

SALES AND USE TAXES

**120.3920**

PRESENTED TO THE BOARD FOR FINAL ACTION

Account No. X-----

Hearing Officer: Stephen A. Ryan

Board Hearing: San Francisco, March 18, 1986

Previously presented for Final Action on May 11, 1987.

The petition, with respect to the determination in the amount of \$62,572.42 for the period October 1, 1980 to September 30, 1983, was heard and taken under consideration by the Board.

Petitioner contended that its charges to its customers for the design, fabrication and transfer of programs for testing equipment constituted charges for custom computer programs in accordance with Revenue and Taxation Code Section 6010.9 and thus were not subject to sales tax.

Petitioner owned four Fairchild Sentry Testers which it used to test semiconductor parts of its customers to determine how the parts functioned. The testers created the environment in which the part would eventually operate after being assembled into a final product. Petitioner developed custom processing programs for use in these testers for each type of item tested. It sold and delivered these processing programs to its customers in storage media form, along with the data collected on the operation of the part tested.

Revenue and Taxation Code Section 6010.9 defines the term computer by exclusion. "Computer" is defined not to include tape-controlled automatic drilling, milling, or other manufacturing machinery or equipment.

In accordance with its recommendation to the Board in regard to Regulation 1502, "Automatic Data Processing Services and Equipment," staff is now of the opinion that the testing equipment in question does not constitute programmable manufacturing machinery or equipment, since the equipment cannot itself be used to make, form, fabricate, process or assemble a product or a component or ingredient of a product. Accordingly, it is the staff's recommendation that the petition be granted and the tax redetermined in accordance with the reaudit of April 10, 1984 and post-hearing reaudit of March 11, 1987 as follows:

	Tax	Interest	Total
As determined	\$49,096.36	\$13,476.06	\$62,572.42
Adjustment	<u>-36,316.34</u>	<u>-9,558.36</u>	<u>-45,874.70</u>
As redetermined	\$12,780.02	\$3,917.70	\$16,697.72
Payments	-49,096.36	-5,015.03	-54,111.39
Credit Interest	<u>                    </u>	<u>-16,496.72</u>	<u>-16,496.72</u>
Balance	<u>-\$36,316.34</u>	<u>-17,594.05</u>	<u>-\$53,910.39</u>

Interest is computed to December 31, 1987.

Should the recommendation of the staff be approved, notification to the taxpayer of the Board's decision should be as follows:

The Board found that the semiconductor testing equipment qualified as a "computer" within the meaning of Revenue and Taxation Code Section 6010.9. The Board found that petitioner created and transferred custom computer programs for use on computers. The Board concluded that the transactions were excluded from the definition of "sale" and "purchase" as provided by Section 6010.9. The Board ordered that the petition be granted and the tax reduced to \$12,780.02.

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