rule 92 was amended on June 29, 2004, several days prior to the July 1, 2004 date on which the computer software definitions in Section 59-12-102 became effective. Although Section (C) of the rule was not amended and remains in effect, Section (D) and the portions of Section (A) cited above were deleted, as were the last two sentences of Section (B). Accordingly, beginning on June 29, 2004 and effective for the remainder of the audit period, Rule 92 provided as follows:

> B. The sale, rental or lease of prewritten computer software constitutes a sale of tangible personal property and is subject to the sales or use tax regardless of the form in which the software is purchased or transferred.
> C. The sale, rental or lease of custom computer software constitutes a sale of personal services and is exempt from the sales or use tax, regardless of the form in which the software is purchased or transferred. Charges for services such as software maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of custom software are not taxable.

III. Definition of "Tangible Personal Property."

10. Until July 1, 2004, "tangible personal property" was defined in Section 59-12-102 (2003), as follows in pertinent part:

> (35) (a) "Tangible personal property" means:
> (i) all goods, wares, merchandise, produce, and commodities;
> (ii) all tangible or corporeal things and substances which are dealt in or capable of being possessed or exchanged;
> (iii) water in bottles, tanks, or other containers; and
> (iv) all other physically existing articles or things, including property severed from real estate.
> . . . .

11. The Utah Supreme Court considered this definition of "tangible personal property" in regards to computer software in *South Central Utah Telephone Ass'n v. Auditing Div. of the Utah State Tax Comm'n*, 951 P.2d 218 (Utah 1997) and found:

> Although perhaps difficult to comprehend and perceive at these microscopic levels, the electronic signals of installed software are tangible. Software is

> information recorded in a physical form which has a physical existence, takes up space on the tape, disc, or hard drive, makes physical things happen, and can be perceived by the senses. . . .
>
> The nature of the billing program - the electronic signals - did not change after installation; only the media on which it was stored changed. The electronic signals are the same whether stored on . . . floppy discs or on [an entity's] network. Before installation, the program is tangible, . . . and it remains tangible after installation.

12. Beginning July 1, 2004, the definition of "tangible personal property" was amended and Section 59-12-102(96) provides as follows in pertinent part:

> (85) (a) "Tangible personal property" means personal property that:
> (i) may be:
> (A) seen;
> (B) weighed;
> (C) measured;
> (D) felt; or
> (E) touched; or
> (ii) is in any manner perceptible to the senses.
> (b) "Tangible personal property" includes:
> . . . .
> (v) prewritten computer software.

IV. Definition of "Purchase Price."

13. Until July 1, 2005, Section 59-12-102(23) (2003)[4] defined "purchase price" to mean "the amount paid or charged for tangible personal property or any other taxable transaction under Subsection 59-12-103(1), excluding only cash discounts taken or any excise tax imposed on the purchase price by the federal government."

14. Beginning July 1, 2005, the terms "purchase price" and "sales price" are defined in Section 59-12-102, as follows in pertinent part:

> (61)(a) "Purchase price" and "sales price" mean the total amount of consideration:
> (i) valued in money; and

[4] In the 2003 General Session, the Legislature enacted Senate Bill 147 ("S.B. 147"), which included an amendment to the definition of "purchase price" that was to become effective July 1, 2004. In the 2004 Third Special Session, however, the Legislature enacted Senate Bill 3000, which delayed the effective date of the amendment until July 1, 2005. Accordingly, the definition of "purchase price" remained unchanged for that portion of the audit period prior to July 1, 2005.

(ii) for which tangible personal property or services are:
(A) sold;
(B) leased; or
(C) rented.
(b) "Purchase price" and "sales price" include:
(i) the seller's cost of the tangible personal property or services sold;
(ii) expenses of the seller, including:
(A) the cost of materials used;
(B) a labor cost;
(C) a service cost;
(D) interest;
(E) a loss;
(F) the cost of transportation to the seller; or
(G) a tax imposed on the seller; or
(iii) a charge by the seller for any service necessary to complete the sale.
. . . .

V. Waiver of Penalties and Interest.

15. UCA §59-1-401(13) provides that "upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties and interest imposed under this part."

DISCUSSION

At issue is whether the computer services that the taxpayer performed during the audit period and that the Division assessed are taxable. First, the Commission will discuss and interpret those sections of Utah law that pertain to services that may be performed on computers. Second, the Commission will apply its interpretation of the pertinent law to the specific services that the taxpayer asked the Commission to address, as described in Exhibit P-2, as well as to other issues discussed at the hearing. Third, the Commission will address whether prospective compliance is appropriate for any of the services that the Commission deems to be taxable. Fourth, the Commission will address whether reasonable cause exists to waive interest.

I. Utah Law Applicable to Computer Services.

The Division proffers that it assessed tax on the transactions at issue after analyzing the taxpayer's specific services, as described on its invoices, and determining the services to be taxable repairs or renovations of tangible personal property or taxable installations or attachments of tangible personal property

to tangible personal property. Before determining whether the taxpayer's services are taxable, the Commission will first address several legal issues raised at the hearing.

A. Tangible Personal Property. There is no dispute that computer hardware is tangible personal property. Upon considering the two definitions of "tangible personal property" that existed in Section 59-12-102 during the audit period and the Utah Supreme Court's ruling in *South Central Utah Telephone*, it is clear that a computer's software and data are also tangible personal property. The Commission notes that the taxpayer acknowledged that even though software and data served different functions within a computer, there were no physical differences or characteristics between software and data.

Furthermore, for purposes of repairs or renovations and installations or attachments, the Commission finds that software is tangible personal property whether it is prewritten or canned computer software, as defined first in Rule 92 and later in Section 59-12-102(58), or whether it is custom computer software, as defined in Rule 92 until June 29, 2004.[5]

In addition, Rule 78(B) (until July 20, 2005) and Section 59-12-102(52), (67) (after July 1, 2005) provide that any repair or renovation of tangible personal property that is "permanently attached to real property" is, generally, not subject to taxation. However, neither party contends that the computers involved in the transactions at issue are permanently attached to real property.[6] Accordingly, for purposes of the

[5] Although custom computer software is tangible personal property, the Commission acknowledges that its *purchase* is not subject to taxation because the primary object of such a transaction is the nontaxable services required to write the software, not the incidental tangible personal property that the customer receives. In *CASE A. v. State Tax Comm'n*, 842 P.2d 822 (Utah 1992), the Utah Supreme Court discusses the factors to consider when analyzing a sales transaction as a whole to determine whether the essence, or primary object, of the transaction is one for services (i.e., where the tangible personal property is incidental to an essentially services transaction) or whether the primary object is one for tangible personal property (i.e., where the services are incidental to the receipt of the tangible personal property).

[6] In 2006, after the audit period, the definition of "permanently attached to real property," as found in Section 59-12-102(52)(c), was amended to clarify that a "computer" is not permanently attached to real property "if the attachment to real property is only through a line that supplies water, electricity, gas, telephone, cable, or supplies a similar item. . . ."

services on which the Division imposed tax, the Commission considers the hardware, the software and the data to be tangible personal property that were not permanently attached to real property.

B. Repairs or Renovations. The repair or renovation of tangible personal property is subject to taxation pursuant to Section 59-12-103(1)(g). Because a computer is comprised of hardware, software and data, all of which are considered tangible personal property, any charge to "repair" or "renovate" a computer is subject to taxation.

The Utah Supreme Court has addressed taxable "repairs" or "renovations" in several cases. In *CASE B. v. State Tax Comm'n*, 395 P.2d 57 (Utah 1964), the Court determined that "testing and checking the heating, lighting and cooling systems in passenger cars and in maintaining the charge in the battery systems" in the cars were not taxable because repairing is to "correct *defects* in materials" and "merely testing material or recharging a perfectly normal battery is not repairing a defect."

