

201709001L [Tax Type: Sales] [Document Type: Letter/Memo]

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Texas Comptroller of Public Accounts STAR System

201709001L

September 7, 2017

RE: Private Letter Ruling No. 150580775

Dear *****:

We issue this private letter ruling in accordance with Rule 3.1, Private Letter Rulings and General Information Letters, [ENDNOTE 1] in response to your original request dated August 9, 2013. You submitted additional documentation to your request on February 24, 2015. Detrimental reliance relief is provided in accordance with Rule 3.10, Taxpayer Bill of Rights.

You request guidance on the taxability of Taxpayer's Cross-Connect charges for access to fiber optic cable provided to customers who locate equipment in Taxpayer's colocation facilities.

Facts Presented:

***** (Taxpayer) operates carrier-neutral colocation centers, called CENTERS. Customers locate their computer equipment within a CENTER and contract with Taxpayer for the provision of Cross-Connects.

A Cross-Connect can connect a customer directly to an internet service provider or to other Taxpayer customers.[ENDNOTE 2] Cross-Connects to internet service providers are established by connecting

customers to fiber optic cables buried underground. Cross-Connects between Taxpayer customers are established by connecting customers' equipment with pre-wired cables in conduits and cables located in overhead trays inside a CENTER. In all cases, Taxpayer intends for the cables to be annexed to the CENTER's real property.

In the sample contracts provided, a "Cross-Connect" is defined as "a physical or wireless interconnection within a CENTER that (i) exits Customer's cage or (ii) connects Customer to another [Taxpayer] customer." [ENDNOTE 3] For purposes of this private letter ruling, based on the information provided, Cross-Connects refer only to fiber optic cables located in underground conduits, pre-wired conduits, or overhead trays.

Taxpayer does not provide internet access services. Customers purchase internet access separately from third party service providers.

Charges for Cross-Connects are separately stated on Taxpayer's invoices.

Question, Ruling, and Analysis

Question: Are Cross-Connect charges subject to Texas sales and use tax?

Ruling: Separately stated Cross-Connect charges for access to fiber optic cable to establish connections from customers' equipment to internet service providers or to establish connections between customers within a CENTER are charges for the rental of real property and are not subject to Texas sales and use tax.

Analysis:

Section 151.010 defines "taxable item" to mean tangible personal property and taxable services. Section 151.051 imposes sales tax on each sale of a taxable item.

Section 151.0101(a)(6) provides that telecommunications services are a taxable service. Section 151.0103, in relevant part, defines "telecommunications services" to mean the electronic transmission, routing, or reception of sounds, data, or information utilizing wires, cable, radio waves, microwaves, satellites, or fiber optics. Taxpayer provides its customers access to cables through which they transmit data using their own equipment located in Taxpayer's CENTER. Taxpayer does not route or transmit data as described by Section 151.0103. Therefore, Cross-Connect charges are not taxable telecommunications services.

The sale or lease of real property is not the sale of a taxable item and is not subject to Texas sales and use tax. Comptroller's Decision 107,056 (2017) addresses the question of when tangible personal property becomes part of a real property improvement:

"The starting point for most discussions regarding whether tangible personal property has been affixed to realty in such a way as to become an improvement to realty is *Hutchins v. Masterson*, 46 Tex. 551 (1887). Hutchins asks: (1) Has there been a real or constructive annexation of the article in question to the realty?; (2) Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it was connected?; and (3) Was it the intention of the party making the annexation that the chattel becomes a permanent accession to the freehold? *See also Logan v. Mullis*, 686 S.W.2d 605, 607-08 (Tex. 1985) (holding that the third question, dealing with intent, is preeminent, whereas the first and second criteria constitute evidence of intention)."

Fiber optic cables Taxpayer located in underground conduits are improvements to real property. Pre-wired cables in conduits and cables in overhead trays within CENTER facilities are also affixed to real property with the intention that they remain permanently. Prior Comptroller guidance has found the installation of fiber optic cable to be an improvement to real property. *See* STAR Accession No. 200308205L (August 12, 2003). Accordingly, Cross-Connect charges for the right to use the fiber optic cables to connect customers with internet access service providers or other customers within a CENTER are charges for the rental of real property. These charges are not subject to Texas sales and use tax.

This ruling applies only to Cross-Connect charges for fiber optic cables permanently incorporated into or annexed to real property.

As noted above, the contracts and invoices provided define a Cross-Connect as a physical or wireless interconnection within a CENTER. This ruling does not apply to Cross-Connect charges for cables or other tangible personal property that is not incorporated into real property. For example, this ruling does not apply to Cross-Connect charges for network patch cables. This ruling also does not apply to charges for wireless equipment or the provision of wireless connections.

Comptroller's Decisions and STAR documents cited are available on the Comptroller's State Tax Automated Research (STAR) system. The Texas Tax Code, Texas Administrative Code, and the STAR system are accessible at <https://comptroller.texas.gov/taxes/>.

If you have questions about this private letter ruling, please email us through our website at <https://comptroller.texas.gov/web-forms/tax-help/> and reference Private Letter Ruling No. 150580775.

Sincerely,

Tax Policy Division – Indirect Taxes
Texas Comptroller of Public Accounts

ENDNOTES:

1. Unless otherwise noted, all references herein to "Section" are to Tex. Tax Code Ann. (Vernon 2008 and Supp. 2015) and all references to "Rule" are to 34 Tex. Admin. Code (2015).
2. See http://www.***** last visited December 19, 2016.
3. Taxpayer Master Services Agreement, Switch and Data # *****, dated April 16, 2016.

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