STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S981214A

On December 14, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from PricewaterhouseCoopers, LLP, 1301 Avenue of the Americas, New York, NY 10019.

The issues raised by Petitioner, PricewaterhouseCoopers, LLP, are:

(1) Whether communications towers and equipment buildings are considered real property or tangible personal property when these assets are affixed to real estate: (1) that the Buyer described below has purchased; and (2) where the Buyer has assumed a Ground Lease.

(2) Whether fees charged by the Buyer for the right to attach antennas to the towers and place transmitters/receivers in the buildings are subject to sales or compensating use tax.

Petitioner submitted the following facts as the basis for this Advisory Opinion.

The Sellers, a group of affiliated corporations, provide wireless communications services to their customers. In order to render these services, the Sellers and other providers operate communications equipment (a "Communications System"), consisting of ground based radio frequency transmission and reception equipment connected by coaxial cable to antennas mounted on communications towers located throughout the United States. The ground-based equipment is housed inside buildings at the tower sites.

The towers on which this equipment is located are steel structures averaging 171 feet in height (with some exceeding 400 feet in height). The equipment buildings range in size from approximately 8' x 10' to 20' x 40'. Most of the buildings are constructed of brick, concrete block, or wood/metal with siding and were built on site. All are equipped with electric and telephone service, and are climate controlled. These buildings are used to house the transmission portion of a communications system that consists of a transmitter and a receiver and associated antenna, which is installed on the tower. This equipment is all powered by electricity and often has battery back-up capabilities or an on-site generator system for emergency purposes.

A tower may be constructed only after licenses, permits and approvals are obtained from the Federal Aviation Administration and from local zoning boards and building commissions. These processes generally take from several months to several years to complete. When construction finally begins, a concrete foundation (the "pad") is poured, dried, and steel spikes or plates are embedded. The tower is then constructed on the pad from the ground up with the base bolted to the embedded steel spikes or plate. Generally, a substantial amount of land is required in order to construct a tower because guy wires are necessary to secure the tower to the land. Once constructed, it is expected that the tower will remain indefinitely.

Prior to the sale to Buyer as described below, Sellers owned communications towers and equipment buildings at tower sites in more than twenty states. Sellers owned the land at approximately 40 percent of the tower sites and entered into ground leases (the "Ground Leases") at the remainder of the tower sites. Some of the leases are long-term arrangements, but most have 5-10 year terms, with options for the lessee to renew for one or two additional terms. Other leases permit the lessee to enter into month-to-month or year-to-year arrangements once the initial term expires.

In addition to using the towers in the communications business, Sellers had entered into site usage agreements with other communications companies to permit such parties a nonexclusive right to attach their antennas to the towers and place transmitters and receivers in the equipment buildings for a monthly fee. The agreements also generally granted these companies the right to enter the premises to install, remove, repair or maintain any communications equipment placed on the towers or in the equipment buildings. There are typically several site usage agreements at each tower site.

The Buyer, a Delaware corporation, recently purchased the following assets from the Sellers:

(1) Substantially all of the Sellers' tower site assets (i.e., communications towers and equipment buildings);

(2) Land;

(3) Each interest as tenant in and to the Ground Leases; and

(4) Each interest as grantor in and to the site usage agreements.

For a monthly fee, the Buyer grants wireless communication companies the right to attach their equipment to the towers. These site usage agreements generally range in duration from three to five years. The Buyer is not a communications company and does not render communication services.

Six of the towers sold in the transaction are located in New York. Four of these towers are located on land also acquired by the Buyer and two are located on leased land where the Buyer has assumed a Ground Lease. Although the leases generally provide that the towers are subject to removal at the end of the lease term, for the following reasons, it is the Buyer's intention that the towers will remain indefinitely:

- It takes approximately 7 - 10 days to remove a tower. Removing the tower requires deconstructing the tower in a process that mirrors constructing the tower, and costs between $30,000 and $50,000.

- The Federal Communications Commission ("FCC") generally licenses transmitters only for a specific location. Thus, in order to remove a tower and construct a new one elsewhere (even 100 feet away), each transmitter located at that tower site may need to be relicensed by the FCC. The FCC does not provide expedited approval for relicensing transmitters that must be moved because the tower site has moved; thus, the process of obtaining a license for a new site would take three months to three years to complete.

- Each wireless communications company develops a Network Plan whereby communications equipment is strategically placed at tower sites in order to provide adequate signal coverage throughout a specific geographic area. Removal of this equipment from a tower site would not only be costly, but could require the revision of the Network Plan to avoid gaps in signal coverage.

