
State of South Carolina
Department of Revenue
Office of General Counsel
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SC PRIVATE LETTER RULING #05-4

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

REFERENCES: S.C. Code Section 12-36-60 (2000)
 S.C. Code Section 12-36-110(1) (2000)
 S.C. Code Section 12-36-910(B)(3) (Supp. 2004)
 S.C. Code Section 12-36-1310 (Supp. 2004)
 S.C. Code Ann. Regs. 117-314 (Supp. 2004)
 S.C. Revenue Ruling 04-15
 S.C. Revenue Ruling 89-14

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2000)
 S.C. Code Ann. Section 1-23-10(4) (2000)
 S.C. Revenue Procedure 03-1

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set forth, and is binding on agency personnel only with respect to the person to whom it was issued and only until superseded or modified by a change in statute, regulation, court decision, or advisory opinion, providing the representations made in the request reflect an accurate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:

What is the application of the sales and use tax to a contract between ABC and the County in which ABC is providing the county, for one lump sum charge, communications towers and associated prefabricated concrete buildings, site preparation and communications equipment?

Conclusion:

The sales and use tax does not apply to that part of the lump sum charge attributed to the construction and installation of communications towers and associated prefabricated concrete buildings. As a construction contractor, ABC must pay sales or use taxes for building materials it purchases and uses in constructing the communications towers and associated prefabricated

concrete buildings. However, sales or use tax does apply to the sale to the county of any tangible personal property (*e.g.*, antennas, cables, amplifiers, generators, etc.) attached to the towers or housed in the buildings.

ABC has indicated it can determine the portion of the contract price attributable to the towers and shelters, including construction costs. If the price breakdown between the costs for constructing the towers and associated buildings and the gross proceeds for the sale of tangible personal property to the County is not reasonable or not supported by the records of the taxpayer, then the sales and use tax will apply to the gross proceeds of the entire contract.

Facts:

ABC has contracted to provide, ship, test and install an integrated radio communications system for the County consisting of various communications towers, buildings and equipment, as well as software and supplies. Each of nine field communications towers will feature buildings used to shelter the radios and other electronic equipment.

The price of the towers and associated buildings accounts approximately 17% of the contract price for the entire communications system. The contract price is paid in installments when performance targets are met and is not based on the price of individual components; however, ABC reserved the right to make partial shipments of equipment and to request payment upon shipment of such equipment. Communications System Agreement, Exhibit B.

The contract price does not include any amount for federal, state, or local excise, sales, lease, service, rental, use, property, occupation, or other taxes, assessments or duties (other than federal, state, and local taxes based on ABC's income or net worth), all of which will be paid by Customer [the County] except as exempt by law.

Communications System Agreement Section 16.1.

The towers are at least 400-feet high, and significant preparation is required for each tower site. In addition to basic construction-related tasks, such as surveying, preparing site drawings and obtaining permits, the towers' construction requires 35-foot soil-boring tests at tower locations, as well as geotechnical reports of soil conditions at each guy anchor point. At each site, up to 3,600 square feet must be graded to provide a level, solid, undisturbed surface for installation of site components. The tower foundations require work involving excavation, as well as installation of rebar and concrete. Each site features a power generator, which is enclosed within a 12-inch thick, 6-foot high concrete block wall. RF-system and GPS antennas are attached to each tower, as are tower-top amplifiers.

ABC will install "modular prefabricated concrete shelters" (buildings), measuring at least 24' x 12', to protect equipment at each tower site. The buildings feature 5.5-inch thick concrete walls and bullet-resistant doors and are installed on concrete foundations. Each building is placed on a 6-inch concrete slab with a continuous perimeter footing. The foundation slab is constructed larger than the building footprint. Once the building is placed on the slab, angle brackets are placed near the four corners of the building. The angle brackets attach to the building, and anchor bolts tie the angle brackets to the concrete foundation. Once completed, permanent electric, liquid-propane gas, and telecommunications connections are made.

Discussion:

The effect of its contract with the County is that ABC is both selling tangible personal property and constructing real property. The communications equipment (radios, antennas, computers, etc.) constitute tangible personal property while the towers and associated prefabricated concrete buildings constitute real property. Accordingly, the sales and use tax applies to the sale of the communications equipment. The sales and use tax does not apply to the construction of the towers and associated buildings, although ABC must pay sales or use tax on the building materials used in their construction.

Sales and Use Tax in South Carolina

South Carolina Code Section 12-36-910(A) imposes a 5% sales tax on the gross proceeds of sales of every person engaged in the business of selling tangible personal property at retail. The retailer is liable for the tax. South Carolina Code Section 12-36-1310(A) imposes a 5% use tax on the sales price of tangible personal property purchased at retail for storage, use, or other consumption in South Carolina. The use tax is the liability of the purchaser under South Carolina Code Section 12-36-1330. South Carolina allows a credit against the use tax due in South Carolina for the state and local sales or use tax due and paid in another state on purchases of tangible personal property.

Construction Contractors

Sales and use taxes apply to ABC's purchase of building materials used in the construction of the communications towers. Essentially, ABC serves as a construction contractor. For sales and use tax purposes, a "construction contractor" is any person or business making repairs, alterations, or additions to real property. See Regulation 117-314.2.

Sales and Use Taxes on Building Materials

Construction contractors are considered consumers of building materials they purchase to perform their construction jobs; as such, the sales or use tax accrues when these building materials are purchased. S.C. Code Section 12-36-110(1); see also S.C. Code Regs. 117-314 ("Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold") and S.C. Code Regs. 117-314.2 ("Building materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner").

