FINAL PRIVATE LETTER RULING

REQUEST LETTER

09-009

02/24/2009

Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134
February 24, 2009

Re: Request for Private Letter Ruling

Dear Commissioners,

I am writing to request an opinion as to how the Utah Sales and Use Tax Act applies to expenditures related to backup electrical generators. By way of Introduction, my name is NAME. I am a Field Manager for COMPANY. We are one of several competitive Local Exchange Carriers (CLEC's) that serve the state of Utah in the field of telecommunications. We, like the regulated carrier (REGULATED CARRIER), furnish communications services throughout the state. Our services range from ordinary dial tone to very high-speed data transmission. We are licensed to serve small business from ordinary dial tone to very high-speed data transmission. We are licensed to serve small business and above. We essentially provide the same services as the regulated carrier to more than 16,000 customers in the state of Utah. In several areas along the Wasatch front we have both switching and transmission hubs that service our fiber optic network. Those hubs are completely self sufficient with their own power backup, HVAC, fire protection and security. These facilities mentioned reside in CITY (1), CITY 2 (1) and CITY 3 (3). Even though they are housed within other structures, they are completely separate from the buildings they are housed in as far as power, etc are concerned. We have our own transformers, metering, etc.

Backup Electrical Generators Required.

At each of these facilities COMPANY has backup generators. In the case of a long-term power outage, our backup systems will keep us running regardless of the rest of the tenants in the buildings in which they are housed. We service hospitals, government agencies [DEFENSE INDUSTRY and large/small business customers. As our customers rely on us for major telecommunication and data transmission services as well as emergency contact communication like 911, our network must be online 24 hours a day, 365 days a year.

Along with those facilities mentioned in the previous paragraph, we also have 10 remote sites on our Long Haul network. Those sites are in very remote areas of the state and function as repeater stations for our long haul fiber. They start at the northern part of the state and continue on to the

very southern end. They are essentially small huts and once again have their own power backup and HVAC.

In June of 2007 the FCC released an Order on Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks. In that order the FCC directed the Public Safety and Homeland Security Bureau (PSHSB) to implement several of the recommendations. Among those recommendations was that all assets necessary to the provision of communication services should have backup power regardless of what type of commercial power they normally use.

The reason this letter is being written arises from the billing of one of our vendors, VENDOR does all of our generator maintenance throughout the state and even a few places in the southern portion of Idaho on the Long Haul sites. In times past, the billing from VENDOR has been, as I have interpreted the tax law, free of sales tax on labor concerning the maintenance on the backup generators at all 15 sites mentioned previously. Recently Mr. Mark Seeronen of VENDOR has communicated to us that some of their accounts have been ruled upon by the tax commission as not eligible for sales tax free status for one reason or another.

Those generators, regardless of the site, are all permanently installed and totally wired into the electrical circuitry of the site. They are totally dedicated to keep us on the air in case we should incur a long-term power outage. The Long Haul units actually come on line quite often as those remote sites do experience frequent power interruptions due to their remote nature. In reading publication 42 from tax.utah.gov., it is my interpretation that as a utility providing the services that we do in the way that we do, COMPANY does qualify for the sales tax exemption for Tangible Personal Property. In Private Letter Ruling 04-019, dated March 29, 2005, the Commissioners addressed the issue of backup electrical generators for a hospital and concluded that where the backup generators primary function is to provide power to the entire underling real property structures, consist of large pieces of equipment not easily moved and are intricately integrated into the underlying realty, any transaction to purchase, install, repair, renovation and to install tangible personal property, in connection with them would be non-taxable events. As with the hospital, COMPANY'S backup generators are both physically and functionally incorporated into the underlying real property, in this case the switching and transmission hubs. As these generators are large, permanently installed and provide backup power for our entire electrically isolated facility, they should fall under that sales tax exemption associated with the labor services for repairs or installations. I have provided photographs of the generators in support of COMPANY'S position.

COMPANY is committed to following all of the Utah Law, but with that in mind, would like a specific direction given so that we can answer the concern that has been raised by our vendor (in this case, VENDOR. Thank you for your prompt attention to this matter.

Respectfully,
NAME
COMPANY
ADDRESS
PHONE

RESPONSE LETTER

August 20, 2009

NAME
TITLE
COMPANY
ADDRESS

RE: Private Letter Ruling Request—Sales Tax Treatment of Repair and Maintenance Services on Backup Generators Owned by Telecommunications Service Provider

Dear NAME:

You have requested a ruling on the sales tax treatment of your company's purchases of repair and maintenance services performed on your backup generators that provide backup power for your telecommunication equipment.

