

SC PRIVATE REVENUE OPINION #01-2

SUBJECT: Communications Grids
 (Sales & Use Taxes)

REFERENCES: S. C. Code Ann. Section 12-36-910 (2000)
 S. C. Code Ann. Section 12-36-1310 (2000)
 S. C. Code Ann. Section 12-36-100 (2000)
 S. C. Code Ann. Section 12-36-110 (2000)
 S. C. Code Ann. Section 12-36-120 (2000)
 S. C. Code Ann. Section 12-36-60 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
 S. C. Code Ann. Section 1-23-10(4) (2000)
 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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate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.

Question:

Are charges by ABC, Inc. ("ABC") to communications companies for allowing such companies to attach their antennae to communications grids owned by ABC subject to the sales or use tax?

Conclusion:

It is the Department's opinion that charges by ABC, Inc. ("ABC") to communications companies for allowing such companies to attach their antennae to communications grids owned by ABC are not subject to the sales or use tax.

Facts:

ABC owns communications grids and equipment buildings which are located on rooftops of buildings in South Carolina. ABC has entered into long-term lease agreements with the owners of these buildings and most are for 15 to 20 years, with options for ABC to renew for one or two additional terms. Other leases permit ABC to enter into month-to-month or year-to-year

agreements once the initial term expires. Although the leases generally provide that ABC may remove its property at the end of the lease term, it is ABC's intention that the grids and buildings remain in place indefinitely.

ABC does not provide communications services, but allows communication companies, for a monthly fee, to attach their antennae to these grids. ABC has asked if such fees are subject to tax.

ABC's grids vary in size and weight dependent upon available rooftop space, expected demand, required wind and loading capacity and other factors. They range in size and weight from approximately 10 feet by 20 feet, weighing 5 to 6 tons on the low end, to 60 feet by 80 feet, weighing 20 to 25 tons or more on the high end. The grids are constructed in very large component parts by steel foundries according to specifications provided by ABC. The large, individual components are hoisted from the ground to the rooftop either by crane or by helicopter. Each grid is incorporated into the building structure under close architectural oversight.

Building codes require that each grid be physically and permanently anchored to columns of the building which provide structural support for the building. Such anchoring is accomplished by boring holes into the building columns measuring between 2 and 4 inches in diameter, after which each hole is filled with an extremely high strength polymer bonding material having a holding capacity of more than 5,000 pounds per square inch into which portions of the grid are inserted prior to curing. Once cured, the resulting bond provides a holding capacity so great that the only effective manner to remove the grids would be to blast it out or break away portions of the building's structural concrete columns.

In addition to the column anchors, the grids are further anchored to the rooftop by a process of boring over 100 holes completely through the poured reinforced concrete slab of the rooftop and attaching flanges of the grid to the rooftop with hardened steel bolts. These bolts completely penetrate the rooftop and are tightened using nuts positioned against a hardened steel back plate. Such bolts are structural strength, measuring between one inch and one and one-half inches wide by 5 to 8 inches long.

The method of construction and incorporation of a grid into a building structure is not accomplished with a view toward its future removal. Instead, the construction method is designed so that a grid will be a permanent part of the building and will come down when the building itself comes down. Were a grid to ever be removed while the building was in use, it would have to be done by crane or helicopter lift, as the size and the weight of the sections of the grid make it impractical to remove them in any other manner. Also, reroofing of the building would be required due to the sheer number of holes which would remain in the roofing system. There are, typically, 120 connection points for a grid, each of which involves a bored hole which goes completely through the building's roof.

A grid typically holds between twenty and thirty antennae.

Discussion:

Sales and Use Tax Law:

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.

Code Section 12-36-100 defines the terms "sale" and "purchase," in part as "any transfer ... of tangible personal property for a consideration including ... a rental, lease, or other form of agreement."

Code Section 12-36-110 defines "retail sale," in part, as "all sales of tangible personal property except those defined as wholesale sales." The term "wholesale sale" is defined in Code Section 12-36-120, in part, as "a sale of tangible personal property ... for resale, and do[es] not include sales to users or consumers not for resale."

In other words, for a transaction to be subject to tax, there must be a transfer of tangible personal property, for a consideration, to the user or consumer of the property.

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....

Grids:

Based on the above, if the grids are real property, then the charges are not subject to tax.

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 (Bkrcty. 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 grids in question are real property.

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

For purposes of completeness, 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 (grids) 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 A. Carpentier
Elizabeth A. Carpentier, Director

June 25 _____, 2001
Columbia, South Carolina