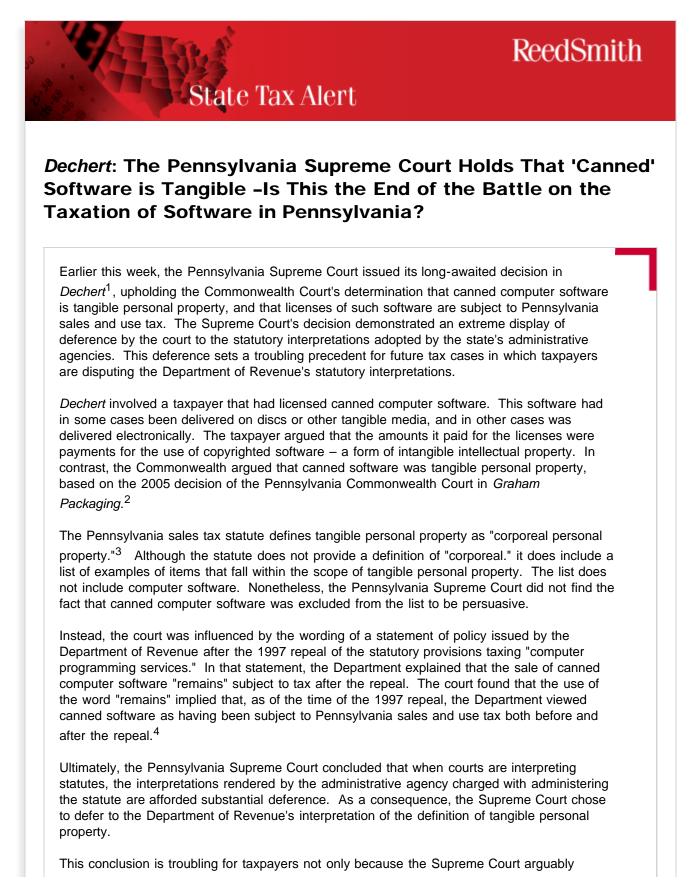
## **Reed Smith**

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misunderstood the true nature of the software, but also because it shows an excessive amount of deference to the Department's interpretation of taxing statutes. Essentially, the court concluded that when it's too close to call, the Department gets the benefit of the doubt. The Department is likely to exploit this deference in future cases. Although the holding in *Dechert* is likely to be disappointing for most companies making software purchases in Pennsylvania, it may not be the last battle over the Commonwealth's sales tax treatment of electronically delivered software. As Dechert's counsel in this matter, we are considering filing a motion for reconsideration. The motion is expected to note that the court's rationale—deference to the Department's interpretation of the statute—does not apply to electronically delivered canned software, which, prior to Graham Packaging, was always characterized by the Department as not being tangible personal property. In addition, the motion is expected to highlight the significant uniformity problem that would be created if the court's decision were to apply to electronically delivered software. Currently, it is the Department of Revenue's position that other electronically delivered products, like books and music, are not tangible personal property. However, based on the statute, the Department has no authority to treat some electronically delivered data as tangible while not treating other electronically delivered data as tangible, with the distinction based merely on the type of data being delivered, or the way in which the data is expected to be used by the purchaser. Finally, Dechert may actually benefit some Pennsylvania taxpayers by opening up some refund opportunities and filing positions. For example, purchasers of software may be able to include these tangible assets in their property factor denominator for corporate tax purposes. Also, software producers may be able to take advantage of the franchise tax manufacturing exemption. Even taxpayers producing and purchasing custom software may have potential refund opportunities and filing positions based on the court's analysis. For more information on *Dechert* and its significance for your company, please contact the authors of this article, or the Reed Smith lawyer with whom you normally work. 1. Dechert LLP v. Commonwealth, 12 MAP 2008 (7/20/2010). 2. Graham Packaging Company, LP v. Commonwealth of Pennsylvania, 882 A2d 1076 (9/15/2005). 3. 72 P.S. § 7201(m). 4. 61 Pa. Code § 60.19. Michael A. Jacobs — click here for the full list of Kaitlin A. McKenzie-Partner <u>Fiumara</u> Reed Smith state tax Philadelphia Associate attorneys +1 215 851 8868 Philadelphia + 1 215 851 8875

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