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Letter Ruling 11-1: Sales Tax; Installed Utility Poles

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February 4, 2011

You have requested a letter ruling regarding the applicability of the Massachusetts sales tax to the sale of a one-half interest in an installed utility pole. Based on the facts presented, we conclude that such sale is not subject to the sales tax, as discussed more fully below.

Facts

The following is a summary of the facts you have provided upon which we base our ruling. Your company, ***** , "Company A," is in the business of selling and delivering electricity and electric service to consumers in Massachusetts. In order to provide this service, Company A owns electric poles that have been permanently installed in real property on public and private streets and highways, wooded areas, and private lots. The wood poles are approximately 40 feet tall and are cemented into the ground in a cement foundation with other necessary supports, such as guy wires, to keep them rigid and permanent.

In order to install the poles, a hole that is at least one-fifth of the length of the pole and a foot larger than the diameter of it is dug in the ground. Generally, the pole is erected with a derrick. The poles require heavy machinery to lift and guide the pole into the ground and remain steady while the foundation cures. A cement truck pours a cement foundation around the pole. A pole can easily last 25 to 50 years. Sometimes they are removed and replaced and sometimes they are retired and left in place and a new pole installed.

Prior to affixing the poles to the land Company A obtains a perpetual easement or other right of way from the landowner or municipality to use the land. The poles constitute a planned network of permanent structures and are used to support electric equipment such as wires and cables. Company A pays property tax under G.L. c. 59, § 2 on these poles to the local Massachusetts municipalities in which they are located.

Company A has been asked by ***** , "Company B" to sell a one-half interest in these installed poles so that Company B can attach its telecommunication wires, cables and equipment to the poles in order to provide services to consumers in Massachusetts. Pursuant to Intercompany Operating Procedures agreed to by both Company A and Company B, the installed poles will be owned by both Company A and Company B, with each company jointly responsible for maintenance,

payment of property tax, and any other issues that arise. The sales price of the interest is a flat amount of ***** per pole.

Ruling Request

For Massachusetts sales tax purposes, is the sale of a one-half interest in an already-installed wooden utility pole a sale of real property and not subject to tax or a sale of tangible personal property subject to tax?

Discussion of Law

Massachusetts imposes a 6.25 percent sales tax on all retail sales of tangible personal property in Massachusetts by any vendor unless exempt by a specific provision of law. G.L. c. 64H, § 2. "Tangible personal property" is defined as "personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being with the commonwealth..." G.L. c. 64H, § 1. By definition, tangible personal property does not include property affixed to land. See G.L. c. 59.^[1] See also LR 84-56, in which the Commissioner ruled that the charge for a right to attach property to a utility pole or similar structure is typically not the taxable sale of tangible personal property.

In Letter Ruling 00-7, the Commissioner ruled that communications towers and related equipment buildings were considered real property and as such the sale of those towers and buildings were not subject to sales tax. In so determining, the ruling considered the degree to which the structures were attached to real estate to establish whether an item is properly classified as real estate. See *Board of Assessors of Wilmington v. Avco Corp.*, 357 Mass. 704 (1970). In 2001, citing *Avco*, the Appellate Tax Board decided a property tax case on similar grounds. See *Perma, Inc. v. Board of Assessors of the Town of Billerica*, A.T.B. Docket Nos. F249189, F257001 (2001). In that case, the Board held that certain underground storage tanks were properly classified as personal property and not real estate because they were not so annexed to their surroundings that they could not be removed without material damage. In addition, the Board noted that the tanks were not akin to buildings but rather large thermoses utilized in manufacturing. *Id.* In your case, the utility poles at issue have already been installed. The installation process you describe indicates that the poles are meant to be permanent structures and therefore become part of the real estate on which they are located.

Ruling

Based on the facts presented and the analysis of the authorities discussed above, we rule that the sale of a one-half interest in an already-installed wooden utility pole is not a sale of tangible personal property and therefore is not subject to tax for purposes of the Massachusetts sales tax.^[2]

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:rmh

LR 11-1

^[1] This ruling does not purport to interpret or govern any imposition of property tax on utility poles under G.L. c. 59.

^[2] The sale of real estate is generally subject to the deeds excise. See G.L. c. 64D, § 1. This ruling

makes no determination whether the sale of a one-half interest in an already-installed wooden utility pole is subject to the deeds excise.