More recently in *CASE C v. Auditing Division*, 842 P.2d 876 (Utah 1992), the Court determined that drilling and milling services performed on cross tie logs were not taxable repair or renovation services. The Court provided definitions for the terms "to repair" and "to renovate" and explained that:

> Repair and renovation . . . suggest activities that "fix" an already manufactured product. To repair is to "restore by replacing a part or putting together what is torn or broken." To renovate is to "restore to a former better state." Webster's Ninth New Collegiate Dictionary 998 (1984). Drilling and milling the cross ties did not involve repairing existing cross ties or restoring the existing cross ties to a former better state.

PETITIONER REP 1 suggests that the only way to "repair" or "renovate" software involves the writing of code to correct a deficiency or defect in the software itself and that a purchased program, such as "Windows" or "Word" cannot be repaired by anyone other than its original provider. We accept as true PETITIONER REP 1's statement. Nevertheless, the Commission is not persuaded by this argument. It is the interaction of various software programs with the hardware that results in a properly functioning computer. It appears that in many instances, a customer hires the taxpayer to restore his or her computer to its "former

better state" or to restore it "by replacing a part," whether that part is hardware or software. In either case, an already manufactured product would be "fixed." When the taxpayer performs services with these characteristics, the Commission finds that the taxpayer has performed a taxable repair or renovation of tangible personal property.[7] As a result, the Commission rejects PETITIONER REP 1's arguments that canned computer software that is malfunctioning cannot be repaired and that "fixing" a computer without changing or replacing any hardware is always the nontaxable customization of software and not the taxable repair or renovation of tangible personal property.

C. Installation or Attachment of Tangible Personal Property. Prior to July 1, 2005, Section 59-12-103(1)(g)(ii) provided that services "to install tangible personal property in connection with other tangible personal property" were taxable. Effective June 1, 2005, Section 59-12-102(67)(b) provided that a taxable repair or renovation of tangible personal property included "attaching tangible personal property to other tangible personal property. . . ."

Black's Law Dictionary (5th ed. 1979) ("Black's"), p. 717, defines "install" to mean "to set up or fix in position for use or service." Black's, p. 115, also defines "attach" to mean "to bind, fasten, tie, or connect, to make fast or join." Given these definitions, it appears that the "setting up of tangible personal property in connection with other tangible personal property" (the taxable service prior to July 1, 2005) is similar to the "connecting of tangible personal property to other tangible personal property" (the taxable service as of July 1, 2005). Without evidence to suggest otherwise, the Commission considers the services that were taxable pursuant to Section 59-12-102(1)(g)(ii) to be the same services that are now taxable under Section 59-12-102(67)(b).

[7] The Commission acknowledges that certain services performed on both prewritten computer software and custom computer software are not subject to taxation, as discussed later in this decision in regards to the taxability of set up services.

Furthermore, the Utah Supreme Court has interpreted whether specific circumstances qualify as taxable "installations" in *CASE B*. In that case, the Court determined that "[s]tenciling identification on baggage trucks and benches" was not a taxable installation service because "to conclude [otherwise] seems to be an abdication from lexicography, - one that any taxpayer would fail to understand." It also found that "[r]eclaiming (removal) and coopering (replacing inner doors into freight cars prior to grain shipments) grain doors" was not a taxable installation service because to conclude otherwise would be "a distortion of common meaning." The Court further stated that to find the service involving the grain doors to be taxable would be "like saying that there is an "installation" to put a 100-lb. block of ice in a car, even though part of it or the water upon melting is removed, - nothing having been added to the car."

PETITIONER REP 1 contends that software is not "installed" on a computer because the software added to the computer is replicated from software that exists elsewhere, such as on a disc. He also argues that the software is not "installed" because it is not permanent, that is, it can be removed from the computer. The Commission disagrees with this reasoning. The Commission finds that installing software or data to a computer "adds" something to that computer that was not "on" the computer before the installation. That fact that the tangible personal property added to the computer may be a replicate of other tangible personal property or that the installation may not be permanent does not change the fact that at the time of installation, something new has been added to the computer. Furthermore, in *South Central Utah Telephone*, the Utah Supreme Court has specifically described the downloading of a computer software program as "installation," stating "[t]he nature of the billing program—the electronic signals—did not change after installation; only the medium on which is was stored changed. . . . Before installation, the program is tangible, [citation omitted], and it remains tangible after installation." 951 P.2d at 224. As a result, the Commission finds that software or data may be installed or attached to a computer.

D. Cleaning or Washing. Throughout the audit period, Section 59-12-103(1)(h) provides that services for cleaning or washing tangible personal property are taxable. In *DECISION B*, the Court stated that "[c]leaning, in our opinion, simply is 'cleaning,' as the word commonly is used." It also found that "cleaning" or "washing" services did not qualify as "renovating" services, ruling that services to wash the windows of train cars did not result in the windows being renovated. The Court concluded that the windows had instead been "washed" because the "glass is identical after the dirt is removed as it was before" and that the "glass was not changed, but only 'washed'".[8]

Webster's II New Riverside University Dictionary (1984) defines the verb "clean" to mean "to get rid of dirt" or "to get rid of impurities" (p. 269). In addition, the verb "wash" is defined to mean "to cleanse with water or other liquid, and often with soap, detergent, or bleach, by immersing, dipping, rubbing, or scrubbing" or "to cleanse or purify" (p.1302).

Based on the above, the Commission finds that services to cleanse or to get rid of dirt or dust from a computer, as well as services to rid a computer's hardware, software or data of impurities, qualify as taxable services to clean or wash tangible personal property.

II. Applying Utah Law to the Taxpayer's List of Services and Other Issues.

A. Services Listed on Exhibit P-2 That Are Still in Dispute. As described in Finding of Fact #8, the parties agree that some of the services listed on Exhibit P-2 are subject to taxation. They also agree that some of the listed services are not subject to taxation. The Commission will not disturb the parties'

[8] The audit period in *CASE B* was 1957 through 1961, when repairs, renovations and installations of tangible personal property were subject to taxation. However, cleaning and washing services were not specifically addressed in Utah law at this time. In *CASE B*, the Commission asked the Court to find that cleaning and washing services qualified as a taxable repair, renovation or installation. Subsequent to the Court ruling against the Commission, the Legislature amended the law to specifically tax the cleaning and washing of tangible personal property, as well.

agreement concerning these particular services. However, the Commission will address the following services that remain at issue.

1. *Services Described in Sections 1 and 2.* The taxpayer identifies four services in Section 1 and six services in Section 2. All of these services involve installing or downloading software or data to a computer. Whether the software or data is "installed" or "downloaded" or whether the software or data is "free," something new is added to a computer when these services are performed. The Commission also finds that downloading a program constitutes "installation," as described in Subsection 2.5. The Commission finds that software or data, once downloaded, is added to a computer for at least a temporary period. As a result, the Commission finds that all services listed in Section 1 and Section 2 of Exhibit P-2 are taxable installations or attachments of tangible personal property.

The Commission also notes that these services might also be deemed taxable repairs or renovations if performed to restore a computer to former, better state. In any case, the Commission finds that all of the services described in Section 1 and Section 2 are taxable.

2. *Services Described in Section 3.* In this section, the taxpayer identifies three separate services involving the "reinstalling" of software. The Commission cannot envision why a customer would hire the taxpayer to perform these services unless his or her computer was not working properly. Furthermore, PETITIONER REP 1 stated that in some instance where a computer is not running, the software must be removed and reinstalled before the computer will run again. As a result, the Commission finds that all of these services are performed to restore tangible personal property to a former, better state and qualify as repairs or renovations. Moreover, "reinstallation," by definition, includes "installation," which we have already found to be taxable. Accordingly, the Commission finds that the three services described in Section 3 are taxable.

