

THE LINCOLN TELEPHONE AND
TELEGRAPH COMPANY, A
Corporation,

) ORDER

) Plaintiff,

) vs.

) FRED A. HARRINGTON, Acting
) Tax Commissioner of the State
) of Nebraska and STATE OF
) NEBRASKA, DEPARTMENT OF REVENUE,

) Defendant.

This appeal involves the question of whether the lease of so-called computer software is subject to the Nebraska sales tax. The precise question is whether the software is tangible personal property as defined by Neb. Rev. Stat. § 77-2702 (18) (Reissue 19

In computer language, according to the evidence, hardware is the physical machines such as tape drives, cathode ray tubes, printers and the computers themselves which perform the data processing functions. Software on the other hand is the intelligence or programs which, when given to the computer in an appropriate manner, direct the computer in performing its functions.

Another question involved is whether the penalty of \$878.33 assessed under Neb. Rev. Stat. § 77-2709 (1) (Reissue 1976) on the amount of delinquent taxes agreed upon and paid was properly levied.

While the Nebraska courts have not dealt with the issue of whether computer software is tangible or intangible property, the courts of other jurisdictions which have been faced with this question have held that such software is not tangible personal property, subject to tax.

The leading case is District of Columbia v. Universal Computer Associates Inc., 467 F. 2d 615 (D.C. Cir. 1972), in which

the United States Court of Appeals for the District of Columbia
that two sets of punched cards, which were the media of two computer
software programs represented "intangible values" and were not
"tangible personal property" subject to the District of Columbia
personal property tax.

In the following cases, on fact situations indistinguishable
from the case currently before the court, it was held that computer
software programs were not tangible personal property.

Commerce Union Bank v. Tidwell, 538 S.W. 2d 405 (Tenn. 1976);
State v. Central Computer Services, Inc., 349 So. 2d 1156 (Ala.
1977); Honeywell Information Systems, Inc. v. Maricopa County,
118 Arizona 171, 575 P. 2d 801 (1978); and First National Bank of
Fort Worth v. Bullock, 584 S.W. 2d 548 (Texas Court of Civil
Appeals 1979).

As to the penalty assessed on the amount of delinquent
taxes, which taxes were later agreed upon and paid, it is my
opinion that the Tax Commissioner did not abuse his discretion
by not waiving this penalty.

THE COURT THEREFORE FINDS that the order of the defendant
Tax Commissioner, finding that the leases of computer software are
leases of tangible property is erroneous, and should be and it is
hereby reversed.

THE COURT FURTHER FINDS that the penalty of \$878.33
assessed by the defendant was proper and should be affirmed.

Dated this 19th day of February, 1981.

BY THE COURT:


District Judge