75-17

February 28, 1975

Memorandum

To: Director of Revenue and Taxation

From: Attorney General

Sub ct: Inquiry regarding possible violation of Section 19518 of the Government Code

Your memorandum of February 14, 1975, requests an opinion *whether* G:-e Memorial Family Plan, Inc., hereinafter referred to as the " Funeral Plan" is in violation of Section 19519 of the Government Code, relative to the payment of the gross receipts tax.

These are the facts included in your memorandum. Funeral plan has recently been active in attempting to sell funeral services by persuading customers to execute retail installment contracts. A number of individuals have reported to your office that they subscribed to the contract and later discovered that pursuant to Paragraph 7 of said contract the gross receipts tax was not included in the purchase price. These individuals indicated they were unaware of these provisions relating to payment of the gross receipt tax at the time the agents of Funeral Plan were attempt*ing to sell the contracts. Paragraph 7 of the contract provides:*

> "Any gross receipts tax, sales tax or other tax imposed by law which is payable as a result of this agreement shall not be inc luded in the purchase price provided for in this agreement, but payment in the amount of thirty-five percent (35%) of such tax shall *be paid* to Funeral Plan on execution of this Agreement and the remaining sixty-five percent (65%) shall be paid to the designated *mortuary by the* purchaser, or his estate; at the time such services and merchandise are provided."

Section 19519 of the Government Code *as contained in Title XX, Chapter* VI, titled "Business Privilege Tax" provides:

> 'Unfair Competition. It shall be unlawful for any taxpayer under this Chapter to advertise, or hold out to the public in any manner, directly or indirectly, that any tax levied hereunder is not considered as an element of the purchase price."

The tax which Section 19519 refers to is that levied on persons for the privilege of doing business or other activities in Guam. Section 19540, Government Code. An understanding of the nature of the tax is essential in arriving at an interpretation of the section:

As mentioned above, the gross receipts tax is a *privilege tax* levied *against* persons *on account* of their business and other *activities in Guam, measured by the application of rates against values, gross proceeds of sale or gross income, as the case may* be. It is not a tax imposed on the buyer goods *or services.* While Section 19519 would allow the seller to pass on to the buyer the tax itself imposed on the seller, payment of the tax is the prime obligation of the seller, and the buyer has no direct obligation as far as the law is concerned. However, it is not a tax on a sale (or lease),

It is the intent of Section 19519 to *prohibit that* conduct of a taxpayer in which there is involved a misrepresentation of the purchase price. Misrepresentation may occur in different ways.

A taxpayer (seller) may advertise or hold out to the. public that his purchase price does not include as an element thereof the gross receipt tax when in fact it is. This activity is a violation of Section 19519 because it misrepresents to the public the purchase price, by including therein the tax imposed on vendor.

A taxpayer may advertise or hold out to the public that this product sells for a certain price and buyer later finds out when he does but the product that the taxpayer seller has increased his price by adding thereto the gross receipts tax. This activity.. is.... also a violation of. Section 19519 because the addition of the tax "is not considered an element of the purchase price", but rather *is an* addition *to the purchase price. Taxpayer here is again* misrepresenting *the purchase* price, by adding *to that sum which he* represented as his purchase price the tax imposed on him.

The manner in which the gross receipts tax is collected may be in violation of Section 19519 if it loads a buyer to believe *that payment of such tax is imposed directly* on such buyer. A taxpayer's attempt to shift the burden of the tax in such an instance is contrary to the intent *of the Section. It is a. violation of Section* 19519 because the taxpayer' (seller) is misrepresenting the nature of the tax, which is not permissible under Section 19519, although allowed in other chapters of the code.

This is apparent in examining other sections of *the* code. Section 19201 imposes a tax of one cent for each ten cents paid for admission to any place, including admission by season ticket of subscription. That section obligates the person paying for such admission to pay the tax d ~~x~~ directly. Section 19650 imposes a tax *of ten* percent *on the rental price* charged or paid for accommodations in *hotel, lodging houses, or similar facilities. The tax is* imposed *at the* time the sale is made and directly on the buyer. Persons engaged in the above activities may advertise or hold out to the public that the price of *their product* is a certain sun and charge the tax imposed as an addition to the buyer's purchase price without violation of Section 19519. Moreover, legal liability for the tax is on the *buyer*.

In the instant case, Paragraph 7 of the contract provides that the tax shall not be included in the purchase price, but does not require the buyer to pay for it. This statement ;misrepresents the purchase price because addition of the gross receipts tax is not made "an element of the purchase price" but an addition thereto. *In* order to the business privilege tax, taxpayer must include such tax as an element of its purchase pprice. Failure to do so is a violation of Section .

In addition, *Paragraph 7 which states that "any gross receipts tax,* sales tax, or other tax imposed by *law which is* payable as a esult of this Agreement" misrepresents *the nature of* the tax. A *buyer may* reasonably believe that the *tax* is imposed directly on him. The purpose of the gross receipts tax is to tax *a person for the* privilege of doing business in Guam and not to tax the sale. Funeral Plan may pass on to its customers the gross receipts tax as a cost which must be included in its purchase price and not as a tax on its customers. In essence, it is requiring the buyer to **pay the legal liabilities of** the taxpayer. Misrepresentation of **this** type is **also prohibited by** Section **19519.**

Assuming the facts as you suggest, Funeral Plan would be in violation *of Section 19519 for the above-states reasons.*

/s/ RICHARD D. MAGEE
Acting