3. *Services Described in Section 4*. In this section, the taxpayer identifies seven services that involve "uninstalling software." The Commission will discuss the first three services listed in this section separately from the last four services that are listed,

a. Subsections 4.1, 4.2 and 4.3. These services include ones to delete a program (Subsection 4.1), uninstall a program (Subsection 4.2) and disable a program from starting (Subsection 4.3). Services to install or attach tangible personal property are subject to taxation. Services to delete or uninstall tangible personal property are not a taxable installation or attachment. Furthermore, the Commission finds that services to delete, uninstall or disable software or data from a properly functioning computer do not restore the computer to a former, better state and, thus, are not a taxable repair or renovation. The Division is to remove any transactions from its assessment that are clearly nontaxable under these criteria.

On the other hand, if the customer hires the taxpayer to "fix" a computer that is not functioning properly and the taxpayer fixes it by deleting, uninstalling or disabling software or data, the Commission finds that such services restore the computer to a former, better state and are a taxable repair or renovation.

b. Subsections 4.4, 4.5, 4.6 and 4.7. The Commission finds the last four services listed in Section 4 to be taxable, specifically the services to remove / uninstall a virus (Subsection 4.4), remove / uninstall spyware (Subsection 4.5), remove / uninstall malware (Subsection 4.6) and disable but not remove a virus / spyware / malware (Subsection 4.7). The Commission believes that viruses, spyware and malware are all types of software that "infect" a computer and were not part of the original software that comprised the computer. As a result, the Commission considers services to remove this software to be either services to rid the computer of impurities, and thus taxable cleaning or washing services, or services to restore the computer to a better, former state, and thus taxable repair or renovation services. The Commission recognizes that services to disable such software may not qualify as cleaning or washing services because the unwanted items

are not removed from the computer. Nevertheless, services to disable the unwanted software would still be performed to restore the computer to a former, better state and, as a result, qualify as taxable repair or renovation services. For these reasons, the Commission finds that the last four services listed in Section 4 are subject to taxation.

4. *Services Described in Section 6*. In this section, the taxpayer identifies three services concerning the deletion or removal of files or programs from a computer, specifically services to delete a program file (Subsection 6.1), delete a data file (Subsection 6.2) and delete e-mail (Subsection 6.3). The Commission believes the taxability of these services is the same as the taxability of the first three services described in Section 4 of Exhibit P-2, which was discussed above. Accordingly, the Commission finds that the services described in Section 6 are nontaxable when performed on a properly functioning computer and taxable when performed on a computer that is not functioning properly. The Division is to remove any transactions from its assessment that are clearly nontaxable under these criteria.

5. *Service Described in Subsection 12.1*. The taxpayer described the service listed in Subsection 12.1 as "running CHKDSK to fix filesystem corruption." PETITIONER REP 1 stated that "fix" in this description means "to repair." He further explained that a "filesystem" is neither software nor data but a method of organizing data on a computer. PETITIONER REP 1 stated that a filesystem can be "corrupted" in a number of ways, including equipment failure, a power surge, a virus, or the computer being turned off at the wrong time. PETITIONER REP 1 explained that when a filesystem is corrupted, one can run the CHKDSK program that is already on the computer to check for problems with the way files are organized on a drive. PETITIONER REP 2 added that running CHKDSK reestablishes links between files.

The parties have already agreed that running a defragmentation program already on the computer, as described in Subsection 12.2, is not subject to taxation. PETITIONER REP 1 explained that the defragmentation program rearranges files and information on the drive that may have become fragmented.

The Division argues that because the CHKDSK program is run when a computer is "broken" and needs repair, the service to run "CHKDSK to fix filesystem corruption" qualifies as a taxable repair or renovation. The Commission disagrees and finds that a service to run a program already on a computer is not a taxable repair or renovation, even if the computer was not functioning prior to the program being run. The Commission notes that the Division has already agreed that a service to "run a program to repair a database, as described in Subsection 5.3, is nontaxable. The Commission does not believe that the service described in Subsection 5.3 is distinguishable from the service described in Subsection 12.2. Accordingly, the Commission finds that the service described in Subsection 12.1 is not subject to taxation and that the Division should remove any transaction from its assessment that is described as a service to run the CHKDK program.

B. Other Issues.

At the hearing, the taxpayer raised additional issues not specifically listed on Exhibit P-2. Aspects of the additional issues, as discussed below, may overlap some of the services listed on Exhibit P-2. To such extent, however, the following rulings on the additional issues do not alter our previous determinations for the services listed on Exhibit P-2.

1. *Services to Make a "Slow" Computer "Run Faster."* PETITIONER REP 1 explained that on occasion, a customer hires him to fix a computer that is "running slow." If the computer is running "slow," services to repair it may be taxable or nontaxable depending on the following circumstances. Under the first circumstance, the computer once ran faster and that the customer wants the computer to run faster again. Under these circumstances, the Commission finds that the services to make the computer run faster, restore the computer to a better, former state and qualify as a taxable repair or renovation.

Under the second circumstance, a computer is running at its "original" speed and the customer wants it to run faster than it ran as originally manufactured. Under these specific circumstances, the services would not restore the computer to a former, better state and would not be considered a taxable repair

or renovation. If any invoice item on which the Division imposed tax shows that the service was intended to make a computer run faster than it originally ran and is not incidental to a taxable sale of another service or tangible personal property, the Division is to remove the transaction from its assessment.

In addition, the Commission has previously found that services to delete, uninstall or disable a program, software or data are nontaxable. If these are the only services performed to make a computer run faster, the services are nontaxable. Except for these specific circumstances, however, the Commission finds that services to make a slow computer run faster are subject to taxation.

2. *Services Where Computer Not Functioning as Customer Wants it to Function*. PETITIONER REP 1 also distinguished between and wanted clarification for a computer "not functioning properly" and one "not functioning as the customer wants it to function." Without further clarification, it appears clear that a computer not functioning properly needs to be restored to a former, better state and that services to "fix" such a computer are taxable repair or renovation services. However, the Commission finds that when a customer wants a computer to function differently than originally manufactured, services to change the computer's functionality do not restore the computer to a former, better state and, as a result, do not qualify as taxable repair or renovation services. If any of the transactions on which the Division imposed tax shows that the service was to make the computer operate differently than originally manufactured and is not incidental to a taxable sale of another service or tangible personal property, the Division is to remove the transaction from its assessment. Again, services to delete, uninstall or disable a program, software or data are nontaxable and should also be removed. Otherwise, the services described above are taxable.

3. *Taxation of "Hardware."* At the Formal Hearing, PETITIONER REP 1 stated that he interpreted one of the rulings in the Initial Hearing Order to hold that the sale of "hardware" is not taxable if it is sold in connection with services to move data. The interpretation is incorrect. Unless an exemption

applies, the sale of hardware is subject to taxation, whether it is sold alone or whether it is sold in connection with a separately stated, nontaxable service.

In the Initial Hearing Order at p.19, the Commission discussed the taxability of services to "transfer" or "move" data to a new hard drive that the customer also purchases. The Division determined that the services to "transfer" or "move" the data do not qualify as taxable installations or attachments of tangible personal property, and we do not further address the taxability of such services here. However, in the Initial Hearing Order, the Commission did not specifically address the taxability of the hardware. Regardless, the sale of hardware is subject to taxation unless a specific exemption exists, whether or not the hardware purchase is made in connection with the purchase of nontaxable services.

