
State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC PRIVATE REVENUE OPINION #00-5

SUBJECT: Communications Towers & Buildings
 (Sales & Use Taxes)

REFERENCES: S. C. Code Ann. Section 12-36-910(A) (Supp. 1999)
 S. C. Code Ann. Section 12-36-910(B)(3) (Supp. 1999)
 S. C. Code Ann. Section 12-36-1310(A) (Supp. 1999)
 S. C. Code Ann. Section 12-36-1310(B)(3) (Supp. 1999)
 S. C. Code Ann. Section 12-36-60 (Supp. 1999)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (Supp. 1999)
 S. C. Code Ann. Section 1-23-10(4) (Supp. 1999)
 SC Revenue Procedure #99-4

SCOPE: A Private Revenue Opinion is a written statement issued to a specific taxpayer by the Department to apply principles of law to a specific set of facts or a particular tax situation. **A Private Revenue Opinion does not have the force and effect of law, and is not binding on the person who requested it or the public.** It is, however, the Department's opinion limited to the specific facts set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate statement of the material facts and the transaction was carried out as proposed.

Questions:

1. For sales and use tax purposes, are the described transactions whereby ABC, Inc. ("ABC") acquired certain communications towers and buildings purchases of tangible personal property or purchases of real property?
2. Are charges by ABC to communications companies for use of the towers and buildings as described in this document subject to the sales or use tax?

Conclusions:

1. It is the Department's position that purchases by ABC of the towers and buildings described in this document were purchases of real property. Therefore, the purchases are not subject to the sales or use tax.

2. It is the Department's opinion that charges by ABC to communications companies for use of the towers and buildings described in this document are not subject to the sales or use tax.

Facts:

For a monthly fee, ABC grants wireless communications companies the right to attach their equipment to ABC's towers and to install and operate related communications equipment in buildings located at the tower sites. These "site usage agreements" generally range in duration from three to five years. ABC is not a communications company and does not provide communications services. The sites are located in over twenty states, including South Carolina.

Previously, the subject towers and buildings were owned by communications companies that are now ABC's customers ("Customers"). Along with the towers and buildings, Customers also owned the land at approximately 40% of the sites and had ground leases for the rest. Customers also had site usage agreements for some of their sites. A "site usage agreement" is an agreement whereby the Customers permitted other communications companies a nonexclusive right to attach their antennae to Customers' towers and to place transmitters and receivers in buildings owned by the Customers. ABC bought the land and ground leases, along with the towers and buildings, from the Customers. ABC also bought the site usage agreements from the Customers.

ABC has asked if purchases of the towers and buildings from the Customers were purchases of tangible personal property for sales and use tax purposes, or purchases of real property. If purchases of the towers and buildings were of tangible personal property, then the transactions are subject to the sales and use taxes. If real property, they are not.

ABC has also asked if payments received from customers for the right to attach their equipment to the towers and to install and operate communications equipment in the buildings are subject to the sales or use tax.

The towers in question are steel structures averaging 171 feet in height (with some exceeding 400 feet in height). To construct a tower, a concrete foundation ("pad") is poured and dried with steel spikes or plates embedded. The tower is then constructed on the pad from the ground up with the base bolted to the embedded spikes or plates. Once constructed, it is expected a tower will remain indefinitely.

The equipment buildings range in size from 8' x 10' to 20' x 40'. Most are constructed of brick, concrete block, or wood/metal with siding and were built on site. All are equipped with telephone service and are climate controlled. The buildings are used to house the transmission portion of a communications system that consists of a transmitter and a receiver and associated antenna, which is installed on the tower. Like the towers, it is expected the buildings will remain indefinitely.

Discussion:

Code Section 12-36-910, which imposes the sales tax, provides:

(A) A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.

Code Section 12-36-1310, which imposes the use tax, provides:

(A) A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail...at the rate of five percent of the sales price of the property...

Therefore, for either the sales tax or the use tax to apply, there must be a retail sale (purchase) of tangible personal property. The sales tax is imposed on the retail sale of tangible personal property and the use tax is imposed on the storage, use or consumption of tangible personal property that has been purchased at retail.

As for the meaning of the term “tangible personal property,” Code Section 12-36-60 provides, in part:

‘Tangible personal property’ means personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses....

Based on the above, it must be determined if the towers and buildings were tangible personal property, or if they were real property, when purchased by ABC.

For guidance in this matter, we refer to City of North Charleston v. Claxton, 431 S.E.2d 610 (S.C. 1993). While that case dealt with the value of property in a condemnation proceeding, it also addressed the issue of real (fixtures) versus personal property.

Quoting from that case:

Criteria for determining whether an item remains personalty or becomes a fixture when affixed to realty includes: (1) the mode of attachment; (2) the character of the structure of the article; (3) the intent of the parties making the annexation; and, (4) the relationship of the parties. Creative Displays, 272 S.C. at 72, 248 S.E.2d at 918.

The Court, in Claxton, referenced Rebel Manufacturing and Marketing Corporation, 54 B.R. 674 (Bkrtcy. D.S.C. 1985). In that case, a bank argued that the sale of a mobile home was subject to a mortgage on the realty because it was a fixture [real property]. The mobile home was underpinned, anchored, and connected to sewerage, water and electric lines. Also, the home had a screened porch attached and was adjacent to several large trees.

In ruling for the bank, the Court reasoned:

The various substantial structures and trees surrounding the mobile home would be severely damaged, if not destroyed, should the mobile home be removed.

It seems clear that the debtor's positioning the mobile home among the trees, and adding the construction [the porch] warrants the inference that the intent of the debtor was for the mobile home to become a part of the realty.

Paris Mountain Water Company v. Woodside, 133 S.C. 383, 131 S.E. 37 (1925), a South Carolina State Supreme Court case, was concerned with whether water pipes placed in lands belonging to others were to be taxed as realty or personalty. The Court, in holding that the pipe was to be taxed as realty, stated:

In the requirement of an intention to make the article annexed a permanent accession to the land, the expression of permanent does not, it seems, imply that the annexation must be intended to be perpetual, but rather that the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished, or until the article is superseded by another article more suitable for the purpose.

Based on the above, it is the Department's opinion that the towers and buildings in question were real property when sold to ABC.

In the Department's opinion, because the towers and buildings are real property, not tangible personal property, the sales in question are not subject to the South Carolina sales or use tax.

We next address the issue of the charges by ABC to third-party communications companies to attach antennae to the towers and to install and operate communications equipment in the buildings.

To address this second issue, we must also consider other provisions of Code Sections 12-36-910 and 12-36-1310.

Code Section 12-36-910 also imposes the *sales* tax on the:

(B)(3) gross proceeds accruing or proceeding from the charges for the ways or means for the transmission of the voice or messages, including the charges for use of equipment furnished by the seller or supplier of the ways or means for the transmission of the voice or messages.

The same language is found in Code Section 12-36-1310(B)(3), which imposes the *use* tax.

Since the charges by ABC are for the use of real property (the towers and buildings) and not for the ways or means for the transmission of the voice or messages, it is the Department's opinion that such charges are not subject to tax under Code Sections 12-36-910(B)(3) and 12-36-1310(B)(3).

CAVEAT: This advisory opinion is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting the advisory opinion may not rely on it. If the taxpayer relies on this advisory opinion, and the Department discovers, upon examination, that the facts and circumstances are different in any material respect from the facts and circumstances given in this advisory opinion, then the advisory opinion will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this advisory opinion, changes in a statute, a regulation, or case law could void the advisory opinion.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Elizabeth Carpentier _____
Elizabeth Carpentier, Director

September 11 _____, 2000
Columbia, South Carolina