

TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 17-09

Revenue rulings are not binding on the Department. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.

SUBJECT

The application of the Tennessee sales and use tax to the engineering, procurement, and construction of a fiber-to-the-home network infrastructure.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

The Taxpayer is a company that contracts with a telecommunications company (the "Client") for the installation, procurement, and construction of a fiber-to-the-home network infrastructure (the "Network") in [REDACTED] Tennessee, enabling the Client to provide high-speed Internet access to its customers throughout [REDACTED].

Constructing the Network requires installing thousands of miles of fiber optic cabling and conduit underground and on existing telecommunications aerial poles, and installing fiber huts, which are small, prefabricated modular buildings used for housing equipment that act as the main switchboards for the Network.

Pursuant to its contract with the Client, the Taxpayer procures all of the materials necessary for installation and primarily subcontracts with third-party contractors to perform much of the labor. Title to the installed materials passes to the Client after the Taxpayer or its subcontractors installs the materials.

Neither the Taxpayer nor the Client owns the land or the aerial poles on which the Taxpayer installs the materials. Instead, with respect to the fiber optic cables installed on aerial poles, the Client enters into [REDACTED] lease agreements with [REDACTED] renewals with the owners of the poles. If such lease agreement is not renewed, the Client is required to remove the fiber optic cable from the aerial poles.¹ With respect to fiber optic cables installed underground, the Client obtains necessary access rights for a public right-of-way easement. For both the lease agreements and the easements, the Client retains the right to remove the installed materials.

¹ The lessor of the poles may request that the fiber optic cable be relocated or removed if the lessor sells the poles or is required to relocate the poles.

The Taxpayer charges the Client lump-sum pricing or fixed unit rate pricing for constructing the Network, in both cases inclusive of all labor and materials. The pricing is determined based on the type and amount of work performed.²

RULING

Is the lump-sum price that the Taxpayer charges the Client for engineering, procurement, and construction of the Network subject to the Tennessee sales and use tax?

Ruling: Yes. The Taxpayer sells and installs tangible personal property that remains tangible personal property after installation.

ANALYSIS

Under the Retailers' Sales Tax Act,³ the retail sale in Tennessee of tangible personal property and specifically enumerated services is subject to the sales tax, unless an exemption applies.⁴ One specifically enumerated service taxable at retail is the installing of "tangible personal property that remains tangible personal property after installation . . . where a charge is made for the installation."⁵ Thus, the Taxpayer's sale and installation of the materials will be subject to the Tennessee sales and use tax if the materials remain tangible personal property following installation.⁶ If, on the other hand, the materials become affixed to realty upon installation, the sale and installation of the materials to the Client will not be subject to the Tennessee sales and use tax.⁷

The issue of whether an item of tangible personal property becomes part of realty depends upon the application of the law of fixtures to the particular factual circumstances.⁸ The question of when

² [REDACTED].

³ Tennessee Retailers' Sales Tax Act, ch. 3, §§ 1-18, 1947 Tenn. Pub. Acts 22, 22-54 (codified as amended at TENN. CODE ANN. §§ 67-6-101 to -907 (2013 & Supp. 2016)).

⁴ "Retail sale" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent." TENN. CODE ANN. § 67-6-102(76) (Supp. 2016). TENN. CODE ANN. § 67-6-102(78)(A) defines "sale" in pertinent part to mean "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration."

⁵ TENN. CODE ANN. § 67-6-205(c)(6) (2013). "Tangible personal property" includes "property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses." TENN. CODE ANN. § 67-6-102(89)(A).

⁶ Installation charges are subject to sales and use tax as part of the sales price. *See* TENN. CODE ANN. § 67-6-102(79)(A) (defining "sales price" to include installation charges); TENN. COMP. R. & REGS. 1320-05-01-.27(2) (2016) (providing that installation services provided with the sale of tangible personal property are a part of the sales price of the tangible personal property sold).

⁷ However, the Taxpayer would be liable for use tax with respect to all tangible personal property used in the performance of its contract, unless the Taxpayer had already paid sales and use tax on the purchase of such items or such items are otherwise exempt from the sales and use tax. *See* TENN. CODE ANN. § 67-6-209(b) (2013); TENN. COMP. R. & REGS. 1320-05-01-.07(1) (2000) ("contractors engaged in constructing or improving real property, whether on a lump sum or a cost-plus basis, are purchasers and consumers of the materials used by them, and are required to pay the Sales or Use Tax on such materials or equipment purchased or imported into this State for use in connection with their contracts.").