4. *Taxation of Diagnostic Consulting Services*. When a customer's computer is not running properly or running how the customer wishes it to run, the taxpayer must usually diagnose the problem before fixing it. Generally, the Commission would consider "fixing" a computer to be the primary object of such a transaction and any associated diagnostic service to be incidental to the primary object, even if separately stated. In addition, as of July 1, 2005, "purchase price" is defined in Section 59-12-102(61)(b)(iii) to include "a charge by the seller for any service necessary to complete the sale." Diagnostic services are necessary to complete the sale of tangible personal property or other services required to fix a computer. As a result, the Commission believes that any separately stated charge for services to diagnose a computer problem is taxable or nontaxable depending on the taxability of the charge to fix the problem.

a. Taxable Diagnostic Services. For example, if the taxpayer diagnoses that a computer is not working properly because of a broken piece of hardware, the taxable charge for the new piece of hardware is the primary object of the transaction.[9] As a result, any associated diagnostic charge is also

[9] *See Utah State Tax Commission Private Letter Ruling 94-016* (June 4, 1994), in which the Commission determined that "consulting fees in connection with the determination of hardware or software needs are taxable if you also sell the equipment."

taxable, regardless of whether it is separately stated. Similarly, when the customer purchases a taxable repair or renovation, a taxable installation or attachment, or a taxable cleaning or washing, any associated diagnostic charge is also taxable, even if separately stated. In such instances, the Commission finds that the diagnostic service is incidental to the taxable primary object of the transaction and, as a result, is also taxable.

b. Nontaxable Diagnostic Services. On the other hand, if the charge to fix the problem is nontaxable, such as a charge to make a computer run faster than originally manufactured, the incidental diagnostic charge is also nontaxable. There may also exist circumstances where the taxpayer diagnoses the problem and the customer decides not to have the problem fixed. In such circumstances, the Division agrees that the diagnostic service would be a nontaxable service.[10] However, were a nontaxable diagnostic charge bundled together with a taxable diagnostic charge, the entire charge would be taxable.

c. When Diagnostic Service and Repair Service Occur on Different Days. At other times, the diagnostic service may occur on one day and the service to fix the problem may occur on a later date. If the customer decides to have the problem fixed when he or she receives the diagnosis, the Commission finds that the taxability of the diagnostic charge follows the taxability of the charge to fix the problem, regardless of when the service to fix the problem occurs. For example, if the taxpayer diagnoses that a computer needs a taxable repair and the customer agrees upon receiving the diagnosis to have the computer repaired, the diagnostic service is incidental to and part of the taxable repair service, even if the parties agree that the repair will occur at a later time.

On the other hand, a customer may bring a computer in for repair and after receiving the diagnosis, wants to think over whether to proceed with the repair. The customer then agrees on a later date to have the computer repaired. When the circumstances show that the customer did not agree to the repair on

[10] *See Utah State Tax Commission Private Letter Ruling 05-018* (March 14, 2007), in which the Commission determined that "your work may uncover problems with software or hardware that, for various reasons, the client may not wish to have you remedy. These services are . . . are not subject to tax."

the date the diagnosis was received, the Commission believes that the diagnostic service is a separate transaction that is not incidental to the subsequent repair transaction. Under such circumstances, the diagnostic service would not be subject to taxation. If any of the transactions on which the Division imposed tax are diagnostic services that are nontaxable under the guidelines discussed above, the Division should remove those transactions from its assessment.

5. *Setting Up a Server or Computer*. At the Formal Hearing, the parties disagreed on whether separately stated services to "set up" a server or computer are subject to taxation. Although the steps the taxpayer performs when setting up a server or computer were not detailed at the Formal Hearing, the Commission offers the following guidelines to determine whether such services are taxable. The Commission will discuss separately those set up services that are purchased in connection with a server or computer and those set up services that are sold alone.

a. Set Up Services Purchased with a Server or Computer. When a service is purchased in connection with tangible personal property, all of the circumstances surrounding the transaction must be examined to determine whether there are two primary objects of the transaction (i.e., the service and the tangible personal property) or whether there is one primary object of the transaction (i.e., the tangible personal property, with the service being incidental to the primary object). If there are two primary objects of the transaction, the taxability of each object is determined separately. If the primary object of the transaction is taxable tangible personal property and the service is deemed to be incidental, the amounts charged for the property and the service are both taxable, regardless of whether the service would have been nontaxable if purchased alone.

The Division argues that any set up services purchased in connection with a taxable server or computer would be part of the taxable "purchase price" of the computer or service because Section 59-12-102(61)(b)(iii), as of July 1, 2005, defines "purchase price" to include "a charge by the seller for any service

necessary to complete the sale." The Division argues that set up services are "necessary to complete the sale" of a taxable server or computer and, as a result, are also subject to taxation. The Commission, however, does not read Section 59-12-102(61)(b)(iii) as broadly as the Division.

Were a customer who purchased a taxable server or computer also *required* to purchase the set up services, the Commission would agree with the Division that the set up services were "necessary to complete the sale" of the taxable equipment. Under such circumstances, the Commission would find the charges for set up services also to be subject to taxation, regardless of whether they were separately stated.

However, if the set up charges are optional, further analysis is needed to determine if they are "necessary to complete the sale" of a taxable server or computer. In *Utah State Tax Commission Private Letter Ruling 08-002* (Amended June 10, 2009) ("*PLR 08-002*"), the Commission considered the taxability of optional set up and training fees associated with the purchase of taxable software and stated that:

> As you have described them, the Set Up and Training fees are non-taxable services if purchased alone. However, they may be taxable if the Set Up and Training services fall under the statutory definition of purchase price. Purchase price includes "a charge by the seller for any service necessary to complete the sale . . ." [citation omitted]. The interpretation of "services necessary to complete the sale" is not determined solely on whether the services are contractually obligated. Rather, necessary services include services that, without which, a transaction involving another associated taxable transaction would not take place. To determine whether a service is necessary, we must analyze the sale transaction as a whole.

In *PLR 08-002*, the Commission ruled that the optional set up and training fees at issue were not part of the "purchase price" of the taxable software because: 1) the taxable software purchase was not contingent on purchasing the set up and training services; 2) the set up and training services were optional and not contractually required; 3) not all customers purchasing the software purchased the services; 4) software consulting firms other than the one that sold the software at issue also provided the set up and training services; 5) some customers perform the services on their own; and 6) the software seller provided customers

additional information on the Internet to perform the services on their own.[11] Under these specific circumstances, the Commission found that the set up and training services are separate services that are not included in the purchase price of the taxable software.

In addition, in the Initial Hearing Order for *Utah State Tax Commission Appeal No. 06-1038* (April 7, 2008),[12] the Commission considered whether services to "configure" a computer or computer workstation so that it will operate were taxable. The configuration services included: 1) setting up login IDs and network authentications, such as user names and passwords; 2) setting up "networking protocols," which enable an individual workstation and computer to communicate and work with the local network, the Internet, and email; 3) setting up spyware and virus scans; and 4) setting up calendars and contact systems.

The Commission found that these configuration services, when purchased in connection with a taxable computer, were not part of the purchase price of the computer based on the specific circumstances, which included: 1) the configuration services were not included in the price of a computer; 2) there was no evidence to suggest that a person purchasing a computer was required to also purchase the configuration services; 3) it was conceivable that many customers either configure their computers themselves or have in-house staffs to perform such services; and 4) sometimes it took several trips to complete a complex configuration job. The Commission found "the configuration services . . . to be a separate and distinct transaction not included in the 'purchase price' of a computer." In addition, the Commission determined that the separate configuration services were not taxable installation or attachment services, finding:

> that the configuration services consist mainly of entering passwords and IDs, setting features on software to ensure that the computer will communicate with the

[11] Although the Commission found these specific set up and training charges to be nontaxable, it has found installation and training services to be taxable under other circumstances. *See CASE D v. Utah State Tax Comm'n,* 367 P.2d 852 (Utah 1962), in which the Utah Supreme Court sustained the Commission's determination that services "to check the [equipment] installations . . . and to instruct local operators in its use and maintenance" were taxable because they were incidental and part of the sale of the equipment.