You provided that your company, COMPANY, is one of several Competitive Local Exchange Carriers serving more than 16,000 customers in the State of Utah. Its services range from simple dial tone to high-speed data transmissions. Its customers are small businesses and above. It has both switching and transmission hubs that service its fiber optic network. You further explained that COMPANY has five main facilities in Utah and smaller facilities at ten remote sites in the state. At each of these fifteen locations, you have a backup generator. You explained that these generators are permanently installed and totally wired into the electrical circuitry of the sites and are dedicated to keeping COMPANY "on the air" in case of a power outage.

You further explained that your question arises from what COMPANY'S vendor, VENDOR, said. VENDOR performs repair and maintenance services on all of COMPANY's backup generators throughout Utah. You stated that VENDOR told COMPANY that the Utah State Tax Commission ruled against it on some of its accounts, finding that the accounts are not tax exempt for one reason or another. You explained that VENDOR is currently charging sales tax on the maintenance services for the generators, but previously it had not. Therefore, you now ask the Commission whether the VENDOR's repair and maintenance services performed on COMPANY's backup generators are tax-exempt. You explained that you think that the services are tax-exempt based on our previous Private Letter Ruling ("PLR") 04-019.

I. Applicable Law

Utah Code Ann. § 59-12-103(1) imposes a sales and use tax on:

amounts paid or charged for . . .
(a) retail sales of tangible personal property made within the state;

. . . .

(g) amounts paid or charged for services for repairs or renovations of tangible personal property, unless Section 59-12-104 provides for an exemption from sales and use tax for:
    (i) the tangible personal property; and
    (ii) parts used in the repairs or renovations of the tangible personal property described in Subsection (1)(g)(i), whether or not any parts are actually used in the repairs or renovations of that tangible personal property . . .

. . . .

(l) amounts paid or charged for tangible personal property if within this state the tangible personal property is
    (i) stored;
    (ii) used; or
    (iii) otherwise consumed . . .

For § 59-12-103(1)(g), Utah Code Ann. § 59-12-102(88) states that "repairs or renovations of tangible personal property" means:

(a) a repair or renovation of tangible personal property that is not permanently attached to real property; or
(b) attaching tangible personal property or a product that is transferred electronically to other tangible personal property if the other tangible personal property to which the tangible personal property or product that is transferred electronically is attached is not permanently attached to real property.

Utah Code Ann. § 59-12-102(68) states:

(a) "Permanently attached to real property" means that for tangible personal property attached to real property:
    (i) the attachment of the tangible personal property to the real property:
        (A) is essential to the use of the tangible personal property; and
        (B) suggests that the tangible personal property will remain attached to the real property in the same place over the useful life of the tangible personal property; or
    (ii) if the tangible personal property is detached from the real property, the detachment would:
        (A) cause substantial damage to the tangible personal property; or
        (B) require substantial alteration or repair of the real property to which the tangible personal property is attached.
(b) "Permanently attached to real property" includes:
    (i) the attachment of an accessory to the tangible personal property if the accessory is:
        (A) essential to the operation of the tangible personal property; and
        (B) attached only to facilitate the operation of the tangible personal property;

(ii) a temporary detachment of tangible personal property from real property for a repair or renovation if the repair or renovation is performed where the tangible personal property and real property are located; or
(iii) property attached to oil, gas, or water pipelines, except for the property listed in Subsection (68)(c)(iii) or (iv).

(c) "Permanently attached to real property" does not include:
(i) the attachment of portable or movable tangible personal property to real property if that portable or movable tangible personal property is attached to real property only for:
(A) convenience;
(B) stability; or
(C) for an obvious temporary purpose;
(ii) the detachment of tangible personal property from real property except for the detachment described in Subsection (68)(b)(ii);
(iii) an attachment of the following tangible personal property to real property if the attachment to real property is only through a line that supplies water, electricity, gas, telecommunications, cable, or supplies a similar item as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act:
(A) a computer;
(B) a telephone;
(C) a television; or
(D) tangible personal property similar to Subsections (68)(c)(iii)(A) through (C) as determined by the commission by rule made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act; or
(iv) an item listed in Subsection (108)(c).

