

830 CMR 64H.1.3 Computer Industry Services and Products

830 CMR: DEPARTMENT OF REVENUE

830 CMR 64H:00: SALES AND USE TAX

830 CMR 64H.1.3 is repealed and replaced with the following

(1) Statement of Purpose; Effective date; Outline of Topics.

(a) Statement of Purpose. The purpose of this regulation, 830 CMR 64H.1.3, is to explain the application of the Massachusetts sales and use taxes to computer products and software.

(b) Effective date. This regulation, 830 CMR 64H.1.3, is effective October 20, 2006, applies to transactions on and after April 1, 2006.

(c) Outline of topics. This regulation, 830 CMR 64H.1.3, is organized as follows:

- (1) Statement of Purpose; Effective date; Outline of Topics
- (2) Definitions
- (3) General Rules
- (4) Sales, Leases, and Rentals of Computer Hardware
- (5) Sales, Leases, Licenses and Rentals of Masters Related to the Rights to Reproduce Computer Software
- (6) Sales, Leases, Licenses and Rentals of Custom Computer Software
- (7) Optional Software Maintenance Contracts
- (8) Furnishing of Information to Customers
- (9) Processing of Data Furnished by Customers
- (10) Additional Copies of Custom Software or Personal Reports
- (11) Training Services and Materials
- (12) Transmission of Data
- (13) Access to Database Services
- (14) Other Miscellaneous and Nontaxable Services
- (15) Multiple Points of Use Certificates

(2) Definitions. For purposes of this regulation, 830 CMR 64H.1.3, the following terms have the following meanings:

Canned software, see Prewritten Software.

Commissioner, the Commissioner of Revenue or the Commissioner's duly authorized designee.

Computer, an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

Computer equipment, computer hardware and any software loaded onto the hardware prior to sale.

Computer hardware, the physical components of a computer system.

Computer software, a set of coded instructions designed to cause a computer or automatic data processing hardware to perform a task.

Custom software, a software program prepared to the special order of a customer that is not prewritten software.

Database, a collection of interrelated data in a form capable of being processed by a computer, organized to facilitate efficient and accurate inquiries and updates.

Delivered electronically, delivered to the purchaser by means other than tangible storage media.

Department, the Department of Revenue.

Electronic, relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Engaged in business in Massachusetts, see, M.G.L. c. 64H, § 1.

Imprinted magnetic media, magnetic media which have computer-readable programs or data imprinted onto them.

Lease, a lease, rental, or any other temporary transfer of possession or control for consideration, regardless of how the transfer is characterized by the parties.

License, the right to use, copy, or access software, regardless of the location or ownership of any server on which the software may be installed. Unlike a lease, a licensing arrangement may or may not be time limited.

Load and Leave, delivery to the purchaser by use of tangible storage media where the tangible storage media is not physically transferred to the purchaser.

Magnetic media, storage media, such as hard disks, floppy disks, diskettes, magnetic tape, cards, bar code, or any similar medium that is computer-readable.

Prewritten computer software (Prewritten software), also known as canned software and

standardized software, computer software, including prewritten upgrades, which is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser. Where a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute prewritten computer software.

Printed matter, human-readable information reproduced via printing, photocopying, or similar method of reproduction.

Processing of data furnished by customers, the processing of raw data provided by customers into reports delivered in tangible form or delivered electronically that are not or may not be incorporated in reports furnished to other persons.

Program, the complete sequence of computer instructions necessary to solve a problem, including system and application programs and subdivisions such as assemblers, compilers, routines, generators, and utility programs.

Reports of individual information, reports or other information personal and individual in nature that may not be or is not substantially incorporated in reports furnished to any other purchaser, provided via printed matter or other tangible media.

Reports of standard information, reports or other information that are not reports of individual information, provided via printed matter or other tangible media.

Tangible personal property, personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. Tangible personal property includes electricity, gas, steam, and prewritten computer software. See M.G.L. c. 64H, § 1.

(3) General Rules.