⁸ *See, e.g., Gen. Carpet Contractors, Inc. v. Tidwell*, 511 S.W.2d 241 (Tenn. 1974) (holding that sales and use tax purposes, the dispositive issue regarding whether a contractor is improving realty is whether the property being installed becomes a fixture to the realty).

an item is considered a fixture is resolved by ascertaining the intent of the parties.⁹ “Only those chattels are fixtures which are so attached to the freehold that, from the intention of the parties and the uses to which they are put, they are presumed to be permanently annexed, or a removal thereof would cause serious injury to the freehold.”¹⁰ Therefore, if the property is “intended to be removable at the pleasure of the owner, it is not a fixture.”¹¹ However, when property is installed upon real property pursuant to a non-ownership interest in the real property, such as a lease or easement, Tennessee courts have determined that the key question becomes whether the parties intend that the owner of the property being installed has the ability to remove the property from the land, asking whether the installed property remains “separate and apart from the freehold.”¹²

Notably, in *ANR Pipeline Co. v. Tenn. Bd. of Equalization*, the Tennessee Court of Appeals reviewed whether sub-surface pipelines used to transport petroleum products, which were installed pursuant to easements over affected freeholds, were considered real or personal property for purposes of the Tennessee property tax.¹³ The pipe, typically buried under thirty inches or more of soil, was infrequently moved after installation, and, if removed from the ground, it was not economically feasible to reuse removed pipe elsewhere in the pipeline.¹⁴ The court concluded that the ability to remove the pipe at the pipeline companies’ pleasure is, alone, “sufficient to prove the intent of the parties and thus mandate that the pipelines are personal property under Tennessee law.”¹⁵ The court reached its determination because the pipeline “does not enhance the value of the freehold, and is not an improvement to the freehold. . . . The pipeline is not affixed to the land in the legal sense, because it can be, and sometimes is, moved.”¹⁶ Finally, the court reasoned that law of fixtures concerns the relative priorities of ownership to an item of personal property,¹⁷ and because the landowner did not become the owner of the installed property, the property did not become part of the real property as a fixture.

In *American Fiber Systems, Inc. v. Chumley*,¹⁸ the Davidson County Chancery Court examined whether the lease of a dark fiber network¹⁹ constituted the lease of real property for Tennessee sales and use tax purposes.²⁰ The court, citing *ANR Pipeline Co.*, held that because the fiber, which was attached to utility poles or buried underground pursuant to a lease contract, is “removable at the pleasure of

⁹ *Id.* at 242-43.

¹⁰ *Magnavox Consumer Electronics v. King*, 707 S.W.2d 504, 507 (Tenn. 1986) (quoting *Hickman v. Booth*, 173 S.W.438 (Tenn. 1914)).

¹¹ *Id.*

¹² *ANR Pipeline Co., et al. v. Tenn. Bd. of Equalization*, Nos. M2001-01098-COA-R12-CV, M2001-01117-COA-R12-CV, M2001-01119-COA-R12-CV, 2002 WL 31840689, at *3 (Tenn. Ct. App. Dec. 19, 2002), *perm. app. denied*, June 30, 2003.

¹³ *Id.* at *1.

¹⁴ *Id.* at *2.

¹⁵ *Id.* at *4.

¹⁶ *Id.* at *3.

¹⁷ *Id.* (citing *Green v. Harper*, 700 S.W.2d 565 (Tenn. Ct. App. 1985)).

¹⁸ No. 06-574-II (Tenn. Ch. Ct. Oct. 14, 2008).

¹⁹ “Fiber optic cable that is provided without the equipment to ‘light the fiber’ is referred to in the telecommunications industry as ‘dark fiber.’” *Id.* at *1, n. 1.

²⁰ *Id.* at *1.

the owner at the end of the lease,”²¹ the company “clearly intended to maintain control and ownership of the cables during the useful life of the cables.”²² Therefore, the court concluded that the installed dark fiber was not a fixture, and its lease did not constitute the lease of real property for Tennessee sales and use tax purposes.

Here, the Taxpayer installs conduit, fiber, and other necessary appurtenances, on real property pursuant to lease agreements and easements in which the Client has an interest. The Client’s legal right to remove the materials from the aerial poles and the ground at any time shows a clear intention for the Client to retain ownership of the materials such that the materials remain personalty after installation. Therefore, based on the reasoning applied in *ANR Pipeline Co.* and *American Fiber Systems, Inc.*, the materials do not become affixed to the real property upon installation and remain tangible personal property owned by the Client.

Thus, because the materials remain tangible personal property after installation, the lump-sum price that the Taxpayer charges the Client for the engineering, procurement, and construction of the Network is subject to the Tennessee sales and use tax.

Grant Marshall
Assistant General Counsel

APPROVED: David Gerregano
Commissioner of Revenue

DATE: 06/21/17

²¹ *Id.* at *15.

²² *Id.* at *16.