ALERT
JULY 27, 2010

TAX
News Concerning Recent Tax Issues

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LICENSE FOR CANNED SOFTWARE IS TAXABLE

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The Supreme Court of Pennsylvania held that a license to use canned software is a license to use tangible personal property and is therefore taxable for Sales and Use Tax purposes. *Dechert LLP v. Commonwealth*, No. 12 MAP 2008 (Pa., July 20, 2010). Oral argument on the appeal was held over 1 ½ years ago.

The statute defines *tangible personal property* as:

> Corporeal personal property including, but not limited to, goods, wares, merchandise, steam and natural and manufactured and bottled gas for non-residential use, electricity for non-residential use, prepaid telecommunications, premium cable or premium video programming service, spirituous or vinous liquor and malt or brewed beverages and soft drinks, interstate telecommunications service originating or terminating in the Commonwealth and charged to a service address in this Commonwealth, [and] intrastate telecommunications service [with certain exceptions].

72 P.S. §7201(m). The court found ambiguity in the language whether a canned computer program is included within *corporeal personal* property but resolved the doubt in favor of taxability because in 1991 the General Assembly subjected to tax *computer programming services* and later repealed the provision, suggesting that they assumed that canned computer programs were taxable throughout. The court further relied on a statement of policy by the Pennsylvania Department of Revenue to the same effect. 61 Pa. Code §60.19. The court found no ambiguity in the fact that canned computer programs were not specifically listed in the statute, in view of the language *corporeal personal property including, but not limited to,* various specific items. The court found persuasive support in *Graham Packaging Co., LP v. Commonwealth*, 882 A.2d 1076 (Pa. Commw. 2005), where the Commonwealth Court held that canned software is tangible personal property because it is corporeal. However the Pennsylvania Supreme Court declined to adopt the "true object test" relied on by *Graham Packaging* as explained in *South Central Bell Telephone Co. v. Barthelemy*, 643 So. 2d 1240 (La. 1994).

Justice Thomas Saylor filed a concurring opinion. Justice Michael Eakin dissented, principally arguing that a canned computer program is not corporeal because, in his view, such a program simply rearranges the pattern of electrons already on a computer.

The decision raises the question whether the same treatment will be given to the download of music, books, and other digital products.