Utah Admin. Code R865-19S-58 ("Rule 58"), titled "Materials and Supplies Sold to Owners, Contractors and Repairmen of Real Property Pursuant to Utah Code Ann. Sections 59-12-102 and 59-12-103," states in pertinent part:

(1) Sales construction materials . . . to . . . repairmen of real property are generally subject to tax if the . . . repairman converts the materials . . . to real property.
(a) "Construction materials" include items . . . that lose their separate identity as personal property once incorporated into the real property.
(b) Fixtures or other items of tangible personal property such as furnaces, built-in air conditioning systems, . . . or other items that are appurtenant to or incorporated into real property and that become an integral part of a real property improvement are treated as construction materials for purposes of this rule.

. . . .

(4) This rule does not apply to contracts where the retailer sells and installs personal property that does not become part of the real property. Examples of items that remain tangible personal property even when attached to real property are:

(a) moveable items that are attached to real property merely for stability or for an obvious temporary purpose;
(b) manufacturing equipment and machinery and essential accessories appurtenant to the manufacturing equipment and machinery;
(c) items installed for the benefit of the trade or business conducted on the property that are affixed in a manner that facilitates removal without substantial damage to the real property or to the item itself and
(d) [certain telephone or communications equipment and associated wire and lines]

The Utah Code provides specific exemptions that apply to telecommunications service providers. "Telecommunications service provider" is defined in Utah Code Ann. § 59-12-102(114)(a) as "a person that: (i) owns, operates, and manages telecommunications service; and (ii) engages in an activity described in Subsection (114)(a)(i) for the shared use with or resale to any person of the telecommunications service."

Utah Code Ann. § 59-12-104(62) provides an exemption from sales and use tax for:

(a) purchases or leases of an item described in Subsection (62)(b) if the item:
  (i) is purchased or leased by, or on behalf of, a telecommunications service provider; and
  (ii) has a useful economic life of one or more years; and
(b) the following apply to Subsection (62)(a):
  (i) telecommunications enabling or facilitating equipment, machinery, or software;
  (ii) telecommunications equipment, machinery, or software required for 911 service;
  (iii) telecommunications maintenance or repair equipment, machinery, or software;
  (iv) telecommunications switching or routing equipment, machinery, or software; or
  (v) telecommunications transmission equipment, machinery, or software

"Telecommunications enabling or facilitating equipment," which is used in § 59-12-104(62)(b)(i), is defined in Utah Code Ann. § 59-12-102(110) to include, among other things, "(b)(iii) a supplementary power supply." In addition, "telecommunications maintenance or repair equipment," which is used in § 59-12-104(62)(b)(iii), is defined in Utah Code Ann. § 59-12-102(112) to include:

> equipment, machinery, or software purchased or leased primarily to maintain or repair one or more of the following, regardless of whether the equipment, machinery, or software is purchased or leased as a spare part or as an upgrade or modification to one or more of the following:
> (a) telecommunications enabling or facilitating equipment, machinery, or software . . .

II. Analysis

A. COMPANY's Generators Are Not Integral to Real Property; Rather, They Remain Personal Property After Installation.

In general, sales and repair transactions involving tangible personal property are taxable under § 59-12-103(a) and (g). However under Rule 58, if a repairman of real property converts tangible personal property into real property, the repairman does not charge sales tax. Rather, the repairman pays sales and use tax on the purchase of the tangible personal property prior to converting it to real property. R865-19S-58(1)-(1)(a). Furthermore, if a repairman sells and installs or later repairs certain property that is *integral* to the real property, he does not charge sales tax on such sales, either. Property that becomes an integral part of real property may include furnaces, built-in air conditioning, and other similar items. R865-19S-58(1)-(1)(b). However, Rule 58 does not apply when the personal property does not become real property. R865-19S-58(4).

PLR 04-019 addressed whether a hospital generator was so incorporated into the hospital real property that it became an integral part of the real property. That generator "provided complete electrical power replacement for the hospital"; it did not "exist only to serve a specific piece or pieces of equipment." Furthermore, it was "necessary to serve the utility needs of the hospital and [was] both functionally and physically incorporated into the underlying real property improvement; i.e., the hospital." Under the facts of that situation, the Commission found that the generator was "considered part of the realty upon installation." However, the Commission also cautioned,

> [U]nder different circumstances, the Commission has found generators, including back-up generators, to remain tangible personal property after their installation. ***A generator that is installed to provide back-up electrical power to a specific piece of equipment has generally been considered to remain personal property after installation because the equipment it serves is itself tangible personal property.*** (Emphasis added.)

