COLORADO
Department of Revenue
Taxation Division

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GIL-2008-9

XXXXXXXXXXXXXX
Attn: XXXXXXXXXXX
XXXXXXXXXXXXXX
XXXXXXXXXXXXXX

February 28, 2008

Re: Taxability of telecommunications tower

Dear XXXXXXXX,

This letter is in response to your letter to the Colorado Department of Revenue, dated November 27, 2007, re: taxability of telecommunications tower. We apologize for the time it has taken to respond to your inquiry.

**Issues**
You submitted the following questions:

1. Is the transfer of a leasehold improvement attached to realty subject to taxation?
2. Can a subcontractor purchase exempt from tax, qualified telecommunications equipment billed to the general contractor on a time and material contract or lump sum contract?
3. Can the general contractor purchase exempt from tax, qualified telecommunications equipment billed to a telecommunications company on a time and material contract or lump sum contract?

**Background**
You represent a client who contracts with telephony companies to erect telecommunications towers. The towers are attached to the real property or structures owned or leased by the telephony company.

**Discussion**
1. *Except as otherwise noted, a contractor is considered the consumer of building materials and supplies and must pay tax on its purchase or use of such property. The subsequent transfer to the owner of the completed building or improvement is not a taxable transaction.*

It is not clear whether you are asking whether the contractor incurs a tax obligation when it transfers to the telephone company title to a tower the contractor constructed on real property or structure

either owned or leased by the telephone company; or whether the transfer by the telephone company of its leasehold interest in the real property or structure on which the towers are place is a taxable transaction. Given the nature of your other questions, I assume you are asking the former question. I also assume that the contractor transfers title to the tower to the telephone company at the completion of construction and installation.

In general, Colorado imposes sales or use 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). However, 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.

A contractor using a lump sum contract is considered the consumer of the building materials if the material loses its identity as tangible personal property and becomes an integral and inseparable part of the realty. As the consumer, the contractor must pay sales tax when it acquires the property from suppliers (or use tax if the property is purchased out-of-state and brought into Colorado). The subsequent transfer of the property to the owner is a non-taxable transaction.

The Department will consider a number of factors to determine whether building material is an inseparable part of the realty. These factors include: the extent to which the component is physically made part of the building and the extent to which the building would be damaged by removal of the component; the extent to which the component benefits the real property generally; and the intentions of the parties. See, generally, *Raynor Door, Inc. v Charnes*, 765 P.2d 650 (Colo. 1988) (tangible personal property does not include property that loses its identity when it becomes "an integral and inseparable part of the realty, nonremoveable without damage to the premises," citing Department of Revenue Regulation 26-102.15, 1 Code Colo. Reg. 201-4; *International Paper Company v. Cohen*, 126 P.3rd 222 (Colo. 2005) (tangible personal property becomes nontaxable real property when it "loses its identity by becoming an integral and inseparable part of the realty, and is removable only with substantial damage to the premises."); *Andrews v. Williams*, 173 P.2d 882, 883 (Colo. 1946); *Updegraff, et al. v. Lesem*, 62 P. 342, 345 (Colo. App. 1900) (holding that mining machinery and materials were not real property, no matter how firmly attached to the land, because they were installed for the purpose of carrying on the business of working a mine); *Marcum, Inc. v. State Tax Commission of the State of Idaho*, Docket No. 90030, Idaho District Court Ada (1990) (intention of the parties is important factor when determining the nature of the property).

The department will treat the property as tangible personal property if the telephone company treats the tower as tangible personal property for purposes of federal income tax (e.g., deducts depreciation expense for the towers). See, Colorado Revenue Determination No. 79, 01/01/1999 (taxpayer equitably estopped from claiming television broadcast towers were not tangible personal property when taxpayer claimed depreciation expenses for the towers on its federal income tax return).

There is not sufficient information in your letter to allow us to determine whether the towers are so permanently affixed to real property that they lose their identity as tangible personal property. This is a fact-intensive determination and one not particularly suited for resolution in an informational letter such as this. For your information, some states have concluded, based on an extensive review of the facts, that communication towers are not tangible personal property. See, South Carolina Private Letter Ruling No. 05-4, 09/22/2005; California Sales Tax Counsel Rulings No. 330.2101. But, see, *All City Communication Company, Inc. and Waukesha Tower Associates v. State of Wisconsin Department of Revenue*, 01-CV-2337, 03/20/2002 (commercial broadcast tower is tangible personal property).

There are two exceptions to the general rule that the contractor is the consumer of the building materials and, therefore, liable for the tax. If the tower does not lose its identity as tangible personal

property when incorporated into real property, then the contractor is considered a retailer, not a consumer, of the property. The contractor's purchase of building materials from a supplier is an exempt wholesale sale because the property will be resold to the owner. The building owner is the consumer, and the contractor must collect sales tax from the owner.

Secondly, a contractor is treated as the retailer, not the consumer, of building materials if the contractor uses a time and material contract. The contractor's purchase of materials from suppliers is an exempt wholesale sale. The subsequent sale of the materials by the contractor to the owner is a taxable transaction and the tax is calculated based on the marked up cost of the materials. However, the contractor must pay use tax on (1) materials not separately stated in the contract and (2) materials that are not transferred to the owner and are used or consumed in the performance of its contractor's contract.

2. *Except in the case of a time and material contract, a subcontractor, like a contractor, is treated as the consumer of the building materials and supplies and must pay tax on the acquisition of such property; but the transfer of such property from the subcontractor to the general contractor is not a taxable transaction.*

A subcontractor incurs tax obligations in the same manner as a general contractor. For example, a subcontractor using a lump sum contract is generally treated as the consumer of building materials that lose their identity when incorporated into real property and, therefore, the subcontractor must pay tax on the acquisition or use of such materials. On the other hand, a subcontractor is a retailer, not the consumer, of such materials if the materials do not lose their identity as tangible personal property when affixed to real property or if the materials are sold pursuant to a time and material contract.

See, generally, department FYIs Sales 6 and 62 for a discussion of construction contracts and how local sales and use taxes are collected on construction projects. You can view and download these publications and a variety of other tax publications, forms, and instructions from our web site by visiting us at: www.revenue.state.co.us and go to "Taxation" > FYIs > Sales Tax > FYIs Sales 6 and 62.

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