
Opinion of the Tax Commissioner

Date Issued: May 25, 2001

Opinion No: 00-0003

Tax: Sales

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Subject: Real or Personal

This request for an Opinion of the Tax Commissioner was received on March 2, 2000. It concerns the Ohio sales tax treatment of communication towers, communications equipment and equipment buildings used to provide wireless communications services.

TAXPAYER'S STATEMENT OF FACTS

On XXXX, XXXX. ("Buyer"), a Delaware corporation, purchased communications towers, equipment buildings, land, interests in and to ground leases and interests in and to site usage agreements from XXXX ("Seller"). The Buyer entered into a fifteen-year site usage agreement with the Seller at the sites where the Seller currently has communication systems. For a monthly fee, the Buyer grants the Seller and other communications companies the right to attach their equipment to Buyer's towers. The Seller provides wireless communications services to their customers. In order to render these services, the Seller and other communications companies own and operate communications equipment consisting of ground based radio frequency transmission equipment and reception equipment connected by coaxial cable to antennas mounted on the towers.

The communication towers are steel structures averaging 171 feet in height. The equipment buildings are of brick or concrete block or wood/metal construction and equipped with electrical and telephone service. The equipment buildings house the transmission equipment which consists of a transmitter and a receiver for the antenna.

QUESTIONS FOR WHICH AN OPINION IS REQUESTED

(1) Are the communications towers and equipment buildings considered real property or tangible personal property when these assets are affixed to real estate that the buyer has purchased or where the buyer has assumed a ground lease?

(2) If the assets at the tower sites are considered real property, will payments received for the right to attach equipment to the towers and equipment buildings be subject to sales or use tax?

ANSWERS

(1) Based upon the facts provided by the Buyer, the property should be classified as follows. Except for the land, building, wiring and related equipment for providing electricity to the building and the foundation upon which it is situated, the property at issue is to be treated as personal property. Revised Code sections 5701.03 (A) and (B) define “Personal property” and “Business fixture:”

(A) “Personal property” includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a *business fixture*, and that does not constitute real property, as defined in section 5701.02 of the Revised Code. "Personal property" also includes every share, portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, used or designed to be used in business either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat is within the jurisdiction of this state or elsewhere. "Personal property" does not include money as defined in section 5701.04 of the Revised Code, motor vehicles registered by the owner thereof, electricity, or, for purposes of any tax levied on personal property, patterns, jigs, dies, or drawings that are held for use and not for sale in the ordinary course of business, except to the extent that the value of the electricity, patterns, jigs, dies, or drawings is included in the valuation of inventory produced for sale. (Emphasis added.)

(B) "Business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. "Business fixture" includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, *transmission*, and *distribution systems*, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises. (Emphasis added.)

The towers and any appurtenances thereto and any equipment used to transmit the communication services are items of tangible personal property that have become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty.

Additionally, the tower and equipment are used as a transmission system and are therefore a business fixture and properly classified as personal property. From the facts as presented, the land, buildings, building foundations, wiring and related equipment for providing building electricity and telephone service to the building primarily benefit the realty and therefore are not business fixtures. These are properly classified as real property.

(2) Regardless of whether the property is classified as real property or personal property, the payments by the wireless communications company for the right to attach equipment to the towers and equipment buildings are not subject to sales or use tax in Ohio.

The sale of real property or the rights to real property is not a sale of tangible personal property and therefore not subject to tax in Ohio. Furthermore, a charge for space on the tower or for the placement of equipment on an equipment building used in common with other clients is not considered a sale as defined in R.C. 5739.01(B), because the lessee of the space does not exercise sufficient control over the communications tower.

This Opinion applies to the taxpayer only. It may not be transferred or assigned.

In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes. R.C. 5703.53(E).

Thomas M. Zaino
Tax Commissioner