(a) Sales Tax. Sales in Massachusetts of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard

information in tangible form are generally subject to the Massachusetts sales tax. Taxable transfers of prewritten software include sales effected in any of the following ways regardless of the method of delivery, including electronic delivery or load and leave: licenses and leases, transfers of rights to use software installed on a remote server, upgrades, and license upgrades. The vendor collects sales tax from the purchaser and pays the sales tax to the Commissioner.

(b) Use Tax. The Massachusetts use tax complements the Massachusetts sales tax and is imposed on the use, storage, or other consumption of computer hardware, computer equipment, and prewritten computer software, regardless of the method of delivery, and reports of standard information in tangible form purchased for use, storage, or other consumption in Massachusetts. Apportioned Massachusetts use tax will be imposed on prewritten software concurrently available for use in multiple jurisdictions within the meaning of 830 CMR 64H.1.3(15) without regard to any of the following:

1. The jurisdiction where the purchaser takes delivery;
2. The location or ownership of any server on which the software may be installed; or
3. Whether the purchaser gives the seller an MPU exemption form.

(c) Exceptions to the Massachusetts use tax. The Massachusetts use tax is not imposed if:

1. The vendor collected and paid the Massachusetts sales tax on the sale of the tangible personal property;
2. The transaction is exempt from the sales tax; or
3. The purchaser paid a tax or reimbursed the vendor for a tax imposed by another state or territory of the United States on the transaction, provided that:
 - a. The tax was legally due, without right to a credit or refund; and
 - b. The other state or territory allows a corresponding exemption for tax paid to Massachusetts.
 - c. If the tax paid to the other state or territory was less than five percent, the exemption does not apply and Massachusetts use tax is imposed on the difference between the two rates.

(d) Collection and payment of the Massachusetts use tax.

1. Collection and payment of use tax by vendor engaged in business in Massachusetts. When a vendor that is engaged in business in Massachusetts sells taxable software, computer hardware, computer equipment or reports for use, storage, or other consumption in Massachusetts, the vendor shall collect the Massachusetts use tax from the purchaser and remit the tax to the Department. The Department will presume that tangible personal property sold by any vendor for delivery in Massachusetts is sold for use, storage, or other consumption in Massachusetts.

2. Payment of use tax by purchaser. If the vendor does not collect either the Massachusetts sales tax or the Massachusetts use tax, the purchaser should pay the five percent use tax to the Department. See 830 CMR 62C.16.2. For software concurrently available for use in multiple jurisdictions, the purchaser must remit apportioned use tax to Massachusetts as provided in 830 CMR 64H.1.3(15).

(e) Non-taxable sales. Sales of custom software, personal and professional services, and reports of individual information are generally exempt from Massachusetts sales and use taxes.

(4) Sales, Leases, and Rentals of Computer Hardware.

(a) Tax treatment of computer hardware sales. Sales, leases, rentals, and installment sales of new or used computer hardware are generally taxable. See 830 CMR 64H.1.3(3).

(b) Exemptions from the sales tax. The exemptions from the Massachusetts sales tax are contained in M.G.L. c. 64H, § 6.

(c) Installation charges. Separately stated charges for installing computer hardware of any type are not taxable, so long as the charges are reasonable and set in good faith.

(d) Leases of computer hardware.

1. General. Leases of computer hardware are generally taxable in the state where the hardware is physically located.

2. Collection and payment of sales tax on leases. Lessors of computer hardware will collect and pay sales tax on lease and rental payments as the payments become due. A lessor's gross receipts for any period are the amounts due during that period under the terms of the lease.

3. Access to computer hardware on the premises of another.

a. Leases include agreements under which a person has access to computer hardware not on that person's premises, if that person or that person's employee operates, directs, or controls the computer hardware.

b. For rules applicable to access of prewritten software on the premises of another, See 830 CMR 64H.1.3(3).

(e) Installment sales of computer hardware.

1. Installment sales of computer hardware are generally taxable.

2. Vendors under an installment sales contract for computer hardware should collect and pay sales tax on the total sales price of the hardware. The tax is payable on the return due date immediately following the date of the sale.

