ST 00-0156-GIL 07/27/2000 CONSTRUCTION CONTRACTORS

This letter discusses the tax liability incurred by companies that place towers and grids on buildings for communications purposes. (See, 86 Ill. Adm. Code 130.2075)(This is a GIL.)

July 27, 2000

Dear Xxxxx:

This letter is in response to your letter received on March 16, 2000. We regret our delay in responding. The nature of your letter and the information which you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See, 2 Ill. Adm. Code 1200.120 (b) and (c), which can be found at http://www.revenue.state.il.us/legalinformation/regs/part1200.

In your letter you have stated and made inquiry as follows:

We respectfully request written guidance from the Illinois Department of Revenue (the 'Department') clarifying the tax implications of the facts outlined below.

I. Facts

Company X (hereinafter referred to as 'the Company') owns or leases communication sites located in all fifty states. The Company does not provide communication services. Rather, the Company grants wireless communication companies (hereinafter referred to as the 'Company's customers')[1] the right to operate their communication systems at these sites in exchange for a monthly fee. These communication systems typically consist of ground based radio frequency transmission and reception equipment that is connected by coaxial cable to antennas mounted on either a communication tower or a building rooftop. Other than as specified below, the Company's customers maintain ownership of these systems and are responsible for installing, removing, repairing, or maintaining all system equipment.

The configuration of a particular communication site can vary depending on whether the site is located on the ground (hereinafter referred to as a 'tower site' or on the top of a building (hereinafter referred to as a 'rooftop site'). A communication tower[2] is located at

[1] The Company's customers include those that provide the following services: cellular telephone, paging, electronic data transmission, PCS/digital telephone transmission, short-wave and two way radio transmission, marine radio transmission, VHF and UHF television broadcasting, and FM radio broadcasting.

[2] The Company owns a variety of tower types that differ in construction, cost, height and structure. These tower types include monopole towers, guyed wire towers, self-supporting towers, and wooden poles. **Monopole towers** are approximately 120 feet in height and are attached to a concrete foundation by a ring of bolts bolted to a circular steel base

each tower site. These towers are steel structures averaging 200-250 feet in height (with some exceeding 400 feet in height). In constructing a typical tower, 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. Where guy wires are necessary to secure the tower, a substantial amount of land may be required. An equipment building that is located next to the tower houses the transmission and reception equipment referenced above. These buildings are generally constructed of brick, concrete block, or wood/metal with siding and range in size from approximately 8' x 10' to 20' x 40.' They are also equipped with electric and telephone service and are climate controlled.

Where the site is a rooftop site,[3] the antennas are usually attached to a grid,[4] which is a steel structure that generally lies horizontally across, and has been bolted to, a building rooftop. The transmission and reception equipment is housed in either a fiberglass equipment building located on the rooftop or in a specified equipment room located inside the building.

A grid typically holds between twenty and thirty antennas. However, where there is insufficient antenna space on a grid, the Company's customers can still gain access to the site if the Company has a SYSTEM in place. The SYSTEM permits several communication providers to transmit and receive signals through use of a single 'master' antenna. Under this system, a customer's transmission and reception equipment is connected by cables to a distribution hub that is also located in the shelter. The distribution hub, which is attached by cables to the master antenna, not only transmits signals that it receives, but also is able to sort incoming signals and relays them to the correct piece of equipment. Thus, with the SYSTEM, a customer no longer needs to attach its own antenna to the grid; rather, these customers use the Company's master antenna.[5]

The Company typically owns the communication towers and the grids located at the sites. However, the Company leases the underlying realty at over half of the tower sites. In addition, the Company has entered into leasing arrangements with owners of the buildings where the rooftop sites are located.[6] Some of these tower site and rooftop

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plate. **Guyed wire towers** are approximately 330 feet in height and are usually pinned to a steel base plate bolted to a concrete foundation. These towers are further anchored to the ground through the use of steel guy wires that run from the tower to concrete buckles that are located around the tower's base. **Self-supporting towers** are approximately 250 feet in height and the steel legs are bolted to a concrete foundation. **Wooden poles** are approximately 60 feet in height and are embedded in either soil or concrete.