[12] One of the parties to the appeal has requested a Formal Hearing. As a result, the Initial Hearing Order is not a final decision.

> computer network, and performing other similar nontaxable services. As a result, it appears that the installation of any free or existing spyware or virus scans is incidental to the other, nontaxable services.

In the present case, the circumstances surrounding the taxpayer's sale of set up services in connection with the sale of tangible personal property were not detailed. Without evidence of the specific circumstances of the taxpayer's transactions, the Commission is unable to determine whether the taxpayer's set up services are a separate transaction or merely incidental to the sale and part of the "purchase price" of taxable personal property. Accordingly, the taxpayer has not carried his burden of proving his set up services are nontaxable when sold in connection with a taxable server or computer.

b. Set up Services Sold Alone. The taxability of set up services sold alone is not dependent on the taxability of another transaction. As a result, set up services are nontaxable, unless the circumstances show that the set up services are, in essence, one of the services subject to taxation, such as a taxable repair or renovation or a taxable installation or attachment. For example, if the set up services primarily involved the installation of spyware and virus software, the Commission might consider the set up services to be essentially taxable services to install tangible personal property. On the other hand, if any installation services were deemed incidental to the total services required to set up a server or computer, the set up services would be nontaxable. Again, in the absence of specific evidence on these transactions, the taxpayer has not carried his burden of proving his set up services are nontaxable when sold alone, because the specific services that comprise the taxpayer's set up services are unknown.

c. Taxpayer's Argument. The taxpayer argues that its set up services qualify as "customization" services that are nontaxable under Section 59-12-102(58)(c), which became effective on July 1, 2004, and the version of Rule 92 that was in effect until July 1, 2004.[13]

[13] The Commission notes that portions of Rule 92 were deleted on July 29, 2004, in response to "prewritten computer software" being defined in statute as of July 1, 2004. To the extent that Rule 92 expanded or narrowed the definition of "prewritten computer software" during July 2004, it is invalid during

After July 1, 2004, Section 59-12-102(58)(c) provides that a "modification" or "enhancement" of prewritten computer software is not considered taxable prewritten computer software. Webster's II New Riverside University Dictionary (1984) defines "modification" as a "small alteration, adjustment, or limitation" (p. 762). In addition, it defines "enhance" to mean "to increase or make greater" (p. 433). The Commission believes that Section 59-12-102(58)(c) is intended to clarify that purchases of services to write additional code to alter or augment prewritten computer software are nontaxable services and are not incidental to the sale and part of the "purchase price" of taxable prewritten or canned computer software.[14] The Commission is not convinced that all of the services that may comprise the taxpayer's set up services are "modifications" or "enhancements" of prewritten computer software.

Furthermore, prior to July 1, 2004, Rule 92(D) provided that certain charges associated with the sale or lease of prewritten or canned computer software were nontaxable, specifically "[c]harges for services to modify or adapt canned computer software or prewritten computer software to a purchaser's needs or equipment." Webster's II New Riverside University Dictionary (1984) defines "modify" to mean "to change in form or character" (p. 762). In addition, it defines "adapt" to mean "to adjust to a specified use or situation" (p. 77). The Commission believes that Rule 92(D), like Section 59-12-102(58)(c), was intended to clarify that purchases of services to write additional code to change or adjust prewritten computer software

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this period. As a result, the Commission considers those deleted portions of Rule 92 that addressed "canned" or "prewritten" software only to have effect prior to July 1, 2004.

[14] In *Utah State Tax Commission Private Letter Ruling 95-036* (Aug. 7, 1995), the Commission ruled that:

> Charges for services to modify or adapt prewritten computer software are not taxable if separately stated and identified. We do not agree, however, that charges for "minor adjustments" necessarily qualify for the exemptions. To qualify for exemption, the adaptation must change the functional operation of the canned program. Adding the customer name or account title is not enough. . . .

The Commission issued similar rulings in *Utah State Tax Commission Private Letter Ruling 96-150* (Oct. 21, 1996); *Utah State Tax Commission Private Letter Ruling 97-003* (Jan. 16, 1997); *Utah State Tax Commission Private Letter Ruling 97-062* (Oct. 15, 1997); and *Utah State Tax Commission Private Letter Ruling01-030* (Nov. 27, 2001).

are nontaxable services and not incidental to the taxable purchase of the prewritten or canned computer software.[15] Again, the Commission is not convinced that the services that may comprise the taxpayer's set up services are ones to "modify" or "adapt" prewritten computer software. In the absence of such evidence, the taxpayer has not carried his burden of proof.

d. Summary of Guidelines for Set Up Services. If the taxpayer's separately stated set up services consisted primarily of services to modify or adapt prewritten computer software, they would be nontaxable under Section 59-12-102(58)(c) and Rule 92(D), regardless of whether the services were sold alone or in connection with the sale of taxable tangible personal property.

For set up services that are not ones to alter, augment, modify or adapt prewritten computer software, all circumstances involving the transaction must be considered to determine the taxability of the services. If the set up services are sold in connection with tangible personal property, such services would generally be taxable unless the circumstances showed that the services were optional and, similar to the situations discussed earlier, significant in scope. If set up services are sold alone, they would generally be nontaxable, unless it was determined that they were essentially taxable repairs or installations.

The taxpayer has not provided sufficient information for the Commission to find that any set up services are nontaxable. As a result, the Commission sustains the Division imposition of tax on set up services.

III. Prospective Compliance.

PETITIONER REP 1 states that he is willing to abide by the Commission's decision concerning the taxability of his services in the future. However, he does not believe that he should be held liable for the additional taxes he has been assessed because he obtained advice from the Tax Commission

[15] In *Amended PLR 08-002*, the Commission ruled that separately stated charges for "forms programming" and "custom programming" qualify as nontaxable modification or enhancement services under Section 59-12-102(58)(c).

concerning the taxability of his services prior to going into business. PETITIONER REP 1 claims that the advice he received is different from the Division's determinations of taxability. Specifically, PETITIONER REP 1 claims that he understood that if he performed services that did not require "opening up" a computer, the services were nontaxable. PETITIONER REP 2 testified that he understood the tax code as PETITIONER REP 1 did, specifically that if you open the computer, you charge tax and if you don't open the computer, you don't charge tax. Furthermore, PETITIONER REP 1 claims that throughout the audit period, different Division personnel have given him different answers concerning the taxability of his services. For these reasons, PETITIONER REP 1 asks the Commission not to hold him liable for the assessment.

It appears that the taxpayer received information from Commission employees concerning transactions that involve services connected with the "sale" of software, but not necessarily information for transactions that involve the "repair," "installation" or "cleaning" of software or data. It also appears that a large number of transactions at issue in this appeal involve taxable repairs, installations or cleanings. Accordingly, the Commission finds that the taxpayer did not receive incorrect information involving many of the transactions at issue. Nevertheless, the Commission recognizes that the matters at issue are complex and that it would be productive for the Commission to issue a bulletin or adopt a rule to better explain the taxation of repairs, installations and cleanings performed by the computer services industry, as well as the taxation of diagnostic and other services performed in connection with a taxable transaction. For these reasons, the Commission finds that it would be reasonable, under these specific circumstances, not to impose tax on certain of the transactions at issue, but instead to make compliance prospective to the date the Commission issues a bulletin or adopts a rule on the matters.

The taxpayer proffered that as a rule of thumb, he charged sales tax when he "opened up" a computer to "fix" it, but did not charge sales tax if he could "fix" the computer without opening it. Based on the taxpayer's understanding of the tax laws and the Commission's intention to provide guidance to the

computer services industry, the Commission finds that it would be reasonable not to require the taxpayer to pay tax on those transactions that only involve services performed on software or data.

