

ORIGINAL

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

GLOBAL KNOWLEDGE TRAINING LLC, :
: Appellant, :
: Case No. 2009-1543
v. :
: Appeal from BTA
RICHARD A. LEVIN, TAX :
COMMISSIONER OF OHIO, : Case No. 2006-V-471
: Appellee. :

APPENDIX TO BRIEF OF APPELLEE RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO

NICHOLAS M.J. RAY (0068664)
Siegel, Siegel, Johnson & Jennings Co., LPA
3001 Bethel Road, Suite 208
Columbus, Ohio 43220
Telephone: (614) 442-8885
Facsimile: (614) 442-8880

nray@siegeltax.com

ATTORNEY FOR APPELLANT

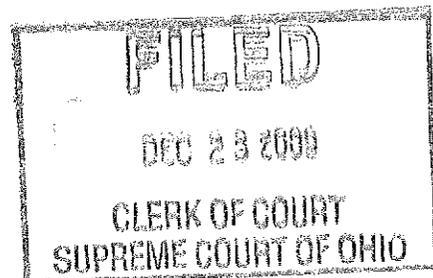
WILLIAM I. SUSSMAN
MICHAEL P. ROBOTTI
Ropes & Gray LLP
1211 Avenue of the Americas
New York, New York 10036-8704
Telephone: (212) 516-9000

OF COUNSEL FOR APPELLANT

RICHARD CORDRAY
Attorney General of Ohio
DAMION M. CLIFFORD (0077777)
Assistant Attorney General
(Counsel of Record)
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226

damion.clifford@ohioattorneygeneral.gov

ATTORNEYS FOR APPELLEE



BOARD OF TAX APPEALS
STATE OF OHIO

AUG 15 1978

Atlas Crankshaft Corporation)
1000 Fifth Avenue)
Columbus, Indiana 47201,)
Appellant,)
vs.)
Edgar L. Lindley,)
Tax Commissioner of Ohio,)
Appellee.)

CASE NO. E-1816
(FRANCHISE TAX)
E N T R Y

APPEARANCES:

For the Appellant - Vorys, Sater, Seymour & Pease
By: Kenneth D. Beck
52 East Gay Street
Columbus, Ohio 43215

For the Appellee - William J. Brown
Attorney General of Ohio
By: J. Elaine Bialczak, Assistant
State Office Tower - 15th Floor
30 East Broad Street
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on October 14, 1976, by the above named appellant, from a final order of the Tax Commissioner dated September 17, 1976, concerning an application for refund of corporation tax paid to the State of Ohio for the year 1972, the body of which final order reads as follows:

"This proceeding, being the application of Atlas Crankshaft Corporation, Columbus, Indiana, a foreign corporation, subject to the Ohio franchise tax, for refund of corporation franchise tax paid for the year 1972, after being duly heard, came on to be considered for final determination.

"The applicant timely filed its 1972 Corporation Franchise Tax Report, pursuant to Sections 5733.02, 5733.021 and 5733.13 of the Revised Code, therein computing the value of its issued and outstanding shares of stock on the net income basis, with a stated franchise tax liability of \$274,063.36 and indicating an overpayment of \$51,936.65, based on estimated payments made. Subsequent thereto, the applicant filed an amended return wherein the applicant recomputed the franchise tax liability on the net income valuation method to be \$234,960.96 indicating therein an overpayment of \$41,029.04. In Schedule B Deductions of the amended return, the applicant reported deductions for: Excess Tax Over Book Depreciation Reserve of \$1,584,113.00 (said Reserve consisting of the difference between depreciation on its assets using the straight line method for book purpose and accelerated depreciation for federal income tax purposes); and Deferred Income Investment Credits of \$80,056.00.

"Upon audit, the assessor disallowed both of the aforementioned deductions claimed by the applicant. The assessor further determined that the applicant's apportionment ratio should be increased from 67.6171% as reported, to 68.0522% - the increase due to an increase of the applicant's sales percentage in the apportionment formula from 2.8512%, as reported, to 4.2371%. On the basis of the aforementioned correction and adjustments by the assessor, the applicant's franchise tax liability was determined to be

\$225,990.16. The applicant filed an application for corporation franchise tax refund in the amount of \$91,039.04. The applicant's refund request was granted, in part, per letter of the income tax division in the amount of \$9.84, the same being the difference between the amount paid by the applicant (\$326,000.00) and that as computed by the assessor (\$32,990.16). The applicant requested a hearing in further consideration of the refund claimed, specifically involving the deduction for Excess Tax Over Book Depreciation. At the duly scheduled hearing, the applicant reiterated its objections concerning the disallowance of the aforementioned deduction; additionally, the applicant maintained that the disallowance of same resulted in double taxation to the applicant, because of the use of differing methods of depreciation for book and federal income tax purposes. Subsequent to the duly scheduled hearing, the applicant submitted additional information, including a memorandum, concerning this contention. Additionally, the applicant maintained that in accordance with the Ohio Supreme Court decision in *Lakenren v. Kosydar*, 44 Ohio St. 2d 189 (December 31, 1975), the applicant should be granted a refund of the difference between the franchise tax payment as computed for the period January 1, 1971 to December 20, 1971, on the net worth basis, and as computed for that period on the net income basis.

"Upon consideration of the information submitted at and subsequent to the refund hearing, and under the authority of Section 5733.11, Revised Code, the Tax Commissioner finds the applicant's contention to be not well taken.

"The applicant specifically cited Section 5733.04 (I)(5), Revised Code, in

support of its contention. The provisions of Section 5733.04 (I)(5), Revised Code, provide that:

- (5) Taxpayers using the installment or completed contract method of accounting, or other acceptable methods of accounting, for federal income tax purposes for the first taxable year on which the tax provided for in Section 5733.06 of the Revised Code is computed on the corporation's net income, shall exclude from net income that amount that originated prior to such first taxable year and that was included as part of surplus at the time of origination as shown by the books of the corporation.

As promulgated by the Tax Commissioner, Special Instruction Number 3, issued June 1, 1970, specifically delineates the application and interpretation of Section 5733.04 (I)(5), Revised Code. Said section explicitly involves adjustments to net income for taxpayers using the installment or completed contracts method of accounting; the phrase "other acceptable methods of accounting," which the applicant contends covers this instant matter, pertains only to variations of the completed contracts method of accounting, of which, the percentage of completion method would be included, for example.

"It is the finding of the Tax Commissioner that the applicant's contention regarding the deduction of the Excess Tax Over Book Depreciation Reserve is not well taken due to the fact that such adjustment or deduction is not provided for in Chapter 5733, Ohio Revised Code; Kroger Co. v. Bowers (1965), 3 Ohio St. 2676.

"Upon consideration of the information and evidence at hand, Section 5733.06, Revised Code, the decision in Lakenegren v. Kosydar (supra), the provisions of Am Sub. H.B. 475 of the 109th General Assembly, effective December 20, 1971, the Tax Commissioner finds that the applicant's contention is not well taken in that the taxable year of the applicant for the 1972 franchise tax report terminated on December 31, 1971, which is subsequent to the effective date, December 20, 1971, of the legislation in question. Also, the tax report in question is that for 1972, the liability for which is determined by the existence of the corporation as of January 1, 1972. As stated in the syllabus in Lakenegren, supra:

'Insofar as it increases the franchise tax obligation of a corporation for an accounting year already closed at the time of enactment, the amendment to R.C. 5733.05, adopted December 20, 1971, is void as a retroactive law in violation of Section 28, Article II of the Ohio Constitution.' (emphasis added)

"Findings no merit in the refund claim here under review, it is the order of the Tax Commissioner that such refund claim be, and the same hereby is, denied. Pursuant to the provisions of Section 5733.12, Revised Code, the Tax Commissioner hereby issues this certificate of final determination which is his final order in regard to the refund claim here under review.

"Upon the expiration of thirty days from the giving of notice of this final determination to the applicant, unless an appeal is filed in conformity with the provisions of Section 5717.02, Revised Code, this matter will be concluded and the files appropriately closed."

From this final order the appellant's notice of appeal was prepared and filed. In pertinent part said notice of appeal provides certain claimed errors and requested relief as follows:

"1. The Tax Commissioner erred in determining that the phrase 'other acceptable methods of accounting' contained in R.C. 5733.04(I)(5) pertains only to variations of the completed contracts methods of accounting.

"2. The Tax Commissioner erred in determining that the excess of the amount of tax over book depreciation is not an appropriate item for deduction and adjustment under R. C. 5733.04(I)(5).

"3. The Tax Commissioner erred in refusing to permit the taxpayer to exclude from net income for the first taxable year on which the tax provided for in R. C. 5733.05 was computed on the taxpayer's net income, such portion of its net income, which as shown by the books of the taxpayer, had originated in prior taxable years and had been included as part of surplus in the computation and payment of the Ohio corporate franchise tax for such earlier years.

"4. The Tax Commissioner erred in failing to find that all franchise taxes for 1972 required to be paid in excess of taxes provided for in R. C. 5733.05 and R. C. 5733.06 prior to their amendment on December 20, 1971, are void as being in violation of Section 28, Article II of the Ohio Constitution, and as such must be refunded."

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by

the Tax Commissioner, the testimony and evidence presented at a record hearing before the Board of Tax Appeals in Columbus, Ohio, on March 8, 1977, and the briefs filed by counsel.

The appellant is an Indiana Corporation licensed to do business in Ohio. It is a major manufacturer of crankshafts, valves, piston pins, cap screws, camshafts and gears at its facilities in Fostoria, Ohio, where it employs over 1,400 persons. There is no major fluctuation in the flow of business activities of appellant and the testimony was clear that there was no major increase or decrease in the appellant's business during the last 11 days of 1971.

The appellant maintains its books and records in accord with generally accepted accounting principles. It computes its depreciation using the straight line method for its general books of account, but depreciates these same assets using an accelerated method of depreciation for federal income tax purposes.

This practice of employing different methods of depreciation have the effect of making corporate net worth for book purposes greater during the earlier composite lives of depreciable assets than the net worth for federal income tax purposes for the same period of time.

In appellant's case, as of December 31, 1970, the net difference in the amount of depreciation computed under the two methods of depreciation was \$1,564,113.00.

This would have made no difference in appellant's situation except that the Legislature of Ohio enacted an additional and alternate method of computing franchise tax payable to the State of Ohio.

The appellant does not engage in long-term contracts which require the use of the completed contract or percentage of completion methods of accounting for additions to income.

It is appellant's contention that a corporate taxpayer using an acceptable method of accounting for federal income tax purposes may, for the first taxable year for which the Ohio franchise tax is computed on the corporation's net income, exclude from such net income that amount of net income that originated prior to such first year if the net income so excluded was included as part of surplus at the time of its origination as shown by the books of the corporation.

And secondly that insofar as it increases the franchise tax obligation of a corporation for that portion of an accounting year already closed at the time of enactment, the amendment to

Revised Code Section 5733.05 adopted December 20, 1971, is void as a retroactive law in violation of Section 28, Article II of the Ohio Constitution.

The appellant paid \$326,000 on an estimated basis toward its 1972 Corporate Franchise Tax liability and subsequent thereto filed an amended return claiming an overpayment of \$91,039.14. Still later appellant filed a refund claim for the same amount, namely \$91,039.14. The refund claim and the amended return claimed as deductions two amounts, the \$1,564,113 labeled on the amended return as "1-1-71 excess tax over book depreciation-reserve" and \$80,056 designated as "1-1-71 deferred income-investment credit."

Subsequent to the date on which appellant filed its amended return, the Tax Commissioner's agent determined that the appellant's apportionment ratios reflected on its franchise tax reports for 1972 should be increased from 67.6171% to 68.0522%. The appellant now agrees with said change in the apportionment ratios and concedes that the deduction of \$80,056 referred to supra is not proper.

It is now therefore the appellant's contention that it should be entitled to the depreciation difference as a deduction of \$1,564,113 which if applied as a deduction to appellant's

franchise tax report for the year 1972, when coupled with the revised apportionment ratio of 68.0522%, would result in overpayment of 1972 franchise tax in the amount of \$85,163 which is the amount now claimed by appellant on this appeal.

Revised Code Section 5733.04(I)(5) provides:

"(5) Taxpayers using the installment or completed contract method of accounting, or other acceptable methods of accounting, for federal income tax purposes for the first taxable year on which the tax provided for in section 5733.06 of the Revised Code is computed on the corporation's net income, shall exclude from net income that amount that originated prior to such first taxable year and that was included as part of surplus at the time of origination, as shown by the books of the corporation." (Underscoring by BTA)

To clarify Revised Code Section 5733.04(I)(5) the Tax Commissioner issued his Special Instruction 3 dated June 1, 1972, which reads as follows:

"Completed Contract Method or Percentage of Completion Contract Method:

"This section of the Revised Code is limited to buildings, installation and construction contracts.

"That amount of income to the extent that the contract was completed prior to the first day of the taxable year which ends in 1971 shall be excluded from income in the taxable

year in which that contract is fully completed. No other income from that contract may be excluded.

"Installment Method:

"All income from installment sales shall be excluded from net income for sales made prior to the first day of the first taxable year, upon which year the franchise tax is computed on the net income alternative basis, to the extent such deferred income was included in surplus and taxed on the net worth alternative basis in prior franchise tax reports.

"The computation is to be made in accordance with Section 453 of the Internal Revenue Code of 1954 as amended."

When reading all of Revised Code Section 5733.04(I)(5), it is obvious that it provides only for an exclusion from net income of items of income which originated in some earlier year.

Items of income originate in one year on financial books and flow through to tax books in later years only in situations where taxpayers use the percentage of completion method for accounting for recognition of income for financial books and some other method of accounting for recognition of income for tax books. Revised Code Section 5733.04(I)(5) nowhere provides that differences between methods of depreciation can be deducted from net income. Because it does not provide for such a deduction, one cannot be taken.

Not only must the Board consider the entire statute, it must also strictly construe this statute against the taxpayer. Exclusions from income, like deductions and exemptions, are a matter of legislative grace. A taxpayer must not be allowed the privilege of a deduction or exemption unless the statute specifically allows it.

Deductions and exemptions are privileges bestowed by the legislature. The Ohio Supreme Court has frequently stated that exemptions must be strictly construed and taxpayers must "affirmatively establish" that they are entitled to the privilege. National Tube Co. v. Glander (1952), 157 Ohio St. 407; Celina Mutual Ins. Co. v. Bowers (1965), 5 Ohio St. 2d 12; and the cases cited therein. Exemption, though constitutional, grants some taxpayers economic advantages. Granting an unwarranted exemption or exception places a greater tax burden on all the citizens of the State.

Deductions afford taxpayers the same kind of economic advantage. Like exemptions, deductions are a tax "break" and must not be freely distributed.

The United States Supreme Court has historically taken a strict view of the applicability of deductions. In New Colonial Ice Co. v. Helvering (1934), 292 U.S. 435, at 440, the Court stated:

"* * * Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

Similar expressions of this point of view can be found in White v. United States (1938), 305 U.S. 281, and Deputy v. Dupont (1940), 308 U.S. 488.

The Ohio Supreme Court has conservatively approached deductions when dealing with the franchise tax. In Kroger Co. v. Bowers (1965), 3 Ohio St. 2d 75, Kroger sought to deduct deferred income taxes from its surplus in computing the value of its reserves pursuant to Revised Code Section 5733.05(A). The Court held that, because the statute allowed the deduction of taxes currently payable, only those taxes could be deducted. Deferred income taxes could not be deducted because the statute did not provide for their deduction. The Court refused to broaden the privilege bestowed by the legislature, essentially because the taxpayer could not point to a specific statute allowing the deduction it wished to take.

The correct approach to deductions is the same conservative approach to exemptions. A taxpayer should unequivocally prove that it is entitled to the privilege by pointing to language in a statute that specifically provides for the claimed privilege.

Revised Code Section 5733.04(I)(5) does not specifically provide for the deduction from net income of the difference between methods of depreciation. If the legislature had wished to create such a deduction, it most certainly would have done so in specific terms.

The taxpayer also argues that if this Board does not accept its interpretation of Revised Code Section 5733.04(I)(5), double taxation will result because the same amount of income will be taxed twice. The taxpayer is mistaken concerning the nature of the tax in issue. The franchise tax is not a tax on income.

Revised Code Section 5733.06 provides, in pertinent part:

"The tax charged to corporations under this chapter for the privilege of engaging in business in this state, which is an excise tax levied on the value of the issued and outstanding shares of stock, shall in no manner be construed as prohibiting or otherwise limiting the powers of municipal corporations in this state to impose an income tax on the income of such corporation."

(Emphasis added)

Revised Code Section 5733.06 sets the amount of tax as:

"(A) Four per cent upon the first twenty-five thousand dollars of the value of the taxpayer's issued and outstanding shares of stock as determined under division (E) of section 5733.05 of the Revised Code; [net income]

"(B) Eight per cent upon the value so determined in excess of twenty-five thousand dollars; or

"(C) Five mills times that portion of the value of the issued and outstanding shares of stock as determined under division (A) of section 5733.05 of the Revised Code."

(Emphasis and parenthetical matter added)

The franchise tax, then, is not a tax on income, but a tax on the value of the issued and outstanding shares of stock of a corporation. The tax is exacted for the privilege of doing business in this State. According to Revised Code Section 5733.05, the value of the outstanding shares of stock is determined by either the net worth of the company or the net income. The corporation's net income is nothing more than a measure of the value of the issued and outstanding shares of stock of the corporation. Net income is not the object of taxation, but only a scale for the value of the object. Double taxation does not occur because income is not being taxed.

The Board of Tax Appeals has considered, as it did consider in Beckwith and Associates, Inc., v. Kosydar, BTA Case No.

However, recognizing the particular kinds of problems which would emerge from this entirely new legislation, the General Assembly provided the Tax Commissioner with additional rule-making authority in Revised Code Section 5733.07. This section which is specifically directed to the administration of the corporate franchise tax provides in pertinent part:

"The tax commissioner shall enforce and administer this chapter. In addition to any other powers conferred upon him by law, the commissioner may:

"(A) * * * * *

"(B) Promulgate such rules and regulations as he finds necessary to carry out this chapter;

" * * * * * (Emphasis added)

The Board of Tax Appeals upheld the Tax Commissioner in its opinion in Beckwith and described the rule-making authority in Revised Code Section 5733.07 as follows:

" * * * R. C. 5733.07 is a particularly broad grant as it commands the Tax Commissioner 'to carry out this [corporate franchise] chapter' rather than to merely make rules. Of the Department as provided in R. C. 5703.05. The use of such active language indicates that the legislature has directed the Tax Commissioner to take an active role in implementing the statutes. Of special note is the fact that this grant of rule-making power was added at

C-228, decided February 25, 1975, aff'd March 23, 1977, at 49 Ohio St. 2d 277, the Commissioner's broad grant of rule-making power with respect to the franchise tax based on net income. The Tax Commissioner, of course, has general authority to promulgate rules to facilitate the enforcement of tax statutes. However, the introduction of the net income method of calculating franchise tax posed substantial administrative difficulties. The General Assembly, anticipating these problems, could have relied on the Tax Commissioner and his general rule-making power to provide the essential administrative interpretations necessary for the implementation of the "new" tax system. That general rule-making power resides in Revised Code Section 5703.05 which provides in pertinent part:

"All powers, duties, and functions of the department of taxation are vested in and shall be performed by the tax commissioner, which powers, duties, and functions shall include, but shall not be limited to the following:

" * * * * *

"(M) Adopting and promulgating, in the manner provided by section 5703.14 of the Revised Code, all rules of the department;

" * * * * * (Eff. 10/11/76)

the same time the net income method of computing franchise tax became effective, December 20, 1971.

"This grant of rule-making power was directly related to the institution of the new method of computation. The General Assembly, realizing that the net income method could not emerge from legislative chambers without creating some uncertainties and ambiguities, directed the Tax Commissioner to cushion the impact of the new tax by providing rules which would ease the corporation sector into the new system without subjecting taxpayers or the State to continuous litigation." (BFA Entry, at 11, 12; emphasis by BFA)

This description of the Tax Commissioner's rule-making authority illuminates two critical factors: first, that the Tax Commissioner is dealing with entirely new and untested legislation; second, that the legislature has directed the Tax Commissioner to make rules which would "carry out" the intentions of the legislature as expressed in each and every word of Chapter 5733, Revised Code. In Beckwith, this Board and the Supreme Court recognized the broad nature of the Commissioner's authority with respect to Chapter 5733. And, as with the Commissioner's rule in Beckwith, the Commissioner through his Special Instruction in this case, is merely "carrying out" the intention of the legislature to apply the "new" net income method of computing franchise tax to all taxpayers and providing tax "breaks" only as specifically written

in the statute. In so doing, the Tax Commissioner has acted reasonably and lawfully.

Revised Code Section 5733.04 (I)(5) does not provide a deduction for the difference between accelerated and straight-line depreciation. This section applies only when a taxpayer's method of accounting for recognition of income dictates the origination of income in the income account in some year prior to the first year on which the franchise tax is computed using the net income method. The statute does not provide for the deduction of depreciation, but only for the exclusion from net income of this previously originated income. The Tax Commissioner's Special Instruction No. 3, issued pursuant to the broad grant of authority contained in Revised Code Section 5733.07, is only an expression of this logical reading of the entire Revised Code Section 5733.04 (I)(5). Special Instruction No. 3 is also consistent with the Court's and the Board's long-standing practice of strictly interpreting exception and exemption statutes. Deductions, like exceptions and exemptions, provide taxpayers with a tax "break," and should not be liberally construed.

It is therefore the finding of the Board of Tax Appeals that Special Instruction No. 3 is proper and within the powers of the Tax Commissioner to promulgate.

As the Court stated at 44 Ohio St. 2d 202-203:

The second issue presented by this case is whether the amendment to Revised Code Section 5733.05, adopted December 20, 1971, is retroactive in that income earned by a corporation before the enactment of the statute is included in computing the franchise tax based on the net income method. The taxpayer is a calendar year taxpayer, and, therefore, its accounting year ends on December 31, of each year. Because the taxpayer's accounting year was not closed at the time of the enactment of the amendment to Revised Code Section 5733.05, the statute is not retroactive with respect to the taxpayer.

The Ohio Supreme Court clearly stated in Lakengren v. Kosydar (1975), 44 Ohio St. 2d 199, that the net income method for determining franchise tax is retroactive only as it applies to accounting years already closed before the statute was enacted.

The syllabus of the case states:

"Insofar as it increases the franchise tax obligation of a corporation for an accounting year already closed at the time of enactment, the amendment to R. C. 5733.05, adopted December 20, 1971, is void as a retroactive law in violation of Section 28, Article II of the Ohio Constitution." (Emphasis added)

The rationale underlying the Court's decision was that, once an accounting year is closed, no further obligations can be imposed on the income for that year.

"In this case, the appellant used a permissible period of accounting (R. C. 5733.03), and at the conclusion of that period was subject to a tax obligation under existing law of \$3,557.55, payable a year later if the appellant wished to continue doing business in Ohio. Under the accepted systems of accounting approved by the Revised Code, appellant was entitled to distribute or invest the profit it had earned, and need not retain some part of those profits in anticipation of a subsequent tax based upon the income earned in that year, income which might or might not be related to the actual business activity of the corporation in the following year. Appellant was entitled to consider that the money was finally its own. When the accounting year closed for the taxpayer, it closed for the taxing authority as well. As of February 28, 1971, the tax obligation of the appellant was calculable under existing statutes. A subsequent increase of that obligation whether by an increase in the rate or by the enactment of an alternative method of calculation based upon the income earned in the preceding year is retroactive in effect and is prohibited by the Ohio Constitution." (Emphasis added)

The net income method was retroactive with respect to Lakengren, Inc., because its accounting year was closed before the statute was enacted. As far as the Court is concerned, a closed accounting year cannot be reopened by the legislature.

The taxpayer in the instant case stands in a different place. This taxpayer is a calendar year taxpayer. Its accounting year had not ended by December 20, 1971, the date the net income method was enacted. Rather, this taxpayer's accounting year ended December 31, 1971, eleven days after the enactment of the statute. Because the accounting year was not closed, the taxpayer could not consider the income yet its own, and the legislature could impose a higher obligation on that income. Obligations and income for the taxpayer's entire accounting year were not finally determined on December 20, 1971. The application of the net income method to this taxpayer is not a retroactive application of a law.

The Supreme Court left no doubt concerning the application of the net income method to taxpayers whose accounting years ended after December 20, 1971. The Court stated at 44 Ohio St. 2d 204:

" * * This in no way prevents the General Assembly from levying a tax payable in the future, based upon the income of periods ending after the enactment of the levy. * * *"
(Emphasis added)

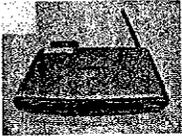
Clearly, the amendment to Revised Code Section 5733.05, enacted December 20, 1971, is not retroactive with respect to calendar year taxpayers.

Giving consideration to the facts, the statutes, the case law and the findings of the Board of Tax Appeals, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.


Chairman

lah



How to Find a Computer Router

April 28, 2009 by Timothy Sexton

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So, you want to know how to find a computer router, eh? First things first: are you a newbie to the whole router networking arena or have you gone ahead and bought that one at the Wal-Mart and now you're looking to locate a computer router that has some real meat and muscle to it? No, wait, that's not exactly first things first when it comes to how to find a computer router.

