

Cite as 6 WTD 137 (1988)

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition)	<u>D E T E R M I N A T I O N</u>
For Correction of Assessment of)	
)	No. 88-257
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . . .
)	

RULE 107: RETAIL SALES TAX -- WARRANTIES, MAINTENANCE AGREEMENTS AND SERVICE CONTRACTS. Retail sales tax is not applicable to third party warranty contracts.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF HEARING: December 3, 1986

NATURE OF ACTION:

Taxpayer petitions for correction of the assessment.

FACTS AND ISSUES:

Norton, A.L.J. (successor to Dressel, A.L.J.) -- Taxpayer has a contract with The Ultimate Corp. entitled "Maintenance Service Agreement for Data Processing Equipment." The computers were purchased used from . . . and were manufactured by Honeywell. The Ultimate Corp. and Honeywell are non-related entities. The standard Agreement in effect during the audit period provides:

Ultimate agrees to provide to Customer, and Customer agrees to accept, Ultimate's data processing equipment maintenance service subject to the following terms and conditions:

. . .

5. Maintenance Service

5.1 Ultimate, thru its agent, Honeywell Field Engineering Service will make all necessary adjustments and repairs to keep the equipment in good operating condition in accordance with Ultimate's policies then in effect. Additional Terms and Conditions on Reverse Side Hereof.

5.2 Ultimate will determine the preventive maintenance service required for the equipment. Remedial maintenance service will be provided after notification that the equipment is inoperative. Ultimate will be responsive to the remedial maintenance needs of Customer and will have full access to the equipment.

Taxpayer states that Ultimate has not furnished any regular or periodic maintenance to the equipment and none was promised or intended under the agreement. After a series of letters with Ultimate, a change was made in 1986 to clarify the agreement. The change made was to insert in the opening sentence after "Ultimate agrees to provide," the following phrase:

"maintenance service and
repairs as needed"

The issue is whether this agreement is for regular or periodic maintenance that requires the payment of retail sales and/or use tax under Rule 107.

DISCUSSION:

Rule 107 in effect during 1985 provides:

When a warranty or service contract is sold along with a sale of tangible personal property the entire charge is taxable as gross proceeds from the sale of tangible personal property. However, the sale of a warranty or service contract by itself is a transaction subject to business tax under the service classification upon gross income therefrom The sale of a maintenance contract which calls for regular or periodic maintenance, repair, or adjustment of tangible personal property is taxable as a retail or wholesale sale, as the case may be.

However, the distinction between a warranty and maintenance contract can be more easily seen in the Rule 107 change adopted December 31, 1985. It provides:

Warranties, sometimes referred to as guarantees, are agreements which call for the replacement or repair of tangible personal property with no additional charge for parts or labor, or both, based upon the happening of some unforeseen occurrence, e.g., the property breaks down.

Maintenance agreements, sometimes referred to as service contracts, are agreements which require the specific performance of repairing, cleaning, altering, or improving of tangible personal property on a regular or periodic basis to ensure its continued satisfactory operation.

. . .

Warranties which are sold by any person who was not the seller of the property protected by the warranty or which are purchased subsequent to and distinct from the original warranty purchased concomitant with the property, are deemed to be services rather than retail sales. Charges for such warranties are subject to the service business tax and are not subject to retail sales tax. (Emphasis ours.)

In looking at the "Ultimate" agreement as it was in 1985, there is nothing that requires Ultimate to perform preventive maintenance. It is discretionary. This is reinforced by the fact that Ultimate did no preventive maintenance on a regular or periodic basis. It responded only to remedial (fix it when broke) services. That this is what was intended by the parties is further illustrated by the change in the contract in 1986.

Therefore, on the facts, it is determined that the agreement is one of warranty and not maintenance. Since the warranty was issued by a non-seller of the equipment, Rule 107 provides that they are not subject to retail sales tax and/or use tax.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. This matter will be referred to the Audit Section for adjustment of the assessment in accordance with this Determination. An amended assessment will be issued and will be due for payment on the date indicated thereon.

DATED this 30th day of June 1988.