[3] A rooftop site can also be located on top of a water tower.

[4] At certain rooftop sites, the antennas are attached to the side of the building rather than on a grid.

[5] The SYSTEM is not restricted to the Company's rooftop sites. The system is also used at certain tower sites.

[6] At certain rooftop sites, the building owner has attached the grid to its own rooftop. In these instances, the Company has leased the building rooftop and the grid.

site leases are long-term arrangements, but most have 10-15 year terms, with options for the Company to renew for one or two additional terms. Other leases permit the Company to enter into month-to-month or year-to-year arrangements once the initial term expires. Although the leases generally provide that the lessee may remove its property and equipment from the site at the end of the lease term, for the following reasons, it is the Company's intention that the towers will remain indefinitely:

- It would take approximately one week to dismantle a tower site at a cost of almost $30,000, while it would take the Company almost two weeks at a cost of $20,000 to dismantle a rooftop site. In the event that a tower site or a rooftop site would ever be dismantled,[7] the Company would not rebuild or construct a new site using the same grids or tower beams because of concerns about the structural integrity of these materials after they were removed from their original location. Rather, these materials would be scrapped.

- To construct a new tower site, it would take between one and two months and cost between $150,000 and $225,000. To construct a new rooftop site, it would take one month and cost between $40,000 and $50,000.

- The Federal Communications Commission ('FCC') generally licenses transmitters only for a specific location. Thus, in order to remove a tower or grid and construct a new one elsewhere (even one located close by), each transmitter located at that site may need to be relicensed by the FCC. The FCC does not provide expedited approval for relicensing transmitters that must be moved merely because the site has been relocated; thus, the process of obtaining a license for a new site would take three months to three years to complete. Additionally, for certain tower sites, the approval of the Federal Aviation Administration may be required.

- Each Company customer develops a network plan whereby communication equipment is strategically placed at sites in order to provide adequate signal coverage throughout a specific geographic area. Removal of this equipment from a 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 site in most communities in the United States. The process can take from six months to two years. In many communities, new sites can no longer be built; however, existing locations are generally grandfathered.

[7] To date, the Company has only dismantled a few tower sites. The Company has never dismantled a rooftop site.

II. Questions Presented

A. Part One: For Illinois sales tax purposes, are the Company's communication towers (as described on page 2 in footnote 2) and equipment buildings located at the tower sites considered real property or tangible personal property when these assets are affixed to real estate: (a) that the Company owns; or (b) that the Company leases?

Part Two: For Illinois sales tax purposes, are the grids and the equipment buildings located on the building rooftops considered real property or tangible personal property when: (a) the Company owns these assets and affixes them to building rooftops that it leases from building owners; or (b) the building owners own these assets and affix them to their own rooftops?

B. If the assets described in Part One or Part Two of Question A are considered tangible personal property under (a) or (b) of either part, will ongoing, monthly payments received from the Company's customers (as described on page 1 in footnote 1) for the right to attach their antennas to the towers or grids and place their equipment in the equipment buildings be subject to the Illinois sales tax or the Illinois telecommunications excise tax? Will the answers change if the customer's equipment that is located in an equipment building is attached to the Company's SYSTEM rather than to its own antenna?

III. Rulings Requested

A. The assets described in Part One and Part Two of Question A are considered real property when these assets: (1) are affixed to real estate regardless of whether the Company owns or leases the underlying realty; and (2) are affixed to building rooftops regardless of whether these assets are owned or affixed to the rooftop by the Company or the building owner.

B. If the assets described in Part One or Part Two of Question A are considered tangible personal property under (a) or (b) of either part, the ongoing, monthly payments received from the Company's customers (as described on page 1 in footnote 1) for the right to attach their antennas to the towers and/or grids and place the equipment in the equipment buildings are not subject to the Illinois sales tax or the Illinois telecommunications excise tax. This conclusion will not change if the customer's equipment that is located in an equipment building is attached to the Company's SYSTEM rather than to its own antenna.