First things parts, part II: A router is a piece of computer equipment that makes connecting multiple computers to a network possible. Routers come in both wired and wireless models, but most places that sell routers will offer each kind for sale. Finding a computer router is probably easier than determining what kind of router you need, so do your homework before actually buying one.

When embarking upon your odyssey to track down the perfect computer router the very first place you may want to begin is at your computer. Conduct an internet search using your favorite search engine...and then use [Yahoo](#) if that fails. (I kid Yahoo, but, you know, c'mon, they're Yahoo!)

You will find a much broader access to a line of top notch routers by perusing online computer equipment stores than you will conveniently find even in a big city like New York or Los Angeles or Wasilla. The downside to finding a router on the internet is that you *may* not get as good a warranty and there may be no customer service rep capable of answering your questions. For this reason, try to find a reputable router dealer with a FAQ and, even better, an online customer service rep who seems knowledgeable.

While on the internet in your search for the value router, hop on over to eBay for computer router deals that will blow your mind. The upside to buying a router on eBay is that you can often get a deal that will save you more than half the money you would spend at a brick and mortar or online store. The downside is that you have no way of knowing whether the router will actually work, so always make sure the seller has a no questions asked return policy. And pay attention to the seller's rating and how much they have sold. If an eBay seller has a rating over 95% and has sold over 500 items, you can usually trust him.

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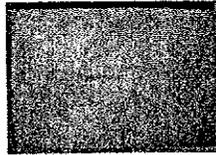


Timothy Sexton was Associated Content's first Content Producer of the Year. He is a member of the Society of Professional Journalists, has published over 6,000 articles and two novels. - [Full profile](#)



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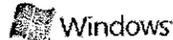
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Windows Desktop Products History

Published: June 30, 2002 | Updated: March 7, 2006

Many longtime PC users trace the Microsoft Windows® operating system to the 1990 release of Windows 3.0, the first widely popular version of Windows and the first version of Windows many PC users ever tried. However, Microsoft initially announced the Windows product seven years earlier and released the first version in 1983.

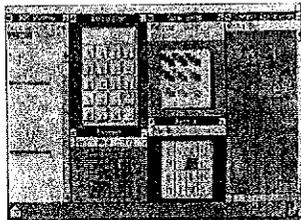


The Windows 1.0 product box featured the operating system's new, tiled windows and graphical user interface (GUI).

1985: Windows 1.0

The first version of Windows provided a new software environment for developing and running applications that use bitmap displays and mouse pointing devices. Before Windows, PC users relied on the MS-DOS® method of typing commands at the C prompt (C:\). With Windows, users moved a mouse to point and click their way through tasks, such as starting applications.

In addition, Windows users could switch among several concurrently running applications. The product included a set of desktop applications, including the MS-DOS file management program, a calendar, card file, notepad, calculator, clock, and telecommunications programs, which helped users manage day-to-day activities.



This early Interface Manager product preceded the Windows 1.0 GUI.

[↑ Top of page](#)

1987: Windows 2.0

Windows 2.0 took advantage of the improved processing speed of the Intel 286 processor, expanded memory, and inter-application communication capabilities made possible through Dynamic Data Exchange (DDE). With improved graphics support, users could now overlap windows, control screen layout, and use keyboard combinations to move rapidly through Windows operations. Many developers wrote their first Windows-based applications for this release.

The follow-up release, Windows 2.03, took advantage of the protected mode and extended memory capabilities of the Intel 386 processor. Subsequent Windows releases continued to improve the speed, reliability, and usability of the PC as well as interface design and capabilities.

[↑ Top of page](#)

1990: Windows 3.0

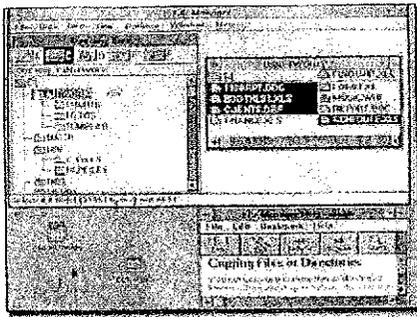
The third major release of the Windows platform from Microsoft offered improved performance, advanced graphics with 16 colors, and full support of the more powerful Intel 386 processor. A new wave of 386 PCs helped drive the popularity of Windows 3.0, which offered a wide range of useful features and capabilities, including:

- Program Manager, File Manager, and Print Manager.
- A completely rewritten application development environment.
- An improved set of Windows icons.

The popularity of Windows 3.0 grew with the release of a new Windows software development kit (SDK), which helped software developers focus more on writing applications and less on writing device drivers. Widespread acceptance among third-party hardware and software developers helped fuel the success of Windows 3.0.

In This Article

- [Windows Overview & History](#)
- [Windows Desktop Timeline](#)
- [Windows Desktop Products History](#)
- [Windows Technologies History](#)
- [Internet Explorer History](#)
- [Windows Server Timeline](#)
- [Windows Server Products History](#)
- [Other Windows Products](#)



The new File Manager in Windows 3.0.

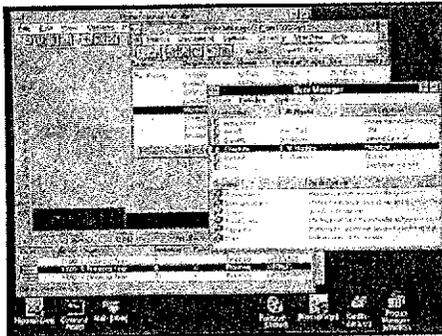
[↑ Top of page](#)

1993: Windows NT 3.1

When Microsoft Windows NT® was released to manufacturing on July 27, 1993, Microsoft met an important milestone: the completion of a project begun in the late 1980s to build an advanced new operating system from scratch. "Windows NT represents nothing less than a fundamental change in the way that companies can address their business computing requirements," Microsoft Chairman Bill Gates said at its release.

That change is represented in the product's name: "NT" stands for new technology. To maintain consistency with Windows 3.1, a well-established home and business operating system at the time, the new Windows NT operating system began with version 3.1. Unlike Windows 3.1, however, Windows NT 3.1 was a 32-bit operating system.

Windows NT was the first Windows operating system to combine support for high-end, client/server business applications with the industry's leading personal productivity applications. It was initially available in both a desktop (workstation) version and a server version called Windows NT Advanced Server. The desktop version was well received by developers because of its security, stability, and Microsoft Win32® application programming interface (API)—a combination that made it easier to support powerful programs. The result was a strategic business platform that could also function as a technical workstation to run high-end engineering and scientific applications.



Windows NT 3.1 contained overlapping windows and other features similar to Windows 3.1.

In addition, the operating system broke new ground in security, operating system power, performance, desktop scalability, and reliability. New features included a preemptive multitasking scheduler for Windows-based applications, integrated networking, domain server security, OS/2 and POSIX subsystems, support for multiple processor architectures, and the NTFS file system.

[↑ Top of page](#)

1993: Windows for Workgroups 3.11

A superset of Windows 3.1, Windows for Workgroups 3.11 added peer-to-peer workgroup and domain networking support. For the first time, Windows-based PCs were network-aware and became an integral part of the emerging client/server computing evolution.

Windows for Workgroups was used in local area networks (LANs) and on standalone PCs and laptop computers. It added features of special interest to corporate users, such as centralized configuration and security, significantly improved support for Novell NetWare networks, and remote access service (RAS).

[↑ Top of page](#)

1994: Windows NT Workstation 3.5

The Windows NT Workstation 3.5 release provided the highest degree of protection yet for critical business applications and data. With support for the OpenGL graphics standard, this operating system helped power high-end applications for software development, engineering, financial analysis, scientific, and business-critical tasks.

The product also offered 32-bit performance improvements and better application support, including support for NetWare file and print servers. Other improved productivity features included the capability to use friendlier, long file names of up to 255 characters.

[↑ Top of page](#)

1995: Windows 95

Windows 95 was the successor to the three existing general-purpose desktop operating systems from Microsoft—Windows 3.1, Windows for Workgroups, and MS-DOS. Windows 95 integrated a 32-bit TCP/IP (Transmission Control Protocol/Internet Protocol) stack for built-in Internet support, dial-up networking, and new Plug and Play capabilities that made it easy for users to install hardware and software.

The 32-bit operating system also offered enhanced multimedia capabilities, more powerful features for mobile computing, and integrated networking.

[↑ Top of page](#)

1996: Windows NT Workstation 4.0

This upgrade to the Microsoft business desktop operating system brought increased ease of use and simplified management, higher network throughput, and tools for developing and managing intranets. Windows NT Workstation 4.0 included the popular Windows 95 user interface yet provided improved networking support for easier and more secure access to the Internet and corporate intranets.

In October 1998, Microsoft announced that Windows NT would no longer carry the initials NT and that the next major version of the business operating system would be called Windows 2000.

[↑ Top of page](#)

1998: Windows 98

Windows 98 was the upgrade from Windows 95. Described as an operating system that "Works Better, Plays Better," Windows 98 was the first version of Windows designed specifically for consumers.

With Windows 98, users could find information more easily on their PCs as well as the Internet. Other ease-of-use improvements included the ability to open and close applications more quickly, support for reading DVD discs, and support for universal serial bus (USB) devices.

[↑ Top of page](#)

1999: Windows 98 Second Edition

Windows 98 SE, as it was often abbreviated, was an incremental update to Windows 98. It offered consumers a variety of new and enhanced hardware compatibility and Internet-related features.

Windows 98 SE helped improve users' online experience with the Internet Explorer 5.0 browser technology and Microsoft Windows NetMeeting® 3.0 conferencing software. It also included Microsoft DirectX® API 6.1, which provided improved support for Windows multimedia, and offered home networking capabilities through Internet connection sharing (ICS). Windows 98 SE was also the first consumer operating system from Microsoft capable of using device drivers that also worked with the Windows NT business operating system.

[↑ Top of page](#)

2000: Windows Millennium Edition (Windows Me)

Designed for home computer users, Windows Me offered consumers numerous music, video, and home networking enhancements and reliability improvements.

For example, to help consumers troubleshoot their systems, the System Restore feature let users roll back their PC software configuration to a date or time before a problem occurred. Windows Movie Maker provided users with the tools to digitally edit, save, and share home videos. And with Microsoft Windows Media® Player 7 technologies, users could find, organize, and play digital media easily.

Windows Me was the last Microsoft operating system to be based on the Windows 95 code base. Microsoft announced that all future operating system products would be based on the Windows NT and Windows 2000 kernel.

[↑ Top of page](#)

2000: Windows 2000 Professional



More than just the upgrade to Windows NT Workstation 4.0, Windows 2000 Professional was also designed to replace Windows 95, Windows 98, and Windows NT Workstation 4.0 on all business desktops and laptops. Built on top of the proven Windows NT Workstation 4.0 code base, Windows 2000 added major improvements in reliability, ease of use, Internet compatibility, and support for mobile computing.

Among other improvements, Windows 2000 Professional simplified hardware installation by adding support for a wide variety of new Plug and Play hardware, including advanced networking and wireless products, USB devices, IEEE 1394 devices, and infrared devices.

[↑ Top of page](#)

2001: Windows XP

With the release of Windows XP in October 2001, Microsoft merged its two Windows operating system lines for consumers and businesses, uniting them around the Windows 2000 code base.

The "XP" in Windows XP stands for "experience," symbolizing the innovative experiences that Windows can offer to personal computer users. With Windows XP, home users can work with and enjoy music, movies, messaging, and photos with their computer, while business users can work smarter and faster, thanks to new technical-support technology, a fresh user interface, and many other improvements that make it easier to use for a wide range of tasks.

For more information about the experiences made simpler by Windows XP, see the overview and how-to articles on the [Amazing Windows Experience](#) site. For more product information, see the [Windows XP Web site](#). For more information about new technologies designed for Windows XP, see the [Windows XP Technologies History](#) page.

2001: Windows XP Professional

Windows XP Professional brings the solid foundation of Windows 2000 to the PC desktop, enhancing reliability, security, and performance. With a fresh visual design, Windows XP Professional includes features for business and advanced home computing, including remote desktop support, an encrypting file system, and system restore and advanced networking features. Key enhancements for mobile users include wireless 802.1x networking support, Windows Messenger, and Remote Assistance.

For more information, see the [Windows XP Professional Web site](#).

2001: Windows XP Home Edition

Windows XP Home Edition offers a clean, simplified visual design that makes frequently used features more accessible. Designed for home users, the product offers such enhancements as the Network Setup Wizard, Windows Media Player, Windows Movie Maker, and enhanced digital photo capabilities.

For more information, see the [Windows XP Home Edition Web site](#).

2001: Windows XP 64-bit Edition

Windows XP 64-bit Edition satisfies the needs of power users with workstations that use the Intel Itanium 64-bit processor. The first 64-bit client operating system from Microsoft, Windows XP 64-bit Edition is designed for specialized, technical workstation users who require large amounts of memory and floating point performance in areas such as movie special effects, 3D animation, engineering, and scientific applications.

For more information, see the [Windows XP 64-bit Edition Web site](#).

2002: Windows XP Media Center Edition

For home computing and entertainment, Microsoft released the Windows XP Media Center Edition operating system in October 2002 for specialized media center PCs.



With all the benefits of Windows XP Professional, Media Center Edition adds fun digital media and entertainment options, enabling home users to browse the Internet, watch live television, communicate with friends and family, enjoy digital music and video collections, watch DVDs, and work from home.

For more information, see the [Windows XP Media Center Edition Web site](#).

2002: Windows XP Tablet PC Edition

The long-held industry vision of mainstream pen-based computing became a reality when Microsoft unveiled the Windows XP Tablet PC Edition in November, 2002. The logical evolution of notebook computers, Tablet PCs include a digital pen for handwriting recognition capabilities, yet can be used with a keyboard or mouse, too.

In addition, users can run their existing Windows XP applications. The result is a computer that is more versatile and mobile than traditional notebook PCs.

For more information, see the [Windows XP Tablet PC Edition Web site](#).

[Top of page](#)

3 of 8

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1 of 1 DOCUMENT

Mentor Technologies Limited Partnership, General Partner Mentor Technologies, Inc.,
Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. 94-A-1058 (SALES & USE TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1995 Ohio Tax LEXIS 1035

August 25, 1995

[*1]

APPEARANCES:

For the Appellant - Ronald W. Gabriel, James McArdle Mattimoe, Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, By: Steven L. Zisser, Assistant Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215

OPINION:

DECISION AND ORDER

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on September 29, 1994, by the above-named appellant from a journal entry of the Tax Commissioner. Therein, the Tax Commissioner adjusted the sales and use tax liability and associated penalties assessed against appellant based upon objections raised in appellant's petition for reassessment.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript certified to the Board by the Tax Commissioner. In lieu of appearing at a hearing before the Board, the parties hereto filed "Stipulations of Fact" (hereinafter "stipulations"), followed by briefs, which shall also be considered as part of the record.

Appellant Mentor Technologies Limited Partnership, General Partner Mentor [*2] Technologies, Inc. (hereinafter "Mentor") provides computer training courses to individuals and businesses in Ohio. As set forth in the stipulations, "Appellant hereby waives and concedes all issues raised in its notice of appeal except whether the transactions listed on Exhibit A are subject to the Ohio sales tax." Specifically, Exhibit A contains a list of appellant's clients to which it provided "Disk Operating System" (hereinafter "DOS") training classes.

Appellant was assessed by the Tax Commissioner on all of the DOS training classes that it offered during the audit period, specifically July 1, 1988 - December 31, 1991, pursuant to the provisions of R.C. 5739.01 (B)(3)(e), 5739.01 (Y)(1), and further, Ohio Adm. Code 5703-9-46 (A)(6). R.C. 5739.01 (B)(3)(e) provides the following:

"(B) 'Sale' and 'selling' include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

" * * *

"(3) All transactions by which:

"(e) Automatic data processing and computer services are or are to be provided for use in business when the true object of the transaction [*3] is the receipt by the consumer of automatic data processing

or computer services rather than the receipt of personal or professional services to which automatic data processing or computer services are incidental or supplemental. * * *

R.C. 5739.01 (Y)(1) defines automatic data processing and computer services in the following manner:

"(Y)(1) 'Automatic data processing and computer services' means: processing of other's data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment; * * * and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems. 'Automatic data processing and computer services' shall not include personal or professional services."

Finally, Ohio Adm. Code 5703-9-46 (A)(6) provides that:

"'Training' means instructing computer programmers and operators in the use of computer equipment and its system software. It does not include instruction in the use of application [*4] software or other result-oriented procedures."

Based upon the foregoing provisions, appellant contends that "To be taxable, training must meet two criteria. First it must be provided to computer programmers and operators. Second, it must be provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems. * * * Appellant's training meets neither of the above two criteria, and therefore does not fall within the definition of a taxable 'computer service.'" Specifically, appellant argues that it was not training computer programmers or operators, but simply individuals who use computers in their daily work. Next, Mentor contends that it did not provide its training in conjunction with or to support the sale, lease, or operation of taxable computer equipment or systems, as the training it provided was independent of any other transaction and occurred "in conjunction with nothing." (Appellant's Brief, p. 3) (emphasis in original)

The appellee Tax Commissioner agrees that the training must meet both of the above-named criteria, and, finds that it clearly does. First, he argues that Mentor provided training to "computer programmers [*5] and operators" because he defines operators as anyone who "operated computers in the performance of their duties for their employers, who were the customers of Appellant." (Appellee's Brief, p. 3) He then cites to both The Oxford Encyclopedic English Dictionary and Webster's New World Dictionary, Second College Edition for the plain English or common usage definitions of "operator", that is, "a person operating a machine, etc." or "a person who works some machine ***." The Tax Commissioner concluded that "The individuals who received training from Appellant operated computers in the course of their employment, and are therefore operators within the meaning of the statute." (Appellee's Brief, p. 5)

Next, appellee argues that "The trainees received the DOS training in conjunction with and to support the operation of computers. * * * There can be no question that this training was provided 'in association' with the operation of computers: the individuals trained were the persons who operated the computers, and the training better enabled them to do so. * * * The instant training clearly supports the operation of a computer, because it better enables the operator to operate the [*6] computer." (Appellee's Brief, p. 6)

Clearly, the parties' vastly different interpretations set forth in their respective arguments demonstrate the ambiguous nature of the statutory and code sections under consideration. When attempting to glean what the legislature intended when enacting such sections, we recall that "As a general rule of statutory construction, when the language of a taxing statute is ambiguous, then such ambiguity must be interpreted and should be resolved in favor of the taxpayer." *B.F. Goodrich Co. v. Peck* (1954), 161 Ohio St. 202, paragraph three of the syllabus; see, also, *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St. 2d 208. Moreover, we look to R.C. 1.42 which provides, in pertinent part, that:

"Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

Herein, we first find that the terms "computer programmer or operator" have acquired a technical meaning, and, as such, the definition of "computer operator", as utilized by the Tax [*7] Commissioner, is far too general and overreaching, when applied to the sections under consideration. In his own brief, the Tax Commissioner cited, at length, to a definition of "computer operator" set forth in The Dictionary of Occupational Titles wherein he argues that "the definition of operator includes such pedestrian and non-technical activities as loading paper into a printer and data entry by keyboard," and, as such, an operator is not a position involving great technical expertise or knowledge. (Appellee's Brief, p. 4) This Board does not agree.

Initially, when we consider the context in which the phrase "computer operator" is used, this Board notes that it is stated in conjunction with the phrase, "computer programmer." Undeniably, a computer programmer is an individual with some level of expertise in the coding of programs used to run a computer. Clearly said phrase connotes a very technical position, both inside and outside of the computer industry. Therefore, by coupling that phrase with "computer operator", this Board considers that the phrase "computer operator" attains the same technical connotation, indicating a specialized position within the computer science [*8] industry. In addition, this Board does not agree with appellee when he argues that the definition set forth in The Dictionary of Occupational Titles is "pedestrian and non-technical." On the contrary, said definition indicates a level of specificity and technicality in job duties, above and beyond what an individual who generally uses a computer in his or her everyday job duties would require. Clearly, the individual who would meet the standards set forth in said definition would have to have a higher level of training and understanding of the computer; a computer operator, by the terms of said definition, would have to understand the operations of the computer and be able to not only utilize the computer to complete his or her job effectively, but also be aware of methods by which problems with the equipment can be corrected.

Accordingly, this Board finds that based upon the foregoing interpretation by the Board as well as the stipulations submitted by the parties which indicate that "The individuals who received training from Appellant were not computer programmers; however, they operated and used computers in the course of their employment with Appellant's customers listed [*9] on Exhibit A," this Board finds that the training provided by the appellant to its customers was not given to "computer programmers and operators," as was intended by the statutes and code under consideration. Having determined that appellant's training does not meet the first criteria for taxability, as set forth earlier, we need not address the remaining criteria.

Therefore, for the foregoing reasons, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner, must be and hereby is reversed with regard to the taxability of the transactions listed on Exhibit A in the Notice of Appeal. All other specifications of error have been waived, as noted herein.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesSales TaxIm-
 position of TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax



Ohio Department of Taxation Information Release

PP 2003-01 - New Valuation Schedule for Stand-Alone Computers - February 14, 2003

The purpose of this information release is to explain the new personal property tax valuation schedule for stand-alone computers. The new true value schedule can be used for stand-alone computers beginning with the 2003 tax year. The new true value schedule cannot be used for tax years prior to 2003. Ohio Revised Code sections 5711.18 and 5727.11, along with Administrative Rules 5703-3-10 and 5703-3-11, provide the authority for the Tax Commissioner to issue modified true value schedules that only apply on a prospective basis for all personal property, including public utilities.

Stand-alone computers include computers, as well as related hardware and peripheral equipment, used for general business purposes such as data processing, payroll, tracking sales data, maintaining accounting information and tracking orders (hereinafter referred to as qualifying computer equipment). Qualifying computer equipment excludes computers and related equipment used as part of the manufacturing process or point of sale equipment, or computers and related equipment used directly in the rendition of a public utility service. Computers and related equipment used in these processes will continue to be valued using the appropriate valuation schedule.

The new schedule for qualifying computer equipment, including those previously purchased, is as follows.

AGE OF COMPUTER (IN YEARS)	TRUE VALUE PERCENTAGE OF ORIGINAL COST
1	75.0%
2	60.0%
3	45.0%
4	30.0%
5 OR MORE	15.0%

All qualifying computer equipment, whenever purchased, will be valued using the above schedule. For example, when completing the tax return for tax year 2003, if a taxpayer has qualifying computer equipment it purchased in 2000, the taxpayer should determine the true value of that computer equipment using a 45% valuation percentage. If a taxpayer has qualifying computer equipment it purchased in 2002, the taxpayer should determine the true value of that computer equipment using a 75% valuation percentage.

Any questions can be directed to the Personal Property Tax Division at 614-466-3280 or the Public Utility Tax Division at 614-466-7371.

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LENGTH: 20053 words

COMMENT: TANGIBLE OR INTANGIBLE - IS THAT THE QUESTION? CONFLICT IN THE TEXAS TAX CLASSIFICATION SYSTEM OF COMPUTER SOFTWARE

NAME: CHRISTINE E. REINHARD

SUMMARY:

... Assume that Jones Manufacturing Company, a high technology firm, requires new computer software to meet its expanding business needs and asks its corporate counsel for advice regarding the legal consequences of the transaction. ... While few states have considered the classification of computer software under personal property tax provisions, Texas has had the opportunity to judicially determine whether computer software is tangible or intangible property for both sales and property tax purposes. ... The cases cited by the court addressed whether computer software was tangible or intangible property in the context of sales, use, and property taxation and concluded that software was intangible property. ... Currently, the rule in Texas regarding property taxation of computer software is fairly clear - computer software is considered to be intangible property; therefore, it is not subject to personal property taxation. ... Thus, in Texas, the same copy of computer software is regarded as both tangible and intangible property. ... Texas need not distort the definitions of tangible or intangible personal property merely to tax computer software. ... Due to these differences between canned and custom software and the subsequent valuation problems, Texas should adopt the canned versus custom distinction and tax only canned computer software. ... Once that decision is made, Texas does not need to determine whether computer software is tangible or intangible property. ...

