
Opinion of the Tax Commissioner

Date Issued: June 14, 1991

Opinion No: 91-0005

Tax: Sales/Use

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Subject: Service Plans

This request for an opinion of the Tax Commissioner was received on February 21, 1991. Specifically, it concerns the application of sales and use tax to contracts for the maintenance of computer hardware and software.

XXXX (Taxpayer) sells and services various data processing equipment and software systems to a variety of businesses throughout the northern Ohio region. Part of the services provided include contractual support of both hardware and software. Sample copies of maintenance agreements were submitted along with the request for the Tax Commissioner's opinion.

The "Maintenance Plan Agreement" and "Time & Material Modification to the Terms & Conditions of the Maintenance Plan Agreement" documents have been examined and found to be contracts for repair service subject to tax. The basic agreement requires Taxpayer to perform periodic preventive maintenance, as well as emergency corrective service as needed. An agreement under which the contractor is obliged to perform maintenance services whether or not the equipment malfunctions is deemed to be a contract for taxable repairs. (A warranty agreement that requires the contractor only to "fix it if it breaks" is more akin to an insurance contract, and is not taxable to the customer; instead, the contractor is the consumer liable for the tax on any property used in making the repairs.) The "Time & Material Modification" allows the customer to purchase taxable repair parts and service on a prepaid basis, but is not an insurance-like agreement. The customer buys a certain number of dollars' worth of repair service credit and can then draw on that credit, at a predetermined hourly rate, as desired. Repair and maintenance services performed under contracts like these samples are taxable regardless of whether the work is performed at the customer's site or as "carry-in" service at the vendor's location.

The "XXXX Telephone and Software Support Agreement" document has been examined and found to be a contract for personal services not subject to tax.

In its request for this opinion, Taxpayer also asked for clarification as to whether tax should be charged based on its own location or that of the customer. Services performed under contracts like the samples Taxpayer has provided are not "automatic data processing and computer services," as those terms are defined in R.C. 5739.01(Y)(1). Therefore, pursuant to R.C. 5739.01(E), sales of such services are presumed to occur at the vendor's location. Taxpayer should charge sales tax at the rate appropriate for its own location. Depending on their locations,

customers may also be liable for additional use taxes levied under R.C. 5741.022 and/or 5741.023.

This opinion applies to the taxpayer and its services 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.

Roger W. Tracy
Tax Commissioner