In this case, COMPANY'S generators are tangible personal property and are not an *integral* part of real property. You have argued that COMPANY'S's generators are like the hospital generator in PLR 04-019 and, therefore, no sales tax should apply. We reject this argument because the hospital generator in PLR 04-019 is distinguishable from COMPANY'S. The hospital generator served the real property, the hospital building and grounds, and did not primarily support other equipment that was tangible personal property. In contrast, COMPANY'S generators primarily support its telecommunications equipment, not real property. Therefore, COMPANY'S generators are similar to the generators discussed in PLR 04-019 that "generally . . . remain personal property after installation because the equipment it serves is itself tangible personal property."

B. The Repair and Maintenance Services for COMPANY'S Generators Are Not Subject to Sales Tax Under § 59-12-103(1)(g).

In general, § 59-12-103(1)(g) taxes "amounts paid or charged for services for repairs or renovations of tangible personal property . . ." However, § 59-12-10 2(88) defines "repairs or renovations of tangible personal property" to exclude repairs to tangible personal property permanently attached to real property. Also, § 59-12-102(68) defines "permanently attached to real property." In this case, after reviewing the information and pictures you provided, we conclude that your generators are permanently attached to real property. Because they are permanently attached, the repair or maintenance services would not be subject to tax under § 59-12-103(1)(g).

C. The Parts Used for the Repairs of the COMPANY's Generators Are Subject to Tax if the Parts have a Useful Life Less than One Year.

In general, § 59-12-103(1)(a) taxes " retail sales of tangible personal property made within the state" and § 59-12-103(1)(l) taxes the storage, use, or consumption of tangible personal property within the state. Parts are taxable under either § 59-12-103(1)(a) or § 59-12-103(1)(l). However, § 59-12-104(62) provides an exemption for certain purchases by a telecommunications service provider if the items purchased are described in subsection (62)(b) and have a useful life of one year or greater. These items include a supplementary power supply (i.e. generator), under §§ 59-12-104(62)(b)(i) and 59-12-102(110), and parts used to repair a generator, under §§ 59-12-104(62)(b)(iii) and 59-12-102(112). Therefore, in this case, § 59-12-104(62) exempts from tax COMPANY'S purchases of parts to repair its generators if those parts have a useful life of one year or greater. To receive the exemption for parts under § 59-12-104(62), COMPANY should provide its vendor, VENDOR, with a valid, signed Utah sales tax exemption certificate (Form TC-721) with the box checked for telecommunications equipment, machinery, or software. Form TC-721 is available online at *http://www.tax.utah.gov/forms/current/tc-721.pdf* .

D. A Repair Service that Combines Taxable Parts with Nontaxable Repair Services or Parts Should Separately State the Nontaxable Items.

In general, when a combined transaction consists of both taxable and non-taxable items, the entire transaction is taxable unless the nontaxable and taxable items are separately invoiced or itemized.[1] Effective January 1, 2009, the Utah Code contains a revised and expanded definition of "bundled transaction" in § 59-12-102(15) and a modified tax treatment for bundled transactions in § 59-12-103(2)(d). If a seller does not separately state items on its invoice, one must refer to §§ 59-12-102(15) and 59-12-103(2)(d) to determine taxability. If a transaction is bundled according to the current statutes and a seller has its underlying books and records in order, an otherwise nontaxable service may remain nontaxable even though it is both bundled

[1] *See* Private Letter Ruling 04-007 ("[T]he Commission has long held that if a combined or 'bundled' transaction occurs that consists of both taxable and non-taxable transactions, the entire transaction is taxable unless the different transactions are separately invoiced or itemized. This concept is specified for exempt transactions under Rule 78(D)(1) [currently at Utah Admin Code R865-19S-78(1)], which states '. . . [i]f the extended warranty agreement covers parts as well as labor, any parts that are exempt from sales tax pursuant to Section 59-12-104 must be separately stated on the invoice or the entire charge under the extended warranty agreement is taxable.'")

with a taxable item and not separately stated. § 59-12-103(2)(d)(ii)(A)(I). In this case, if repair and maintenance services include both taxable and nontaxable items, VENDOR should separately state those items on the invoice. If the items are not separately stated, COMPANY must refer to §§ 59-12-102(15) and 59-12-103(2)(d) to determine taxability. COMPANY is welcome to contact the Tax Commission again about how §§ 59-12-102(15) and 59-12-103(2)(d) apply to COMPANY'S situation.

III. Conclusion

Based on the above analysis, the repair and maintenance services performed on COMPANY'S backup generators are tax-exempt if they are either separately stated or are not combined with any taxable item, such as parts having a useful life of less than one year. If the repair and maintenance services are combined with a taxable item, then our conclusions might change. Our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, if you have additional facts that may be relevant, or if you have any other questions, please contact us.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/aln
09-009