3. Separately-stated interest charges under installment sales contracts are not included in the sales price subject to tax as long as the interest charges are set in good faith.

(f) Discounts, coupons, and rebates. For the sales tax treatment of discounts, coupons, and rebates, see 830 CMR 64H.1.4.

(g) Trade-ins of computer hardware.

1. Definition. For the purposes of this subsection, 830 CMR 64H.1.3(4)(g), the following term has the following meaning:

Trade-in, a previously purchased item transferred to a vendor as full or partial consideration for the purchase of another item.

2. Tax treatment of trade-in transactions. The fair market value of traded-in computer hardware as of the date of the trade-in is ordinarily included in the sales price subject to sales tax as part of the consideration. If an item of computer hardware is returned to a vendor in connection with the purchase of computer hardware and that item has no value, the item is not part of the consideration for the purchase of computer hardware. The facts and circumstances will determine the value, if any, of an item of traded-in computer hardware.

(h) Services related to a sale of computer hardware.

1. Mandatory services. If computer hardware cannot be purchased without services such as training, maintenance, developing custom software, and testing, charges for the services are considered part of the sales price and are generally taxable even if separately stated. See also 830 CMR 64H.1.3(14).

2. Optional services. If the purchaser may purchase computer hardware without additional services, separately stated charges for the services are not considered part of the sales price for the hardware and are generally exempt. For purposes of 830 CMR 64H.1.3, separately stated charges must be clearly stated on the bill or invoice presented to the customer as well as on the vendor's books and records. See also 830 CMR 64H.1.3(11), (14).

(i) Service contracts.

1. Definition. For the purposes of this section, 830 CMR 64H.1.3(4), the term Service contract means an agreement for only service, repair, and maintenance (including consultation and technical assistance) of computer hardware, which may include an agreement to supply necessary parts and materials for repair. The agreement must be optional, as described in 830 CMR 64H.1.3(4)(h)2.

2. Agreements to provide parts and materials. If a service contract includes an agreement to supply necessary parts and materials for the repair of computer hardware, the charges for the service contract are not taxable under the following conditions:

a. The contractor should pay sales tax on purchases of parts and materials for use primarily in service contracts;

b. The contractor should not collect sales tax from the customers on parts and materials provided under the service contracts; and

c. The contractor should collect sales tax from the service contract customers for any tangible personal property not included under the service contract for which the contractor makes a separate charge.

3. Adjustment for sales tax paid by contractor. If the contractor paid sales tax on the purchase of tangible personal property for which the contractor later collects sales tax from a customer under 830 CMR 64H.1.3(4)(i)2.c., the contractor may then supply its vendor with a resale certificate and request that the vendor refund the sales tax paid on that property. The vendor may seek an abatement of the sales tax previously collected and remitted within the time limitations of G.L. c. 62C, § 37. With respect to sales or use tax paid on or after January 1, 2001, the contractor may not recover the tax by making an adjustment to its gross sales on its next sales tax return.

(5) Sales, Leases, Licenses and Rentals of Masters Related to the Rights to Reproduce Computer Software.

(a) Definitions. For the purposes of this section, 830 CMR 64H.1.3(5), the following terms have the following meanings:

Master, a single unit of computer software, custom or canned, sold for use in the production of multiple copies of the software to be sold.

(b) Sales of reproduction masters as part of a sale of rights. The sale of the right to reproduce a program is generally subject to Massachusetts sales tax, regardless of whether the transaction is characterized as a sale, lease, license or rental, unless an exemption applies.

(c) Examples

Example 1: Acme Software Development Co. sells prewritten software to Bates Manufacturing, Inc. As part of the contract, Acme transfers a master of the software to Bates. The sale includes the rights for Bates to make 100 copies of the software for use by its employees. The total contract price is \$10,000. The sales price subject to tax is \$10,000.

Example 2: Acme Software Development Co. sells prewritten software to Copyrighted Software Corp., along with unlimited rights to copy and incorporate the software into a spreadsheet software package that Copyrighted will sell to its customers. The total contract price is \$10,000. The sale between Acme and Copyrighted is exempt under G.L. c. 64H, § 6(r), because the software will become an ingredient or component part of tangible personal property to be sold by Copyrighted.

