
Opinion of the Tax Commissioner

Date Issued: October 30, 1990

Opinion No: 90-0009

Tax: Sales/Use

XXXX
XXXX
XXXX

Subject: Maintenance Contracts

This request for an opinion of the Tax Commissioner was received on October 3, 1990. Specifically it concerns the application of sales and use tax to certain maintenance contracts purchased by XXXX

XXXX (hereinafter taxpayer) has submitted the following factual circumstances:

- 1) The taxpayer is a broad-based technology company which provides research and development services on a contract basis to various businesses.
- 2) The taxpayer's services generally require the use of complex and expensive scientific equipment.
- 3) In order to help avoid the down time of this equipment which would be detrimental to its business, the taxpayer normally purchases maintenance agreements on this equipment.
- 4) The taxpayer's primary intent in purchasing the agreements is the remedial repair feature although typical agreements also include one or two preventive maintenance calls.
- 5) Normally, the preventive maintenance is performed only when a repair representative is present as the result of an emergency call.

The enactment of Am. Sub. H.B. 694, effective November 15, 1981, made the repair and installation of tangible personal property taxable unless the property is subject to an exemption. R.C. 5739.01(3)(a) and (b). In regard to the application of these provisions to warranty and maintenance contracts, the Department of Taxation takes the position that a remedial maintenance contract ("fix-it-if-it-breaks") is not subject to sales and use tax. However, a contract for preventive maintenance is a taxable sale.

The reason for the distinction is that under the remedial maintenance contract there is no certainty that a taxable service will be performed. In many respects these contracts are similar to insurance policies. The service provider will repair the item only if it breaks. Consequently, the service provider is the consumer of all parts and services it purchases to fulfill the contract

obligation. By contrast, under a preventive maintenance contract, the repair service will almost undoubtedly occur. For these types of contracts, the provider is considered to be a vendor and tax must be charged on the contract payments.

The taxpayer indicates that many of the contracts purchased provide for both remedial maintenance as well as a number of preventive maintenance visits. The taxpayer also indicates that its primary purpose for purchasing the contracts was to receive the remedial repair service and that “normally”, preventive maintenance is only performed when a repair representative is present as the result of a call for remedial service.

Based on the documentation and facts as presented, it is the opinion of the Tax Commissioner that the taxpayer need not pay sales tax on the price paid for the contracts.

If an actual repair is made which is not covered by the contract and an additional payment is made, the additional payment is taxable.

This opinion applies to the taxpayer and its property only. It may not be transferred or assigned.

In addition, the tax consequences stated in this opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes. R.C. 5703.53 (E).

Joanne Limbach
Tax Commissioner