In Section II of the Discussion above, the Commission determined that a number of services were taxable, including many listed on Exhibit P-2. The Commission finds that the following taxable transactions listed in Exhibit P-2 appear to involve software or data only, specifically: 1) all four services described in Section 1; 2) all six services described in Section 2; 3) all three services described in Section 3; 4) all seven services described in Section 4; and 5) all three services described in Section 6.

In addition, the Commission will apply prospective compliance and will not hold the taxpayer liable for the following services described in Section II(B) of the Discussion above, unless the services are clearly associated with taxable transactions that involve hardware only or taxable transactions that involve hardware and, to a de minimis extent, software or data: 1) all services described in Section 9 and Section 14 on Exhibit P-2, if taxable; 2) taxable services to make a "slow" computer "run faster;" 3) taxable services for a computer not functioning as a customer wants it to function; 4) taxable diagnostic services; and 5) taxable set up services.

Accordingly, for purposes of this appeal, the Commission will not require the taxpayer to pay tax on transactions involving these specific services. However, the taxpayer will be required to collect tax on such transactions once a bulletin is issued or a rule is adopted that clarifies the transactions to be taxable.

The Commission finds that there is insufficient information to determine whether the remaining taxable services discussed in this decision were performed only on software or data. As a result, the Commission sustains the tax imposed on and chooses not to apply prospective compliance to the remaining taxable transactions.

IV. Waiver of Interest.

The Commission is authorized under Section 59-1-401(13) to waive penalties and interest upon a showing of reasonable cause. No penalties were imposed in this matter. Concerning interest, Commission policy is to waive interest only if it arises because of an error of the Commission or its employees. The Commission has ruled that prospective compliance is appropriate for those transactions that only involve software or data. As a result, the Commission believes that it has removed all taxable transactions from the assessment for which the taxpayer failed to collect tax due to his discussions with Commission employees. As a result, reasonable cause does not exist to waive the interest due on the remaining taxable transactions for which prospective compliance does not apply.

CONCLUSIONS OF LAW

1. All computer software, regardless of whether or not it is "prewritten computer software," and all computer data are "tangible personal property" as defined in Section 59-12-102.

2. A taxable repair of a computer would include services to restore the computer to a "former better state" or to restore it by replacing an item of tangible personal property, regardless of whether any computer hardware is changed or replaced. In most instances, services to "fix" a computer that is "running slow" or "not functioning properly" are taxable repair or renovation services. Services to delete, uninstall or disable software or data on a properly functioning computer are not taxable repair or renovation services. In addition, services to make a computer run faster or function differently than originally manufactured are not taxable repair or renovation services.

3. A taxable installation or attachment of tangible personal property includes services to install software or data to a computer.

4. A taxable cleaning or washing of a computer includes services associated with removing viruses, spyware and other unwanted tangible personal property from a computer.

5. Diagnostic services are taxable or nontaxable, depending on the taxability of the transaction that occurs after the diagnosis is made. However, diagnostic services are nontaxable when the customer does not agree to have a computer "fixed" on the date of the diagnosis.

6. Set up services may be taxable or nontaxable, depending on the all the circumstances associated with the transaction. There is insufficient information to establish if any of the taxpayer's set up services are nontaxable.

7. The Commission finds that the following services listed on Exhibit P-2 are taxable: 1) all services described in Section 1; 2) all services described in Section 2; 3) all services described in Section 3; 4) the services described in Subsections 4.1,4.2 and 4.3, but only if performed on a computer that is not functioning properly; 5) the services described in Subsections 4.4, 4.5, 4.6 and 4.7; 6) all services described in Section 6, but only if performed on a computer that is not functioning properly; 7) all services described in Section 9, but only if the services are performed in connection with a taxable transaction; 8) all services described in Section 10, except that the services described in Subsections 10.3 and 10.4 are taxable only if performed in connection with the taxable repair or renovation of a computer; and 9) all services described in Section 14, but only if the services are performed in connection with a taxable transaction. All other transactions listed on Exhibit P-2 are nontaxable.

8. The Commission will apply prospective compliance and will not hold the taxpayer liable for the following taxable transactions listed on Exhibit P-2: 1) all four services described in Section 1; 2) all six services described in Section 2; 3) all three services described in Section 3; 4) all services described in Section 4; 5) all services described in Section 6; and 6) all services described in Section 9 and Section 14, unless the services are clearly associated with taxable transactions that involve hardware only or taxable transactions that involve hardware and, to a de minimis extent, software or data.

In addition, the Commission will apply prospective compliance and will not hold the taxpayer liable for the following services described in Section II(B) of the Discussion above, unless the services are clearly associated with taxable transactions that involve hardware only or taxable transactions that involve hardware and, to a de minimis extent, software or data: 1) taxable services to make a "slow" computer "run faster;" 2) taxable services for a computer not functioning as a customer wants it to function; 3) taxable diagnostic services; and 4) taxable set up services. The taxpayer is liable for any remaining transactions that the Commission has determined to be taxable.

9. The Commission finds that reasonable cause does not exist to waive interest that has accrued on the taxable transactions to which the Commission has not applied prospective compliance.

DECISION AND ORDER

Based upon the foregoing, the Division is ordered to remove from its assessment all transactions that the Commission has found to be nontaxable in this Final Decision. In addition, the Division is ordered to remove from its assessment all transactions that were found to be nontaxable in the Initial Hearing Order, as neither party argued that any of these transactions should be taxable at the Formal Hearing.

Furthermore, the Commission finds that it is appropriate to apply prospective compliance for certain transactions found to be taxable. The Division is ordered to remove from its assessment all taxable transactions for which the Commission, in this Final Decision, has found that prospective compliance applies.[16] In addition, the Division is ordered to remove from its assessment all taxable transactions for which the Commission, in its Initial Hearing Order, found that prospective compliance applies, as neither party argued at the Formal Hearing that the Commission should not have applied prospective compliance to any of these transactions.

[16] For the convenience of the parties, the Commission has summarized its Final Decision rulings concerning taxation of services and prospective compliance in a chart labeled Attachment A.

Lastly, the Commission finds no cause to waive any remaining interest. It is so ordered.

DATED this _____ day of _____, 2009.

_____
Kerry R. Chapman
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

DISSENT

I respectfully dissent from my colleagues.

As with the initial hearing decision, this body has spent considerable time and effort trying to craft a decision when one of its primary tools is a Utah Supreme Court case from almost a half century ago and the Commission's own limited knowledge of 21st century technology. In order to reach its conclusions, the commission performed a number of tortuous maneuvers interpreting *CASE B*, including:

- Comparing repairs and renovations of hardware, software and data to the repair of heating, lighting and cooling systems in railroad passenger cars, and the drilling and milling of cross-tie logs;
- Matching the installation or attachment of hardware, software and data to coopering (removing and replacing) railroad doors to freight cars prior to grain shipments, and the stenciling of identification on baggage trucks and benches; and
- Analyzing the cleaning and washing of hardware, software and data to washing windows of train cars.

I have great respect for the analysis of my colleagues and the research and writing by the administrative law judge, Mr. Chapman, on this case (I personally commend Mr. Chapman for his efforts). Notwithstanding these endeavors, this Commission and staff do not possess the correct tools to develop a well-grounded judgment in this matter. The railroad car decision is not enough to give this body any guidance on computer hardware and software systems. In turn, the Supreme Court decision of 1997 discusses the storage of data, but does not address the repair of tangible personal property as it relates to computer software systems.

I dissent in the imposition of any tax or interest on the Taxpayer. If it has taken the Commission this much effort to interpret the law, how can we expect a small business owner to understand how to apply the law?

The Petitioner made a good faith effort to correlate sales tax to his business operations. There are just not clear guidelines -- an error that cannot be assigned to the taxpayer. If this issue were clear-cut, the Commission would not be spending over 40 pages explaining its position.