TEXT:

[*871]

I. Introduction

Assume that Jones Manufacturing Company, a high technology firm, requires new computer software to meet its expanding business needs and asks its corporate counsel for advice regarding the legal consequences of the transaction. n1 If the corporate counsel advises Jones that there will be no legal consequences and Jones subsequently purchases [*872] various types of software from a vendor, n2 this attorney may later be confronted with an angry client who has just received an expensive tax bill for the software. n3 Frequently, counsel for buyers or licensees of software, such as the attorney in this hypothetical, will overlook the state and local tax consequences of the transaction. n4 This mistake can be quite costly as taxes can add thousands of dollars in extra expenses. n5 In order to avoid such a mistake, attorneys must be aware of the current tax law. n6 However, having an understanding of current tax law and its applicability is not enough - the tax lawyer must also be aware of the origin and evolution of the law of taxation. n7

[*873] The history of taxation can be described as the continuous battle among individuals and groups to achieve their particular goal. n8 Specifically, many individuals and groups demand lower taxes while others insist on additional governmental expenditures. n9 State and local governments are continually entangled in this struggle as they attempt to raise enough revenue dollars to meet the demands of their constituents. n10 Taxing authorities have repeat-

edly relied on property, or ad valorem, n11 taxes as a [*874] revenue source. n12 In fact, in the United States, local governments derive more than three-fourths of the tax revenue from property taxes. n13

State and local governments tax both real and personal property. n14 However, of the two, personal property is taxed less often. n15 The reason it is taxed less frequently is because one category of personal property, intangible property, n16 is generally not subject to taxation. n17 Intangible [*875] property embraces such items as stocks, bonds, promissory notes, and copyrights. n18 Conversely, tangible property, which is typically taxable, includes items such as animals, clothes, furniture, jewelry, and motor vehicles. n19

Classifying property as tangible or intangible is a key issue in determining whether personal property will be taxed. n20 Classification of software became an important issue shortly after IBM revolutionized the world of computers by pricing software separately from computer hardware. n21 Prior to IBM's 1969 policy change, computer software was furnished free of charge because it was considered an inseparable component of the computer system. n22 Thus, IBM's "unbundling" of its computer systems not only shattered the general perception that hardware and software [*876] were inseparable, but it also led to the creation of a new and distinct form of property - computer software. n23

In recent years, state and local taxing authorities have targeted computer software to enhance their tax bases. n24 Of course, such taxation has been met with strong disapproval from many corporations. n25 For these businesses, classifying computer software as tangible or intangible is quite significant because the classification could either save or cost them vast amounts of tax dollars. n26 For example, if computer software is deemed [*877] tangible property, it would be considered part of the business inventory n27 subject to a property tax. Conversely, if computer software is classified as intangible property, no such tax would apply. n28 Therefore, the classification of computer software is a matter worth debating.

For the past three decades, a number of states have judicially addressed the question of whether computer software constitutes tangible or intangible property for sales, use, or property tax purposes. n29 While many ju [*878] risdictions originally classified computer software as intangible property, n30 the current trend among states recently considering the issue is to deem computer software tangible property. n31 Computer software has generally been classified as tangible property in the context of sales and use taxation; n32 however, this classification is not as clear in the area of property taxation. n33

[*879] While few states have considered the classification of computer software under personal property tax provisions, n34 Texas has had the opportunity to judicially determine whether computer software is tangible [*880] or intangible property for both sales and property tax purposes. n35 Texas first faced the issue of taxation of computer software in *First National Bank v. Bullock*. n36 In *First National Bank*, the Texas Court of Civil Appeals held that computer software was intangible property for sales tax purposes. n37 However, the Texas legislature reversed the decision of the court by changing the sales tax code to reflect computer software as tangible property. n38 Thus, computer software became subject to sales taxation. n39

More recent debate concerns property taxation of computer software. n40 Texas first addressed the classification of computer software in the context of property taxation in 1996. n41 In *Dallas Central Appraisal District v. Tech Data Corp.*, n42 the Dallas Court of Appeals ruled that computer software was intangible property, thus not taxable. n43 However, the question remains whether the Texas legislature will overrule the decision [*881] of the court, once again making computer software taxable tangible property. n44

This Comment evaluates the tax classification of computer software in Texas under recent statutory provisions and case law. Part II begins by outlining the classic definitions of real, personal, tangible, and intangible property. The discussion continues with a review of the development and evolution of property taxation in the United States. Part III examines the definition and various types of computer software and then addresses the legal issues surrounding the taxation of computer software. Part IV evaluates the methods used to assess the value of computer software as well as the problems inherent in software valuation. Part V presents the conflicting approach Texas has taken in classifying computer software. Finally, part VI proposes that the Texas legislature decide not whether computer software constitutes tangible or intangible property but rather whether computer software should be taxable or not taxable.

II. Property Taxation

A. Property Defined

Property embraces everything that is or may be subject to ownership. n45 Traditionally, property has been classified as either real or personal. n46 Real property refers to land, what is affixed to the land, and the rights associated with

the land. n47 Under the broadest definition, personal property consists of anything that is subject to ownership and does not fall within the denomination of real estate. n48 Further, personal property is divided into two categories: tangible or intangible. n49 Tangible property is "property which is touchable and has real [physical] existence." n50 Typically, tangible property includes items that can be felt or touched, such as [*882] animals, furniture, and merchandise. n51 Conversely, intangible property is "property which cannot be touched because it has no physical existence." n52 Additional examples of intangible property include claims, interests, and rights. n53 Under the law of taxation, intangible property also refers to property that "has no intrinsic and marketable value, but is merely the representative or evidence of value." n54

B. Property Tax Development

Since colonial times, the United States has taxed property. n55 The American colonies first began to rely on property taxes as a revenue source after winning the right to levy taxes from England. n56 The tax levied was only on specific items of property. n57 As the nation grew, individuals and other entities grappled for favorable tax treatment. n58 In order to resolve this growing disharmony, many states attempted to establish a fair and uniform system of taxation by implementing a single tax rate applicable to all property. n59 This need for equality and uniformity led to a [*883] change in property taxation, n60 as all personal property, both tangible and intangible, became the object of ad valorem property taxation. n61

However, the general and uniform property tax failed to accomplish the goal of taxing all property equally. n62 In particular, taxpayers realized that intangible property was difficult to identify and easy to conceal. n63 As a result, avoidance of the personal property tax became the norm rather than the exception. n64 To prevent intangible property from escaping taxation, states expended a significant amount of resources locating and un [*884] covering hidden property. n65 Additionally, a few states lowered the applicable tax rate in order to cajole taxpayers into reporting the intangible property they possessed. n66 Despite these efforts, most states failed to halt the increasing evasion of the property tax. n67 Consequently, the uniformity movement and the effort to tax intangible property created an inefficient and ineffective tax system. n68

In order to solve the problems created by the uniformity movement and avoid penalizing those who voluntarily paid taxes, many states adopted the classification theory of property. n69 The resulting differentiation between types of property led to the passage of statutes and constitutional amendments excluding intangible property from the scope of ad [*885] valorem property taxation. n70 This exclusion meant that taxing authorities could focus their collection efforts on property that was more easily identifiable. n71 This change in property taxation caused by the classification movement still exists because most jurisdictions do not levy a property tax on intangible personal property. n72

Despite the efforts to reform the system, the revenue generated by the property tax has declined in the twentieth century. n73 One reason for this decline lies in the changing nature of the wealth tax base. n74 When the property tax first developed, agrarian culture was preeminent because [*886] land constituted the paramount form of wealth. n75 By contrast, today wealth is frequently evidenced by rights, relationships, and status. n76 This new type of wealth is intangible; thus, it is generally not subject to property taxation. n77

Another reason for the reduction in property tax revenue lies in two important twentieth century events, the Great Depression and World War II. n78 The Great Depression impacted the property tax by causing the subsequent creation of homestead and personal property exemptions as well as additional rival taxes. n79 World War II furthered the conclusion of the dominant property tax by requiring different types of taxes to meet the growing demand for increased revenue. n80

Although the overall prominence of the property tax has eroded, states still rely on it to raise revenue. n81 Real estate commonly forms the bulk of [*887] a state's property tax base. n82 In contrast, tangible personal property taxes are more limited in scope because exemptions are typically provided for "personal" tangible property or tangible property not producing income. n83 In this regard, taxing authorities are frequently seeking new forms of property to further enhance the tax base as well as to meet the ever increasing demands on government expenditures. n84 It is therefore no surprise that taxing authorities are considering taxing computer software as a way to raise much needed revenue. n85

III. Computer Software Taxation

A. Computer Software Defined

Before considering the taxability of computer software, an understanding of its basic characteristics is required. Computer systems are defined [*888] as machines that process information. n86 Generally, they are composed of two components, hardware and software. Hardware is the physical equipment that comprises the computer system. n87 Computer software, a generic name for computer programs, directs the hardware in performing the required tasks. n88 This definition of computer software is merely one of several definitions. It has also been defined as the "total data processing expenditures less hardware, communications and supply costs," as well as "the total data processing personnel costs plus the costs associated with the purchase or lease of computer program developed by outside organizations." n89 The broadest definition of computer software embodies [*889] everything that is not hardware. n90 Unfortunately, courts, legislatures, and the computer industry have not adopted a single definition. Each entity operates with its own concept of computer software, which further frustrates the issue of whether computer software is taxable property. n91

B. Types of Computer Software

1. System, Utility, and Application Software

Despite the difficulty in creating a single definition for computer software, three categories have generally been recognized. n92 The first category, systems or operational software, controls the overall direction of the computer system. n93 This software tells the computer how to start programs, how to communicate with various hardware devices, and how to perform other basic operational functions. n94 Such software programs [*890] are fundamental to the operation and maintenance of the computer system. n95 Thus, operational software is perceived as a permanent and necessary component of the computer, and is often purchased with the computer system. n96

The second category of computer software includes utility software. This type of software consists of a variety of general purpose programs that allow the user to sort, transfer, and manage data. n97 In addition, utility software includes compilers, which translate human-written programs into a language the computer can comprehend. n98 This type of software is frequently considered a derivative of system software. n99

The third category, application software, consists of programs that are designed to perform specific functions. n100 This type of software enables [*891] the computer user to communicate with the equipment. n101 Application software is often described as a task or user-oriented program that makes computers more versatile. n102 An example of application software is a word-processing or accounting program.

Some state legislatures and courts have distinguished between system and application software for purposes of property tax assessment. n103 For example, California, Kansas, and Ohio impose a property tax only on system or operational software, and not application software. n104 Other states, however, have made a different distinction. Instead of differentiating between system and application software, they draw a distinction between canned and custom software. n105

[*892]

2. Canned and Custom Software

A canned software program, which is also called "off-the-shelf" or "prewritten" software, is one that is sold to multiple users n106 and does not contain a future service element. n107 Service is nonexistent with canned software because the seller is not obligated to perform any future update or maintenance services, and no individualized labor of the seller is directed toward any specific buyer. n108 In addition, canned software is sold "as is" at the retail level and is conveyed to the purchaser through a number of mediums, including computer tapes and disks. n109 Typically, the sale of canned software is subject to a restrictive license, permitting only the purchaser to use the software under certain conditions. n110 Thus, the purchaser of a canned program "receives few rights other than the use of the program and possession of the medium upon which it is stored or transferred." n111

In contrast, custom software is written for one user according to that user's specifications n112 and contains a service element. n113 In a typical [*893] case, the software vendor asks system engineers to create custom programs that comply with the user's requirements, in addition to designing, implementing, and testing the programs and training the user. n114 This process leads to custom software stored on computer tapes or disks, combined with user manuals and other documentation. n115 Ownership of custom software is difficult to transfer, n116 and it is not limited by the same types of restrictions as canned software. n117 The purchaser of custom software "bargains for the full bundle of rights associated with the program, including the rights to use it on multiple machines, modify, copy, sell, lease and

otherwise transfer the right to use the custom program." n118 Of course, the purchaser of custom software pays much more for this set of rights than the buyer of canned software pays for a restrictive license. n119

A number of states distinguish between canned and custom software when levying taxes. n120 States that adopt this distinction largely conclude [*894] that canned software is taxable tangible property while custom software constitutes nontaxable intangible property. n121 However, a problem regarding canned and custom software arises when a customer purchases an off-the-shelf program that has been slightly modified or customized. n122 For taxation purposes, the courts must determine whether this modified off-the-shelf program should be classified as canned or custom software. This determination is difficult to make because this software does not fit neatly in either category. n123

[*895] A few states have chosen to tackle the issue of modified or customized canned software in the context of sales taxation. n124 For example, in 1977, Tennessee modified its sales and use tax law to provide that tangible personal property specifically included customized computer software. n125 In *United Design Corp. v. Oklahoma Tax Commission*, n126 the Oklahoma Supreme Court recognized that customized software is subject to sales taxation. n127 Recently, a bill was unsuccessfully proposed in North Carolina, suggesting that software with over half of its cost derived from modifications be exempt from the state's sales tax. n128

C. Taxability - Tangible v. Intangible

Courts and legislatures are often faced with the difficult task of determining whether particular types of computer software, such as system, application, canned or custom software, are taxable. n129 In making this determination, courts must first evaluate whether computer software is [*896] tangible or intangible personal property. n130 Courts have made this distinction by employing various lines of reasoning.

1. Lines of Reasoning

One of the first lines of reasoning the courts embraced was the "know ledge" rationale. n131 This rationale concluded that the intangible know ledge contained within the tangible medium was the significant factor for tax purposes. n132 In other words, the information on the tangible medium, such as a punch card, magnetic tape, or disk, which was transferred to the computer system, was simply intangible knowledge. n133 Therefore, the [*897] tangible medium was "merely incidental to the purchase of the intangible knowledge and information stored on the tapes." n134

This rationale was employed in *District of Columbia v. Universal Computer Associates* n135 when the court concluded that the material of the punched cards was of insignificant value compared to what was actually paid for, the "intangible value of the information stored on the cards." n136 The knowledge rationale was also applied by the court in *Commerce Union Bank v. Tidwell* n137 to reach the same conclusion as *Universal Computer Associates* - computer software constitutes nontaxable intangible property. n138 In *Commerce Union Bank*, the Tennessee Supreme Court concluded that what the buyer had purchased was intangible knowledge and not a tangible medium. n139

Subsequently, courts expanded on the theory behind the knowledge rationale by further focusing on computer software's two components, the physical storage medium and the knowledge and information contained on that medium. The result was the creation of the "essence of the transaction" test. n140 This test maintains that when the transaction is, "in essence," the purchase of an intangible item, the transaction is exempt from taxation. n141 The "essence of the transaction" test looks at what is [*898] being purchased, a tangible medium or intangible knowledge. n142 In *First National Bank v. Bullock*, a Texas court applied this test and concluded that the computer software involved was intangible personal property. n143 The court held that "the essence of [the] transaction was not the four tapes, but, instead, the purchase of the computer process, an intangible." n144 An Ohio court of appeals reiterated the Texas court's point when it concluded in *Compuserve, Inc. v. Lindley* n145 that the primary purpose in purchasing computer software is to receive the intangible information and not the inexpensive tangible medium. n146

Another test employed by courts in software tax cases is the "relative value" test. n147 This test also recognizes that the software development process involves both tangible and intangible elements. n148 Although a tangible medium is used to store and transfer intangible knowledge, most [*899] of the software product consists of the intellectual content. n149 Under this test, the tangible medium is simply a nominal and incidental cost to obtaining the desired information. n150 For example, computer software selling for \$ 50,000 might be stored on tapes or disks that cost \$ 50. The discrepancy in value indicates that the purchaser, who pays \$ 50,000, is actually buying knowledge and information rather than a physical product.

The fourth test, the "mode of transmission," is frequently employed by courts. n151 This test proposes that when "the knowledge can be conveyed from the seller to the buyer without the use of a physical medium, the transaction involves the sale of intangible property." n152 In *Chittenden Trust Co. v. King*, n153 a Vermont court held that regardless of the way the software could have been transferred, the way in which it was transferred was controlling. n154 Thus, in states using the mode of transmission test, software transferred electronically by modem might escape property taxation while those who obtain software on diskettes will not avoid the tax assessor's claims. n155 One commentator has suggested that the mode of [*900] transmission test is limited in that it "examines the tangibility of property [only] at the time of transmission." n156 Accordingly, this test is not helpful in the realm of property taxation because, unlike a sales tax, the property tax is typically imposed annually and does not concentrate on the transfer of the property. n157

2. Analogy Arguments

In addition to using lines of reasoning to determine whether computer software is tangible or intangible property, courts have analogized computer software to other various types of taxable property, including films, books, and audio cassette tapes and records. n158 These types of taxable property have much in common with computer software. n159 For example, the value of a film, book or audio recording lies in the intellectual and artistic content, not in the physical, tangible medium upon which that [*901] content is transferred. n160 Likewise, computer software's value is derived from the knowledge contained within the computer disk or tape. n161

Despite this similarity, courts have drawn distinctions that undermine any legal comparison between computer software and other taxable property. n162 For example, in *Commerce Union Bank v. Tidwell*, the court drew two critical distinctions between film and computer software. n163 First, the court concluded that the storage mediums, disks, and tapes were not crucial to computer software, unlike film where the celluloid upon which movie recorded was "a crucial artistic element of the motion picture...." n164 As the court has stated, "for without film there could be no movie." n165 Second, the court differentiated between film and software by contending that the medium upon which the computer program was recorded could be returned to the seller or destroyed after the program had been run through the computer. n166 On the other hand, a movie film's value continued after the movie had been shown because it could be used over and over again. n167 Thus, the ability to reuse film but not computer software led the court to conclude that computer software was intangible property. n168

Another manner in which courts have found that computer software differs from films, records, and books is that the latter three items can be used immediately upon purchase. Before software can be used, it must [*902] be translated into a language that the computer can understand. n169 Due to this need for translation, software is not immediately perceptible to the senses, unlike films, records, and books, which are directly perceptible. n170 Additionally, courts have pointed out that films, records, and books need not be maintained after the initial sale whereas custom computer software requires periodic updating by the seller. n171 Such distinctions have led courts to conclude that computer software cannot be tangible property. n172

By contrast, various courts have found weaknesses in these distinctions. *Comptroller of the Treasury v. Equitable Trust Co.* n173 was the first case to reject the analysis that other types of taxable personal property, such as films and records, were not analogous to computer software. n174 The court suggested that prior courts incorrectly ignored the similarities between the "machine readable" form of data on computer tapes and the "machine readable" character of films and audio tapes. n175 The court also [*903] determined that, like a record, a software tape does not surrender its tangible character simply because its content is produced through intellectual effort. n176 In essence, the court refused to acknowledge any distinction made between a computer program recorded on a computer tape and music recorded on a cassette tape. n177

Chittenden Trust Co. v. King n178 followed *Equitable Trust* and also rejected the traditional distinctions drawn between computer software and other taxable property. n179 According to the court, when assessing sales or use tax, tapes containing off-the-shelf computer programs are indistinguishable from other taxable personal property such as films, videotapes, books, cassettes, and records. n180 The court concluded that "the value lies in their respective abilities to store and later display or transmit their contents" and a "computer software tape is no different." n181 Thus, unlike previous courts, the courts in *Chittenden Trust Co.* and *Equitable Trust* used an analogy argument to support their conclusion that computer software was tangible personal property. n182

3. Goods v. Services Distinctions

In determining whether computer software is tangible or intangible, courts have dealt with another distinction - whether the sale of computer software constitutes the sale of a good or a personal service. n183 In general, if computer software is deemed a product or a good, it is tangible [*904] property subject to sales, use, and property taxation. n184 If software is viewed as a service, however, it is considered intangible and not subject to these taxes. n185

Services are not provided with the sale of unmodified canned programs that are available to the general public. n186 However, custom software, which differs for each customer and is of no value to the general public, is more likely to be considered a service rather than a canned program because it involves personal attention provided by the seller through maintenance and update services. n187 Also, with custom software, the value of the tangible medium is minute in relation to the value of the services required to create that software. n188

[*905] Because software contains elements of both goods and services, courts have developed several tests to make a distinction between the two. n189 One test is whether the transfer of the physical property is an indispensable element of the transaction. n190 This test is similar to the "essence of the transaction" test. A second test compares the value of the materials to the value of the services rendered. n191 Another test, resembling the relative value test, asks whether the item transferred has value only to the purchaser or whether the item can be sold to the general public. n192

This good versus service distinction along with the various lines of reasoning and analogy arguments have helped courts to answer the difficult, yet key, inquiry surrounding taxation of computer software. These methods have aided the courts' decisions as to whether computer software is tangible or intangible property. Today, a majority of these courts have concluded that computer software constitutes tangible personal property. However, reaching that decision does not completely resolve subsequent problems which arise when tangible property is taxed. For example, one significant problem facing taxing computer software is the difficulty in valuation.

[*906]

IV. Valuation of Computer Software

Valuation of property for taxation purposes is a difficult task, and valuation of computer software is no exception. n193 Assessing the value of computer software is complicated by its nature and the different elements its cost can encompass, including development and future services. n194 Be [*907] cause most states do not intend to assess a property tax upon future services and rights, particularized valuation methods must be developed for computer software in order to avoid overvaluation and unnecessary tax payments. n195

No one method of valuation has been universally accepted. n196 In fact, most state tax regulations are silent as to the appropriate guidelines for assessing the value of computer software. n197 Nevertheless, the three major approaches to valuation have been used to ascertain the value of computer software: the fair market approach, the income approach, and the [*908] cost approach. n198 Generally, the type of method employed will depend on the software being valued.

The fair market approach values software based on what identical or similar software would sell for on the open market. n199 Establishing the value of software, therefore, depends upon the assessor's ability to locate readily available software in the market that has similar or identical features and characteristics to the software being valued. n200 Thus, the fair market approach applies easily to canned software that performs general functions such as accounting, database management, or wordprocessing because comparable programs are easily located. n201 On the other hand, this approach does not work well with custom software because it is designed specifically for a particular user; therefore, equivalent software is extremely difficult to locate. n202

[*909] When using the fair market approach, tax assessors commonly employ one of four methods to determine the fair market value. The first method strives to determine how much the software or software of a similar function would sell for between "a willing seller and a willing buyer in an arm's-length transaction." n203 The second method uses the vendor's list price, which takes into account any accumulated depreciation. n204 The third method utilizes the actual price minus any depreciation. n205 The fourth method determines the value based on the cost to reproduce the computer software, taking into account current prices for labor and services. n206 Determining which of these four methods is utilized to ascertain fair market value depends on the type of property being assessed. n207

In contrast, the income approach, which is commonly used with commercial real estate, is based on the "present value of the income stream generated over the economic life of the taxed item." n208 When applying [*910] this approach to computer software, the assessor computes the net cash flow associated with the revenue and income generated

by the software. n209 The assessor also discounts any anticipated future income to present value by capitalizing the value of the software. n210

The income approach presents a number of problems. First, attributing an income stream to a specific piece of software is a difficult task because it is hard to pinpoint the amount of income generated by a single software program. n211 Second, ascertaining the value of custom software is virtually impossible as this software is normally developed solely for the user's internal use. n212 Third, uncertainty and risk result when basing the software's value on the capitalization of future income because that income may not be realized. n213

Finally, the cost approach, the simplest valuation method, is commonly used with both canned and custom software. n214 Applying the cost approach to canned software results in the assessed value equaling the purchase price of the off-the-shelf program. n215 Conversely, the assessed value of custom software is based on either the original cost of the entire [*911] development process or the cost of duplicating the utility of the software, taking into consideration depreciation and obsolescence factors. n216

With custom software, the assessor employing the cost approach has to consider the cost of labor, supplies, and hardware, as well as the margin of profit. n217 However, the problem with applying the cost approach to custom software is that it tends to overvalue the software. n218 The cost approach usually encompasses the costs associated with initial design, implementation, and testing, which are not actually part of the finished product. n219 Not only are these developmental costs hard to determine and to exclude, but assigning a value to these components is an arduous procedure, particularly when less detailed records are kept regarding the cost of that development process. n220 This problem becomes clear when an additional copy of the computer software is created. The cost of making the additional copy is only the cost of the storage medium, usually a [*912] disk or magnetic tape; no developmental cost is incurred when the copy is made. n221 Thus, assessing the cost of this additional copy of computer software using the cost approach would clearly overstate its value.