IV. Analysis

A. The assets described in Part One and Part Two of Question A are considered real property when these assets: (1) are affixed to real estate regardless of whether the Company owns or leases the underlying realty; and (2) are affixed to building rooftops regardless of whether these assets are owned or affixed to the rooftop by the Company or the building owner.

Illinois generally imposes tax upon the selling price of tangible personal property: (1) purchased at retail from a retailer; or (2) transferred by a service provider as an incident to the sale of a service. 35 ILCS 120/2; 35 ILCS 115/2. Although tangible personal property is not defined by statute, such term does not include property that has become permanently attached to the land. 86 Ill. Adm. Code § 130.120. Whether an article that has been attached to realty has become a fixture or remained personal property is determined through the application of a three-part test. This test focuses on whether: (1) the items are annexed to the realty; (2) the items are appropriate and adapted to the use of purpose of that part of the realty to which the items are connected: and (3) the party making the annexation intended to make it permanent. See Private Letter Ruling, ST 90-0632-PLR (September 21, 1990), citing *Hacker v. B. Munroe & Son,* 176 Ill. 384 (1898); *Lindstrom v. Houzenga,* 177 Ill.App. 1 (App.Ct.2d.Dist., 1988). In *Private Letter Ruling,* ST 92-0178-PLR (March 31, 1992), the Department stated that it viewed towers embedded or bolted to a ground foundation and masts bolted to a building were generally considered permanently affixed to the realty. The Company's towers, grids, and equipment buildings should also be considered part of the realty.

1. The assets described in Part One and Part Two of Question A are sufficiently annexed to the realty.

Annexation refers to the act of attaching or affixing personal property to real property. The communication towers located at the tower sites are generally large steel structures averaging 200-250 feet in height. In constructing a typical tower, 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.[8] The equipment building that is located next to the tower at these sites are generally constructed of brick, concrete block, or wood/metal with siding and are equipped with electric and telephone service and are climate controlled. At the rooftop sites, the grids are steel structures that lie horizontally across, and have been bolted to, building rooftops. The equipment shelters (if located in the rooftop rather than inside the building) are also securely bolted

[8] Guy wire towers are typically pinned to a steel base plate that is bolted to a concrete foundation and are further anchored to the ground through the use of steel guy wires that run from the tower to concrete buckles that are located around the tower's base.

to the rooftop. Thus, all of these assets are sufficiently annexed to the realty at the sites where they are located.

2. The assets described in Part One and Part Two of Question A are adapted to the use or purpose of the realty.

Generally, an object attached to the realty may become a fixture if it is consistent with the purposes to which the realty is devoted. 335 Am.Jur.2d, Fixtures, § 12, p. 708. The Company's sole purpose for entering into arrangements to purchase or lease the land at the tower sites and lease the rooftop at the rooftop sites was to expand its communication site business. Thus, the towers, grids, and equipment buildings that have been attached to land or building rooftops are consistent with the Company's intended use of the realty – to establish communication sites at these locations.

3. The assets described in Part One and Part Two of Question A were intended to become a permanent accession to the freehold.

No one, whether it be the Company, the Company's customers, or the lessors of the land or buildings expects that a communication site will be dismantled and relocated. Even on the leased sites where certain provisions in the leases permit the Company to remove the towers, grids, and equipment buildings at the end of the lease term, there are powerful incentives for the Company to continue to renew these leases or to purchase these properties so that the removal of these assets are seldom, if ever, necessary:

- It would take approximately one week to dismantle a tower site at a cost of almost $30,000, while it would take the Company almost two weeks at a cost of $20,000 to dismantle a rooftop site. In the event that a tower site or a rooftop site would ever be dismantled, the Company would not rebuild or construct a new site using the same grids or tower beams because of concerns about the structural integrity of these materials after they were removed from their original location. Rather, these materials would be scrapped. In addition, unbolting the lower beams from the tower would cause substantial damage to the concrete foundation (which clearly has become part of the premises) on which the towers stand. Furthermore, the rooftop grids are bolted to the rooftops in such a way that to remove them without restoring the roof to its original condition would likely render the rooftop unsuitable for any other purpose.