In my initial hearing dissent, I stated the following:

> "As such, I hold the Commission should abate all taxes and interest associated with this case and begin the dialogue of the rulemaking process. Once the Commission has done this then examples of what is and is not taxable can be placed in a publication similar to that in Publication 42 http://www.tax.utah.gov/forms/pubs/pub-42.pdf which has examples of what is and is not taxable in terms of repair of tangible personal property attached to real property."
>
> "Finally, during and after the rulemaking process, I recommend the Commission ask the Legislature if there is a clearer intent and policy direction on taxation in this matter. Other than that, without further guidance from the Legislature or the Supreme Court, we must be careful in imposing taxes on the regulated public based on laws that we ourselves have not clearly articulated in advance how we hold they apply."

I commend my fellow commissioners for joining me in recognizing the importance for the Commission to issue a bulletin to explain the taxation of repairs, installations and cleanings performed by the computer services industry, as well as the taxation of diagnostic and other services performed in connection with a taxable transaction. Unfortunately, I hold the Commission's intention to provide guidance to the computer services industry is long over due, and for that reason the Petitioner should not be held liable for any taxes or interest.

In the record is the transcript of a statement by a tax commission audit employee describing taxation of the computer industry as dwelling "in the dark ages" and that the auditing division struggles with interpretation of the statutes in this regard (Fact #13, Petitioner Exhibit 1). Taxpayer testified that he remembered in 2003 and 2007 the commission gave two different interpretations of the tax code on installation of a server. In answer to several questions posed to the auditing division in the hearing Petitioner said he received different answers than he had previously received.

In the hearing, an auditing representative testified the tax commission had encouraged them to create a publication for the industry and asked for petitioner's help to that end. The auditing representative added (paraphrased):

> *I think the law is clear. We already have it there in Publication 25, but the industry may be able to help us with the lingo, wording, and what questions need to be answered.*

I take administrative notice of Publication 25, as it was referred to in the hearing and is on the Tax Commission's website at http://tax.utah.gov/forms/pubs/pub-25.pdf. In looking at this 16-page publication that was updated in November 2008, I found seven relevant parts that primarily paraphrase the applicable statutes and rules relied on in this order. These pertinent items fit on an 8 ½ x 14 sheet of paper.

I note that eight commission private letter rulings (PLRs)1 are referenced in this commission order. These PLRs were issued between 1994 and 2009. I take further administrative notice of the number of private letter rulings the Commission has issued dating back to 1992 regarding software and hardware, which are redacted and on the Commission's website http://tax.utah.gov/research/search.html. It is possible that over the last 20 years there have been more private letter rulings regarding software and hardware than on any other single issue. Although the Commission has given guidance to requesting taxpayers through PLRs, the guidance was not compiled and consolidated into one publication, and provided to this industry of service providers. Clearly a publication based on commission PLRs and any general advice from taxpayer assistance and auditing would have given more guidance than the short, general references in tax commission Publication 25.

Petitioner's formal hearing brief included a one-page outline of tax statutes as he understood them and two pages of taxability questions (Fact 8 and Petitioner's Exhibit 2). The Commission has answered each of these taxability questions, which are provided on seven pages -- pages 41 to 47 of this order. Ironically, the specific questions and issues offered by the Petitioner in his hearing brief are the catalyst for the most sound, comprehensive and complete advice the Commission will provide to date to this industry. Petitioner's two pages of questions, and the Commission's answers to those questions in the form of a

publication, will do more to get compliance from this industry than assessing tax and interest on the Petitioner (who in good faith attempted to pay his taxes).

The confusion in the communications from the commission to taxpayers regarding the taxation of computer services highlights the lack of clarity in our internal regulations and policies. It also reveals a need for greater direction from the Legislature and Governor. As such, I dissent to the immediate prospective application of the conclusions of law in this order until a comprehensive Tax Commission publication has been completed to give guidance to this industry. The situation warrants suspending all audits and audit assessments on this industry until clear guidance can be given. The current Publication 25 does not deliver specific guidance to taxpayers. If the Commission wants this industry to understand the essence of the transaction, the primary object and purpose of a transaction between it and its client, then we need to assist, and not confuse.

It is within the purview of the Commission to promulgate rules, which explain how the Commission will implement and interpret the current tax laws. The purpose of the rulemaking process is to promote a dialogue between a government agency and its regulated public. The pursuing conversation assists the agency in clarifying in rule how it will interpret, implement and regulate based on the current law. The Commission should not apply this ruling until the members of the body can meet with the industry, engage in rulemaking to clarify the statute and incorporate all appropriate information into a new publication just for this industry. The guidance given in this order in answer to Petitioner's taxability questions can be the opening dialogue with the industry.

As stated in my initial hearing decision, during and after the rulemaking process, I recommend the Commission ask the Legislature for a clear intent and policy direction on taxation in this matter. Other than that, without further guidance from the Legislature or the Supreme Court, we must be

careful in imposing taxes on the regulated public based on laws that we ourselves have not clearly articulated in advance how we hold they apply.

The Legislature is the appropriate body to weigh in further on the appropriate tax policy for this industry particularly as it relates to the number of taxpayers that rely on computers. The Legislature is the appropriate body to address the issue of data and its taxability as tangible personal property per the Supreme Court case. The statute does not differentiate between the taxing of data, software or hardware as tangible personal property. All the parties in this matter are burdened with the same limitations as the Commission - a general lack of policy direction. If it is the primary role of the Commission to interpret and enforce statutory and case law, at the current time we have the limited benefit of both.

In conclusion, I hold the Petitioner should not be held liable for any taxes or interest. In addition, all audits in these matters should be suspended, until the Commission completes the rulemaking process, publishes an adequate publication and/or receives further guidance from the Legislature.

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601et seq. and 63G-4-401 et seq.

KRC/07-0118.fof

ATTACHMENT A

EXHIBIT P-2 SERVICES			
Section	**Analysis**	**Taxable or Nontaxable?**	**Prospective Compliance?**
1.1 Install retail / prewritten / canned software related to sale or lease of that software.	Installation of Tangible Personal Property ("TPP").	Taxable	Yes
1.2 Install retail / prewritten / canned software NOT related to sale or lease of that software.	Installation of TPP.	Taxable	Yes
1.3 Install a free update to software described in Section 1.1 or Section 1.2.	Installation of TPP.	Taxable	Yes
1.4 Install an updated database or definitions file belonging to a program without updating the software itself.	Installation of TPP.	Taxable	Yes
2.1 Install a freeware program.	Installation of TPP.	Taxable	Yes
2.2 Install an update to a no-cost / freeware program.	Installation of TPP.	Taxable	Yes
2.3 Install a free plugin or extension into a web browser.	Installation of TPP.	Taxable	Yes
2.4 Download a program and install it.	Installation of TPP.	Taxable	Yes
2.5 Download a program without installing it.	Installation of TPP.	Taxable	Yes
2.6 Download a file.	Installation of TPP.	Taxable	Yes
3.1 Reinstall Windows or other operating system.	Repair or Renovation of TPP.	Taxable	Yes
3.2 Reinstall a preinstalled program.	Repair or Renovation of TPP.	Taxable	Yes
3.3 Reinstall any non-custom program.	Repair or Renovation of TPP.	Taxable	Yes