Example 3: Acme Software Development Co. sells a master copy of prewritten software to

Diligent Distributors Corp., along with unlimited rights to copy, market and sell the software to the public. The total contract price is \$15,000. The sale between Acme and Diligent may be a sale for resale, providing the requirements of M.G.L. c. 64H, § 8 or M.G.L. c. 64I, § 8 are met.

Example 4: Acme Software Development Co. sells a master copy of a word processing software package to Massachusetts Computer Company. Massachusetts Computer Company will copy and load the software package on to the hard drive of computers sold both inside and outside of Massachusetts. The contract provides that Acme is paid \$5,000 at the signing of the contract and \$250 for each copy of the software that is made by Massachusetts Computer Company. The sale between Acme and Massachusetts Computer Company is exempt under M.G.L. c. 64H, § 6(r), because the software will become an ingredient or component part of tangible personal property to be sold. Sales or use of the computer equipment in Massachusetts is taxable.

Example 5: Acme Software Development Co. sells prewritten software to On-Line Games, Inc., a Massachusetts company. The sales price is \$5,000. On-Line Games will incorporate the software into a product that will be marketed and sold on the Internet as a game. The game may be downloaded by the purchaser from the On-Line Games website for a cost of \$5. The sale between Acme and On-Line Games is exempt under M.G.L. c. 64H, § 6(r) because the software will become an ingredient or component part of tangible personal property to be sold. Sales of the game to purchasers in Massachusetts are taxable sales of prewritten software.

Example 6: Acme Software Development Co. sells prewritten software to On-Line Products, Inc., a Massachusetts company. The sales price is \$12,000. On-Line Products will incorporate the software into a digital product that is not software and is sold on the Internet. The digital product may be downloaded by the purchaser from the On-Line Products website for a cost of \$5. The software becomes a part of a digital product that is not taxable when downloaded to customers in Massachusetts; the exemption in M.G.L. c. 64H, § 6(r) does not apply. Acme must collect sales tax on the \$12,000 sales price paid by On-Line for the prewritten software.

(6) Sales, Leases, Licenses and Rentals of Custom Computer Software.

(a) Exemption for sales of custom software. Sales of custom software are generally exempt from sales tax as professional service transactions regardless of the method of delivery.

(b) Professional service transactions. A professional service transaction for custom software is one in which the principal object of the purchaser is the professional and personal services of a programmer, systems analyst, or other person who imprints or has imprinted the result of the services on magnetic media, the cost of which is an inconsequential element of the cost of the entire transaction. The cost of the medium is the price paid for the medium by the programmer, regardless of any improvement made to the medium by the programmer.

(c) Definition of "inconsequential element". The term "inconsequential element" generally means a cost of less than ten percent of the total contract price. This definition is only a guideline and

may vary depending on the facts and circumstances of a particular transaction.

(d) Custom modifications to prewritten software. Sales of custom modifications to prewritten software are generally not taxable if the sales price of the prewritten software and the charges for the custom modification are separately stated. The charges must be reasonably allocated and determined in good faith. For purposes of 830 CMR 64H.1.3, separately stated charges must be shown on the bill or invoice presented to the customer as well as on the vendor's books and records. The sales price of the original prewritten software is taxable.

(e) Documentation regarding costs of tangible personal property in relation to entire transaction. The vendor or purchaser may state in transaction documents that the estimated cost of tangible personal property related to a custom modification transaction or any other service transaction described in this regulation, 830 CMR 64H.1.3, is an inconsequential element of the entire transaction. This statement will not be considered a separate statement of the cost of the tangible personal property. The cost of the tangible personal property so estimated is not taxable solely because of this statement.

(f) Custom software sold to subsequent purchasers. If custom software sold to a single purchaser is later sold to others, the later sales are sales of prewritten software. The sale of custom software to a subsequent purchaser that meets the requirements for a custom modification under 830 CMR 64H.1.3(6)(d) is not taxable.