Regardless of which approach is employed to value computer software, the taxpayer and the tax assessor face some obstacles. For instance, one notable problem concerns how to account for depreciation and obsolescence. n222 Obsolescence occurs if property falls into disuse or its value is diminished by changes in technology or public taste. n223 The valuation of the software must be adjusted to account for economic obsolescence, otherwise the software will be overvalued. n224 However, computer software often undergoes rapid technological changes, making it difficult to establish a standard economic life for the software. n225 Unlike computer hardware, which depreciates over a definite period of time, software may lose all of its value in a very short time period. n226 Therefore, the valuation of this software must reflect the fact that it may have outlived much of its usefulness. n227

[*913] Multiple copies of the same computer software pose an additional problem. n228 Often businesses make backup copies of software for security reasons. n229 This duplication of software raises the issue of whether each copy should be assessed for property tax purposes. n230 If a tax is levied on each respective copy, the cost to the business would increase substantially. n231 This problem is further complicated when the copies are located in different jurisdictions, and each jurisdiction desires to tax the respective copy of the computer software. n232 Thus far, the courts have not addressed the issue of how to deal with tangible copies of software, leaving this question open for legislative and administrative resolution. n233

V. Texas's Approach to the Taxation of Computer Software

Since the early 1970s, state courts have struggled to determine whether computer software constitutes tangible or intangible personal property. n234 [*914] Such classification decisions have normally occurred in the realm of either sales, use, or property taxation. n235 Very few states, however, have judicially addressed the legal nature of computer software in more than one area of taxation. n236 Thus, courts faced with the issue of the property tax classification of computer software have relied on precedent in the sales and use tax context to provide an answer. n237

A. Sales Taxation

Texas first addressed the sales tax classification of computer software in *First National Bank v. Bullock*. n238 First National Bank brought suit against the state, seeking to recover \$ 109,000 paid in taxes levied on the purchases of computer software. n239 The bank had purchased four computer programs that enabled its computer to perform deposit, lending, and general accounting functions. n240 The bank contended that the tax levied was improper because the programs did not constitute tangible [*915] personal property. n241 The Austin Court of Civil Appeals agreed with the bank, thus allowing it to recover the taxes levied on its purchase of computer software. n242

In order to determine whether the bank's computer software constituted taxable property, the court considered whether computer software was tangible or intangible property. n243 To make that determination, the court applied the "essence of the transaction" test. n244 The court concluded that the true object of the transaction in the case was not the four magnetic tapes storing the computer software, but the actual purchase of the intangible computer programs. n245 Therefore, because the sale involved intangible property, the sales tax levied was improper. n246

The court also declined to adopt the state's argument distinguishing between canned and custom software. n247 The state had argued that an earlier case, *Bullock v. Statistical Tabulating Corp.*, n248 was not controlling because the software involved was customized. n249 In contrast, the software purchased by First National Bank included canned programs, which were "standard items sold to numerous customers with only slight [*916] modifications to conform to each purchaser's use." n250 The state contended that because the software purchased by First National Bank lacked the service character present in custom software, it should be taxed. n251 However, the court disagreed, claiming that the test is "not whether the product is 'customized' or 'canned,' but whether the object of the sale is tangible personal property." n252

The ruling in *First National Bank* did not remain the rule of law in Texas for long. In 1984, the Texas legislature amended the sales tax code to include computer software within the definition of tangible personal property. n253 The 1984 amendment, however, excluded custom software. n254 Thus, the Texas legislature chose to distinguish between canned and custom software, which the court of civil appeals had declined to do. The legislature later reconsidered the propriety of that distinction and, in 1987, decided to withdraw the language excluding custom computer software from the definition of tangible personal property, therefore allowing sales taxation of all types of computer software. n255

B. Property Taxation

Texas courts did not address the issue of whether computer software was subject to a personal property tax until 1996. In *Dallas Central Appraisal District v. Tech Data Corp.*, n256 the Dallas Court of Appeals held that computer software was not taxable. n257 *Tech Data Corporation* had sued the Dallas Central Appraisal District alleging that the appraisal of *Tech Data's* business property had erroneously included over \$ 2 million in computer software. n258 Essentially, *Tech Data* argued that the computer software was intangible; thus, the software was not subject to ad valorem taxation. n259 The court of appeals agreed with *Tech Data*, concluding that the computer software constituted nontaxable, intangible personal property. n260

In reaching this conclusion, the court utilized the definition of computer software provided by *Tech Data*. n261 *Tech Data's* controller explained in an affidavit that the "software is 'intellectual property consisting of binary instructions, programs, routines, and symbolic mathematical code that controls the functioning of computer hardware and directs hardware operations.'" n262 The controller further stated that "software consists of 'imperceivable binary impulses.'" n263 The court compared this latter definition to the definition of tangible personal property. n264 The tax code defines tangible personal property as "personal property that can be seen, weighed, measured, felt, or otherwise perceived by the senses, but does not include a document or other perceptible object that constitutes evidence of a valuable interest, claim, or right and has negligible or no intrinsic value." n265 The court concluded that "imperceivable binary pulses" could not possibly fit within that definition. n266 Therefore, the decision of the court in this case partially turned on how computer software is defined.

In reasoning that computer software is intangible property, the court also relied on *First National Bank*. The court found *First National Bank* persuasive because the sales tax definition of tangible property, at the time *First National Bank* was decided, was the same as the current property tax definition. n267 Like *First National Bank*, the court decided that computer software could not be tangible personal property under the tax [*918] code. n268 The court also quickly dismissed the subsequent legislative change to the sales tax definition as unpersuasive. n269 According to the court, "That the legislature saw fit to alter the sales tax definition of 'tangible personal property' without changing the property tax definition of 'tangible personal property' indicated a clear legislative intent to continue to exclude computer application software from ad valorem taxation." n270

The Dallas Court of Appeals further relied on *First National Bank* because, according to the court, that case also considered the taxability of computer application software. n271 In recognizing this possible similarity, the court was not clear as to whether it was using the term "application" to refer to the distinction between application and operational software or to simply modify the term computer software. If the court was attempting to differentiate between types of software, *First National Bank* was not appropriate precedent for this point n272 because the *First National Bank* court declined to draw any distinction between the differing types of computer software. n273

Regardless of the precedential value of First National Bank, the court's ambiguous employment of the word "application" to describe the software at issue could lead to future litigation. Future taxpayers in Texas may attempt to argue that Tech Data Corp. only declined to impose a property tax on application software, leaving systems or operational software subject to taxation. n274 This argument could potentially prevail. Other states drawing such a distinction between various software have [*919] subjected only operational software to taxation, particularly due to its integral relationship with the computer system. n275

In Tech Data Corp., the court also applied the "essence of the transaction" test to determine that computer software was intangible property. n276 However, the Tech Data Corp. court varied the test slightly by eliminating the focus on the transaction and instead concentrating on the "essence" of the property. n277 Despite this variation, the key inquiry of the test, which decides whether the intangible information or the tangible medium is the significant component, remained the same. n278 As such, the court concluded that the "essence" of the computer software was the software itself, not the tangible medium. n279 Therefore, the computer software was intangible personal property. n280

Although the Dallas Court of Appeals relied heavily on First National Bank to determine the legal nature of computer software, the court also found support in a number of other state court decisions. n281 The cases [*920] cited by the court addressed whether computer software was tangible or intangible property in the context of sales, use, and property taxation and concluded that software was intangible property. n282 Most of the cases the court relied on were decided during the 1970s and early 1980s. n283 In fact, the court did not acknowledge more recent sales and use tax decisions in Louisiana, Missouri, and West Virginia, which determined that computer software constituted tangible property. n284 Despite this lack of acknowledgement, the court's decision in Tech Data Corp. is consistent with other state courts that have addressed the issue of software classification in the context of property taxation. n285 Thus, the court's failure to address these cases did not defeat or weaken the persuasiveness of its holding.

The legislative response to Tech Data Corp. has been similar to the response to the decision in First National Bank. In February 1997, a bill was proposed in the Texas Senate to amend the property tax definition of computer software to include "an inventory of computer software held for sale at wholesale or retail by a person who is in the business of selling property of that kind." n286 This definitional change would mean that only [*921] businesses that are involved in the sale of computer software would pay an ad valorem tax on the software held in their inventory. n287 This bill, however, did not pass prior to the adjournment of the 75th legislative session. n288

Currently, the rule in Texas regarding property taxation of computer software is fairly clear - computer software is considered to be intangible property; therefore, it is not subject to personal property taxation. n289 However, in light of the recent trend among jurisdictions as well as the bill proposed in response to Tech Data Corp., the rule is not only disputable, but a cause for concern for many individuals. n290 In fact, many high technology firms are interested in the rule espoused in Tech Data Corp. because they rely heavily on computer software to conduct their operations. n291 Taxation of computer software would, therefore, seriously affect their businesses through increased tax costs. n292 A number of these high technology companies have expressed a desire to create a consistent [*922] method upon which taxes are levied. n293 Consequently, the 1999 legislative session will more than likely be a battleground for high technology firms and state legislators seeking to expand the tax revenue base.

C. Conflict in the System

The court's decision in Dallas Central Appraisal District v. Tech Data Corp. has created a conflict in the Texas tax system because computer software is subject to a sales tax, but not a property tax. n294 While this situation is advantageous for businesses and does not seem illogical, the reasoning behind the differing approaches is unsound. Computer software is subject to a sales tax simply because it is statutorily classified as tangible personal property. n295 On the other hand, a property tax is not levied on computer software because it is considered intangible personal property for property tax purposes. n296 Thus, in Texas, the same copy of computer software is regarded as both tangible and intangible property. Consequently, the Texas legislature should resolve this conflict.

VI. Proposed Solution to the Classification Conflict

During the 1999 legislative session, Texas will have the opportunity to resolve the conflict in its tax system regarding computer software. Although it would seem that in order to resolve the conflict Texas must classify computer software as tangible or intangible property, that is not [*923] the case. n297 Texas only needs to determine whether computer software should be taxed. n298

Texas need not distort the definitions of tangible or intangible personal property merely to tax computer software. Currently, Texas defines tangible property as "personal property that can be seen, weighed, measured, felt or otherwise perceived by the senses." n299 Intangible property is defined by the tax code as "a claim, interest (other than an interest in personal property), right or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses." n300 Neither of these definitions easily applies to computer software, and Texas has a unique opportunity to pursue the taxation of computer software without manipulating either definition. n301 Unlike some states, the Texas Constitution permits the taxation of both tangible and intangible personal property. n302 Therefore, the decision whether to tax either type is largely within the province of the Texas legislature. n303

One of the main reasons behind the large number of states classifying computer software as tangible property is to increase the tax revenue. n304 [*924] While this result-oriented approach is often necessary in order to satisfy the demands for additional expenditures, manipulating the definition of tangible personal property is not the only answer. If taxation of computer software is desired, the Texas legislature can provide a separate provision permitting the classification of computer software. Texas, therefore, does not need to attempt to fit old laws to new technology simply to raise needed funds. n305

If the decision to tax computer software is made, Texas must also determine whether to distinguish between different types of software. Texas can either differentiate between application and system software or canned and custom software. n306 A distinction is generally made between application and system software based on the level of specificity and the necessity to the physical computer system. n307 Although this distinction is logical to computer users, it presents a significant problem for taxing authorities. n308 In order to correctly impose a tax, tax assessors must be able to differentiate between the various types of software programs. n309 Such differentiation requires a level of knowledge and skill that most assessors [*925] do not possess. As such, incorrect assessments are likely to result in addition to arbitrary line-drawing. n310 Because of this assessment problem, the Texas legislature should not adopt this distinction.

However, the Texas legislature should embrace the canned versus custom distinction. The primary reason for adopting this differentiation lies in the difficulty of valuation. Because custom software is personalized for a particular user, its value to other potential users is relatively low. n311 Canned software, meanwhile, has equal value to all computer users. n312 In addition, custom software contains a service element, which is extremely difficult to identify. n313 Not only are service costs incurred in the developmental process, but future maintenance and update services are often included in the total cost. n314 However, with canned software, no services are rendered; the software is simply purchased "as is." n315 Due to these differences between canned and custom software and the subsequent valuation problems, Texas should adopt the canned versus custom distinction and tax only canned computer software. The adoption of this distinction should not be problematic because the current administrative practice is to exempt custom software. n316 However, tax assessors will still [*926] need to deal with the valuation problems posed by obsolescence and the existence of multiple copies, which are inherent with all types of computer software. n317

The solution to the conflict in the tax classification system is reasonably uncomplicated. Texas is only required to decide whether it desires to tax computer software or not. Once that decision is made, Texas does not need to determine whether computer software is tangible or intangible property. Because of the constitutional permission to tax either type of personal property, Texas can circumvent that difficult question. However, if the decision to tax computer software is made, Texas should distinguish between canned and custom software. Due to their differing natures and the valuation problems posed, such a distinction is advantageous for the state of Texas.

VII. Conclusion

Taxation of computer software is an important, yet complicated issue. The key inquiry is whether computer software constitutes tangible or intangible property. Determining the property classification is not an easy task due to the nature of computer software itself. Not only is the term "computer software" difficult to define, but the multitude of different types of computer software further obscure the formation of a uniform definition.

However, the question of classification need not be answered by the state of Texas. The Texas legislature has the ability to tax both tangible and intangible property. Classifying computer software as either type is, therefore, unnecessary. Texas can resolve the current conflict in its tax classification system, in which computer software is considered both tangible and intangible property, by simply deciding whether computer software should be taxable or not. In order to make that decision, the legislature must clarify the valuation issue to ensure fair and equitable tax appraisals. Ques-

tions regarding the value of canned and custom software must be answered as well. While it is easy to place a "fair market" value on canned software, what, if any, value should be placed on custom software?

[*927] Whether to tax computer software will be a highly charged issue in the next legislative session. High technology firms have a vested interest in preventing the Texas legislature from increasing the taxes placed on their businesses. While the state of Texas desperately needs funds to cover the increasing amount of expenditures, computer software may not be the solution. Nevertheless, until the legislature resolves the issues surrounding computer software's taxability, courts will continue to entertain arguments concerning computer software and taxation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law State & Local Taxes Personal Property Tax Intangible Property Imposition of Tax Tax Law State & Local Taxes Personal Property Tax Tangible Property Imposition of Tax Computer & Internet Law Taxation State Tax

FOOTNOTES:

n1. See Marc S. Friedman & Lindsey H. Taylor, *State and Local Taxation of Software: A Trap for Computer Counsel*, *Computer Law.*, June 1990, at 20 (providing a similar hypothetical), available in Westlaw, 7 No. 6CLW20.

n2. See *id.* (providing various actions the firm might take based on advice given by counsel).

n3. See *id.* (recognizing the consequences of a lawyer overlooking software taxes).

n4. See *id.* (noting that the attorney in this case failed to advise the client on the state and local tax consequences of the transaction); Joseph X. Donovan, *Sizable Liabilities Await the Unwary: Impact of State and Local Taxes Is Often Overlooked*, *Law Firm Partnership & Benefits Rep.*, Jan. 1997, at 9 (suggesting that businesses and law firms can no longer dismiss local and state taxes as a "minor inconvenience"), available in Westlaw, 2 No. 12 LFPBR 9.

n5. See Marc S. Friedman & Lindsey H. Taylor, *State and Local Taxation of Software: A Trap for Computer Counsel*, *Computer Law.*, June 1990, at 20 (claiming that a transaction involving software can entail a significant amount of extra expenses due to sales and property taxes imposed on computer software), available in Westlaw, 7 No. 6CLW20; see also *General Bus. Sys., Inc. v. State Bd. of Equalization*, 208 *Cal. Rptr. 3d 374*, 374 (*Cal. Ct. App. 1984*) (evaluating the validity of sales tax levied on computer software that totaled \$ 50,256.27); *International Bus. Machs. Corp. v. Director of Revenue*, 765 *S.W.2d 611*, 612 (*Mo. 1989*) (deciding whether to grant refund requests, equaling \$ 25,926.28 and \$ 1,424,662, for sales tax imposed on computer software); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 *A.2d 467*, 468 (*R.I. 1992*) (addressing a dispute over a \$ 17,000 personal property tax bill for computer software); *Companies Fight Software Tax Bite*, *Chi. Trib.*, June 9, 1996, at 7 (discussing a disagreement over a property tax levied on computer software, which according to attorney Mark Holcombe "involves hundreds of thousands of dollars"), available in 1996 *WL* 2679556.

n6. See *Baird v. Pace*, 752 *P.2d 507*, 509 (*Ariz. Ct. App. 1987*) (mandating lawyers to utilize standard research techniques to discover rules of law); *Van Norden v. Schindler*, 545 *N.Y.S.2d 462*, 463 (*N.Y. Sup. Ct. 1989*) (holding attorney liable for failure to conduct appropriate research to ensure that current law was being relied upon); see also Model Rules of Professional Conduct Rule 1.1 (1983) (requiring attorneys to provide competent representation that includes reasonable legal knowledge).

n7. Cf. Robert Araujo, S.J., *The Virtuous Lawyer: Paradigm and Possibility*, 50 *SMU L. Rev.* 433, 450-51 (1997) (arguing that a virtuous lawyer must not only comprehend the case at hand or the rules of law that apply

to it, but also the history of the law and the particular rule's role in the evolution of the law); M.H. Hoeflich, *Plus Ça Change, Plus C'est Le Même Chose: The Integration of Theory & Practice in Legal Education*, 66 *Temp. L. Rev.* 123, 141 (1993) (contending that lawyers should understand the theory of the law in addition to the law itself); Chief Justice Randall T. Shepard, *Foreword: The Importance of Legal History for Modern Lawyering*, 30 *Ind. L. Rev.* 1, 1 (1997) (arguing that the legal profession operates on the basis of history).

n8. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 187 (1996) (tracing the history of taxation to conflicts among individuals focusing on their own goals); cf. Walter Hellerstein, *Political Perspectives on State and Local Taxation of Natural Resources*, 19 *Ga. L. Rev.* 31, 31-32 (1984) (describing the continual debate over state and local taxation of natural resources); Agnes Palazett, *Indians Win Sales Tax Battle: Pataki Orders Repeal of Rule on Gas, Cigarette Levy*, *Buff. News*, May 23, 1997, at A1 (discussing the battle between the state of New York and its Indian business over the sales taxation of gasoline and cigarettes to non-Indians on Indian reservations), available in 1997 WL 6437715.

n9. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 206-07 (1996) (attributing the complexity of the tax system to competing interests). A number of people suggest that there should be a balance between lowering taxes and increasing governmental expenditures. See Stephen Goldsmith, *Editorial, The Best Way to Pay for Library Expansion*, *Indianapolis Star*, July 3, 1997, at A15 (discussing the increased demand of government services in light of property taxes), available in 1997 WL 2890586; Ann O'Hanlon, *Some Va. Cities Find Freedom Too Costly: Several Consider Rejoining the Ranks of Towns*, *Wash. Post*, Feb. 24, 1997, at B3 (arguing that if taxes are lowered then additional expenditures cannot be funded), available in 1997 WL 9336516; Jesse E. Todd, Jr., *Demand Fewer Services and Less Regulation If You Really Want Lower Taxes*, *Sun-Sentinel Ft. Lauderdale*, Oct. 23, 1997, at 23A (contending that if lower taxes are demanded, then fewer services must be demanded), available in 1997 WL 16079757; Erick M. Weiss, *Good News About Property Tax: 41 Percent of State's Towns Show Stable of Lower Tax Rates*, *Hartford Courant*, Oct. 3, 1997, at A1 (reporting that taxpayers usually request more services and lower taxes), available in 1997 WL 14674503.

n10. See Arthur D. Lynn, Jr., *The Institutional Context of Property Tax Administration* (indicating that state and local governments are consistently under fiscal strains due to various program expansions), in *The Property Tax and Its Administration* 3, 12 (Arthur D. Lynn, Jr. ed., 1969); James S. Haney, *Wisconsin Business Pays Fair Share to State's Tax Base and to Education*, *Milwaukee J. Sentinel*, Apr. 5, 1996, at 17 (stating that property taxes permit government spending), available in 1996 WL 11320263.

n11. See *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 194 (Utah 1984) (stating that the ad valorem tax literally means "according to value" and "is used to designate an assessment of taxes against property at a certain rate"); *Black's Law Dictionary* 51 (6th ed. 1990) (defining an ad valorem tax as a tax imposed on the value of property); *State Tax Cases Rep.* 20-001 (Commerce Clearing House, Inc. 1993) (describing an ad valorem tax as a tax "imposed upon the ownership or use of property, or upon the property itself, and measured by the value of the property taxed"). Although an ad valorem tax is more commonly imposed on real estate, it can and has been imposed on personal property. See, e.g., *Ga. Code Ann.* 48-5-3 (1997) (imposing an ad valorem tax on personal property); *Ky. Rev. Stat. Ann.* 91.260 (Michie 1996) (permitting an ad valorem tax to be imposed on personal property); *Tex. Tax Code Ann.* 11.01 (Vernon 1992) (levying an ad valorem tax on all tangible personal property).

n12. See Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?* (revealing that traditionally states have relied on the property tax as a major source of revenue), in *The Property Tax and Its Administration* 15, 22 (Arthur D. Lynn, Jr. ed., 1969); *State Tax Cases Rep.* 20-001 (Commerce Clearing House, Inc. 1993) (stating that ad valorem or property taxation is the principle source of revenue in every state).

n13. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 4 (1996) (noting that in local United States governments, property taxes still provide three-fourths of the tax revenue). Local, not state, governments impose a majority of property taxes. See *id.* at 5. In the past century, states have turned to

other types of taxes, particularly sales and income taxes, in order to raise enough revenue to meet their needs. See *id.*

n14. See Black's Law Dictionary 1216 (6th ed. 1990) (defining property as commonly used to denote everything which is real or personal); see, e.g., *Ariz. Rev. Stat. Ann.* 42-202 (West 1991) (subjecting all property to property taxation); *Mich. Comp. Laws Ann.* 211.1 (West 1986) (imposing a property tax on all property); *Nev. Rev. Stat.* 361.045 (West 1995) (taxing all property); *N.J. Stat. Ann.* 54:4-1 (West 1998) (providing for property taxation of all real and personal property).

n15. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 4 (1996) (noting that "in 1986, locally assessed personal property made up only 10.1 percent of the property tax base in the United States"). Traditionally, real property, not personal property, has been the "backbone" of the property tax system. *State Tax Cases Rep.* 20-001 (Commerce Clearing House, Inc. 1993); see *id.* at 205 (contending that "real estate now makes up the bulk of the tax base in most states").

n16. See Black's Law Dictionary 1216-17 (6th ed. 1990) (extending the definition of property to include anything of value including tangible or intangible personal property). Under the Texas Tax Code, tangible personal property is defined as "personal property that can be seen, weighed, measured, felt, or otherwise perceived by the senses, but does not include a document or other perceptible object that constitutes evidence of a valuable interest, claim, or right and has negligible or no intrinsic value." *Tex. Tax Code Ann.* 1.04(5) (Vernon 1992). Conversely, intangible personal property is defined as "a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document." *Id.* 1.04(6).

n17. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 163, 165-66 (1990) (stating that as a general rule, most jurisdictions do not tax intangible property); Janet Fairchild, Annotation, *Property Taxation of Computer Software*, 82 *A.L.R.3d* 606, 608 (1978) (indicating that most jurisdictions do not tax intangible property). Only 14 states levy a tax on intangible property. See *Intangibles Assessment Date, State & Loc. Tax Wkly.*, Nov. 25, 1996, at 8-9 (listing the assessment dates of states that tax intangible property as well as the type of intangible property taxed). These states are Alabama, Florida, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas and West Virginia. See *id.* at 8. Under its Constitution, Texas permits its legislature to tax intangible property. See *Tex. Const.* art. VIII, 1(c) (enumerating that the legislature may tax intangible property). The tax code, however, only provides for a tax on intangible property of a transportation business or intangible property governed by the Insurance Code or the Texas Savings and Loan Act. See *Tex. Tax Code Ann.* 11.02(b) (Vernon 1992) (stating that intangible property, unless exempt by law, is taxable if Texas has jurisdiction to tax those intangibles).

n18. See Black's Law Dictionary 1217 (6th ed. 1990) (stating that corporeal or tangible personal property includes animals, furniture, and merchandise).

n19. See *id.* at 809 (considering certificates of stock, bonds, promissory notes, copyrights, and franchises as intangible property).

n20. See, e.g., *Wal-Mart Stores, Inc. v. City of Mobile*, 696 *So. 2d* 290, 291 (Ala. 1996) (concluding that computer software was tangible property subject to a gross receipts tax); *Northeast Datacom, Inc. v. City of Wallingford*, 563 *A.2d* 688, 689 (Conn. 1989) (holding that computer software was intangible personal property therefore not subject to property tax); *South Cent. Bell Tel. Co. v. Barthelmy*, 643 *So. 2d* 1240, 1241 (La. 1994) (finding computer software to be tangible property thus subject to sales tax).

n21. See *State v. Central Computer Serv.*, 349 So. 2d 1160, 1163 (Ala. 1977) (Maddox, J., dissenting) (indicating that the problems of classification of computer software began with IBM's 1969 announcement of separate pricing). The first case addressing whether computer software constituted tangible or intangible property was *District of Columbia v. Universal Computer Associates, Inc.*, decided in 1972. See *District of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615, 617 (D.C. Cir. 1972) (determining whether software stored on punched cards was tangible personal property). In that case, the court concluded that computer software should be deemed intangible property. See *id.*

n22. See *Central Computer Serv.*, 349 So. 2d at 1164 (explaining that prior to 1969 computer software was "bundled" with computer hardware and furnished at no extra cost); *In re Protest of Strayer*, 716 P.2d 588, 590 (Kan. 1986) (asserting that until IBM announced its separate pricing policy computer software was viewed as "an integral part of the computer hardware"); Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Comm. L. Rev.* 161-62, 166 (1990) (indicating that prior to "unbundling" computer hardware and software were treated as a single property unit by computer sellers and purchasers).

n23. See John G. Martin, Note, The Revolt Against the Property Tax on Software: An Unnecessary Conflict Growing out of Unbundling, 9 *Suffolk U. L. Rev.* 118, 123 (1974) (explaining that IBM's announcement of separate pricing resulted in computer software being considered a separate and distinct entity); see also Andrew Rodau, Computer Software: Does Article 2 of the Uniform Commercial Code Apply?, 35 *Emory L.J.* 853, 873-74 (1986) (asserting that computer software is now viewed as distinct from computer hardware).

n24. See William B. Bierce, New Rules on Sales and Use Tax for Software: Agencies Update Use of Technology, N.Y. L.J., Aug. 27, 1991, at 1 (emphasizing the importance of computer software as a new source of tax revenue); Thomas M. Findley, The Application of Florida's Sales Tax to Software and Electronic Computer Transmissions, Fla. B.J., Nov. 1994, at 63 (1994) (noting that the "Florida Department of Revenue has cast a hungry eye toward the potential tax revenues to be obtained from the computer industry"); Richard Raysman & Peter Brown, State Sales Taxation of Software, N.Y. L.J., Feb. 19, 1991, at 3 (asserting that state sales tax statutes have purposefully been broadened to include computer software).