In most circumstances, most states today treat contractors as consumers of the building materials they use in constructing or improving real estate and not as retailers of the materials they transfer in connection with their construction projects. Consequently, contractors generally pay tax on the materials they purchase for construction, but they do not collect tax from their customers on the contract price.

Hellerstein Section 15.08[1][c] (RIA Updated 2005).

Sales of building materials for use in adding to, repairing or altering real property, are subject to the sales or use tax at the time of purchase even though the property erected

therefrom may be subsequently leased or rented to the person who owns or controls the land on which the property is situate. Examples include, but are not limited to, building materials used in constructing grain storage tanks, silos, *pre-engineered buildings* and other structures. . . .

S.C. Code Regs. 117-314.1 (Emphasis added).

The term “building materials” includes such tangible personal property as lumber, timber, nails, screws, bolts, structural steel, elevators, reinforcing steel, cement, lime, sand, gravel, slag, stone, telephone poles, fencing, wire, electric cable, brick, tile, glass, plumbing supplies, plumbing fixtures, pipe, pipe fittings, *prefabricated buildings*, electrical fixtures, built-in cabinets and furniture, sheet metal, paint, roofing materials, road building materials, sprinkler systems, air conditioning systems, built-in-fans, heating systems, floorings, floor furnaces, crane ways, crossties, railroad rails, railroad track accessories, tanks, builders hardware, doors, door frames, window frames, water meters, gas meters, well pumps, and any and all other tangible personal property which becomes a part of real property. . . .

S.C. Code Regs. 117-314.2 (Emphasis added).

The definition of “building materials” includes tangible personal property used to build the communications towers, and it also includes the prefabricated concrete buildings associated with the towers. Regulation 117-314.2 specifically includes “prefabricated buildings” within the definition of building materials. As mentioned earlier, “[b]uilding materials when purchased by builders, contractors, or landowners for use in adding to, repairing or altering real property are subject to either the sales or use tax at the time of purchase by such builder, contractor, or landowner. . . .” S.C. Code Regs. 117-314.2. Accordingly, the prefabricated buildings are subject to either the sales or use tax at the time of purchase by ABC. S.C. Code Regs. 117-314.2.

Building Materials from Out-of-State

In general, purchases by construction contractors are retail purchases and are subject to South Carolina sales or use tax. South Carolina Code Section 12-36-1310(A) provides that if a contractor buys building materials in another state and brings them into South Carolina for use on a construction contract in South Carolina, then the contractor is liable for South Carolina use tax. See also Regs. 117-314.3 (“Building materials transferred from out-of-state into South Carolina for use, storage, or consumption are assumed to have been purchased for such use, storage, or consumption in South Carolina and are subject to the South Carolina use tax”). A credit is allowed against South Carolina use tax for the total taxes (state and local) due and paid in another state pursuant to South Carolina Code Section 12-36-1310(C).

Communications Towers as Fixtures

Once constructed, the communications towers would be considered real property for sales tax purposes. See *City of North Charleston v. Claxton*, 431 S.E.2d 610 (S.C. 1993) (addressing the issue of real property (fixtures) versus personal property in the context of a condemnation proceeding); *Rebel Manufacturing and Marketing Corporation*, 54 B.R. 674 (Bkrcty. D.S.C. 1985) (mobile home was fixture because various substantial structures and trees surrounding the

mobile home would be severely damaged, if not destroyed, should the mobile home be removed); and *Paris Mountain Water Company v. Woodside*, 133 S.C. 383, 131 S.E. 37 (1925) (water pipes placed in lands belonging to others were to be taxed as realty).

South Carolina courts have defined a fixture as “an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it.” [*Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993).] Mere affixation does not automatically render property a fixture. *Creative Displays, Inc. v. S.C. Highway Dep’t*, 272 S.C. 68, 72, 248 S.E.2d 916, 917 (1978). . . . In determining whether an item is a fixture, courts should consider the following factors: “(1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties.” *Hyman v. Wellman Enters.*, 337 S.C. 80, 84, 522 S.E.2d 150, 152 (Ct. App. 1999).

Carjow, LLC v. Simmons, 349 S.C. 514, 519, 563 S.E.2d 359, 362 (Ct. App. 2002). Several other states have determined that similar communications towers constitute real property for tax purposes. See *Shenandoah Mobile Co. v. Cumberland County Bd. of Assessment Appeals*, 68 Pa. D. & C.4th 529 (Pa. Com. Pl. 2004); *Nextel of New York, Inc. v. Assessor for Village of Spring Valley*, 4 Misc.3d 233, 771 N.Y.S.2d 853 (N.Y. Sup. 2004) (applying statutory definitions); *NYT Cable TV, A Div. of the New York Times Co. v. Audubon Borough*, 9 N.J. Tax 359, 368 (N.J. Tax. 1987).

Similarly, once installed, the prefabricated concrete buildings associated with the towers would be considered real property for sales tax purposes. See *Carjow, LLC v. Simmons*, 349 S.C. 514, 519, 563 S.E.2d 359, 362 (Ct. App. 2002). The buildings’ character and mode of attachment, the relationship of the parties, and the parties’ intentions, support the conclusion that the buildings were designed to become part of the real property at the tower sites.

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/Burnet R. Maybank III
Burnet R. Maybank III, Director

September 22, 2005
Columbia, South Carolina