(7) Optional Software Maintenance Contracts.

(a) Definition. For the purposes of this section, 830 CMR 64H.1.3

(7), the term Computer software maintenance contract means an agreement to furnish maintenance services, upgrades, enhancements or updates of prewritten software, which may include an agreement for service, repair, and maintain computer hardware. Maintenance services may include including technical assistance and consultation. The agreement must be optional, as described in 830 CMR 64H.1.3(4)(h)2.

(b) Tax treatment of optional computer software maintenance contracts. Charges for optional software maintenance contracts that do not include upgrades are generally not taxable. An optional contract is one that the customer is not obligated to purchase as a condition to acquiring the software. Charges for an optional maintenance contract must always be separately stated on the invoice to the customer.

(c) Computer software maintenance contracts.

1. Charges for upgrades and services not separately stated. For transactions on and after January 1, 2007, if the charges for upgrades and services are not separately stated, tax applies to 50% of the sales price of the maintenance contract.

2. Charges for upgrades and services separately stated. If an upgrades plus service contract

separately and reasonably states charges for the service and upgrades portions of the contract, charges for the upgrades portion are taxable, and charges for the service portion are not taxable.

3. Cost of upgrades to be reasonable and in good faith. If the separately stated costs of upgrades to be supplied appear reasonable and are set in good faith, they will be accepted by the Commissioner. If the estimated costs of upgrades to be supplied do not appear reasonable, the Commissioner may assess additional sales tax using the method in 830 CMR 64H.1.3(7)(c)1.

(d) Prior relationship of contractor to vendor not relevant. The rules set out in 830 CMR 64H.1.3(7) apply regardless of the fact that the contractor may have been a vendor who sold the customer an item of computer hardware.

(e) Examples:

Example 1: Faithful Computer Services, Inc., entered into an agreement with General Medical Professional Corporation to service personal computers General recently purchased from another vendor. For \$1,500 a year, Faithful will periodically check General's personal computers and will be available to correct any problems that arise. Faithful has also agreed to replace any worn-out parts at no charge during the term of the agreement. Faithful should pay sales tax on all parts it buys to service General's computers and should not charge General sales tax for the parts. Faithful's \$1,500 yearly charge to General is not taxable.

Example 2: Floppy Disk Co. sold General Medical Professional Corporation a prewritten billing software package for \$1,500 for use on personal computers General purchased from another vendor. Floppy also entered into an optional agreement for \$600 with General to maintain the software package, replace defective disks, and provide any updates to the package if released. Floppy is unable to determine the value of any upgrades at the time of sale. Floppy must collect and remit tax on \$1,800 (\$1,500 plus 50% of \$600).

(8) Furnishing of Information to Customers.

(a) Tax treatment of sales of reports of standard information. Sales of reports or other information on printed matter or magnetic media, sold or intended to be sold to two or more purchasers, are generally taxable. Such reports may reflect collection, compilation, or analysis of information. Examples include database files, mailing lists, market research, and surveys.

(b) Exemption for sales of reports of individual information. The sale of a report of individual information, whether printed or on magnetic media, is not taxable if the report may not be or is not substantially incorporated into reports furnished to other persons.

(9) Processing of Data Furnished by Customers.

(a) Exemption for processing of data furnished by customers. Charges for processing data furnished by customers are generally exempt from sales tax, regardless of the method of delivery of the processed information to the customer. Processing data may include the following: summarizing data, computing data, extracting data, sorting files, and sequencing data as well as

services that provide the customer or subscriber with additional, different, or restructured information. The following are examples of exempt data processing: charges automated teller machine (ATM) terminal driving services, electronic funds transfer services, or credit card or check verification services. Changes to the format, code or protocol of the subscriber's content or information solely for the purposes of transmission are not a data processing service. Telecommunications services consumed in the provision of data processing services are taxable.

(b) Tax treatment of converting information from one medium to another. If the necessary steps for processing data furnished by a customer have been completed and the customer pays a vendor to convert the data from one medium to another tangible medium, the separately stated charges for conversion are taxable, including charges for transferring data from a storage medium compatible with one computer system to a storage medium compatible with another.