n25. See Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Comm. L. Rev.* 161, 162 (1990) (revealing the "tug-of-war" between "state and local governments against corporate computer users over the property taxation of computer software"); Janet Fairchild, Annotation, Property Taxation of Computer Software, 82 *A.L.R.3d* 606, 608 (1978) (commenting on the conflict between taxing authorities and taxpayers over the classification of computer software); Karen Kaplan, California 8-County Suit Seeks Software Revenue Courts: L.A. and Orange Counties Among Those Hoping to Collect Taxes on Programs IBM and Others Lease, L.A. Times, Dec. 31, 1996, at D2 (discussing the resistance by companies, particularly IBM, to the taxation of computer software), available in 1996 WL 12770522; Kit Troyer, Lawmakers Ponder Taxes on Computers, St. Petersburg Times, Apr. 16, 1996, at 5B (noting the struggle between Florida counties and companies over computer software), available in 1996 WL 7110791.

n26. See *Companies Fight Software Tax Bite*, Chi. Trib., June 9, 1996, at 7 (explaining that the cost for companies adds up quickly when multi-million dollar customized computer programs are involved), available in 1996 WL 2679556; Marc S. Friedman & Lindsey H. Taylor, State and Local Taxation of Software: A Trap for Computer Counsel, *Computer Law.*, June 1990, at 20 (contending that property taxes "could add thousands of dollars in expense over the life of a computer system"), available in Westlaw, 7 No. 6CLW20; Bryan Ruez et al., Property Tax: A CPA's Perspective, *Tax Adviser*, Sept. 1, 1997, at 6 (suggesting that property taxes are becoming "a more significant portion of the total tax bite" for businesses), available in 1997 WL 9171344; cf. *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 468 (R.I. 1992) (stating that the amount of property tax levied on the computer software exceeded seventeen thousand dollars); *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 120 (Tex. App. - Dallas 1996, writ denied) (reporting that the value of the computer software at issue totaled over two million dollars).

n27. See *Tex. Tax Code Ann. 11.01* (Vernon 1992) (imposing ad valorem tax on all personal property); see also *Property Taxes on Inventory*, *St. & Loc. Tax Wkly.*, Nov. 11, 1996, at 8-9 (listing states which impose property taxes on inventory). Alaska, Arkansas, Georgia, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Ohio, Oklahoma, Rhode Island, Texas, Vermont, and West Virginia impose an annual personal property tax on business inventories. See *id.* at 8. Delaware, Hawaii, Iowa, New York, and Pennsylvania do not tax tangible or intangible property, therefore, business inventories are not taxable. See *id.* North Dakota only applies a property tax to certain entities, and South Dakota taxes only centrally assessed property owned by utilities, airlines, and express companies. See *id.* The remaining states do not levy a property tax on inventories of merchants or manufacturers holding property for processing or sale. See *id.*

n28. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 2.06 (3d ed. 1996) (stating that the classification of computer software is important because most states exclude intangible property from ad valorem taxation); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165-66 (1990) (stating that most jurisdictions do not levy a tax on intangible property); Janet Fairchild, Annotation, *Property Taxation of Computer Software*, 82 *A.L.R.3d* 606, 608 (1978) (indicating that most jurisdictions do not tax intangible property); see also Bryan Ruez et al., *Property Tax: A CPA's Perspective*, *Tax Adviser*, Sept. 1, 1997, at 6 (noting that about 30 states exempt intangible personal property from taxation), available in 1997 WL 9171344.

n29. See, e.g., *District of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615 (D.C. Cir. 1972); *Wal-Mart Stores, Inc. v. City of Mobile*, 696 So. 2d 290 (Ala. 1996); *Honeywell Info. Sys., Inc. v. Maricopa County*, 575 P.2d 801 (Ariz. Ct. App. 1977); *Navistar Int'l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108 (Cal. 1994); *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688 (Conn. 1989); *First Nat'l Bank v. Department of Revenue*, 421 N.E.2d 175 (Ill. 1981); *In re Protest of Strayer*, 716 P.2d 588 (Kan. 1986); *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240 (La. 1994); *Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192 (Me. 1985); *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248 (Md. 1983); *Detroit Auto. Interinsurance Exch. v. Department of Treasury*, 361 N.W.2d 373 (Mich. Ct. App. 1984); *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204 (Mo. 1990); *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360 (Ohio Ct. App. 1987); *United Design Corp. v. State Tax Comm'n*, 942 P.2d 725 (Ok. 1997); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467 (R.I. 1992); *Citizens So. Sys., v. South Carolina Tax Comm'n*, 311 S.E.2d 717 (S.C. 1984); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976); *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119 (Tex. App. - Dallas 1996, writ denied); *Cache County v. State Tax Comm'n*, 922 P.2d 758 (Utah 1996); *Chittenden Trust Co. v. King*, 465 A.2d 1100 (Vt. 1983); *Pennsylvania & W. Va. Supply Corp. v. Rose*, 368 S.E.2d 101 (W. Va. 1988).

n30. See, e.g., *Universal Computer Assocs.*, 465 F.2d at 619 (declaring computer software to be intangible property); *Honeywell Info. Sys.*, 575 P.2d at 803 (defining computer software as intangible property); *First Nat'l Bank*, 421 N.E.2d at 177 (claiming that computer software was intangible property); *James v. Tres Computer Sys., Inc.*, 642 S.W.2d 347, 348-49 (Mo. 1982) (considering computer software to be intangible property), modified by *International Bus. Machs. Corp. v. Director of Revenue*, 765 S.W.2d 611, 613 (Mo. 1989); *Commerce Union Bank*, 538 S.W.2d at 408 (concluding that computer software constituted intangible property). But see *Chittenden Trust Co.*, 465 A.2d at 1102 (holding that computer software is tangible property).

n31. See *Comshare, Inc. v. United States*, 27 F.3d 1142, 1143 (6th Cir. 1994) (considering computer software to be tangible property); *Wal-Mart Stores*, 696 So. 2d at 291 (declaring that computer software was tangible property); *South Cent. Bell Tel. Co.*, 643 So. 2d at 1241 (classifying computer software as tangible property); see also Suzanne Bagert, *South Central Bell v. Barthelemy: The Louisiana Supreme Court Determines That Computer Software Is Tangible Personal Property*, 69 *Tul. L. Rev.* 1367, 1368 (1995) (indicating that "since 1983 most courts have found computer software tangible"); Ruhama Dankner Goldman, Comment, *From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?*, 42 *Loy. L. Rev.* 147, 158 (1996) (commenting that the trend has been to classify computer software as tangible personal property).

n32. Of the seven states which have addressed the classification of computer software in the context of sales and use taxation since 1985, all seven have concluded that computer software is tangible personal property. See *Wal-Mart Stores*, 696 So. 2d at 291 (declaring computer software tangible property subject to gross receipts tax); *South Cent. Bell Tel. Co.*, 643 So. 2d at 1241 (deeming computer software subject to sales tax as tangible personal property); *Measurex Sys.*, 490 A.2d at 1196 (affirming lower court's decision that canned software was tangible property subject to use tax); *Bridge Data Co.*, 794 S.W.2d at 207 (agreeing that software involved was subject to sales and use tax as tangible property); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124, 129 (R.I. 1985) (concluding that canned software constitutes tangible property subject to use tax); *Mark O. Haroldsen, Inc. v. State Tax Comm'n*, 805 P.2d 176, 181 (Utah 1990) (holding computer software to be tangible property subject to use tax); *Pennsylvania & W. Va. Supply*, 368 S.E.2d at 105 (finding computer software to be tangible personal property under use tax statute).

n33. Since 1985, three states have concluded that, under property tax provisions, computer software constitutes intangible personal property. See *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 691 (Conn. 1989) (concluding that computer software is intangible property thus not subject to municipal property tax); *Compuserve v. Lindley*, 535 N.E.2d 360, 366 (Ohio Ct. App. 1987) (determining that for personal property tax purposes, computer software is not intangible property); *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 121 (Tex. App. - Dallas 1996, writ denied) (deeming computer software intangible property, thus exempt from property taxation). Three other state courts that have addressed the property tax classification have based their decisions on the type of computer software involved. See *In re Protest of Strayer*, 716 P.2d 588, 593-94 (Kan. 1986) (holding operational and software, not applications software, to be tangible personal property subject to property tax); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 469 (R.I. 1992) (classifying custom computer software as intangible property for property tax purposes); *Cache County v. State Tax Comm'n*, 922 P.2d 758, 768 (Utah 1996) (asserting that, for property tax purposes, customized computer software is intangible property).

n34. Since the debate over the classification of computer software began, twice as many cases have addressed computer software in the context of sales and use taxation as opposed to property taxation. Compare *District of Columbia v. Universal Computer Assocs.*, 465 F.2d 615, 619 (D.C. Cir. 1972) (assessing the property taxation of computer software), and *Honeywell Info. Sys., Inc. v. Maricopa County*, 575 P.2d 801, 803 (Ariz. Ct. App. 1977) (examining whether computer software should be subject to property tax), and *Northeast Datacom*, 563 A.2d at 691 (evaluating computer software under property tax provisions), and *In re Protest of Strayer*, 716 P.2d at 593-94 (addressing property taxation of computer software), and *Greyhound Computer Corp. v. State Dep't of Assessments & Taxation*, 320 A.2d 52, 53-54 (Md. 1974) (stating that the issue in the case was the property taxation of computer software), and *Compuserve*, 535 N.E.2d at 366 (considering whether computer software is subject to personal property tax), and *Computer Assocs. Int'l, Inc.*, 615 A.2d at 469 (discussing classification of computer software in context of property taxation), and *Tech Data Corp.*, 930 S.W.2d at 121 (determining whether a property tax can be levied on computer software), and *Cache County*, 922 P.2d at 768 (questioning property taxation of computer software), with *Wal-Mart Stores, Inc. v. City of Mobile*, 696 So. 2d 290, 291 (Ala. 1996) (assessing gross receipts taxation of computer software), and *Navistar Int'l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108, 114 (Cal. 1994) (questioning sales taxation of computer software), and *First Nat'l Bank v. Department of Revenue*, 421 N.E.2d 175, 177 (Ill. 1981) (reviewing whether computer software is subject to use tax), and *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1241 (La. 1994) (discussing sales taxation of computer software), and *Measurex Sys. Inc. v. State Tax Assessor*, 490 A.2d 1192, 1196 (Me. 1985) (addressing whether computer software should be subject of a use tax), and *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248, 260 (Md. 1983) (looking at sales taxation of computer software), and *Detroit Auto. Interinsurance Exch. v. Department of Treasury*, 361 N.W.2d 373, 376 (Mich. Ct. App. 1984) (ascertaining sales taxation of computer software), and *Maccabees Mut. Life Ins. Co. v. State Dep't of Treasury*, 332 N.W.2d 561, 563 (Mich. Ct. App. 1982) (questioning validity of use taxation of computer software), and *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. 1990) (considering whether computer software was subject to sales and use taxation), and *Tres Computer Sys.*, 642 S.W.2d at 348 (addressing use taxation of computer software), and *Hasbro Indus.*, 487 A.2d at 129 (determining whether computer software was subject to use tax), and *Citizens & So. Sys. v. South Carolina Tax Comm'n*, 311 S.E.2d 717, 719 (S.C. 1984) (examining computer software in context of sales taxation), and *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408

(*Tenn.* 1976) (adjudging use taxation of computer software), and *First Nat'l Bank v. Bullock*, 548 S.W.2d 548, 550 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.) (contemplating sales taxation of computer software), and *Mark O. Haroldsen*, 805 P.2d at 181 (examining use taxation of computer software), and *Chittenden Trust*, 465 A.2d at 1101 (reviewing use taxation of computer software), and *Pennsylvania & W. Va. Supply*, 368 S.E.2d at 105 (evaluating computer software under use tax provisions).

n35. Compare *Tech Data Corp.*, 930 S.W.2d at 120 (defining the taxability of computer software in the context of property taxation), with *First Nat'l Bank*, 584 S.W.2d at 549 (addressing taxability of computer software under sales tax provisions).

n36. 584 S.W.2d 548, 550-51 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.).

n37. See *First Nat'l Bank*, 584 S.W.2d at 551 (deeming computer software to be intangible property).

n38. See *Tex. Tax Code Ann. 151.009* (Vernon 1992) (including computer software in the definition of tangible personal property for sales, excise, and use tax purposes within Chapter 151). The inclusion of computer software in the definition of tangible personal property in the portion of the Code pertaining to sales tax was made in 1984. See *Tex. Tax Code Ann. 151.009* historical note (Vernon 1992) (quoting 1994 amendment which "added, and, for the purposes of this chapter, the term includes a computer program that is not a custom computer program" to sales tax definition of tangible personal property) [Act of Oct. 1, 1984, 68th Leg., 2d C.S., ch. 31, art. 6, 2, 1984 Tex. Gen. Laws 222]. Originally custom software was excluded from the definition of tangible personal property, but in 1987 the Texas legislature altered the definition to omit the exemption of custom software. See Act of Jan. 1, 1982, 67th Leg., R.S., ch. 389, 1, 1981 Tex. Gen. Laws 1547, amended by Act of Jan. 1, 1988, 70th Leg., 2d C.S., ch. 5, art. 1, pt. 4, 11, 1987 Tex. Gen. Laws 13 (deleting the portion of the definition that excluded custom computer programs) (current version at *Tex. Tax Code Ann. 151.009* (Vernon 1992)).

n39. See *Tex. Tax Code Ann. 151.010* (Vernon 1992) (construing tangible property as a taxable item).

n40. Compare *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 120 (Tex. App. - Dallas 1996, writ denied) (classifying computer software as intangible personal property for property tax purposes), with *Tex. S.B. 736*, 75th Leg., R.S. (1997) (seeking to classify computer software as tangible property under the property tax provisions).

n41. See *Tech Data Corp.*, 930 S.W.2d at 120 (reviewing the taxability of computer software in the context of ad valorem taxation).

n42. 930 S.W.2d 119 (Tex. App. - Dallas 1996, writ denied).

n43. See *Tech Data Corp.*, 930 S.W.2d at 120 (declaring computer software to be intangible personal property).

n44. Cf. *Tex. Tax Code Ann. 151.009* (Vernon 1992) (adding computer software to sales, use, and excise tax definition of tangible personal property, thus reversing the decision of the court of appeals in *First National Bank v. Bullock*, 584 S.W.2d 548, 551 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e)).

n45. See *Davis v. Davis*, 495 S.W.2d 607, 611 (Tex. App. - Dallas 1973) (embracing property ownership whether legal, beneficial, or private), overruled on other grounds by *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976).

n46. See Black's Law Dictionary 1216 (6th ed. 1990) (defining property as everything which is subject to ownership, real or personal).

n47. See *id.* at 1218 (incorporating land and its tenements and hereditaments as real property).

n48. See *id.* at 1217 (defining personal property in a general sense).

n49. See *id.* at 1216-17 (stating that personal property is commonly divided into two categories).

n50. *Id.* at 1218.

n51. See Black's Law Dictionary 1217 (6th ed. 1990) (stating that corporeal personal property "includes movable and tangible things such as animals, furniture, merchandise, etc.").

n52. *Id.*

n53. See *id.* (delineating examples of intangible property, including claims, interests, and rights).

n54. *Id.* at 809.

n55. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 12-18 (1996) (discussing American colonial taxation of property); Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?* (noting that the American colonies imported the property tax from England), in *The Property Tax and Its Administration* 15, 20 (Arthur D. Lynn, Jr. ed., 1969); John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 67 (1972) (pointing out that colonial tax systems imposed an ad valorem tax); see also Sumner Benson, *A History of the General Property Tax* (discussing the colonial experience with property taxation), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 21-31 (George C. S. Benson et al. eds., 1965).

n56. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 9 (1996) (noting that the colonial legislatures used instruments they were familiar with once they gained the right to impose their own taxes).

n57. See *id.* at 9-10 (reporting that colonial taxes were only levied on specific items of property at specific rates either per acre, per item, or per head).

n58. See *id.* at 10 (indicating that conflicts contributed to an organized resistance against paying taxes).

n59. See Sumner Benson, *A History of the General Property Tax* (asserting that the "establishment of uniformity and universality requirements, demanding the taxation at one rate of all property, was the attempt made by many states to implement a fair system of taxation"), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 36 (George C. S. Benson et al. eds., 1965).

n60. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 199 (1996) (asserting that property tax uniformity was desired from the time of the American Revolution until the end of the nineteenth century); see also Sumner Benson, *A History of the General Property Tax* (reporting that during the nineteenth century, twenty-one states constitutionally adopted uniformity and universality requirements), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 31 (George C. S. Benson et al.

eds., 1965). Glenn Fisher defines uniformity as "the most fundamental characteristic of the general property tax." Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 10 (1996). Essentially, uniformity requires all property to be valued and taxed in the same manner. See *id.*

n61. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 10 (1996) (indicating that "in the nineteenth century most of the constitutions of the newly forming frontier states contained provisions mandating uniform ad valorem taxation of property"); John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 67 (1972) (stating that many states adopted the idea that a tax should be imposed on all property, "regardless of whether the property was real or personal, tangible or intangible").

n62. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 120 (1996) (reporting that uniform taxation of property was not achieved by the end of the nineteenth century); John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 67 (1972) (indicating that over time, the general property tax did not achieve its goal of taxing all property equally); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (noting that the general property tax failed to tax property equally).

n63. Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990); see John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 67 (1972) (indicating that intangible assets were easily concealed from tax assessors); see also George Armistead, *The Texas Tax Problem* 184 (1931) (stating that "personal property is intangible in the sense that it is hard to find").

n64. See Sumner Benson, *A History of the General Property Tax* (claiming that the ease with which one could avoid listing all his or her property led to "widespread disregard of the constitution and the laws"), in *The American Property Tax: Its History, Administration and Economic Impact* 11, 57 (George C. S. Benson et al. eds., 1965); John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 67 (1972) (asserting that because assets were easily concealed from tax assessors, avoidance of the personal property tax dramatically increased); State Tax Cases Rep. 20-002 (Commerce Clearing House, Inc. 1994) (indicating that since the growth of the uniform property, tax has become increasingly inequitable).

n65. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (noting that because they were forced to expand their resources tracking intangible property, many states passed statutes and constitutional amendments excluding intangible property from taxation); Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?* (suggesting that the escape of intangible property from taxation led assessors to exempt it from taxation; stating that where intangibles were retained, taxation was entrusted to state administration), in *The Property Tax and Its Administration* 15, 21 (Arthur D. Lynn, Jr. ed., 1969).

n66. See Sumner Benson, *A History of the General Property Tax* (stating that the exemption of intangible property from taxation led many states to "bribe" taxpayers into listing intangibles by reducing the applicable tax rate), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 64 (George C. S. Benson et al. eds., 1965).

n67. See *id.* at 69 (indicating that most efforts to resolve the failure of the general property tax to reach all property did not succeed); see also Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 161 (1996) (concluding that, in Kansas, most efforts to revitalize the general property tax did not succeed or had only limited success).

n68. See Sumner Benson, *A History of the General Property Tax* (explaining that the ineffectiveness of the general property tax to reach all forms of property resulted in widespread distrust of tax system), in *The Ameri-*

can Property Tax: Its History, Administration and Economic Impact 11, 52 (George C. S. Benson et al. eds., 1965); Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?* (discussing the dropping of intangibles from the tax system and indicating that the "attempt to tax intangibles had corrupted the tax system and tarnished its image"), in *The Property Tax and Its Administration* 15, 21 (Arthur D. Lynn, Jr. ed., 1969).

n69. See Sumner Benson, *A History of the General Property Tax* (contending that the classification theory adopted by a number of states attempted to correct the problems caused by the uniform property tax), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 64 (George C. S. Benson et al. eds., 1965); *State Tax Cases Rep.* 20-002 (Commerce Clearing House, Inc. 1993) (implying that the movement to classify property was in response to the failure of the uniform property tax). The classification theory divided property into various classes and then applied different tax rates to each class. See Sumner Benson, *A History of the General Property Tax*, in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 63 (George C. S. Benson et al. eds., 1965).

n70. See Sumner Benson, *A History of the General Property Tax* (reporting that as a result of the classification movement states completely exempted intangible property), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 39 (George C. S. Benson et al. eds., 1965); John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 67 (1972) (noting that several states statutorily and constitutionally excluded intangible property in order to solve the problems caused by the uniform property tax); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (stating that the inherent difficulties in locating intangible property led many states to pass statutes and constitutional amendments excluding intangible property from ad valorem property taxation).

n71. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (concluding that intangible property was difficult to identify).

n72. See *id.* at 165-66 (stating that as a general rule most states do not tax intangible property); see also L.J. Kutten, *Personal Property Taxation of Computer Software: A State-By-State Guide* 2.06 (3d ed. 1996) (recognizing that most states today exclude intangible property from property taxation); Janet Fairchild, Annotation, *Property Taxation of Computer Software*, 82 *A.L.R.3d* 606, 608 (1978) (asserting that most jurisdictions do not impose a property tax on intangible property); Bryan Ruez et al., *Property Tax: A CPA's Perspective*, *Tax Adviser*, Sept. 1, 1997, at 590 (reporting that a majority of the states exempt intangible property from the property taxation), available in 1997 WL 9171344.

n73. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 207 (1996) (claiming that states have turned away from the property tax in the twentieth century); Sumner Benson, *A History of the General Property Tax* (indicating that the twentieth century has experienced the end of the dominant role of the property tax), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 72 (George C. S. Benson et al. eds., 1965); see also Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (noting that since the depression, the property tax has been unable, by itself, to meet the mounting needs of various governmental units).

n74. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (stating that the wealth tax base has changed since the beginning of the twentieth century); see also Arthur D. Lynn, Jr., *The Institutional Context of Property Tax Administration* (describing that different conditions which have changed the context of twentieth century tax policy), in *The Property Tax and Its Administration* 3, 21 (Arthur D. Lynn, Jr. ed., 1969).

n75. See Arthur D. Lynn, Jr., *The Institutional Context of Property Tax Administration* (reporting that property taxation developed in response to its environment which was "a period of both private and public scarcity when agriculture was predominant, transportation and communication primitive, government decentralized, international commitments minimal, and the public sector relatively small"), in *The Property Tax and Its Administration* 3, 7 (Arthur D. Lynn, Jr. ed., 1969); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (stating that "property taxation developed in an agrarian culture where land was the predominant form of wealth").

n76. See Arthur D. Lynn, Jr., *The Institutional Context of Property Tax Administration* (stating that "today much wealth takes the form of rights, relationships, or status rather than of tangible property, be it real or personal"), in *The Property Tax and Its Administration* 3, 10 (Arthur D. Lynn, Jr. ed., 1969); see also Jonathan Pavluk, *Computer Software and Tax Policy*, 84 *Colum. L. Rev.* 1992, 1992 (1984) (asserting that investment in intangible property is growing while tangible property investment is declining).

n77. See Arthur D. Lynn, Jr., *The Institutional Context of Property Tax Administration* (suggesting that twentieth century forms of wealth are intangible rather than tangible), in *The Property Tax and Its Administration* 3, 10 (Arthur D. Lynn, Jr. ed., 1969); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 165 (1990) (indicating that the new forms of wealth are not tangible).

n78. See Sumner Benson, *A History of the General Property Tax* (claiming that the Great Depression and World War II ended the dominant role of the property tax), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 69 (George C. S. Benson et al. eds., 1965).

n79. See *id.* (alleging that the Great Depression "brought property tax limitation laws, preferential treatment and exemptions for homesteads and personal property, and the addition of rival taxes").

n80. See *id.* (asserting that World War II demanded such large increases in revenue that the property tax alone could not possibly meet).

n81. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 200 (1996) (implying that the property tax, although a smaller source of state funds, is still used to raise nearly all local revenue); *State Tax Cases Rep.* 20-0001 (Commerce Clearing House, Inc. 1993) (indicating that property taxation is a revenue source in every state).

n82. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 205 (1996) (declaring that "real estate now makes up the bulk of the [property] tax base in most states"); *State Tax Cases Rep.* 20-110 (Commerce Clearing House, Inc. 1993) (stating that taxation of real property is the "backbone" of every property tax system); Sumner Benson, *A History of the General Property Tax* (contending the state property tax is mainly levied on real estate), in *The American Property Tax: Its History, Administration, and Economic Impact* 11, 72-73 (George C. S. Benson et al. eds., 1965).

n83. See, e.g. Colo. Const. art. X, 3(1)(c) (exempting "household furnishings and personal effects which are not used for the production of income" from property taxation); *Miss. Code Ann.* 27-31-1 (1997) (listing property exempted from ad valorem taxation including wearing apparel, provisions on hand for family consumption, and all articles kept in the home for personal or family use); Nev. Rev. Stat. 361.-159 (1995) (taxing only personal property which is used in a business conducted for profit); *Tex. Tax Code Ann.* 11.14-11.145 (Vernon 1992 & Supp. 1998) (providing an exemption for all tangible property that a person owns which is not held or used for producing income unless its taxable value is less than \$ 500).

n84. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 165 (1990) (asserting that taxing authorities have been forced to find new forms of property to add to the property tax base).

n85. See, e.g., William B. Bierce, New Rules on Sales and Use Tax for Software: Agencies Update Use of Technology, N.Y. L.J., Aug. 27, 1991, at 1 (indicating that computer software is an important new source of tax revenue for states); Thomas M. Findley, The Application of Florida's Sales Tax to Software and Electronic Computer Transmissions, Fla. B.J., Nov. 1994, at 63 (implying that Florida is evaluating computer software as a potential tax revenue source); Richard Raysman & Peter Brown, State Sales Taxation of Software, N.Y. L.J., Feb. 19, 1991, at 3 (alleging that state sales tax statutes have been broadened to include computer software in order to raise revenue).

