



COLORADO

Department of Revenue

Taxation Division

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GIL-2007-4

XXXXXXXXXXXX
Attn: XXXXXXXX
XXXXXXXXXXXX
XXXXXXXXXXXX

December 4, 2007

Re: taxability of dark fiber

Dear XXXXXXXX,

This letter is in response to your letter to the Colorado Department of Revenue, dated July 24, 2007, re: taxability of dark fiber. We apologize for the time it has taken to respond to your inquiry.

Issue

Are dark and "lit" fiber optic cable subject to sales or use tax?

Background

Your question concerns the following set of facts. A lessor, which is a local exchange carrier licensed to do business in this state, owns a network of "fiber optic cable" which, when activated, is used to support the transmission of voice, data, and internet service applications. The cables are buried underground and accessible only through lock box locations. The lessor leases the right to use the dark fiber to lessees, including other telecommunications companies. In order to activate the dark fiber, the lessee must activate the fiber with external energy source; lessor may also provide this source. Lessor retains ownership of the cable.

Discussion

1. *Monthly leasing charge billed by the lessor to its corporate clients for the use of its unlit fiber optic cable (i.e., dark fiber network) is subject to the Colorado state sales tax.*

Your letter does not contain sufficient information for the department to determine whether the dark fiber optic cable is taxable. Dark fiber is taxable if it retains its identity as tangible personal property and can be separated from the real property without damage. In making a determination, the department will consider, among other things: whether the tangible personal property is tied to a particular business operation rather than the general improvement of the real property; the degree to which the dark fiber is affixed to real property; whether, and the degree to which, there is damage to real property if it is removed; and the objectively manifested intention of the parties.

2. *Dark fiber is tangible personal property unless it is so affixed to real property as to lose its identity and cannot be removed without significant damage.*

Colorado imposes a sales tax on the sale, use, storage, and consumption of tangible personal property. §39-26-104(1)(a) and 202(1)(a), C.R.S. (tax levied on tangible personal property). A “sale” includes a lease of such property. §39-26-102(23), C.R.S. Tangible personal property that loses its identity when it becomes an integral and inseparable part of the realty, irremovable without damage to the premises, is not taxable. Department Reg. 26-102.15. Colorado tax law for real property defines personal property to include “any pipeline, telecommunications line, utility line, cable television line, or other similar business asset or article installed through an easement, right-of-way, or leasehold for the purpose of commercial or industrial operation and not for the enhancement of real property...” §39-1-102(11), C.R.S. Although real property tax law is not necessarily dispositive on issues of sales tax, the department generally will read the real property tax law *in pari materia* with sales tax law, unless the context indicates otherwise. See, also, Connecticut Legal Ruling 2007-3, 07/13/2007 (buried dark fiber does not lose its identity as tangible personal property).

3. *Charges for the use of “lit fiber” subject to taxability as a form of pure telecommunications service.*

Yes, for intrastate telephone services. Telephone services are subject to tax. §39-26-104(1)(c)(I), C.R.S. (Telephone services for all intrastate telephone services are taxable.). Colorado Regulation (39-)26-104.1(1)(c) (Telephone service includes leased circuits and facilities, non-talking circuits, and private line service).. See, also Colorado FYI Sales 80.

Finally, the Department makes a good faith effort to provide accurate and complete answers to questions posed to it by taxpayers. However, the information and answers provided here are not binding on the Colorado Department of Revenue, nor do they replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having authority to bind the Department, has not formally reviewed and/or approved this response.

Respectfully,

Office of Tax Policy
Colorado Department of Revenue