(c) Examples:

Example 1: Hasty Manufacturing Co. contracted with International Research Associates to process the results of a consumer market survey. Hasty sent the raw data, completed questionnaires, to International. International will enter the data into its computer, tabulate the results, and analyze the research. International will present Hasty with a printed report with its conclusions and a magnetic tape containing all the tables and graphs. International's charges are not taxable.

Example 2: Hasty Manufacturing Co. has a payroll software package that computes each employee's pay. Hasty processes its entire payroll on its own computer but pays International Banking Services Corp. to print the checks. International's charges for printing are taxable.

Example 3: Hasty Manufacturing Co. just bought a new word processing system. Hasty paid International Conversion Services, Inc., to transfer the information on the diskettes used on the old system to new diskettes. International's charges for the new diskettes are taxable.

(10) Additional Copies of Custom Software or Personal Reports.

(a) General. Where a vendor sells custom software or reports of individual information to a purchaser who requires multiple copies, separately stated charges for copying the custom software or report in tangible media are taxable, regardless of the exemptions of 830 CMR 64H.1.3(6) and 830 CMR 64H.1.3(8)(b).

(b) Tax treatment of charges for replacement copy provided in tangible media. Separately stated charges for replacing custom software which has been rendered unusable are generally taxable. See also 830 CMR 64H.1.3(7)(b)-(f).

(11) Training Services and Materials.

(a) Training services. Charges for training not provided as a mandatory part of the sale of computer hardware are not taxable. See 830 CMR 64H.1.3(4)(h)1, on charges for mandatory training.

(b) Training materials. Charges for instruction books and manuals in tangible form and canned tutorial software are generally taxable.

(12) Transmission of Data. Taxable telecommunications services, such as telephone and telegraph services, include transmission, conveyance, or routing of voice, data, or any other information or signals to a point, or between or among points. The term "telecommunications services" includes, without limitation, such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added. Charges for encryption services, security authentication and data monitoring provided with data transmission services are also subject to tax as telecommunications services. Changes to the format, code or protocol of the subscriber's content or information solely for the purposes of transmission are not a data processing service for purposes 830 CMR 64H.1.3(9).

(13) Access to Database Services.

(a) Exemption for database services. Charges for access by telephone or other means to databases stored in computer hardware not on the premises of the customer are generally not taxable.

(b) Retrieval of data by customer. In a database service transaction, the customer does not direct or control the entry of data into the database but merely selects data for retrieval.

(c) Tax treatment of printing charges. Separate charges for the actual printing of retrieved data are generally taxable. Separate charges for transmitting retrieved data for a customer who will print the data on the customer's printer are not taxable.

(d) Tax treatment of related computer hardware transactions. The sale of a computer terminal or other computer hardware used in retrieving data from a database is generally taxable.

(14) Other Miscellaneous and Nontaxable Services.

(a) General Rule. Generally, charges for the access or use of software on a remote server are subject to tax. However, where there is no charge for the use of the software and the object of the transaction is acquiring a good or service other than the use of the software, sales or use tax does not apply. See, e.g., 830 CMR 64H.1.3(13).

Example 1: Bob goes to an Internet website that hosts auctions of various items of tangible personal property and places a bid for \$100 on an item of vintage clothing. Although Bob has

accessed and used software on a remote server, the object of the transaction is acquiring the item on which he is bidding in the on-line auction. No tax applies to the access. If Bob's bid is the winning one, sales or use tax is due on any tangible personal property purchased at the on-line auction that is shipped to a Massachusetts customer, however the purchase of clothing in this example is exempt under M.G.L. c. 64H, § 6(k).

Example 2: Ann wants to acquire prewritten computer software to prepare her personal income tax return. The vendor of the software gives her the option of purchasing the software on a disk that will be mailed to her home or she can pay to securely access the software on the vendor's server through the Internet and use of a personal access code. In either case, the functionality of the software is the same. The object of the transaction here is the use of the software. Charges for the prewritten software will be subject to sales or use tax regardless of the method of delivery chosen by Ann.