n86. See David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 55 (1985) (defining a computer as "[a] machine that processes information" by accepting the information, applying program procedures, and supplying the results from those procedures). According to Webster's Dictionary, a computer is "a programmable electronic device that can store, retrieve, and process data." Merriam Webster's Collegiate Dictionary 237 (10th ed. 1993). Webster's New World Dictionary of Computer Terms further describes a computer as "[a] machine that can follow instructions to alter data in a desirable way and to preform at least some operations without human intervention." Webster's New World Dictionary of Computer Terms 108 (6th ed. 1997).

n87. See Merriam Webster's Collegiate Dictionary 530 (10th ed. 1993) (defining hardware as the "physical components...of...an apparatus (as a computer)"); Webster's New World Dictionary of Computer Terms 228 (6th ed. 1997) (identifying computer hardware as "the electronic components, boards, peripherals, and equipment that comprise the computer system"); Arthur R. Rosen, Computer Software Classed As Intangible Property Is Exempt from State Property Taxes, 58 *J. Tax'n* 114, 114 (1983) (declaring computer hardware to be the physical machine); David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (describing computer hardware as the physical equipment necessary for data processing); see also *In re Protest of Strayer*, 716 P.2d 588, 590 (Kan. 1996) (referring to computer hardware as the data processing equipment).

n88. See Webster's New World Dictionary of Computer Terms 478 (6th ed. 1997) (defining software as a computer program or programs); David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (describing software "as a generic term for computer programs" and as "instructions that direct the hardware in performing work"); Casey P. August & Derrick K. W. Smith, Understanding Some Intricacies of Software: Expression, Interfaces, and Reverse Assembly, *Computer Law.*, Apr. 1994, at 16 (identifying software as a computer program with "the message expressed in a series of addressable lines of code which have been recorded on a magnetic disk, paper, or other chosen media"), available in Westlaw, 7 No. 6CLW20. *Compare Norwest Corp. v. Commissioner*, 108 T.C. 358, 360 (1997) (describing software as instructions and commands that enable the computer to function and perform certain specific tasks), with *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 122 (Tex. App. - Dallas 1996, writ denied) (adopting the definition that computer software consists of "imperceivable binary pulses").

n89. Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 309 (1985).

n90. See *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1246 (La. 1994) (stating that "[in] its broadest scope, software encompasses all parts of the computer system other than the hardware"); Robert W. McGee, The "Essence of the Transaction" Test for Computer Software Tangibility and Taxation, 20 *Lincoln L. Rev.* 21, 21 n.1 (1991) (noting that the easy definition of software is anything that is not hardware); John G. Martin, Note, The Revolt Against the Property Tax on Software: An Unnecessary Conflict Growing out of Un-

bundling, 9 *Suffolk U. L. Rev.* 118, 121 n.12 (1974) (stating that a software industry report had defined software as "those aspects of a computer which are not hardware").

n91. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 168-69 m.41-43 (1990) (noting that "one of the major problems with taxation of computer software, however, arises, because the courts, the legislature, and the computer industry all operate with different concepts of 'computer software'").

n92. See David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (listing three categories of software as systems, utility, and applications). Some commentators divide computer software into two categories, systems and application software. See John G. Martin, The Revolt Against the Property Tax on Software: An Unnecessary Conflict Growing out of Unbundling, 9 *Suffolk U. L. Rev.* 118, 122 (1974) (defining software as programs of either systems software type or applications software type); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 171 (1990) (classifying computer software as either systems or application software).

n93. See *In re Protest of Strayer*, 716 P.2d at 590 (describing operational software as the orchestrator of the computer system's basic functions); Webster's New World Dictionary of Computer Terms 503 (6th ed. 1997) (defining system software as "all the software used to operate and maintain a computer system"); Karl K. Heinzmen, Computer Software: Should It Be Treated As Tangible Property for Ad Valorem Tax, 37 *J. Tax'n* 184, 184 (1972) (stating that "operational software represents instructions to data processing equipment"); David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (contending that system software controls and directs the computer system).

n94. See David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (describing the functions of systems software); see also *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360, 363 (Ohio Ct. App. 1987) (acknowledging appellant's contention that systems software is "used to instruct the computer on how to attack a problem").

n95. See *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 406 (Tenn. 1976) (defining operational programs as "fundamental and necessary to the functioning of the computer hardware itself"); Webster's New World Dictionary of Computer Terms 503 (6th ed. 1997) (indicating that system software operates and maintains computer systems).

n96. See *In re Protest of Strayer*, 716 P.2d 588, 593-94 (Kan. 1986) (stating that a computer system cannot operate without operational software); *Compuserve*, 535 N.E.2d at 367 (indicating that computer hardware is inoperable without systems software); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 173-74 (1990) (noting that operational software "is almost a permanent part of the computer").

n97. See David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (listing the purposes behind utility software along with the tasks they perform); see also Webster's New World Dictionary of Computer Terms 531 (6th ed. 1997) (defining utility software as a program which assists in maintaining and improving the overall efficiency of a computer system).

n98. See Webster's New World Dictionary of Computer Terms 105 (6th ed. 1997) (defining a compiler as a "program that reads the statements written in a human-readable programming language...and translates the statements into a machine-readable executable program").

n99. See John W. Bryant & Lance R. Mather, Property Taxation of Computer Software, 18 *N.Y. L.F.* 59, 62 (1972) (including compilers, sorts, and utility routines in the systems software category).

n100. See *In re Protest of Strayer*, 716 P.2d 588, 590 (Kan. 1986) (acknowledging that application programs are particularized and specialized); *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360, 363 (Ohio Ct. App. 1987) (recognizing appellant's contention that application software is "designed to solve a particular problem or perform a particular task"); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 406 (Tenn. 1976) (explaining that application software is designed to perform only specific tasks); Webster's New World Dictionary of Computer Terms 31 (6th ed. 1997) (describing application software as computer programs designed to perform specific tasks); Karl K. Heinzman, Computer Software: Should It Be Treated As Tangible Property for Ad Valorem Tax, 37 *J. Tax'n* 184, 184 (1972) (stating that application programs "generally represent procedures or instructions for data processing equipment which detail the operations the equipment is to perform in order to achieve a specific objective use for the equipment user"); David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 56 (1985) (defining application software as "programs written to solve a specific problem or to do a particular job").

n101. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 174 (1990) (stating that "application software is designed to allow the computer user to communicate with the equipment").

n102. See *id.* at 174 (noting that "application software is task- or user-oriented, emphasizing communication with the computer's user.") (citing William Raabe, Jr., Property Sales, and Use Taxation of Custom and "Canned" Computer Software: Emerging Judicial Guidelines, 36 *Tax Executive* 227, 229-30 (1984)).

n103. See, e.g., *Cal. Rev. & Tax Code* 995.2 (Deering 1995) (distinguishing between operational and application software for property tax purposes); *In re Protest of Strayer*, 716 P.2d at 593-94 (drawing tax distinction between operational and application software); *Compuserve*, 535 N.E.2d at 367 (differentiating systems and application software for property tax assessment); see also Companies Fight Software Tax Bite, *Chi. Trib.*, June 9, 1996, at 7 (noting that California taxes only "basic operating programs" and Virginia taxes only operational software), available in 1996 *WL* 2679556.

n104. See *Cal. Rev. & Tax Code* 995 (Deering 1995) (imposing a property tax on the value of operational software but not application software); *In re Protest of Strayer*, 716 P.2d at 593-94 (concluding that operational software was taxable tangible property while application software was nontaxable intangible property); *Compuserve*, 535 N.E.2d at 367 (determining that systems software is subject to a property tax while application software is not subject to that tax).

n105. See *Navistar Int'l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108, 109 (Ca. 1994) (considering custom computer program within sales tax exemption); *Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192, 1195-96 (Me. 1985) (adopting lower court's distinction between canned and custom software); *Maccabees Mut. Life Ins. Co. v. Department of Treasury*, 332 N.W.2d 561, 564 (Mich. Ct. App. 1982) (indicating the need for a distinction between canned and custom software); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124, 128 (R.I. 1985) (determining that the software in question was canned); see also David C. Tunick & Dan S. Schechter, State Taxation of Computer Programs: Tangible or Intangible?, 63 *Taxes* 54, 62-68 (1985) (discussing cases making a distinction between canned and custom software). But see *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1249 (La. 1994) (declining to make canned-custom distinction).

n106. See *Measurex Sys., Inc.*, 490 A.2d at 1195 (noting that canned software is prepared for a number of users).

n107. See *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 468 (R.I. 1992) (reaffirming that "the service content of a ready-to-execute canned program is virtually nonexistent"); *Hasbro Indus., Inc.*, 487 A.2d at 128 (asserting that the service content is nonexistent because canned software is a fungible item).

n108. See *Maccabees Mut. Life Ins. Co.*, 332 N.W.2d at 563 (noting that canned programs "need no documentation, training, or expert engineering support").

n109. See *id.* (stating that canned programs are bought at the retail level, can be used immediately, and "need no documentation, training or expert engineering support"); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 52 (1992) (stating that canned programs are sold "as is and are available to the general public"); see also Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 171 (1990) (stating that canned software, which is sold "as is," is conveyed through a number of different mediums).

n110. Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 171 (1990).

n111. *Id.*

n112. See *Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192, 1195 (Me. 1985) (noting that custom software is created to meet a specific user's needs); *United Design Corp. v. State Tax Comm'n*, 942 P.2d 725, 729 n.3 (Okla. 1997) (citing the regulation which states that custom programs are prepared according to the customer's special order); Ruhama Dankner Goldman, Comment, From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?, 42 *Loy. L. Rev.* 147, 156 (1996) (stating that custom software is designed according to the specifications of the user).

n113. See *Navistar Int'l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108, 114 (Ca. 1994) (recognizing that the difference between canned and custom software is the service characteristics inherent in custom software); *Measurex Sys., Inc.*, 490 A.2d at 1196 (indicating that custom software contains a service component); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 469 (R.I. 1992) (contending that custom software contains an intangible service element). One court has stated that custom software loses its service characterization if it is resold to another user. See *Navistar Int'l Transp. Corp.*, 884 P.2d at 114 (quoting *Touche Ross & Co. v. State Bd. of Equalization*, 250 Cal. Rptr. 408 (1988)).

n114. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 171-72 (1990) (providing engineers who customize programs given user requirements); see also *Maccabees Mut. Life Ins. Co. v. Department of Treasury*, 332 N.W.2d 561, 563 (Mich. Ct. App. 1982) (commenting on the need for prelease consulting with buyers of customized programs).

n115. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 172 (1990) (resulting in the culmination of computer tapes and disks from customization).

n116. See *Measurex Sys., Inc.*, 490 A.2d at 1195 (claiming that custom software is not easily transferable because it is created for a specific user).

n117. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 172 (1990) (discussing how custom software and canned software are subject to different restrictions).

n118. *Id.*; see Suzanne Bagert, *South Central Bell v. Barthelemy: The Louisiana Supreme Court Determines That Computer Software Is Tangible Personal Property*, 69 *Tul. L. Rev.* 1367, 1372 (1995) (stating that the "owner of [custom] software will then enjoy many rights not attendant to the licensee of canned software, such as the right to use it on as many computers as desired, and the right to sell it or lease it").

n119. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 172 (1990) (stating that a purchaser of custom software pays more for their bundle of rights than the purchaser of canned software).

n120. See *Navistar Int'l Transp. Corp. v. State Board of Equalization*, 884 P.2d 108, 114 (Ca. 1994) (stating that California law does not impose a sales tax on custom software); *United Design Corp. v. State Tax Comm'n*, 942 P.2d 725, 729 (Okla. 1997) (recognizing that canned software is taxed under sales tax regulation while custom software is not so taxed); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 468-69 (R.I. 1992) (acknowledging that canned software is tangible property subject to taxation while custom software is intangible property exempt from taxation); see also 68 *Am. Jur. 2d Sales and Use Taxes* 223 (1993) (discussing how many states differentiate between canned and custom software when imposing a use tax); Maribel A. Fajardo, Esq., *Alabama Proposes to Amend Computer Hardware and Software Regulations*, *State & Loc. Tax Wkly.*, Apr. 28, 1997, at 10-11 (discussing proposed amendments to computer software regulations, which suggest that custom software should be exempt from sales taxation while canned software should remain taxable); Thomas M. Findley, *The Application of Florida's Sales Tax to Software and Electronic Computer Transmissions*, 68 *Fla. B.J.* 63, 63 (1994) (pointing out that while a majority of states tax canned software, several of those states do not tax custom software); Richard Raysman & Peter Brown, *State Sales Taxation of Software*, N.Y. L.J., Feb. 19, 1991, at 3 (reporting that New York and New Jersey only tax canned software and not custom software). But see *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1249 (La. 1994) (indicating that the canned-custom distinction is irrelevant because the "nature of the software is the same").

n121. See *Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192, 1195-96 (Me. 1985) (indicating that canned software is tangible property while custom software is intangible); *Maccabees Mut. Life Ins. Co. v. Department of Treasury*, 322 N.W.2d 561, 564 (Mich. Ct. App. 1982) (concluding that canned software is taxable tangible property, and custom software is nontaxable intangible property); *International Bus. Machs. Corp. v. Director of Revenue*, 765 S.W.2d 611, 612 (Mo. 1981) (en banc) (recognizing that some cases hold canned software tangible property and custom software intangible property); *United Design Corp.*, 942 P.2d at 729 (stating that canned software is taxable while custom software is not taxable); *Computer Assocs. Int'l, Inc.*, 615 A.2d at 468-69 (acknowledging that canned software is taxable tangible property while custom software is nontaxable intangible property).

n122. See Ruhama Dankner Goldman, Comment, *From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?*, 42 *Loy. L. Rev.* 147, 157 (1996) (demonstrating the problem of attempting to differentiate between canned and customized software when program is essentially canned but has some modifications). One commentator designates this type of software as "customized" software. See L.J. Kutten, *Personal Property Taxation of Computer Software: A State-by-State Guide* 2.05 (3d ed. 1996) (dividing software into three categories: canned, customized, and custom). However, customized software should not be confused with "custom" software. See *id.* Customized software is standard software modified to fit the specific needs of the user; it is not created solely for the single user. See *id.*

n123. See Ruhama Dankner Goldman, Comment, *From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?*, 42 *Loy. L. Rev.* 147, 157 (1996) (asserting that the administration of the tax system with canned and custom software is made difficult because of the imprecise line drawn between canned and custom software); see also L.J. Kutten, *Personal Property Taxation of Computer Software: A State-by-State Guide* 2.05 (3d ed. 1996) (suggesting that for personal property tax purposes, "customized software should be broken into its two component parts: canned and custom software," otherwise taxing authorities will classify the software in the category which raises the most revenue).

n124. See *Tenn. Code Ann. 67-6-102(24)(B)* (1997) (imposing a sales tax on customized software); *United Design Corp.*, 942 P.2d at 728-29 n.3 (imposing a sales tax on customized software, which is defined as software with "programming changes to a pre-written program to adapt it to a customer's equipment"); H.B. 14, 1997 Leg., Reg. Sess. (N.C. 1997) (proposing to amend sales tax code so that customized software, or prewritten software with modifications, would be exempt from sales taxation).

n125. See *Tenn. Code Ann. 67-6-102(24)(B)* (1997) (declaring all computer software as tangible property including customized software except for that which is fabricated for a person's own use or consumption); Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 171 (1990) (noting that Tennessee changed its sales tax code in 1977, recognizing customized software as tangible property).

n126. 942 P.2d 725 (Okla. 1997).

n127. See *United Design Corp.*, 942 P.2d at 728-29 (recognizing that the use of sales taxation is appropriate for customized software).

n128. See H.B. 14, 1997 Leg., Reg. Sess. (N.C. 1994) (suggesting amending the sales tax code to state "modification of a prewritten program to meet a customer's needs is custom computer software only to the extent of the modification, unless the charge for modifying the program exceeds fifty percent (50%) of the total charge for the program"); David Strow, N.C. Software Developers Will Fight Tax Legislation, *Bus. J.-Charlotte*, Mar. 17, 1997, at 7 (discussing proposed bill that would only exempt certain custom software packages from sales taxation), available in 1997 WL 7604975.

n129. See Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (noting the difficulty faced by tax assessors in determining whether computer software is assessable), reprinted in L.J. Kuttien, *Personal Property Taxation of Computer Software: A State-By-State Guide* app. E, at 223 (3d ed. 1996).

n130. See *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 689 (Conn. 1989) (stating that the principle issue is whether computer software is tangible property subject to property taxation); *South Cent. Bell Tel. Co.*, 643 So. 2d at 1241 (considering whether computer software is tangible personal property for sales and use tax purposes); *Measurex Systems, Inc. v. State Tax Assessor*, 490 A.2d 1192, 1195 (Me. 1985) (determining, under use tax provisions, whether the software was tangible personal property). Classification of computer software is also an issue at the federal tax level when the question is whether computer software is eligible for an investment tax credit. See *Norwest Corp.*, 108 T.C. at 374-75 (reviewing whether computer software constituted tangible property in order to qualify for an investment tax credit); *Sprint Corp.*, 108 T.C. at 396 (determining whether computer software was tangible property, thus eligible for an investment tax credit). Prior to 1997, the United States Tax Court had considered computer software intangible property, thus ineligible for an investment tax credit. See *Kansas City S. Indus., Inc. v. Commissioner*, 98 T.C. 242, 262-64 (1992) (maintaining that computer software constituted intangible property); *Ronnen v. Commissioner*, 90 T.C. 74, 97 (1988) (holding that computer software was intangible property). However, in 1997, the United States Tax Court overruled its earlier decisions and concluded that computer software was tangible property eligible for an investment tax credit. See *Norwest Corp.*, 108 T.C. at 375 (deeming computer software to be tangible property); *Sprint Corp.*, 100 T.C. at 396 (defining computer software as tangible property).

n131. See Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 176-77 (1990) (discussing two early cases, *District of Columbia v. Universal Computer Associates*, and *Commerce Union Bank v. Tidwell*, which employed the knowledge rationale).

n132. See Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (contending that the "knowledge rationale test stands for the proposition that computer software is merely a means to transfer information from the creator of the data to the end user"), reprinted in L.J. Kuten, *Personal Property Taxation of Computer Software: A State-by-State Guide* app. E, at 230 (3d ed. 1996); Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 313 (1985); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 49 (1992); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 176 (1990) (alleging that the knowledge rationale considers the intangible knowledge, as opposed to the tangible medium, the significant tax factor).

n133. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 313 (1985) (explaining that once the information is transferred to the computer, the only thing that remains is intangible knowledge); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 49-50 (1992) (describing how once information on the tangible medium was transferred to the computer then all that remains is intangible knowledge).

n134. *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408 (Tenn. 1976).

N135. 465 F.2d 615 (D.C. Cir. 1972).

n136. *Universal Computer Assocs., Inc.*, 465 F.2d at 617.

n137. 538 S.W.2d 405 (Tenn. 1976).

n138. See *Universal Computer Assocs.*, 465 F.2d at 618 (holding that computer software is intangible property); *Commerce Union Bank*, 538 S.W.2d at 408 (concluding that the sale of computer software was not the sale of tangible property).

n139. See *Commerce Union Bank*, 538 S.W.2d at 408 (stating that intangible knowledge is what was purchased not the magnetic tapes or punch cards).

n140. See Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 50 (1992) (contending that "the essence of the transaction test was an expansion of the knowledge rationale"); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 177 (1990) (implying that the essence of the transaction test is a variation of the knowledge rationale).

n141. See *Cache County v. Property Tax Div. of Tax Comm'n*, 922 P.2d 758, 767-68 (Utah 1996) (asserting that if the cost of software is primarily incurred for its intangible nature, the property is nontaxable); cf. Robert W. McGee, The "Essence of the Transaction" Test for Computer Software Tangibility and Taxation, 20 *Lincoln L. Rev.* 21, 22 (1991) (stating that the "essence of the transaction test holds that software is tangible if the essence of the transaction is the purchase or sale of tangible property"). The "essence of the transaction" test is sometimes referred to as the "real object" test. See *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124, 126 (R.I. 1985) (stating that the critical test is the "real object" test which means that "'where the real object of the transaction is the product of the service, it is taxable transfer', but 'where the real object of the transaction is the service rendered and the transfer of personal property is merely incidental to the service, the transaction is not taxable'" (quoting *Statewide Multiple Listing Servs., Inc. v. Norberg*, 892 A.2d 871 (R.I. 1978))).

n142. See *Cache County*, 922 P.2d at 767 (stating that "the essence of the transaction" test "focuses on the primary purpose of the transaction"); John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 129 (1987) (pointing out that the essence of the transaction test "gauges the impor-

tance of the tangible medium to the transfer of knowledge"). It should be noted that the type of computer software involved does not affect the outcome of the knowledge rationale or the essence of the transaction test. See Nancy S. Rendleman & Charles B. Neely, Jr., *Property Taxation of Computer Software*, reprinted in L.J. Kullen, *Personal Property Taxation of Computer Software: A State-by-State Guide* app. E, at 230 (3d ed. 1996) (stating that neither test is dependent upon the classification of software).

n143. See *First Nat'l Bank v. Bullock*, 584 S.W.2d 548, 550-51 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.) (stating that the essence of the transaction was the intangible computer software and not the four tapes used to convey the software).

n144. *Id.* at 550.

n145. 535 N.E.2d 360 (Ohio Ct. App. 1987).

n146. See *Compuserve*, 535 N.E.2d at 365 (disagreeing with courts that have concluded that the purpose of purchasing computer software is to obtain the tangible medium by stating that the real purpose is to receive the intangible information).

n147. See *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 691 (Conn. 1989) (noting the dramatic difference in value between the computer disks and the computer software); *District of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615, 617 (D.C. Cir. 1972) (contrasting the value of the material to the value of the information purchased); *Detroit Auto. Interinsurance Exch. v. Department of Treasury*, 361 N.W.2d 373, 376 (Mich. Ct. App. 1984) (delineating between the value of the physical component and "the organization, creation, knowledge and skill of the information thereon"); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 407 (Tenn. 1976) (comparing the cost of the magnetic tape to the total cost of the computer software).

n148. See Robert W. McGee, *Software Taxation in Ohio*, 9 *Akron Tax J.* 49, 50 (1992) (discussing the tests that are used to classify computer software as either tangible or intangible).

n149. See *id.* (noting most of value of software lies in its intellectual content).

n150. See *Detroit Auto.*, 361 N.W.2d at 376 (recognizing that the value of the tangible components of software is nominal compared to the intangible items); *Commerce Union Bank*, 538 S.W.2d at 408 (noting that the value of a tape or disk dissipates once the information is transferred to the computer system).

n151. See Robert W. McGee, *Sales, Use, and Property Taxation of Computer Software*, 8 *Hamline L. Rev.* 307, 314 (1985) (declaring that a "number of courts have applied the 'mode of transmission' test"); Robert W. McGee, *Software Taxation in Ohio*, 9 *Akron Tax J.* 49, 50 n.9 (1992) (claiming that several courts have used the "mode of transmission" test).

n152. Robert W. McGee, *Software Taxation in Ohio*, 9 *Akron Tax J.* 49, 50 (1992); cf. *First Nat'l Bank v. Department of Revenue*, 421 N.E.2d 175, 178 (Ill. 1981) (finding support for the conclusion that computer software is intangible property in the fact that software could be conveyed in a number of ways); *James v. Tres Computer Sys., Inc.*, 642 S.W.2d 347, 349 (Mo. 1982) (noting that the use of a tangible medium, such as a tape, was not necessary as the software could have been conveyed to the purchaser through electronic communications); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408 (Tenn. 1976) (suggesting that computer software can be conveyed through tangible and nontangible methods).

n153. 465 A.2d 1100 (Vt. 1983).

n154. See *Chittenden Trust Co.*, 465 A.2d at 1102 (concluding that because the value of software lies in its tangible form, computer software constitutes tangible personal property); see also *Citizens & S. Sys. Inc. v. South Carolina Tax Comm'n*, 311 S.E.2d 717, 719 (S.C. 1984) (determining that computer software was tangible property based on the fact that it was delivered in a tangible form).

n155. See *Chittenden Trust Co.*, 465 A.2d at 1102 (alleging that if the Bank had procured the software through telephone lines the use tax would have been avoided); Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (suggesting that in states using the mode of transmission test, a taxpayer could possibly avoid property taxes by transferring the software electronically), reprinted in L.J. Kutten, Personal Property Taxation of Computer Software: A State-by-State Guide app. E, at 231 (3d ed. 1996); see also Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 50 n.9 (1992) (providing an example of how the transmission of a program over the telephone lines can save the amount of sales tax owed).

n156. Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software, reprinted in L.J. Kutten, Personal Property Taxation of Computer Software: A State-by-State Guide app. E, at 230 (3d ed. 1996).

n157. Cf. Colo. Const. art. X, 3(2)(a) (requiring property tax assessment to commence January 1 of each year); *Ky. Rev. Stat. Ann.* 132.220(1) (Michie 1991) (providing for property tax assessment as of January 1 of each year); *Tex. Tax Code Ann.* 23.01 (Vernon 1992) (calling for all property to be appraised for property tax purposes by January 1 of each year).

n158. Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 185 (1990); see John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 131 (1987) (noting that software has been analogized to phonograph records, books, and movie films). A recent case addressed whether VCR recordings were comparable to computer software or movie reels. See *Reynaud v. Town of Winchester*, 644 A.2d 976, 977-78 (Conn. App. Ct. 1994) (deciding whether plaintiffs' analogy of VCR recordings to computer software or defendant's analogy to movie reels was more persuasive). The court, however, concluded that the VCR recordings were more similar to movie reels than computer software. See *id.* at 978.

n159. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 314-15 (1985) (asserting that films and records are quite similar to computer software); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 50-51 (1992) (contending that "films and records have much in common with computer software"); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 185 (1990) (acknowledging that filmmaking and software creation involve similar processes).

n160. Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 315 (1985); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 51 (1992).

n161. See Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 51 (1992) (asserting that the value of software lies in its intellectual intangible content).

n162. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 315 (1985) (explaining the distinctions drawn by the courts between computer software and other taxable property); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 51 (1992) (laying out the differences between computer software and films, records, and books); John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 131 (1987) (discussing the distinctions between computer software and films, records, and books).

n163. See *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 407-08 (Tenn. 1976) (drawing a distinction between film and computer software).

n164. *Id.* at 407.

n165. See *id.* at 407 (explaining that film is inherently related to a movie).

