

Cite as 4 WTD 393 (1987)

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

In the Matter of the Petition)	<u>D</u> <u>E</u> <u>T</u> <u>E</u> <u>R</u> <u>M</u> <u>I</u> <u>N</u> <u>A</u> <u>T</u> <u>I</u> <u>O</u>
<u>N</u>	
For Correction of Assessment of)	
)	No. 87-375
)	
. . .)	Registration No. . . .
)	Tax Assessment No. . .
.	
)	

[1] **RULE 107, RULE 173, AND RCW 82.04.050(2):**
MAINTENANCE AGREEMENT -- WARRANTIES -- RETAIL SALE.
A sale of a maintenance contract calling for
periodic inspection, servicing, and repair of
tangible personal property is a retail sale.

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: May 15, 1986

NATURE OF ACTION:

The taxpayer petitions for a correction of a retail sales tax
assessment.

FACTS AND ISSUES:

Normoyle, A.L.J. (successor to Chandler, A.L.J.) -- The
taxpayer, a corporation, is engaged in retail and wholesale
sales of automotive diagnostic equipment. It was audited for
the period from January 1, 1981, through June 30, 1985.

The taxpayer sold equipment to another company (herein referred to as "ABC") for use by ABC in a vehicle emission testing contract it had with The taxpayer gave ABC a "Limited Warranty" on this equipment. In addition, the taxpayer entered into a sub-contract with ABC. It is the taxation of the income from this sub-contract which is the issue on appeal.

The sub-contract provided as follows, in pertinent part:

TITLE PAGE: The sub-contract was issued to the taxpayer "for the purpose of furnishing Field Repair Maintenance and Calibration Services on (taxpayer) supplied analyzers in the (motor vehicle inspection program)." The sub-contract was a fixed price agreement, calling for payments of over one-half million dollars, during the five and one-half years of the sub-contract.

PAGE 2: Under "Purchase Description," the sub-contract had two "Items:" 1. A "Field Repair, Maintenance, and Calibration Service for the purpose of implementation and start-up" of the state inspection program; 2. A "Field Repair, Maintenance, and Calibration Service for the purpose of operation" of the program. (Emphasis added.)

PAGE 3:

Terms: Items will be invoiced on the last working day of each month for that month's effort as listed by (taxpayer) as described above until complete.

Delivery: All items listed will be furnished upon request or need as determined by (ABC) within the described time periods.

EXHIBIT 1.
STATEMENT OF WORK.

PAGE 1:

EQUIPMENT. Taxpayer was to supply ABC with "the necessary personnel to service" 24 emission analyzers in Further, the taxpayer was to furnish the personnel "for the purpose of maintaining the equipment" in accordance with ABC's contract with

SERVICE DESCRIPTION. The taxpayer was to "supply complete service, excluding normal maintenance, such as replacement of filters, hoses, and probes" for the 24 analyzers "including labor and repair parts." The taxpayer agreed to "respond to service calls within a two hour period" each working day, and to supply a "Quality Assurance" check for each analyzer "each month."

DOCUMENTATION. "All services and repairs accomplished will be documented by" the taxpayer, monthly.

(Emphasis added.)

EXHIBIT 1.
STATEMENT OF WORK.

PAGE 2:

REPLACEMENT PARTS. The sub-contract provided that the taxpayer agreed to sell "certain replacement parts separately" to ABC, at the taxpayer's current prices.

PAGES 2 AND 3:

REPAIR TEST EQUIPMENT, PARTS AND PERSONNEL TRAINING. The taxpayer agreed "to provide the necessary initial training and update training of its personnel on the emission analyzer and service procedures."

"Parts necessary for the repair of the emissions" analyzers were to be supplied by the taxpayer.

PAGE 3:

RESPONSE. The taxpayer "will respond to a service call within a two-hour period of any normal working day. . . . This response time will be guaranteed."

EQUIPMENT MODIFICATIONS. "Equipment modifications that may become necessary after this contract is in force will be on a material basis only and are not part of this contract."

INSTALLATION. "(taxpayer) personnel will assist in the installation of the equipment . . . prior to the program operation date"

The taxpayer was paid the full amount under this sub-contract, and reported this income as "wholesaling."

The auditor reasoned that this contract was a maintenance or service contract, re-classified the income to "retailing," and assessed retail sales tax on the full amount of the contract.

The taxpayer contends that the contract was a "simple warranty" and that only additional equipment supplied to ABC was taxable.

The issue is whether or not the sub-contract was a maintenance or service contract (a retail sale) or a warranty contract (not a retail sale).

DISCUSSION:

A person who installs, repairs, cleans, alters or improves tangible personal property for consumers is making a retail sale. RCW 82.04.050(2). This is so even if no tangible personal property is sold or used in connection with such services. Washington Administrative Code (WAC) 458-20-173. According to the contract, the taxpayer assisted in the installation, and it repaired the analyzers. ABC was a consumer. See RCW 82.04.190(1) and (2).

WAC 458-20-107 (Rule 107) reads, in pertinent part:

WARRANTIES, MAINTENANCE AGREEMENTS, AND SERVICE CONTRACTS

For purposes of this rule, the following definitions apply:

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.

. . .

MAINTENANCE AGREEMENTS

Maintenance agreements and service contracts require the periodic specific performance of inspecting, cleaning, physical servicing, altering, and/or improving of tangible personal property. Therefore, charges for contracts or agreements of this nature are retail sales, subject to retailing business tax and retail sales tax under all circumstances.

In the cases of both warranties and maintenance agreements, any actual additional charge made to the consumer because of the providing of materials or the performance of actual labor pursuant to such agreements is separately taxable under the retailing business tax and retail sales tax. This includes so-called "deductible" amounts not covered by the warranty or service agreement.

Moreover, if an agreement contains warranty provisions but also requires the actual specific performance of inspection, cleaning, servicing, altering, or improving the property on a regular or periodic basis, without regard to the operating condition of the property, such agreements are fully taxed as service agreements, not warranties.
(Emphasis added.)

Based on the language of Rule 107, we conclude that this sub-contract, read as a whole, is a maintenance or service contract and, hence, that the taxpayer made a retail sale to ABC. The contract seems to fall within the specific language of the last paragraph of the Rule, quoted above. Even though the contract may contain some language indicative of a warranty, it also requires the specific performance of "inspection, cleaning, servicing, altering, or improving the property on a regular or periodic basis. . . ." On page 1 of Exhibit 1, the taxpayer was to conduct a "Quality Assurance" (including gas calibration) check monthly on each emission analyzer. Page 3 of Exhibit 1 required the taxpayer to assist in the installation of the equipment. These duties are not contingent upon breakdowns as in the case of a true warranty. Rather, they are specific requirements of the contract, "without regard to the operating condition of the property" (to use the language of Rule 107). The inclusion of these requirements of specific performance makes this contract a

maintenance or service contract, fully taxable as a retail sale.

Because the contract extended beyond the audit period, it may be that the taxpayer also is liable for retail sales tax post-audit. This matter is referred to the Audit Section for a determination of the amount of retail sales tax, if any, which remains unpaid after the audit period.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

In addition, the taxpayer may owe retail sales tax on income from the service contract, post-audit period. This matter is referred back to the Audit Section for a determination of any additional retail sales tax which may be due.

DATED this 30th day of December 1987.