(b) Tax treatment of miscellaneous service transactions. Charges for web site hosting, designing computer systems, designing data storage and retrieval systems, consulting services, feasibility studies, evaluations of bids, technical analysis, programming, and the like are generally not taxable if they are not part of a sale of computer hardware or prewritten software. If the miscellaneous services are a mandatory part of a taxable sale of computer hardware or prewritten software, the charges for the services are taxable. See 830 CMR 64H.1.3(4)(h).

(c) Standards for determining whether services are separate from a sale of computer hardware or prewritten software. The following factors indicate, but do not determine, whether a particular service is separate from a sale of computer hardware or prewritten software.

1. Any association or affiliation of the service contractor with the vendor;
2. The separate statement and documentation of the charges in the vendor's books and records;
3. Whether the services are contracted for or provided before the sale; and
4. The language of the agreement.

(d) Location of performance of services. The place where services such as designing computer systems, consulting, analysis, and programming are performed is immaterial to the sales tax treatment of charges for the services.

(15) Multiple Points of Use Certificates.

(a) General Rule. A business purchaser that is not a holder of a direct pay permit that knows at the time of its purchase of prewritten computer software that the software will be concurrently available for use in more than one jurisdiction shall deliver to the seller in conjunction with its purchase an exemption certificate claiming multiple points of use, Form ST-12. Prewritten computer software, for purposes of this section includes, but is not limited to, computer software

delivered or accessed electronically, regardless of the location of the server where the software is installed, software delivered by load and leave, or in tangible form. Computer software received in-person by a business purchaser at a retail business location of the seller is not included.

Computer software for personal use is not included.

1. Upon receipt of an exemption certificate claiming multiple points of use, the seller is relieved of all obligation to collect, pay, or remit the applicable tax and the purchaser shall be obligated to collect, pay, or remit the applicable tax on a direct pay basis. Except as provided in 830 CMR 64H.1.3(15)(a) 7, a certificate claiming multiple points of use must be received by the seller no later than the time the transaction is reported for sales or use tax purposes.

2. A purchaser delivering an exemption certificate claiming multiple points of use may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's books and records as they exist at the time the transaction is reported for sales or use tax purposes.

3. A reasonable, but consistent and uniform, method of apportionment includes, but is not limited to, methods based on number of computer terminals or licensed users in each jurisdiction where the software will be used. A reasonable, but consistent and uniform method of apportionment may not be based on the location of the servers where the software is installed.

4. A purchaser delivering an exemption certificate claiming multiple points of use shall report and pay the appropriate tax to each jurisdiction where concurrent use occurs. The tax due will be calculated as if the apportioned amount of the prewritten computer software had been delivered to each jurisdiction to which the sale is apportioned pursuant to 830 CMR 64H.1.3(15)(a)2.

5. A Multiple Points of Use Certificate may not be used for software received in person by a business purchaser at a retail store.

6. A Multiple Points of Use Certificate may not be used for software that is loaded on computer hardware prior to sale. In that situation, the sales tax sourcing rules for computer hardware determine the taxability of the transaction, regardless of whether the price for the prewritten software is separately stated.

7. The exemption certificate claiming multiple points of use will remain in effect for all future sales eligible for apportionment under 830 CMR 64H.1.3(15) by the seller to the purchaser, except as to the subsequent sale's specific apportionment that is governed by 830 CMR 64H.1.3(15)(a)2, until it is revoked in writing.

8. The purchase of software loaded onto a server located in a single state that will be available for access by a purchaser's employees in multiple jurisdictions is concurrently available for use in more than one jurisdiction within the meaning of 830 CMR 64H.1.3(15) if the purchaser knows at the time of its purchase that the software will be concurrently available for use in multiple

jurisdictions.

9. Delivery of a copy of the software is not necessary for the software to be "concurrently available for use in more than one jurisdiction" within the meaning of 830 CMR 64H.1.3(15).

