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## Opinion of the Tax Commissioner

Date Issued: May 23, 1991

Opinion No: 91-0009

Tax: Sales/Use

XXXX  
XXXX  
XXXX

Subject: Service Plans

This request for an opinion of the Tax Commissioner was received on March 29, 1991. Specifically it concerns the application of sales and use tax to a certain maintenance contract sold by XXXX to the YYYY.

XXXX has submitted the following factual circumstances:

- 1) XXXX entered into a written agreement on or about DATE, with YYYY.
- 2) The written agreement consists of three parts; the general agreement entitled "XXXX Service Plan", the "XXXX Maintenance Agreement", and a Supplement.
- 3) The "XXXX Service Plan" includes within it all possible types of service agreements, including but not limited to maintenance service agreements. The "XXXX Maintenance Agreement" sets forth the general terms and conditions under which XXXX will provide maintenance services to YYYY and lists the responsibilities of YYYY. The Supplement identifies the specific machine covered, the types of services, applicable rates and charges and effective dates.
- 4) Under the terms of the agreement, XXXX charges a minimum maintenance charge for the applicable invoice period. XXXX will provide remedial maintenance to keep equipment in good working order. The service may include preventive maintenance if XXXX determines such to be necessary.
- 5) YYYY is required to make determinations that equipment is in need of maintenance before requesting the maintenance service.
- 6) Additional maintenance charges above the minimum charge for an invoice period are separately invoiced to YYYY.

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 or prescriptive 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.

XXXX indicates that the maintenance agreement with YYYY provides for both remedial maintenance as well as preventive maintenance. When a maintenance contract provides for both, the parties must ascertain if a substantial amount of preventive or prescriptive maintenance will be provided pursuant to the agreement. This may differ contract to contract, depending on the size, type, and amount of owed equipment. If a substantial amount of preventive or prescriptive maintenance will be provided, the contract payments are taxable. If preventive maintenance is only performed when a repair representative is present as the result of a call from YYYY for remedial service and such preventive maintenance is relatively minor in nature, the contract payments need not be taxed.

Based on the documentation and facts as presented, it is the opinion of the Tax Commissioner that XXXX need not charge sales tax on the price of the maintenance contracts. However, XXXX is the consumer of all parts and services it purchases to fulfill the contract obligation and thus must pay sales and use tax on these items.

Sales tax should be charged and collected by XXXX for the additional maintenance charges for repair performed which is not included in the minimum maintenance charge.

This opinion applies to XXXX 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 XXXX to be aware of such changes. R.C. 5703.53(E).

Roger W. Tracy  
Tax Commissioner