- To construct a new tower site, it would take between one and two months and cost between $150,000 and $225,000. To construct a new rooftop site, it would take one month and cost between $40,000 and $50,000.

- The Federal Communications Commission ('FCC') generally licenses transmitters only for a specific location. Thus, in order to remove a tower or grid and construct a new one elsewhere (even one located close by), each transmitter located at that site may need to be relicensed by the FCC. The FCC does not provide expedited approval for relicensing transmitters that must be moved merely because the site has been relocated; thus, the process of obtaining a license for a new site would take three months to three years to complete. Additionally, for certain tower sites, the approval of the Federal Aviation Administration may be required.

- Each Company customer develops a network plan whereby communication equipment is strategically placed at sites in order to provide adequate signal coverage throughout a specific geographic area. Removal of this equipment from a 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 site in most communities in the United States. The process can take from six months to two years. In many communities, new sites can no longer be built; however, existing locations are generally grandfathered.

As a result of these constraints, it is not economically plausible or practical to relocate existing communication sites. Consequently, the towers, grids, and equipment buildings should be considered improvements to realty whether they are attached to real estate that the Company owns or leases. Such result makes sense. As wireless communications providers are turning more and more to third parties for their communication site needs, the tower management industry has grown rapidly and is quickly becoming a national, competitive market. Having the taxation of the arrangements with the Company's customers depend on whether the tower or grid is attached to realty (whether land or a building rooftop) that is owned or leased will introduce substantial distortions and inequities into this market as wireless providers will seek out companies who have purchased, rather than leased, the underlying real estate. Drawing such distinction would place certain companies at a significant disadvantage as customers would select communication sites based upon favorable tax results, and would violate one of the cardinal principles of tax policy, i.e. tax neutrality. Uniform classification of the towers, grids, and equipment building as fixtures is sound tax policy and is wholly justified by the fact that, in reality, these assets are almost never removed.

B. If the assets described in Part One or Part Two of Question A are considered tangible personal property, the ongoing, monthly payments received from the Company's customers (as described on

> page 1 in footnote 1) for the right to attach their antennas to the towers and/or grids and place the equipment in the equipment buildings are not subject to Illinois sales tax or the Illinois telecommunications excise tax. This conclusion will not change if the customer's equipment that is located in an equipment building is attached to the Company's SYSTEM rather than to its own antenna.

Illinois generally imposes a tax upon the selling price of tangible personal property: (1) purchased at retail from a retailer; or (2) transferred by a service provider as an incident to the sale of a service. 35 ILCS 120/2; 35 ILCS 115/2. 'Sale at retail' is generally defined as the transfer of the ownership of or title to tangible personal property to a purchaser for a valuable consideration. 35 ILCS 105/2. Permitting the Company's customers to attach their antennas to the towers and/or grids and place the equipment in the equipment buildings seems to fall outside of this definition. In addition, even if the arrangement between the Company and its customers were characterized as a service, no tax should be charged because the Company is not transferring anything tangible to the customer.

The telecommunications excise tax is imposed upon the act or privilege of originating or receiving intrastate or interstate telecommunications in Illinois. 35 ILCS 630/3 and 630/4. The Department has concluded that tower owners are not required to charge and collect telecommunications excise tax on receipts from the rental of tower space or other support structures where the customer has its own transmitter and simply leases space on the tower or support structure. *Private Letter Rulings*, ST-91-0781-PLR (October 10, 1991); ST-87-0861-PLR (November 23, 1987). This conclusion should not change if the customer's equipment that is located in an equipment building is attached to the Company's SYSTEM rather than to its own antenna.

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If the Department intends to render an unfavorable opinion, we respectfully request a conference to discuss the issues in more detail. Thank you in advance for your consideration of this request. If you would like to discuss this matter further or if you require any additional information, please call me at ####.