N166. See *id.* at 408 (describing the difference in mediums of computer software and films).

n167. See Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 51 (1992) (stating that another distinction between film and software is that a movie has continuing value because "it can be used again and again").

n168. See *Commerce Union Bank*, 538 S.W.2d at 408 (concluding that computer software was not tangible personal property).

n169. See *Commerce Union Bank*, 538 S.W.2d at 408 (pointing out that computer software is not complete and ready upon purchase because it must first be translated into language the computer can understand).

n170. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 315 (1985) (alleging that computer software is not immediately perceptible to the senses); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 51 (1992) (claiming that unlike films, records, and books, computer software cannot be immediately perceived by the senses); John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 131 (1987) (arguing that "books, records, and movies are designed to be readily perceptible by human senses with minimal aid of machines"); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 187 (1990) (noting that computer software is not immediately perceptible to the sense because it must first be translated into a language that a computer can understand).

n171. Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 315 (1985); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 51 (1992); see John W. Bryant & Lance R. Mather, Property Taxation of Computer Software, 18 *N.Y. L.F.* 59, 74 (1972) (pointing out that normally future updates and services are included with the purchase of custom computer software while it is "doubtful whether the hypothetical purchase of a motion picture and its copyright would be regarded as a continuing contract for services").

n172. See *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1247-48 (La. 1994) (rejecting attempts by other jurisdictions to analogize computer software to other taxable tangible property); *Commerce Union Bank*, 538 S.W.2d at 407-08 (relying on the differences between computer software and other tangible property then concluding that computer software is intangible property).

n173. 464 A.2d 248 (Md. 1983).

n174. See *Equitable Trust Co.*, 464 A.2d at 261 (holding that there is no legally significant difference between computer software and records).

n175. See *Chittenden Trust Co.*, 465 A.2d at 1102 (rejecting any distinction between computer software and other tangible property wherein the value lies not in its physical component but rather in the intellectual content).

n176. See *Equitable Trust Co.*, 464 A.2d at 261 (stating that "[a] tape containing a copy of a canned program does not lose its tangible character, because its content is a reproduction of the product of intellectual effort, just as the phonorecord does not become intangible, because it is a reproduction of the product of artistic effort"); Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 188 (1990) (comparing canned programs with phonorecords).

n177. See *Equitable Trust Co.*, 464 A.2d at 261 (holding that there is no legally significant difference between computer software and records).

n178. 465 A.2d 1100 (Va. 1983).

n179. See *Chittenden Trust Co.*, 465 A.2d at 1102 (rejecting the Bank's argument by distinguishing computer software from other taxable personal property).

n180. See *id.* (contending that computer software is not different from other taxable personal property items).

n181. *Id.*

n182. See *id.* (holding that computer software constitutes tangible property).

n183. See, e.g., *General Bus. Sys., Inc. v. State Bd. of Equalization*, 208 *Cal. Rptr.* 374, 375 (*Cal. Ct. App.* 1984) (discussing whether the sale of computer software constituted the sale of a good or the rendition of services); *Communications Groups, Inc. v. Warner Communications, Inc.*, 138 *Misc. 2d* 80, 83, 527 *N.Y.S.2d* 341, 344 (*N.Y. Civ. Ct.* 1988) (determining whether the sale of computer software involved a good or a service); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 469 (*R.I.* 1992) (deciding whether an intangible service element was involved in the sale of computer software); see also Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 316 (1985) (stating that a number of courts have wrestled with the good versus service distinction).

n184. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 316 (1985) (stating that computer software that is deemed a good is considered tangible property). Classification of computer software as a good also means that its sale is governed by the Uniform Commercial Code (U.C.C.). See James A. Moge, Software As UCC Goods: A Critical Look, 34 *How. L.J.* 299, 307 (1991) (concluding that for the U.C.C. to apply software must be classified as a good). The U.C.C. defines goods as "all things...which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and...things in action." *U.C.C. 2-105* (1978). The key inquiry, therefore, is whether computer software should be considered a good or a service. See David C. Tunick, Has the Computer Changed the Law?, 13 *J. Marshall J. Computer & Info. L.* 43, 45 (1994) (noting that the critical question for courts is whether software is considered a good).

n185. See John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 132 (1987) (noting that if the sale of software is actually a sale of services then the transaction will not be subject to a sales or use tax). In addition, if computer software is classified as a service then it does not fall within the scope of the U.C.C. See James A. Moge, Software As UCC Goods: A Critical Look, 34 *How. L.J.*

299, 307 (1991) (stating that if the sale of software was considered a service transaction, then the sale would fall outside the scope of the U.C.C.).

n186. See *Computer Assocs. Int'l, Inc.*, 615 A.2d at 468 (explaining that canned software does not contain a service element); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124, 128 (R.I. 1985) (claiming that service is non-existent with a canned program); Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 317 (1985) (stating that services do not accompany the sale of canned programs); John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 133 (1987) (noting that with canned software no personal services are rendered as it is sold "off the shelf").

n187. See *General Bus. Sys.*, 208 Cal. Rptr. at 375 (determining that the sale of custom computer software was actually the provision of services); *Computer Assocs. Int'l, Inc.*, 615 A.2d at 469 (declaring that custom software contains an intangible service element); Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 316 (1985) (contending that canned programs are normally considered products while custom programs are generally considered services).

n188. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 318 (1985) (demonstrating that tangible medium are generally worth less than services); see also John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 *High Tech. L.J.* 125, 132 (1987) (suggesting that with custom software "the software is merely incidental to the rendering of the service").

n189. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 316-17 (1985) (explaining the different tests used to determine whether computer software constitutes a good or a service); Mary M. Simons, Comment, Benchmarking Wars: Who Wins and Who Loses with the Latest in Software Licensing, 1996 *Wis. L. Rev.* 165, 175 (stating that courts have adopted various tests, including the predominant factors rule and the moveable-end-product rule, to determine whether computer software constitutes a good).

n190. See *General Bus. Sys., Inc. v. State Bd. of Equalization*, 208 Cal. Rptr. 374, 375 (Cal. Ct. App. 1984) (using the true object test, which focuses on the main element of the transaction, to decide that the sale of computer software was in actuality the rendition of services); Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 316 (1985) (pointing out that one test used to distinguish between goods and services asks whether the transfer of the physical property is necessary or merely convenient to achieving the purpose of the transaction).

n191. See Robert W. McGee, Sales, Use, and Property Taxation of Computer Software, 8 *Hamline L. Rev.* 307, 316 (1985) (stating a test which compares the value of materials and services).

n192. See *id.* (describing a test which examines whether there is value to a purchaser only, or whether the item can be sold to the general public).

n193. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.01, at 19-20 (3d ed. 1996) (pointing out that valuing software for personal property tax purposes is difficult, particularly since any service costs must be deducted); Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 188 (1990) (contending that computer software valuation is a particularly difficult task).

A property tax is typically levied on the value of real and personal property owned by a taxpayer. See *Black's Law Dictionary* 1218 (6th ed. 1990) (stating that "an ad valorem tax [is] usually levied by a city or county government on the value of real or personal property that the taxpayer owns on a specified date"); Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 10 (1996) (noting that ad valorem taxation is based on the value of property); 21 Jay D. Howell, Jr., *Property Taxes* 413 (Texas Practice 1988) (stating that

property must be taxed according to its value). A property's value, therefore, must be ascertained once that property has been deemed taxable. After valuation occurs, the amount of tax owed to the taxing authority can be calculated. Generally, the property tax rate is "expressed as a uniform rate per thousand of valuation." Black's Law Dictionary 1218 (6th ed. 1990). For example, in Florida, the current property tax rates range from two cents to twenty-five cents per thousand of assessed value. See *Companies Fight Software Tax Bite*, Chi. Trib., June 9, 1996, at 7 (reporting that "Florida property tax rates generally range from [two] cents to [twenty-five] cents per \$ 1,000 of assessed value"), available in 1996 WL 2679556.

The process of valuation is a difficult task. See Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 81 (1996) (stating that "determining the value of property is a difficult task"); Harold M. Groves, *Is the Property Tax Conceptually and Practically Administrable?* (suggesting that administering the property tax is made difficult because it is based on valuation), in *The Property Tax and Its Administration* 15, 15 (Arthur D. Lynn, Jr. ed., 1969); cf. Nancy S. Rendleman & Charles B. Neely Jr., *Property Taxation of Computer Software* (noting difficulty in determining the value of computer software), reprinted in L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* app. E, at 233 (3d ed. 1996). As one commentator stated, even "the best appraisers may differ as to the value of particular properties." Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 81 (1996).

n194. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 189 (1990) (stating that "the price of a software package often includes many elements, including rights to maintenance and update services to be rendered in the future").

Once a state identifies computer software as taxable property, the state will be faced with the problem of determining a proper valuation of the software. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.01, at 19 (3d ed. 1996) (claiming that tax assessors are faced with the problem of determining the fair value of computer software); Nancy S. Rendleman & Charles B. Neely, Jr., *Property Taxation of Computer Software* (stating that once computer software is deemed taxable property, its value must be determined), reprinted in L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* app. E, at 233 (3d ed. 1996). Unlike most tangible personal property, the true value of software does not lie in its physical form. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 188 (1990) (noting that "the true value of software does not manifest itself in a physical form"). This examination contradicts the finding that computer software is tangible because the majority of the software's value is derived from the intangible knowledge contained on the tangible medium; the value of the physical storage medium, such as a tape or disk, is relatively low in comparison with the value of the intangible knowledge stored on the medium. See *id.* (providing an example in which a 2400-foot magnetic tape, which costs less than \$ 100, could easily contain software valued at \$ 100,000); see also John W. Bryant & Lance R. Mather, *Property Taxation of Computer Software*, 18 *N.Y. L.F.* 59, 63 (1972) (contending that "tangible manifestations of software, such as punch-cards or magnetic tapes and printed materials, are of low intrinsic value").

n195. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 169 (1990) (indicating that a state legislature would never intend to assess a property tax upon future services and rights); see also L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.01 (3d ed. 1996) (asserting that the inclusion of services such as pre-installation planning, training, debugging, testing, and performing engineering diagnostics inflates the value of computer software; thus, the failure to remove these costs in the valuation process will result in overvalued software and unnecessary tax payments).

n196. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.06 (3d ed. 1996) (stating that each taxing authority has its own method of determining the value of taxable property); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 193 (1990) (proclaiming that no one method of valuation has not been accepted). Compare Va. Const. art. X, 2 (using the fair market approach to determine value), and *Kan. Stat. Ann.* 79-501 (1989 & Supp. 1996) (approving of the fair market method for assessing property value), with Patrick Derdenger, *Arizona Property Tax* (reporting that Arizona values property according to its original cost less deprecia-

tion), in *Property Tax Deskbook* 3-834 (William Prugh et al. eds., 1997), and Dwayne W. Barrett & Richard A. Johnson, *Tennessee Property Tax* (acknowledging that although Tennessee has approved of the use of three methods to determine property value, the principal approach is the cost approach), in *Property Tax Deskbook* 43-225.1 (William Prugh et al. eds., 1997).

n197. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 193 (1990) (stating that state legislatures have not provided much guidance in regulations).

n198. See *Colo. Rev. Stat. Ann.* 39-1-103(5)(a) (West 1990 & Supp. 1997) (approving the use of either the cost, income, or market approach to determining the value of real and personal property); *Tex. Tax Code Ann.* 23.0101 (Vernon 1992 & Supp. 1998) (acknowledging the use of the cost, income, and market approaches for assessing the value of property); L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.01-.04 (3d ed. 1996) (examining the three major approaches to determining property value); Bryan Ruez et al., *Property Tax: A CPA's Perspective*, *Tax Adviser*, Sept. 1, 1997, at 590 (explaining the three methods of appraisal - cost, income, and market), available in 1997 *WL* 9171344. But see Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 189-91 (1990) (dividing the valuation process into two approaches: the historical cost method and the fair market value approach).

n199. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.02 (3d ed. 1996) (providing that the fair market approach determines the value of software based on "what software with identical or similar characteristics would sell for on the open market").

n200. See *id.* (stating that in order to value software, readily available software must be located in the market); Nancy S. Rendleman & Charles B. Neely, Jr., *Property Taxation of Computer Software* (suggesting that the market approach "relies upon a comparison of property recently transferred and of a substantially similar nature to the property valued"), reprinted in L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* app. E, at 234 (3d ed. 1996).

n201. L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.02 (3d ed. 1996).

n202. See *id.* (suggesting that the market approach may not work well "with custom, internally developed, or heavily customized canned software because...of the lack of comparable software"); Nancy S. Rendleman & Charles B. Neely, Jr., *Property Taxation of Computer Software* (arguing that the market approach breaks down with modified canned software and custom software), reprinted in L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* app. E, at 234 (3d ed. 1996); Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 190 (1990) (contending that the market approach "depends upon available pricing data on reasonably comparable software packages in the marketplace").

n203. L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.02 (3d ed. 1996); see Bryan Ruez et al., *Property Tax: A CPA's Perspective*, *Tax Adviser*, Sept. 1, 1997, at 590 (defining fair market value as "the price at which the property would sell in the open market in an exchange between a willing seller and willing buyer"), available in 1997 *WL* 9171344.

n204. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.02 (3d ed. 1996) (indicating that one fair market approach "uses the vendor's catalogue listprice less any accumulated depreciation").

n205. See *id.* (noting that another fair market method uses the vendor's actual price if it is different from the catalogue price, still deducting for any depreciation).

n206. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 190 (1990) (requiring sufficiently detailed sales data relevant in guiding value of software). Harris divides the fair market approach into two forms, the "cost of repurchase" and the "cost of replacement." *Id.* The "cost of repurchase" is the cost of purchasing similar software. *Id.* The "cost of replacement" is the cost to reproduce the computer software. *Id.* While the "cost of repurchase" method works only with canned software, the "cost of replacement" method can be applied to either canned or custom software. *Id.* at 191. But see Bryan Ruez et al., Property Tax: A CPA's Perspective, Tax Adviser, Sept. 1, 1997, at 590 (asserting that the replacement cost method is rarely used because of the difficulty in application), available in 1997 WL 9171344.

n207. See Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (explaining that a custom or internally developed application would not have comparable sales to use in a transactional valuation, and that these types of programs are more suited to a cost based analysis), reprinted in L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide app. E, at 234 (3d ed. 1996).

n208. *Id.* The income approach has been divided into two methods, direct capitalization and yield capitalization. See Bryan Ruez et al., Property Tax: A CPA's Perspective, Tax Adviser, Sept. 1, 1997, at 590 (suggesting replacement cost method is used rarely as it is difficult to determine), available in 1997 WL 9171344. Direct capitalization, which is the easiest to use, divides the capitalization rate of comparable companies by a company's normalized net income. See *id.* The yield capitalization method projects the future net cash flow and discounts it to present value. See *id.*

n209. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.03 (3d ed. 1996) (asserting that the income approach "requires the assessor to project the net cash flow associated with the sales revenue, license income, or royalty income generated by the software").

n210. See *id.* (providing that the value of the software must be capitalized in order to discount to present value any anticipated future income).

n211. See Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (claiming that few software owners can accurately allocate an income stream, particularly because obsolescence may obscure an estimate of future income), reprinted in L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide app. E, at 223 (3d ed. 1996).

n212. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.03 (3d ed. 1996) (asserting that "[it] is almost impossible to value software developed for a user's internal use").

n213. See *id.* (alleging that valuing computer software according to the capitalization of future income is risky since such income may never be realized).

n214. See *id.* 3.04 (contending that the cost approach is most commonly used with custom software); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 189 (1990) (noting that the historical cost method is the simplest valuation mode); see also Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (stating that tax assessors frequently use the cost method to value personal property including computer software), reprinted in L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide app. E, at 236 (3d ed. 1996).

n215. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 189 (1990) (arguing that the historical cost method's assessed value would equal the off-the-shelf purchase price).

n216. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.04 (3d ed. 1996) (claiming that a tax assessor determines the value of custom software by either referring to the cost of the development process or the cost to duplicate the utility of the software); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 189 (1990) (stating that under the cost method the value of custom software equals "the original cost of the entire software development process").

n217. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.04 (3d ed. 1996) (determining that assessors must account for the cost of labor, supplies, and hardware along with the margin of profit when valuing software under the cost approach).

n218. See *id.* (alleging that the cost approach "tends to overvalue the software because it is extremely difficult to exclude the nontaxable portion of the development process"); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 189-90 (1990) (arguing that the historical cost method overvalues computer software by including services which are not part of the final product).

n219. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 190 (1990) (overvaluing the software value with initial development costs); see also *District of Columbia v. Universal Computer Assocs., Inc.*, 465 *F.2d* 615, 619-20 (*D.C. Cir.* 1972) (deducting the cost of the development of the software from its assessed value).

n220. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.04 (3d ed. 1996) (proclaiming that tax assessors face the difficulty of assigning a value to the development process); Nancy S. Rendleman & Charles B. Neely, Jr., Property Taxation of Computer Software (alleging that few taxpayers provide "meaningful cost data for their internally developed software" as well as "document the man-hours expended and the dollars invested in the production of the software"), reprinted in L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide app. E, at 238 (3d ed. 1996). But see Justin Hibbard, Software Gains Capital Treatment, *Info. Wk.*, Jan. 12, 1998, at 18 (discussing a pending rule change requiring accountants to treat computer software as an asset, thus improving the record-keeping of the software development process), available in 1998 *WL* 2358043.

n221. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 193 (1990) (declaring that the cost of making additional copies of computer software is "little more than the cost of the storage medium").

n222. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.05 (3d ed. 1996) (listing obsolescence as one of the main problems faced by tax assessors when assessing the value of computer software); see also Corporate Strategies-Briefs-Taxing Technologies, *ComputerWorld*, July 1, 1996, at 61 (claiming that "many states opt to exempt software rather than assess something that quickly can become obsolete"), available in 1996 *WL* 2372767.

n223. See *Black's Law Dictionary* 972 (5th ed. 1979) (defining obsolescence and specifying when it can occur).

n224. See Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 *Conn. L. Rev.* 161, 191 (1990) (suggesting that all valuation approaches must take into

account economic obsolescence); cf. Karen L. Boucher & William B. Curlee, *Managing Personal Property Taxes*, *Tax Adviser*, Nov. 1, 1996, at 672 (stating that most jurisdictions have created depreciation or cost-multiplier schedules to account for a personal property item's normal wear and tear), available in *1996 WL 9338591*.

n225. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.05 (3d ed. 1996) (providing that rapid changes in technology complicate the process of establishing a standard economic life for computer software). But see *33A Am. Jur. 2d Federal Taxation P 14652* (1996) (noting that IRS revenue procedures depreciate computer software purchased separately from hardware over 36 months using a straight-line method).

n226. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by State Guide* 3.05 (3d ed. 1996) (alleging that "unlike computer hardware, which depreciates over a set period, last year's software maybe totally worthless").

n227. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, *23 Conn. L. Rev. 161, 191* (1990) (noting that it may be feasible to replace the software but not economically efficient).

n228. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.05 (3d ed. 1996) (providing an example of when the existence of multiple copies causes valuation problems). Kuttan presents the following hypothetical and subsequently raised questions:

FACTS: A Georgia software user based in Atlanta is only using one copy of software valued at \$ 1,000,000. For back-up security reasons only, the user stores one copy of the software in DeKalb County and another in Gwinnett County. This simple scenario raises the following questions:

1. How many copies are assessable: just the Atlanta copy in use, or the backup DeKalb and Gwinnett copies as well?
2. Can DeKalb and Gwinnett counties assess the back-up copies?
3. At what value is each copy assessed: e.g., is each copy worth \$ 333,333 or \$ 1,000,000?

Id.

n229. Cf. *id.* (suggesting that businesses make additional copies of computer software for security reasons).

n230. See Richard D. Harris, Note, *Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford*, *23 Conn. L. Rev. 161, 191-92* (1990) (asking whether each copy of a computer software program should be assessed for taxation purposes).

n231. If a business had three copies of a software program valued at \$ 1,000,000, and each copy was subject to property taxation, that business would be paying the property taxes assessed on \$ 3,000,000 of software as opposed to \$ 1,000,000 of software. Assuming that the tax rate is \$.50 per \$ 1000, then the business would pay the state \$ 1,500 in property taxes if all three copies were taxed as opposed to \$ 500 if only one copy was taxed.

n232. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 3.05 (3d ed. 1996) (questioning whether different jurisdictions should be able to tax the same computer software item).

n233. See Richard D. Harris, Note, Property Taxation of Computer Software: *Northeast Datacom, Inc. v. City of Wallingford*, 23 *Conn. L. Rev.* 161, 192 (1990) (explaining that courts have not addressed the issue of how to deal with tangible copies of software).

n234. See, e.g., *District of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615, 617 (D.C. Cir. 1972) (interpreting the legal classification of computer software); *Wal-Mart Stores, Inc. v. City of Mobile*, 696 So. 2d 290, 291 (Ala. 1996) (determining the legal nature of computer software); *Honeywell Info. Sys., Inc. v. Maricopa County*, 575 P.2d 801, 803 (Ariz. Ct. App. 1977) (considering how to classify computer software); *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 689 (Conn. 1989) (deciding whether computer software is subject to tax provisions); *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1241 (La. 1994) (addressing whether computer software should be deemed tangible or intangible property).

n235. See, e.g., *Navistar Int'l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108, 114-16 (Cal. 1994) (addressing the sales taxation of computer software); *Northeast Datacom*, 563 A.2d at 689 (determining the validity of personal property taxation of computer software); *Mark O. Haroldsen, Inc. v. State Tax Comm'n*, 805 P.2d 176, 181 (Utah 1990) (determining the taxability of computer software under use tax provisions).

n236. Cf. *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248, 249 (Md. 1983) (reviewing sales taxation of computer software); *Greyhound Computer Corp. v. State Dep't of Assessments & Taxation*, 320 A.2d 52, 53-54 (Md. 1974) (discussing property taxation of computer software); *Computer Assocs. Int'l, Inc. v. City of E. Providence*, 615 A.2d 467, 468 (R.I. 1992) (addressing computer software in context of property taxation); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124, 128 (R.I. 1985) (examining use taxation of computer software); *Cache County v. State Tax Comm'n*, 922 P.2d 758, 767 (Utah 1996) (analyzing property taxation of computer software); *Mark O. Haroldsen, Inc.*, 805 P.2d at 181 (exploring use taxation of computer software).

n237. See *Northeast Datacom*, 563 A.2d at 692 n.8 (finding support for conclusion that software is intangible property for property tax purposes in four sales and use tax cases); *Cache County*, 922 P.2d at 767-68 (discussing previous state case that dealt with use taxation of computer software); Marc S. Friedman & Lindsey H. Taylor, State and Local Taxation of Software: A Trap for Computer Counsel, 6 *Computer Law.*, June 1990, at 20, 21 (reporting that courts often interpret statutes in each area of taxation as written).

n238. 584 S.W.2d 548 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.).

n239. See *First Nat'l Bank*, 584 S.W.2d at 550 (arguing that the computer software does not constitute tangible property).

n240. See *id.* (describing the functions of the bank's computer programs).

n241. See *id.* (implying that the bank sought a refund for the sales tax paid on the purchase of computer software because of the contention that the computer software was not taxable tangible property).

n242. See *id.* at 551 (concluding that since the sale was of intangible property, the tax levied was improper; therefore, the amount paid in sales taxes should be returned with interest).

n243. See *id.* at 550 (stating that the court applies the "essence of the transaction" to determine whether a tax on the sale of tangible personal property is allowed).

n244. See *First Nat'l Bank*, 584 S.W.2d at 550 (explaining that if the essence or object of a sale is intangible property, the transaction is not taxable); see also *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 passim (Tex. 1977) (adopting essence of the transaction test).

