STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 89-241
STORAGE TECHNOLOGY CORP. 2270 South 88th Street Louisville, CO 80028-4305,	§	
Taxpayer.	§	

RECOMMENDED ORDER

Storage Technology Corporation (Taxpayer) petitioned for a refund of lease tax concerning the period August 1985 through March 1989. The Department partially denied the petition and the Taxpayer appealed to the Administrative Law Division. A hearing was conducted in the matter on April 24, 1991. Bruce A. Rawls, Esq. and Connie L. Schoenberg appeared for the Taxpayer. Assistant counsel Beth Acker represented the Department. This Recommended Order is based on the evidence and arguments presented by both parties.

FINDINGS OF FACT

The Taxpayer leases computer equipment and also separately provides maintenance services for its own computer equipment and for equipment leased or sold by other computer companies.

The Taxpayer's standard lease contract requires that the lessee must maintain a service contract on the equipment with either the Taxpayer or any other approved maintenance company. During the period in issue, twenty-one of the Taxpayer's lease customers also contracted for the Taxpayer to service the leased

equipment. The remaining lessees contracted with some other company to service the equipment. The Taxpayer also contracted to provide maintenance services for equipment sold or leased by other companies during the subject period.

The Taxpayer paid lease tax on the proceeds from all of the maintenance contracts and subsequently petitioned for a refund of all the tax paid. The Department concedes that the Taxpayer's maintenance contracts involving equipment leased or awned by another company is not taxable. However, the Department denied the refund for the maintenance contracts on equipment also leased by the Taxpayer.

The Department argues that the maintenance contracts on the Taxpayer's own equipment were a direct consequence of the lease contracts between the Taxpayer and the customer and therefore the maintenance payments constitute taxable gross proceeds derived from the leasing of tangible personal property.

CONCLUSIONS OF LAW

The Alabama lease tax is measured by the gross proceeds derived from the leasing of tangible personal property. "Gross proceeds" is defined as the value accruing from the lease, without deduction for services, the cost of the property, or other related overhead costs incurred by the lessor. See, Code of Ala. 1975, §40-12-220(4).

The maintenance contracts in issue are not taxable because the

Taxpayer was not obligated by the prior lease agreements to perform the maintenance services. Consequently, the refund in issue should be granted.

Independent services provided by a lessor are taxable only if the services are incidental to the lease and the lessor is required to provide the services by the lease agreement. If so, then the services are taxable even if they are scheduled as a separate item in the lease contract, and even if the lessor and the lessee enter into a separate contract for the services. That is not the case here.

In this case, the Taxpayer was not required to perform the maintenance services by the prior lease agreements nor enter into the separate maintenance contracts with the lessees. The lessees could choose the Taxpayer or any other approved maintenance company. Consequently, the maintenance proceeds were not derived from the leasing of the equipment and are not subject to lease tax.

Department Reg. 810-6-5-.09.01 reads in part as follows:

> When a lessor engaged in leasing or renting tangible personal property requires maintenance of the item leased or rented as part of the leasing or rental contract, the gross receipts derived therefrom, including charges for maintenance, will be subject to tax. When there is a separate contract for maintenance only, the rental or leasing tax will not apply to the gross receipts derived therefrom.

The second sentence provides that if there is a separate contract for maintenance only, then the maintenance will not be

taxable. Because a maintenance contract by itself is not subject to lease tax, the second sentence can only be referring to a situation where a lessor has also entered into a separate contract involving maintenance only, as in this case. However, as stated, the separate maintenance contract would be taxable if the lessor was obligated by the underlying lease to enter into the contract or otherwise provide the services.

This is a Recommended order. The original along with the administrative record has been submitted to the Commissioner of Revenue for entry of a Final Order. The Final Order entered by the Commissioner may be appealed by the Taxpayer pursuant to Code of Ala. 1975, §41-22-20.

Entered on June 17, 1991.

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BILL THOMPSON
Chief Administrative Law Judge