

**COMMONWEALTH OF KENTUCKY  
KENTUCKY BOARD OF TAX APPEALS  
FILE NO. K07-R-18**

**COMPUTER SERVICES INC.  
AND UNISYS CORPORATION**

**APPELLANT**

**V.**

**ORDER NO. K-20189**

**FINANCE AND ADMINISTRATION CABINET  
DEPARTMENT OF REVENUE**

**APPELLEE**

**FINDINGS OF FACT, CONCLUSIONS OF LAW DECISION**

This cause is before the Kentucky Board of Tax Appeals from a decision by the Department of Revenue finding that certain software and the media of its delivery to the banking industry was taxable as "tangible personal property".

The board having reviewed the record, heard from counsel and being sufficiently advised makes the following

**FINDINGS OF FACT**

1. Appellant, Computer Services, Inc., (CSI) provides many kinds of data management services to innumerable banking institutions all over the nation. CSI has data hubs in Paducah, Kentucky and Valparaiso, Indiana which utilize the Unisys Clearpath System to capture information from banking documents, so that, in the event of

disaster or loss, CSI can retrieve that information for the customer. They provide other services of many kinds.

2. From June 2, 2002 through July 2, 2002, CSI paid Unisys Corp. \$3,663,717 for licenses to use a variety of their software packages in connection with the above services which CSI was providing to its client institutions.

3. At the end of 60 months, the software had to be returned to Unisys or destroyed. CSI could make no other disposition of it.

4. Ky. sales tax only applies to transfers of tangible personal property. Prior to 2003 the applicable statute was KRS 139.293. It defined "tangible personal property" as "personal property which may be seen, weighed, measured, felt or touched, or which is in any manner perceptible to the senses . . ."

5. Since the software in the case at bar was delivered upon a tangible medium. The Department of Revenue treated it, therefore as tangible personal property. CSI was buying, in this case, the right to use the software. CSI urges that this software delivery system is only incidentally tangible and that it is the software that is being used, not the medium of delivery.

6. The Board believes that this is a distinction without a difference. The software came loaded on a tangible medium, the only hardware upon which it could be used, also provided by Unisys as part of that which was delivered under the same Master Agreement for Products and Services. In effect, there is no difference between the sale of the medium and the message here and the sale of Window 3.0 in a package at Wal-Mart.

7. Unisys Corporation paid \$219,823.02 in sales tax when CSI made the purchase of the right to use the software and have it delivered. On May 22, 2006, they asked for a refund. The Department of Revenue denied the claim on June 15, 2006, Unisys filed a timely protest. It was denied. Thus this appeal.

8. The sole question for the Board is the actual determination of whether or not that property in effect leased herein is tangible personal property.

### **CONCLUSIONS OF LAW**

1. At the time of the assessment herein, KRS 139.200 imposed sales tax in Kentucky on all retailers for the privilege of making "retail sales" in Kentucky for sale of tangible personal property. A lease of such property was, at that time, taxable.

2. The disks and the license for them in this case are "tangible personal property" as much as an auto or a camera card might be. They fulfill a certain function in the banking industry the same as a lawnmower might in the landscaping industry. They do not constitute the knowledge of how the services are provided. They are, themselves the means of those services.

3. If Wal-Mart has to collect tax for Windows 3.0 then Unisys must collect and pay tax for this transaction, as well. The refund was properly denied.

### **DECISION**

The Board finds the Department of Revenue's Final Ruling is proper and therefore, denies the request for refund. The Final Ruling of the Department of Revenue is upheld.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to

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the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

DATE OF ORDER  
AND MAILING: December 22, 2008

KENTUCKY BOARD OF TAX APPEALS  
FULL BOARD CONCURRING

NANCY MITCHELL  
CHAIR