n245. See *First Nat'l Bank*, 584 S.W.2d at 550 (relying on *Statistical Tabulating* and an earlier case, *Williams & Lee Scouting Serv., Inc. v. Calvert*, 452 S.W.2d 789 (Tex. Civ. App. - Austin 1970, writ ref'd n.r.e.)). In *Williams & Lee*, the essence of the transaction was the scouting service provided. *Williams & Lee*, 452 S.W.2d at 792. These services included the gathering of oil and gas well production statistical data and distributing the results to subscribers. *Id.* at 790. The state unsuccessfully attempted to tax the distributed report, considering it a tangible item. *Id.* at 792-93.

n246. See *First Nat'l Bank*, 584 S.W.2d at 551 (stating "although tangible personal property...did change hands, the sale of a license for computer software to appellant was the sale of intangible property, and, therefore, not taxable").

n247. See *id.* at 550 (disagreeing with state's distinction between canned and custom software).

n248. 549 S.W.2d 166 (Tex. 1977).

n249. See *First Nat'l Bank v. Bullock*, 584 S.W.2d 548, 550 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.) (distinguishing cases based on "canned" versus "customized" characterization).

n250. *Id.*

n251. See *id.* (noting the court believed this not a valid distinction).

n252. *Id.*

n253. See Act of Jan. 1, 1982, 67th Leg., R.S., ch. 389, 1, 1981 Tex. Gen. Laws 1547, amended by Act effective Jan. 1, 1988, 70th Leg., 2d C.S., ch. 5, art. 1, pt. 4, 11, 1987 Tex. Gen. Laws 13 (including computer software within the definition of tangible property).

n254. See *id.* (providing that the tangible personal property definition included "a computer program that is not a custom program").

n255. See *Tex. Tax Code Ann. 151.009* historical note (Vernon 1992) (deleting the portion of the definition that excluded custom computer programs) [Acts 1987, 70th Leg., 2d C.S. ch. 5, art. 1, pt. 4, 11, 1987 Tex. Gen. Laws 13].

n256. 930 S.W.2d 119 (Tex. App. - Dallas 1996, writ denied).

n257. See *Tech Data Corp.*, 930 S.W.2d at 124 (rejecting the argument that computer software was taxable as business inventory under the tax code).

n258. See *id.* at 120 (requesting a summary judgment alleging that \$ 2,501,798 was not subject to ad valorem taxation).

n259. See *id.* (stating Tech Data had no ownership interest in the software).

n260. See *id.* at 123 (affirming the trial court's grant of summary judgment on the ground that the computer software was intangible property, thus not taxable under the tax code).

n261. See *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 122 (Tex. App. - Dallas 1996, writ denied) (adopting the definition of computer software provided by Tech Data's controller, Michael Attinella).

n262. *Id.*

n263. *Id.*

n264. See *id.* at 122-23 (comparing Tech Data's definition of software as "imperceivable binary impulses" to tangible personal property definition).

n265. *Tex. Tax Code Ann. 1.04(5)* (Vernon 1992) (emphasis added); see *Tech Data Corp.*, 930 S.W.2d at 122 (citing *Tax Code Section 1.04(5)* for definition of tangible personal property).

n266. See *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 122-23 (Tex. App. - Dallas 1996, writ denied) (stating that "the 'imperceivable binary pulses' that make up computer application software are not capable of being 'seen, weighed, measured, felt, or otherwise perceived by the senses'").

n267. See *id.* (reiterating the First Nat'l Bank court's analysis of the then-existing sales tax definition of tangible property).

n268. See *id.* (agreeing with court's analysis in First Nat'l Bank which concluded that the essence of the transaction was the software not the tangible medium).

n269. See *id.* at 123 n.2 (stating that although the Texas legislature subsequently amended the tax code to include computer software in the sales tax definition of tangible personal property, the legislature failed to make a similar change in the property tax definition).

n270. *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 123 n.2 (Tex. App. - Dallas 1996, writ denied).

n271. See *id.* (indicating that the First Nat'l Bank court considered whether computer application software was tangible property, subject to sales taxation).

n272. See *First Nat'l Bank v. Bullock*, 584 S.W.2d 548, 550 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.) (contending that the canned-custom distinction was not valid and that "the test in each case is not whether the product is 'customized' or 'canned' but whether the object of the sale is tangible personal property").

n273. See *id.* (declining to adopt the appellee's distinction between different types of software).

n274. See *Tech Data Corp.*, 930 S.W.2d at 123 (affirming the trial court's grant of summary judgment on the ground that computer application software did not constitute taxable tangible property).

n275. See *In re Protest of Strayer*, 716 P.2d 588, 593-94 (Kan. 1986) (deciding that only operational software is taxable under property tax provisions because such software is essential to the computer hardware); *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360, 367 (Ohio Ct. App. 1987) (determining that a property tax could legally be levied on systems software but not application software).

n276. See *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 123 (Tex. App. - Dallas 1996, writ denied) (applying the "essence of the transaction" test to determine that the sale of computer software involved intangible personal property).

n277. See *id.* (stating that, in accordance with *First Nat'l Bank*, "the 'essence' of the property is the software itself, not the tangible medium on which the software might be stored").

n278. See *id.* (citing *First Nat'l Bank*, 584 S.W.2d at 550 and contending that under the "essence of the transaction" test, if the intangible property is the significant object, then the transaction would not be taxable); Robert W. McGee, The "Essence of the Transaction" Test for Computer Software Tangibility and Taxation, 20 *Lincoln L. Rev.* 21, 22 (1991) (explaining that the "essence of the transaction" test focuses on what was the "essence" of the sale); Ruhama Dankner Goldman, Comment, From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?, 42 *Loy. L. Rev.* 147, 154 (1996) (asserting that under the "essence of the transaction" test courts look at what was the true object of the purchase, the tape or the information contained on it).

n279. See *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 123 (Tex. App. - Dallas 1996, writ denied) (emphasizing "computer application software cannot constitute 'tangible personal property' as that term is defined for purposes of the Code").

n280. See *id.* (holding "computer application software was not taxable under the Code").

n281. See *id.* at 123 n.3 (relying on a number of decisions from other state courts that had dealt with the issue of computer software tangibility in the context of sales, use, and property taxation). The court supported its decision by citing to *District of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615 (D.C. Cir. 1972), *State v. Central Computer Servs., Inc.*, 349 So. 2d 1160 (Ala. 1977), *Honeywell Info. Sys., Inc. v. Maricopa County*, 575 P.2d 801 (Ariz. App. 1977), *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688 (Conn. 1989), *First Nat'l Bank v. Department of Revenue*, 421 N.E.2d 175 (1981), *In re Protest of Strayer*, 716 P.2d 588 (Kan. 1986), *Maccabees Mut. Life Ins. Co. v. State Dep't of Treasury*, 332 N.W.2d 561 (Mich. 1983), *James v. Tres Computers Sys., Inc.*, 642 S.W.2d 347 (Mo. 1982), *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360 (Ohio 1987), and *Commerce Union Bank v. Tidwell*, 538 S.W.3d 405 (Tenn. 1976).

n282. See *Tech Data Corp.*, 930 S.W.2d at 123 n.3 (noting that the court's decision was in accord with other state's courts).

n283. See *id.* (citing cases from the 1970s and early 1980s). Only three cases cited by the court were more recent - *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688 (Conn. 1989), *In re Protest of Strayer*, 716 P.2d 588 (Kan. 1986), and *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360 (Ohio 1987).

n284. See *South Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1241 (La. 1994) (determining that computer software is tangible property subject to municipal sales and use tax); *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. 1990) (affirming the lower court's finding that the sale of computer software constituted the sale of tangible property); *Pennsylvania & W. Va. Supply Corp. v. Rose*, 368 S.E.2d 101, 105 (W. Va. 1990) (concluding the software was tangible property subject to a use tax).

n285. See *District of Columbia v. Universal Computer Assocs., Inc.*, 465 F.2d 615, 619 (D.C. Cir. 1972) (stating that software is intangible property exempt from property taxation); *Honeywell Info. Sys. Inc. v. Maricopa County*, 575 P.2d 801, 803 (Ariz. Ct. App. 1977) (determining that software is intangible property, thus, not subject to property taxes); *Northeast Datacom, Inc. v. City of Wallingford*, 563 A.2d 688, 691 (Conn. 1989) (concluding that computer software is intangible property not subject to property taxation).

n286. Tex. S.B. 736, 75th Leg., R.S. (1997). In addition to amending the tangible personal property definition, the bill proposed to add the following two subdivisions defining computer program and computer software:

(20) "Computer program" means intellectual property consisting of an ordered set of data representing coded instructions or statements that when executed by a computer cause the computer to process data or perform specific functions. (21) "Computer software" means: (A) a computer program developed for retail sale but not yet installed on a computer, computer system, or computer network; (B) any tangible medium on which the program is stored; and (C) any associated documentation related to the operation of a computer, computer system, or computer network.

Id.

n287. See *id.* (limiting the property tax on computer software to those businesses that sell computer software at either the wholesale or retail level).

n288. The Senate Bill was introduced on February 24, 1997 and was sent to the Senate Committee on Finance two days later where it remained until the adjournment of the legislative session on June 29, 1997. See Texas Legislative Online <<http://www.capitol.state.txx.75>> (reporting that SB 736 was introduced and subsequently assigned to the Finance Committee where it stayed the remainder of the session).

n289. See *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 123 (Tex. App. - Dallas 1996, writ denied) (holding that computer software is intangible property).

n290. See Lori Hawkins, Tax Issues May Affect Tech Future, *Austin Am. Statesman*, Oct. 17, 1997, at C1 (reporting that property taxes are expected to be an important issue in the 1999 legislative session), available in 1997 WL 2843031.

n291. See *id.* (suggesting that high technology companies such as Dell Computer, Compaq, Hart Graphics, and Intel are extremely interested in the method of taxation in Texas), available in 1997 WL 2843031.

n292. See Steve Hornberger, The Sale of Documents Containing Trade Secrets Is a Tangible Personal Property to Sales Tax, As Are Custom Computer Programs Existing for Exclusive Use of the Seller: *Navistar International Transportation Corp. v. State Board of Equalization*, 23 *Pepp. L. Rev.* 766, 772 (1996) (indicating that the taxation of computer software is a significant barrier to the acquisition of high technology firms); Companies Fight Software Tax Bite, *Chi. Trib.*, June 9, 1996, at 7 (alleging that the property tax on computer software can be quite high for businesses), available in 1996 WL 2679556; Computer Tax Should Be Repealed in Nation's Top High-Tech State, *PR Newswire*, Nov. 6, 1997 (quoting a business leader who argues that personal property taxes on computer software need to be eliminated in order for businesses to be competitive), available in Westlaw, Wiresplus Database.

n293. See Lori Hawkins, Tax Issues May Affect Tech Future, *Austin Am. Statesman*, Oct. 17, 1997, at C1 (reporting that a study supported by Texas-based high technology firms recommended "developing a competi-

tive tax strategy for presentation to the 1999 Legislature that ensures long-term tax consistency"), available in 1997 WL 2843031.

n294. See *Tex. Tax Code Ann. 151.009-151.010* (Vernon 1992) (defining computer software as tangible property thus subject to sales, excise, and use tax); *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 120 (Tex. Ct. App. - Dallas 1996, writ denied) (declaring computer software nontaxable intangible property under the property tax code).

n295. See *Tex. Tax Code Ann. 151.009-151.010* (Vernon 1992) (subjecting computer software to sales taxation by defining it as tangible personal property).

n296. See *id.* 11.02 (declaring the nonimposition of property taxes on intangible personal property); *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119, 120 (Tex. App. - Dallas 1996, writ denied) (classifying computer software as intangible personal property).

n297. If Texas decides that computer software constitutes tangible property under its property tax provisions, then a conflict would not exist in the tax system. Compare *Tex. Tax Code Ann. 11.01* (Vernon 1992) (subjecting "all real and tangible personal property" to property taxation), with *Tex. Tax Code Ann. 151.009-151.010* (Vernon 1992) (imposing a sales tax on the sale of tangible personal property, which includes computer software).

n298. See *Tex. Const. art. VIII, 1(b) & (c)* (permitting the legislature to tax both tangible and intangible personal property).

n299. *Tex. Tax Code Ann. 1.04(5)* (Vernon 1992).

n300. *Id.* 1.04(6).

n301. See *Tex. Const. art. VIII, 1(b) & (c)* (allowing both tangible and intangible personal property to be subject to property taxation). A number of states do not permit intangible property to be taxed. See, e.g., *Mich. Const. art. 9, 3* (providing for ad valorem taxation of only real and tangible personal property); *Mo. Const. art. 10, 6(b)* (proclaiming intangible property exempt from taxation); *N.M. Const. art. 8, 1* (levying a property tax on only tangible property).

n302. See *Tex. Const. art. VIII, 1(b) & (c)* (permitting the taxation of tangible and intangible property).

n303. See *id.* (providing the legislature with authority to tax either tangible or intangible property).

n304. See L.J. Kuttan, *Personal Property Taxation of Computer Software: A State-by-State Guide* 1.03 (3d. ed. 1996) (claiming that computer software can generate over \$ 37 million per year in tax revenue); Steve Hornberger, *The Sale of Documents Containing Trade Secrets Is a Tangible Personal Property to Sales Tax, As Are Custom Computer Programs Existing for Exclusive Use of the Seller: Navistar International Transportation Corporation v. State Board of Equalization*, 23 *Pepp. L. Rev.* 766, 772 (1996) (suggesting that courts have aided federal and state governmental attempts to increase revenue through taxation of computer software); William B. Bierce, *New Rules on Sales and Use Tax for Software: Agencies Update Use of Technology*, N.Y. L.J., Aug. 27, 1991, at 1 (emphasizing the importance of computer software as a new source of tax revenue); Thomas M. Findley, *The Application of Florida's Sales Tax to Software and Electronic Computer Transmissions*, Fla. B.J., Nov. 1994, at 63 (noting that Florida's Department of Revenue is considering taxation of computer software as a potential revenue source).

n305. Cf. John Wei-Ching Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 High Tech. L.J. 125, 151 (1987) (suggesting that California's tax system has been stretched to fit new technology); Ruhama Dankner Goldman, Comment, From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?, 42 Loy. L. Rev. 147, 147 (1996) (alleging that Louisiana's tax code has been tested by new technology); Tax Treatment of Technology Lags Behind the Times, 83 J. Tax'n 127, 127 (1995) (indicating that gaps have developed between tax law and technological advances).

n306. Cf. *In re Protest of Strayer*, 716 P.2d 588, 593-94 (Kan. 1986) (distinguishing between operational and application software); *Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192, 1195-96 (Me. 1985) (acknowledging tax distinction between canned and custom software); *Maccabees Mut. Life Ins. Co. v. Department of Treasury*, 332 N.W.2d 561, 564 (Mich. Ct. App. 1982) (recognizing the need for a distinction between canned and custom software); *Compuserve, Inc. v. Lindley*, 535 N.E.2d 360, 367 (Ohio Ct. App. 1987) (differentiating between systems and application software for tax purposes).

n307. See *In re Protest of Strayer*, 716 P.2d at 590 (explaining that application programs are particularized and specialized and that operational programs control the basic functions of the computer); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 406 (Tenn. 1976) (defining operational programs as fundamental and necessary to the computer hardware and applications programs as tailored to perform specific functions).

n308. See John Wei-Chung Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 High Tech. L.J. 125, 150 (1987) (discussing the difficulty of categorizing software that is similar to both operational and application software).

n309. Generally, operational, or systems, software is taxable while application software is not. See *In re Protest of Strayer*, 716 P.2d at 593-94 (concluding that only operational software was subject to a property tax); *Compuserve, Inc.*, 535 N.E.2d at 367 (indicating that systems software is taxable while application software is not).

n310. Cf. John Wei-Chung Kuo, Sales/Use Taxation of Software: An Issue of Tangibility, 2 High Tech. L.J. 125, 150 (1987) (stating that attempts to classify software as operational or application may result in arbitrary line-drawing due to various policy considerations).

n311. See *Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192, 1195 (Me. 1985) (noting that custom software is created to specifically meet a user's needs); Ruhama Dankner Goldman, Comment, From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?, 42 Loy. L. Rev. 147, 156 (1996) (stating that custom software is solely designed according to the specifications of the user).

n312. See *Measurex Sys., Inc.*, 490 A.2d at 1195 (acknowledging that canned software is prepared for several users).

n313. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.04 (3d ed. 1996) (alleging that "it is extremely difficult to exclude the nontaxable portions of the development process"); Richard D. Harris, Note, Property Taxation of Computer Software: Northeast Datacom, Inc. v. City of Wallingford, 23 Conn. L. Rev. 161, 189-90 (1990) (arguing that the computer software can be overvalued by including services which are not part of the final product).

n314. See L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.04 (3d ed. 1996) (stating the development of custom software normally includes costs associated with design, implementation, and testing).

n315. See *Maccabees Mut. Life Ins. Co. v. Department of Treasury*, 332 N.W.2d 561, 563 (Mich. Ct. App. 1983) (noting that canned programs are bought at retail level); *Hasbro Indus., Inc. v. Norberg*, 487 A.2d 124, 128 (R.I. 1985) (asserting that service is nonexistent with canned software); Robert W. McGee, Software Taxation in Ohio, 9 *Akron Tax J.* 49, 52 (1992) (stating that canned programs are sold "as is and are available to the general public").

n316. See Washington State Dep't. of Revenue, Computer Software Study: Report to the Legislature Concerning Research on Taxation of Computer Software, Definitions of Computer Terms and Recommendations (1990) (reporting that in Texas, custom software is exempt from tax assessment by administrative practice), reprinted in L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by State Guide app. E., at 220 (3d ed. 1996).

n317. Cf. L.J. Kuttan, Personal Property Taxation of Computer Software: A State-by-State Guide 3.05 (3d ed. 1996) (suggesting that various problems, such as the existence of multiple copies, rapid obsolescence, and the lack of detailed development records, are faced when valuing any type of software).



35 of 124 DOCUMENTS

Vanguard, Inc., Plaintiff-Appellant, v. Charles D. Schaefer et al., Defendants-Appellees.

NO. 84AP-374

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1984 Ohio App. LEXIS 11480

November 8, 1984

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment reversed and remanded.

LexisNexis(R) Headnotes

Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions

Insurance Law > General Liability Insurance > Exclusions > General Overview

[HN1] There is a general presumption with respect to exclusionary provisions contained in a policy of insurance that that which is not clearly excluded from the operation of such contract is included in the operation thereof.

Contracts Law > Contract Conditions & Provisions > Integration Clauses

Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings

Insurance Law > General Liability Insurance > Coverage > Property

[HN2] The common ordinary usage of the word "equipment" means furnishings, apparatus or necessary articles for an undertaking; the implements used in an operation or activity.

COUNSEL: WHITE, RANKIN, HENRY, MORSE & MANN CO., L.P.A., and MR. RICHARD W. STUHR, for plaintiff-appellant.

MESSRS. LANE, ALTON & HORST, MR. THOMAS A. DILLON and MR. ROBERT HANSON, for defendants-appellees.

JUDGES: McCORMAC, P.J., and STILLMAN, J., concur. STILLMAN, J., retired, of the Eighth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION BY: STRAUSBAUGH, J.

OPINION

OPINION

This is an appeal by plaintiff, Vanguard, Inc., from a judgment of the Franklin County Court of Common Pleas sustaining defendants' motion for a directed verdict, pursuant to *Civ. R. 50*, at the conclusion of plaintiff's evidence.

The record indicates that defendant, Charles D. Schaefer, an insurance agent with defendant, Archer-Meek-Weiler Insurance Agency, Inc., caused an insurance binder to be issued effective October 4, 1979, with respect to liability and physical damage coverage for plaintiff's 1978 GMC one-ton truck; that, on or about November 12, 1979, plaintiff received from defendant Schaefer a renewal binder concerning said truck [*2] as well as a general liability binder, effective November 9, 1979, insuring plaintiff in the amount of \$500,000 for bodily injury and \$100,000 for property damage; and that, on or about December 5, 1979, plaintiff received from defendant Schaefer the policy in question issued by defendant, St. Paul Fire and Marine Insurance Company, with respect to the bodily injury and property damage coverage in question herein. On or about September 20,

1980, plaintiff's premises were broken into and items alleged in the complaint to be worth \$33,176.64 were stolen from the plaintiff's truck. Plaintiff immediately notified defendants of the theft. At all times, defendants have denied plaintiff coverage under the policy.

Upon trial of the cause before a jury at the conclusion of plaintiff's evidence and upon motion of the defendants for a directed verdict, pursuant to *Civ. R. 50*, the trial court arrested the case from the jury and sustained the motion of defendants, finding that:

"1. * * * [R]easonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to Plaintiff that the policy of insurance issued by St. Paul Fire and Marine Insurance Company [*3] bearing policy number 562JG0514 did not provide coverage for Plaintiff's alleged losses and that, accordingly, it did not breach its contract with Plaintiff as alleged.

"2. The Court finds after construing the evidence most strongly in favor of the Plaintiff that reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to Plaintiff that there is no evidence that the St. Paul Fire and Marine Insurance Company intended to provide insurance coverage for the property which is the subject of Plaintiff's alleged losses.

"3. The Court further finds that Plaintiff has failed to establish by competent expert testimony proof of negligence by Defendants, Charles D. Schaefer and Archer-Meek-Weiler Insurance Agency, Inc., in allegedly failing to procure insurance for Plaintiff.

"4. The Court further finds after construing the evidence most strongly in favor of Plaintiff that reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to the Plaintiff on the issue of damage as alleged by Plaintiff.

"It is therefore ORDERED, ADJUDGED and DECREED that judgment be and the same hereby [*4] is rendered in favor of the Defendants and against the Plaintiff and that the Complaint be dismissed at Plaintiff's costs."

It is from this judgment that plaintiff brings its appeal setting forth the following two assignments of error:

"I. The trial court erred in granting a directed verdict for defendant St. Paul Fire & Marine Insurance Company at the close of plaintiff's presentation of evidence.

"II. The trial court's failure to grant summary judgment to appellant is reversible error."

With respect to the first assignment of error, Part V of the policy in question provides in pertinent part:

"Part V - Physical Damage Insurance

"A. We will pay.

"1. We will pay for loss to a covered auto or its equipment under:

"a. Comprehensive Coverage. From any cause except the covered auto's collision with another object or its overturn.

"b. Specified Perils Coverage. Caused by:

"* * *

"(2) Theft;

"* * *

"(5) Mischief or vandalism;

"* * *"

An examination of the policy reveals no exclusions from the term "equipment" contained in Part V of the policy, nor do we find any definition or interpretation of the word "equipment." [HN1] There is a general presumption [*5] with respect to exclusionary provisions contained in a policy of insurance ""* * * that that which is not clearly excluded from the operation of such contract is included in the operation thereof." *Moorman v. Prudential Ins. Co.* (1983), 4 Ohio St. 3d 20; *Home Indemnity Co. v. Plymouth* (1945), 146 Ohio St. 96. [HN2] The common ordinary usage of the word "equipment" means furnishings, apparatus or necessary articles for an undertaking; the implements used in an operation or activity. The items alleged to have been stolen as contained in plaintiff's complaint were testified to have been permanently installed in the insured vehicle. We also take notice that the integration clause contained in the subject insurance contract excludes the introduction of extrinsic evidence.

In paragraph two of the court's judgment entry, it is stated that there is no evidence that defendant insurance company intended to provide insurance coverage for the property which is the subject of plaintiff's alleged losses. Whether defendant insurance company *intended* to provide such insurance coverage is irrelevant because, according to the unambiguous terms of Part V of the insurance contract, [*6] insurance coverage was provided by defendant insurance company for such equipment. We find the language contained therein to be unambiguous and clear, and, therefore, there is no necessity for parol evidence, but, instead, it would be improper to allow the introduction of parol evidence to alter the express coverage of the insurance contract. We find that plaintiff's first

assignment of error is well taken and is therefore sustained.

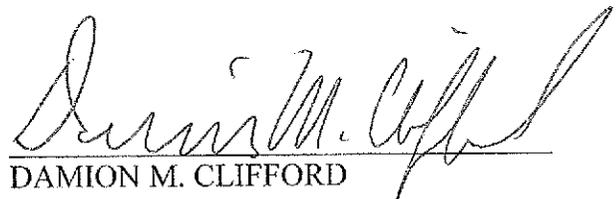
With respect to plaintiff's second assignment of error, we find that the trial court was correct in failing to grant summary judgment to plaintiff. Although having held that the defendant insurance company is liable under the terms of the insurance policy for the items of equipment which were stolen and which fit into the definition of equipment insured which come under Part V of the policy, there may be issues of fact to be decided as to

whether certain items claimed by plaintiff fall under the definition of equipment and whether there may be some exclusions contained in the terms of the policy. Those questions relating to specific items are not before us in this appeal. We, therefore find that plaintiff's second assignment of error is [*7] overruled.

For the foregoing reasons, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded for further proceedings in accordance with law.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Appendix to the Brief of Appellee was sent by regular U.S. mail to Nicholas M. J. Ray, Siegel, Siegel, Johnson & Jennings Co., LPA, 3001 Bethel Road, Suite 208, Columbus, Ohio 43220, counsel for Appellee, and to William I. Sussman and Michael P. Robotti, Ropes & Gray, LLP, 1211 Avenue of the Americas, New York, New York 10036-8704, of Counsel for Appellant, on this 23rd day of December 2009.


DAMION M. CLIFFORD
Assistant Attorney General