Section	Analysis	Taxable or Nontaxable?	Prospective Compliance?
4.1 Delete a progam.	Repair or renovation of TPP, if computer not properly functioning.	Taxable	Yes
	Other instances – nontaxable service.	Nontaxable	Not Appli-cable ("N/A")
4.2 Uninstall a program.	Repair or renovation of TPP, if computer not properly functioning.	Taxable	Yes
	Other instances – nontaxable service.	Nontaxable	N/A
4.3 Disable a program from starting.	Repair or renovation of TPP, if computer not properly functioning.	Taxable	Yes
	Other instances – nontaxable service.	Nontaxable	N/A
4.4 Remove / uninstall a virus.	Either cleaning of TPP or repair or renovation of TPP.	Taxable	Yes
4.5 Remove / uninstall spyware.	Either cleaning of TPP or repair or renovation of TPP.	Taxable	Yes
4.6 Remove / uninstall malware.	Either cleaning of TPP or repair or renovation of TPP.	Taxable	Yes
4.7 Disable but not remove a virus / spyware / malware.	Repair or renovation of TPP.	Taxable	Yes
5.1 Run a program (without installing).	Nontaxable service.	Nontaxable	N/A
5.2 Run a program (without installing) from removable media.	Nontaxable service.	Nontaxable	N/A
5.3 Run a program to repair a database.	Nontaxable service.	Nontaxable	N/A
5.4 Run a program to scan for a virus.	Nontaxable service.	Nontaxable	N/A
5.5 Run a program to scan for spyware.	Nontaxable service.	Nontaxable	N/A
5.6 Run a program to scan for malware.	Nontaxable service.	Nontaxable	N/A
6.1 Delete a program file.	Repair or renovation of TPP, if computer not properly functioning.	Taxable	Yes
	Other instances – nontaxable service.	Nontaxable	N/A

Section	Analysis	Taxable or Nontaxable?	Prospective Compliance?
6.2 Delete a data file.	Repair or renovation of TPP, if computer not properly functioning.	Taxable	Yes
	Other instances – nontaxable service.	Nontaxable	N/A
6.3 Delete e-mail.	Repair or renovation of TPP, if computer not properly functioning.	Taxable	Yes
	Other instances – nontaxable service.	Nontaxable	N/A
7.1 Create a script.	Nontaxable service.	Nontaxable	N/A
7.2 Create a document or data file.	Nontaxable service.	Nontaxable	N/A
7.3 Undo changes to a document or script.	Nontaxable service.	Nontaxable	N/A
7.4 Restore a document / data file / script from a backup.	Nontaxable service.	Nontaxable	N/A
8.1 Back up data.	Nontaxable service.	Nontaxable	N/A
8.2 Back up data to another network location.	Nontaxable service.	Nontaxable	N/A
8.3 Back up data to an external hard drive.	Nontaxable service.	Nontaxable	N/A
8.4 Back up data to a flash drive / thumb drive.	Nontaxable service.	Nontaxable	N/A
8.5 Back up data to a CD or DVD.	Nontaxable service.	Nontaxable	N/A
8.6 Back up data to tape or other magnetic media.	Nontaxable service.	Nontaxable	N/A
8.7 Back up data to a different location on the same computer.	Nontaxable service.	Nontaxable	N/A
8.8 Back up data to a disk image.	Nontaxable service.	Nontaxable	N/A
8.9 Copy data.	Nontaxable service.	Nontaxable	N/A
8.10 Restore a file from backup.	Nontaxable service.	Nontaxable	N/A

Section	Analysis	Taxable or Nontaxable?	Prospective Compliance?
8.11 Restore computer to a previous time using System Restore or similar method.	Nontaxable service.	Nontaxable	N/A
8.12 Restore computer from a backup.	Nontaxable service.	Nontaxable	N/A
9.1 Turn on a computer.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
9.2 Reboot / restart a computer.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
9.3 Turn off a computer.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
9.4 Plug in a computer.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
10.1 Install a part inside the computer.	Repair or renovation of TPP.	Taxable	No
10.2 Replace a part inside the computer (remove and install).	Repair or renovation of TPP.	Taxable	No
10.3 Remove a part inside the computer only, NOT putting it back in.	Taxable, if performed in connection with a taxable repair or renovation.	Taxable	No
	Other instances - nontaxable service.	Nontaxable	N/A

Section	Analysis	Taxable or Nontaxable?	Prospective Compliance?
10.4 Troubleshooting hardware / parts WITHOUT replacing any parts.	Taxable, if performed in connection with a taxable repair or renovation.	Taxable	No
	Other instances - nontaxable service.	Nontaxable	N/A
10.5 Troubleshooting hardware / parts and replacing parts.	Repair or renovation of TPP.	Taxable	No
11.1 Change settings in a program.	Nontaxable Service.	Nontaxable	N/A
11.2 Change data in a database.	Nontaxable Service.	Nontaxable	N/A
11.3 Edit a document or spreadsheet.	Nontaxable Service.	Nontaxable	N/A
11.4 Change settings in the Windows registry.	Nontaxable Service.	Nontaxable	N/A
11.5 Restore settings in the Windows registry.	Nontaxable Service.	Nontaxable	N/A
11.6 Restore the registry from a backup copy.	Nontaxable Service.	Nontaxable	N/A
11.7 Creating / editing / deleting a user account.	Nontaxable Service.	Nontaxable	N/A
11.8 Creating / editing / deleting an e-mail account.	Nontaxable Service.	Nontaxable	N/A
11.9 Speaking to a customer on the phone or in person.	Nontaxable Service.	Nontaxable	N/A
11.10 Walking a customer through the steps of fixing a problem (on the phone or in person).	Nontaxable Service.	Nontaxable	N/A
12.1 Running CHKDSK to fix filesystem corruption.	Nontaxable Service.	Nontaxable	N/A
12.2 Defrag a filesystem.	Nontaxable Service.	Nontaxable	N/A
12.3 Partition a hard drive.	Nontaxable Service.	Nontaxable	N/A
12.4 Format a hard drive.	Nontaxable Service.	Nontaxable	N/A
13.1 Internal wiring.	Nontaxable Service.	Nontaxable	N/A
Section	**Analysis**	**Taxable or**	**Prospective**

		Nontaxable?	Compliance?
13.2 Installing wall jacks / wall plates / mud rings /etc. inside walls.	Nontaxable Service.	Nontaxable	N/A
13.3 Installing parts to real property using nails, screws, brads, glue, etc.	Nontaxable Service.	Nontaxable	N/A
13.4 Installing racks, patch panels, etc. attached to floor, wall or ceiling.	Nontaxable Service.	Nontaxable	N/A
13.5 Attachment of TPP to real property via an "anti-theft" cable.	Nontaxable Service.	Nontaxable	N/A
14.1 Travel time to / from a customer.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
14.2 Typing on a keyboard or clicking a mouse.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
14.3 Updating firmware of a hardware device.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A

OTHER ISSUES

Section	Analysis	Taxable or Nontaxable?	Prospective Compliance?
1. Make "slow" computer run faster.	Repair or renovation, if returns computer to former, better state.	Taxable	Yes, Subject to Limitation Described at Charts End*
	Nontaxable service, if computer operating as originally manufactured or if services only include ones to delete, uninstall or disable software or data.	Nontaxable	N/A
2. Make computer "function differently."	Repair or renovation, if returns computer to former, better state.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable service, if computer operating as originally manufactured or if services only include ones to delete, uninstall or disable software or data.	Nontaxable	N/A
3. Diagnostic services that are incidental to another transaction.	Taxable, if performed in association with a taxable service.	Taxable	Yes, Subject to Limitation Described at Chart's End*
	Nontaxable, if performed in association with a nontaxable service.	Nontaxable	N/A
4. Diagnostic services that are not incidental to another transaction.	Nontaxable service.	Nontaxable	N/A
5. Set up services.	Taxable or nontaxable, depending on the circumstances. From information available at Formal Hearing, the Commission found all set up services at issue to be taxable.	Taxable	Yes, Subject to Limitation Described at Chart's End*
* Prospective compliance applies to any such taxable service, unless the service is clearly associated with a taxable transaction that involves hardware only or a taxable transaction that involves hardware and, to a de minimis extent, software or data.			