- It is now extremely difficult to obtain zoning approval to construct a tower in most communities in the United States. The process can take from six months to two years. In many communities, new towers can no longer be built; however, existing towers are generally grandfathered.

- Many of the Ground Leases require that the property be restored to its original condition when the lease has been terminated. This process, which is both time consuming and expensive, would not only include removing the towers and equipment buildings from the site, but would also require the removal of the concrete foundations to which these assets are securely connected.

On the same date Buyer purchased the assets from Sellers, Buyer entered into site usage agreements with Sellers at those sites where Sellers currently have communications systems and other related equipment in place. The initial term of these agreements is fifteen years. In accordance with standard industry practice, Sellers are granted a nonexclusive right of access to the premises twenty four hours a day, 365 days a year for their employees, agents, contractors or representatives to install, remove, repair or maintain any communications equipment attached to the towers or located in the equipment shelters. Sellers maintain ownership of the equipment. Sellers do not, however, have possession or control over the towers. Buyer is now responsible for maintaining the towers and the sites.

Buyer will now collect monthly payments from: (1) the customers that have been permitted to place their equipment at the tower sites pursuant to the site usage agreements that Buyer assumed; (2) Sellers, pursuant to the site usage agreement entered into on the date of the transaction; and (3) any other new customers with whom Buyer enters into site usage agreements.

Applicable Law

Section 1101(b) of the Tax Law provides, in part

When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

* * *

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume . . . , conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

* * *

(9) Capital improvement. An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

Section 1105(a) of the Tax Law imposes sales tax on the receipts from every retail sale of tangible personal property, except as otherwise provided.

Opinion

An exclusion from the imposition of sales tax is provided in Section 1105(c)(3)(iii) of the Tax Law for an installation of tangible personal property which, when installed, will constitute a capital improvement to real property, property or land. In order for the installation to constitute a capital improvement, it must meet all three criteria of a capital improvement as described in Section 1101(b)(9) of the Tax Law and Section 527.7(a)(3) of the Sales and Use Tax Regulations (see Clestra Hauserman, Inc., Adv Op Comm T&F, September 16, 1994, TSB-A-94(43)S). Thus, in Buyer's case as presented by Petitioner, if the communications towers and equipment buildings qualified as capital improvements at the time they were installed, then they constitute real property, not tangible personal property. If the towers and buildings did not qualify as capital improvements at the time they were installed, then they would remain tangible personal property. See Section 526.8(c)(1) of the Sales and Use Tax Regulations.

The communications towers are steel structures averaging 171 feet in height which come in sections (beams). The bases of the towers are bolted to steel spikes or plates which are embedded in concrete pads. Guy wires are necessary to secure the towers to the land. The towers are subject to specific locations requirements and must comply with various federal and local statutes and ordinances. Removing the towers requires deconstructing them in a process that mirrors their construction.

The communications towers described above do not qualify as capital improvements because they fail to satisfy the second prong of the statutory test in that they do not become part of the real property nor are they permanently affixed to the real property so that their removal would cause material damage to the property or to the assets themselves. Although most forms of equipment normally require some form of affixation to real property, the test is not merely whether such equipment is affixed to the property. Rather, the test is whether the equipment is affixed to such a degree that it loses its separate identity and becomes part of the real property or to such a degree that removal would cause material damage to the property or to the article itself. Material damage is not considered to exist merely because the property in question is worth less when it is removed than it was worth when it was installed and in operating condition (see Peek 'N' Peak Recreation, Inc., Adv Op Comm T&F, July 9, 1987, TSB-A-87(24)S). The primary method of affixing the towers to the real property is a baseplate bolted to a concrete pad. This connection can be disassembled by removing the bolts and the towers can be removed by reversing the procedure used to install them. The mere bolting of equipment to real property does not, in and of itself, create the degree of permanence necessary to establish that a particular installation is a capital improvement (see Matter of Charles R. Wood Enterprises, Inc. v. State Tax Commn., 67AD 2d 1042; Matter of West Mountain Corp. v. Miner, 85 Misc 2d 416). Based on these facts, it is concluded that the installation of these towers on owned or leased land cannot be considered capital improvements to real property and these assets are therefore tangible personal property, the sale of which was subject to tax at the time of purchase by Buyer.