10. The purchase of a license that allows the licensee/customer to make copies of software that will be used in more than one jurisdiction by the customer is concurrently available for use in more than one jurisdiction within the meaning 830 CMR 64H.1.3(15) if the purchaser knows at the time of its purchase that the software will be concurrently available for use in multiple jurisdictions.

11. Examples:

Example 1: Prewritten software is installed on a server located in another state but concurrently available for use by purchaser's employees in Massachusetts as well as other states. The purchaser gives the seller a properly completed MPU form. Part of the sales price of the software will be apportioned to Massachusetts for sales/use tax purposes.

Example 2: Prewritten software is installed on a server located in Massachusetts but concurrently available for use by purchaser's employees in other states as well as Massachusetts. The purchaser gives the seller a properly completed MPU form. Part of the sales price will be apportioned to those other states for sales/use tax purposes.

Example 3: A business in Massachusetts purchases an enterprise license that allows the purchaser to make copies of software (either from a master disk or downloaded copy) and those copies will be concurrently available for use at the purchaser's business locations in various jurisdictions. The purchaser gives the seller a properly completed MPU form. For sales/use tax purposes, part of the sales price will be apportioned to the other states where the purchaser is using copies of the software.

Example 4: A sale of software eligible for MPU treatment includes a separately stated charge for a maintenance contract including upgrades and telephone support. The charges for upgrades and services provided under the maintenance contract are not separately stated. Both the sales price of the software and the taxable sales price of the service contract, determined under 830 CMR 64H.1.3(7)(c)1 are subject to MPU apportionment.

Example 5: Prewritten software concurrently available for use by the purchaser's employees in other states as well as Massachusetts is delivered in a tangible medium to the purchaser's offices in New Hampshire. New Hampshire does not impose a sales tax and the purchaser does not give the seller a properly completed MPU form. Apportioned use tax is due to Massachusetts.

Example 6: Prewritten software concurrently available for use by the purchaser's employees in other states as well as Massachusetts is delivered via a master copy in tangible medium to the purchaser's offices in Connecticut. The vendor collects and remits Connecticut sales tax. Providing that the conditions of 830 CMR 64H.1.3(3)(c) are met, no additional use tax may be due to Massachusetts.

(b) Seller Remittance of Apportioned Tax. Notwithstanding 830 CMR 64H.1.3(15)(a), when the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction, but the purchaser does not provide an exemption certificate claiming multiple points of use, the seller may work with the purchaser to produce the correct apportionment. The purchaser and seller may use any reasonable, but consistent and uniform, method of apportionment that is supported by the seller's and purchaser's business records as they exist at the time the transaction is reported for sales or use tax purposes. If the purchaser certifies to the accuracy of the apportionment and the seller accepts the certification, the seller shall collect and remit the tax to the appropriate jurisdictions as provided in 830 CMR 64H.1.3(15)(a)4. In the absence of bad faith, the seller is relieved of any further obligation to collect tax on any transaction where the seller has collected and remitted tax pursuant to the information certified by the purchaser, provided that the seller retains records of the methodology used to apportion the tax in addition to the purchaser's written certification.

(c) When the seller knows that the prewritten software will be concurrently available for use in more than one jurisdiction and the purchaser does not have a direct pay permit and does not provide the seller with an exemption certificate claiming multiple points of use exemption as required by 830 CMR 64H.1.3(15)(a) or the certification required by 830 CMR 64H.1.3(15)(b), the seller shall collect and remit the tax as provided by 830 CMR 64H.6.7, unless the purchaser is otherwise exempt.

(d) A holder of a direct pay permit shall not be required to deliver an exemption certificate claiming multiple points of use to the seller. A direct pay permit holder shall follow the provisions of 830 CMR 64H.1.3(15)(a)2 in apportioning the tax due on prewritten computer software that will be concurrently available for use in more than one jurisdiction.

(e) Nothing in 830 CMR 64H.1.3(15) shall limit a person's obligation for sales or use tax to any state in which the qualifying purchases are concurrently available for use, nor limit a person's ability under state, federal, or constitutional law, to claim a credit for sales or use taxes legally due and paid to other jurisdictions.