The Retailers' Occupation Tax imposes a tax upon persons engaged in the business of selling tangible personal property at retail. A "sale at retail" is the transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Sales of real estate are not subject to tax. See the enclosed copies of 86 Ill. Adm. Code 130.101 and 130.201.

Please find enclosed copies of 86 Ill. Adm. Code 130.1940 and 130.2075, which govern the tax liabilities of construction contractors in Illinois. The term, "construction contractors," includes general contractors, subcontractors, and specialized contractors such as landscape contractors. The term, "contractor," means any person or persons who are engaged in the occupation of entering into and performing construction contracts for owners. In Illinois, construction contractors are deemed end users of the tangible personal property which is removed from the market and incorporated into real estate. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. Therefore, any tangible personal property which general contractors or subcontractors purchase for incorporation into real estate is subject to Use Tax. If contractors did not pay the Use Tax liability to their suppliers, they must self-assess their Use Tax liability and remit it directly to the Department.

Communication towers that are permanently affixed to realty are considered construction contract situations. The same result applies to grids that are permanently attached to real estate. Use Tax liability will accrue to the construction contractor permanently affixing the towers or grids to real estate, regardless of who owns the real estate.

In determining whether an item is permanently affixed to real estate, a very fact-specific inquiry must be made regarding whether the item is intended to remain with the realty. In order to make a finding that the item is permanently affixed, at least three factors must generally be examined. First, the item must be affixed to the realty. The item must also be applied to the use or purpose to which the realty is put. Finally, the intent of the person affixing the item must be examined. Another factor often examined is whether the item is essential to the use to which the real estate has been put. Your letter articulates several factors which point to an intent to permanently affix the towers and grids. Generally, the Department views antenna towers and grids that are attached to buildings as you have described to be construction contract situations. However, we cannot provide a specific determination to you in the context of a General Information Letter.

Your letter does not provide a great deal of detail regarding the equipment buildings. We urge you to apply the factors described above in determining whether affixation of these structures constitutes a construction contract situation. Your letter indicates several factors evidencing an intent for the item to remain with the realty. These structures appear to be affixed to the real estate and to be applied to the use to which the real estate has been put. In addition, you have specified that the structures have utility connections. These factors would tend to support a determination that a construction contract situation is involved. However, we, again, cannot make such a finding in the context of a General Information Letter. Provided that the equipment buildings are permanently affixed to real estate, the person incorporating them into real estate incurs a Use Tax liability, regardless of whether he owns or leases the property to which they are affixed.

The same test must be examined in determining if the Company's SYSTEM constitutes a construction contract situation.

Generally, charges made by companies to customers for the right to either attach their antennas to towers or grids which are permanently affixed to real estate, or to place equipment in the equipment buildings which are permanently affixed to real estate, are not subject to the Illinois sales tax (i.e., the Retailers' Occupation Tax and the Use Tax).

The Telecommunications Excise Tax is imposed upon the act or privilege of originating or receiving interstate or intrastate telecommunications purchased at retail from a retailer, at the rate of 7% of the gross charges for such telecommunications. Generally, charges made to customers for the right to affix their own antennas to a tower or grid, or to place their equipment in a building, are not subject to the Telecommunications Excise Tax. However, this result does not apply when customers do not utilize their own antennas, but instead pay companies for the right to utilize a SYSTEM provided by companies. Section 2 of the Telecommunications Excise Tax Act, 35 ILCS 630/2, provides that "telecommunications," in addition to the meaning ordinarily and popularly ascribed to it, includes, without limitation … the transmission of messages … by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities." Companies charging customers for use of a SYSTEM are making charges for the right to originate or receive messages. As your letter indicates, the SYSTEM not only transmits signals it receives, but also sorts incoming signals and routes them to appropriate customer equipment. Your letter does not provide detailed information regarding the manner in which customers use the telecommunications originated or received by the SYSTEM. Depending upon the disposition of such telecommunications, the resale exemption may be applicable.

I hope that this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department' Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110 (b).

Very truly yours,

Jerilynn T. Gorden
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JTG:msk
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