COURT OF APPEALS
DECISION
DATED AND RELEASED

August 22, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1984

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner-Appellant,

v.

MANPOWER INTERNATIONAL, INC.,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. The Wisconsin Department of Revenue appeals from an order affirming a decision of the Tax Appeals Commission. The issue is whether the commission properly determined that Manpower International, Inc. did not owe sales tax on its sale of pre-written computer software from 1987 through 1990. We affirm.

Section 77.52(1), STATS., imposes a sales tax on the sale or lease of tangible personal property, "including accessories, components, attachments, parts, supplies and materials." Section 77.52(2)(a)10 imposes a sales tax on the "repair, service, alteration ..., inspection and maintenance of all items of tangible personal property ...." Section 77.52(2)(a)11 imposes the tax on "the producing, fabricating, processing, printing or imprinting of tangible personal property" for consumers who furnish the materials used in the process. For the period 1987 through 1990, § 77.51(20), STATS., 1989-90, defined tangible personal property as "all tangible personal property of every kind and description...." Section 77.51(20) has since been amended to expressly define computer programs, except custom computer programs, as tangible personal property.

The parties define pre-written or "canned" software as that which "is produced in quantity, available for sale to the public, selected by the customer to meet the customer's hardware requirements, is generally usable by the customer as written, and is `loaded' into the computer memory by the customer." Manpower usually delivered the canned software on magnetic tapes or diskettes that the taxpayer placed into a computer's magnetic tape or disc drive for copying into the computer's memory unit. The parties stipulate that the memory units are physically altered and rearranged at the molecular level when new programs are copied into it. The cost of the magnetic tapes or diskettes was a minimal part of Manpower's charge for the software. In some cases, Manpower delivered the software by telephone.

Before the legislature amended § 77.51(20), STATS., canned computer software was not "tangible personal property." In ***Janesville Data Center, Inc. v. DOR***, 84 Wis.2d 341, 346, 267 N.W.2d 656, 658 (1978), the supreme court held that the sale of keypunch cards, magnetic tapes and computer printouts was not taxable because the essence of the transaction was the intangible data embodied in these products. Here, the technology may have advanced, but the principle remained the same; the essence of the transaction was the sale of information offered by Manpower. Under ***Janesville Data Center***, information is intangible property not subject to a sales tax.

The department argues, alternatively, that the transactions were taxable because canned software is an accessory, component, attachment or part for the computer because the computer is useless without software. However, § 77.52, STATS., imposes a sales tax only upon the retail sales of tangible goods,

not the sales of intangibles. ***Janesville Data Center***, 84 Wis.2d 345, 267 N.W.2d at 658. Under the holding in ***Janesville Data Center***, software is an intangible and is not taxable as such, even if computers are useless without it.

The department also argues in the alternative that the lease of canned software is taxable as a service under §§ 77.52(2)(a)10 and 11, STATS., because loading it into the computer physically alters the computer's memory core. While that may be true, it is not the essence of the transaction, which remains the transfer of intangible data. Under ***Janesville Data Center***, such transactions therefore remained nontaxable events until the legislature amended § 77.51(20), STATS.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.