With regard to the equipment buildings, these structures substantially add to the value of the real property to which they are affixed. The equipment buildings are valuable in and of themselves, and they facilitate Buyer's tower management business upon the premises. Thus, the first of the three enumerated criteria of a capital improvement as described in Section 1101(b)(9) of the Tax Law is satisfied. However, it is not clear that the second statutory requirement is also satisfied, in that the buildings do not necessarily become part of the real property. In Crater's Wharf v. Valvoline Oil Co., 204 App Div 840, removal of similar structures which were erected for a tenant's business purposes left the premises in substantially the same condition as at the time of the original letting. Therefore, only if the equipment buildings cannot be removed without any damage to themselves (e.g., if they are not modular in form, are not relocatable, or cannot be moved/transported as an entity or in separate sections) or to the land on which they sit, will they satisfy the second prong of Section 1101(b)(9) (see

Grumman Aerospace Corporation, Dec Tx App Trib, April 11, 1991, TSB-D-91(22)S; Hudson River Estates, Inc., Adv Op Comm T&F, April 5, 1985, TSB-A-85(2)S).

Finally, as to the third requirement of Section 1101(b)(9), an installation made for the purpose of conducting a business of one who is not the owner of real property, e.g., a tenant, licensee or franchisee, is presumed not to be permanent but is made for the sole use and enjoyment of the person who owns the business during the term of the lease, and not for the purpose of the landlord's estate. Such an installation is comparable to trade fixtures which are not considered capital improvements because they are removable by the tenant without substantial injury to real property and therefore fail to satisfy the requirement of intended permanence (Matter of 100 Park Ave. v. Boyland, 144 NYS2d 88 aff'd 309 NY 685). Moreover, where the lessee is obligated to remove the improvement at the end of the lease term, the evidence is even stronger that the improvement is intended to be other than permanent (Matter of Manhattan Cable Tel v. New York State Tax Commn., 137 AD2d 925, lv denied 72 NY2d 808).

Presumptions, however, may be overcome by appropriate lease terms or facts. The tenant's intent must be deduced from all the facts and circumstances at the time the improvement is installed (Empire Vision Center, Inc., Dec Tx App Trib, November 7, 1991, TSB-D-91(87)S; Flah's of Syracuse v. Tully, 89 AD2d 729). Two of the six equipment buildings located in New York and purchased by Buyer are located on leased land, and Buyer has assumed the Ground Leases. In Flah's of Syracuse, Inc., supra, the lease between the retailer and its landlord expressed a "contrary intention" to the presumption of impermanence, whereby title to improvements made vested in the landlord immediately upon their installation. The improvements were said to become part of and remain in the premises, thereby establishing that they were intended as permanent installations. In Petitioner's case, the buildings are used for Buyer's tower management business, and not for the benefit of the landlord. Although Buyer may have powerful incentives to continue to renew its leases or to purchase the land so that removal of the buildings is seldom, if ever, necessary, under the terms of the Ground Leases Buyer has agreed that it must remove these assets upon termination of the respective leases. There is no "contrary intention" that the buildings are to be permanent annexations to the land expressed in the leases between Buyer and the owners of the two leased premises. Such being the case, since the installation of these two equipment buildings fails to meet the third requirement of Section 1101(b)(9) of the Tax Law, they cannot be classified as capital improvements. Accordingly, these assets retained their character as tangible personal property and were subject to tax at the time of purchase by Buyer (Glenville Cablesystems Corp. v. State Tax Commn., 142 AD2d 851).

On the other hand, in those cases where the equipment buildings are actually permanently affixed to the underlying real property so they cannot be removed without material damage to themselves, and were erected by or on behalf of the owner of the real property, a finding of intended permanence arises from the mode of annexation, the relationship to the real property of the party making the addition, and the apparent purpose for which the annexation was made (viz., for owner to provide wireless communications or tower management services to its customers). See Beaman Corporation, Adv Op Comm T&F, September 6, 1982, TSB-A-82(32)S). Therefore, the four equipment buildings located in New York on land owned by Sellers and acquired by Buyer, would meet all of the conditions for a finding that they constitute capital improvements and therefore real property, the sale of which is not subject to sales or use tax, provided the second statutory requirement is also satisfied as described above.

With regard to issue "2," Buyer's customers pay a monthly fee to Buyer for the right to attach their antennas to the towers and to place their transmitters/receivers in the equipment buildings pursuant to the terms of various site usage agreements Buyer has assumed or entered into. The physical location of the towers is the primary reason for desiring such space on them. Each customer has free and unrestricted access to the premises during the term of the agreement to install, remove, repair or maintain any communications equipment placed on the towers or located in the equipment buildings. Payments received for the right to attach and house equipment owned by the customer are not charges for the rental of or license to use tangible personal property, and are not subject to State and local sales and use taxes (see T&K Communication Systems, Inc., Adv Op Comm T&F, December 30, 1998, TSB-A-98(87)S).

DATED: November 12, 1999

/s/
John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.