



Florida Department of Revenue
Technical Assistance and Dispute Resolution

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Executive Director

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QUESTION: Whether Taxpayer's lease of tower space and fixtures for the transmission of radio signal qualifies for the sales tax exemption provided in section 212.031(1)(a)5., F.S.

ANSWER: Taxpayer's lease of tower space and fixtures for the transmission of radio signal does not meet the qualification requirements for the sales tax exemption provided in section 212.031(1)(a)5., F.S.

July 10, 2020

XXX
XXX
XXX

RE: Technical Assistance Advisement No. – 20A-013
Sales and Use Tax – Lease of Communication Tower Space
XXX ("Taxpayer")
FEI No. XXX
Sections 177.031, 212.031, 403.503, and 610.103, Florida Statutes (F.S.);
Rule 12A-1.070, Florida Administrative Code (F.A.C.)

XXX ("Tower Licensor")
XXX ("Prior Broadcast Company")
XXX ("Ground Lessee")
XXX ("Tower Site")
XXX ("Landowner")

Dear XXX:

This letter is a response to your petition on behalf of XXX ("Taxpayer"), dated March 11, 2020 (received March 16, 2020), for the Florida Department of Revenue's (the "Department's")

issuance of a Technical Assistance Advisement ("TAA") with regards to the sales tax implications on the lease of space on a communications tower. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, Florida Administrative Code. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

Requested Advisement

Whether Taxpayer's lease of tower space and fixtures for the transmission of radio signal qualifies for the sales tax exemption provided in section 212.031(1)(a)5., F.S.

Brief Answer

Taxpayer's lease of tower space and fixtures for the transmission of radio signal does not meet the qualification requirements for the sales tax exemption provided in section 212.031(1)(a)5., F.S.

Facts

Taxpayer, a radio broadcaster, has use rights to a tower provided by Tower Lessor for the purpose of radio transmission. Taxpayer acquired use rights of Tower Site from Prior Broadcast Company. Tower Site is built on a portion of property subject to ground lease from Landowner to Ground Lessee. Ground Lessee assigned a portion of the land to Tower Licensor who provided Tower Site use rights to Prior Broadcast Company pursuant to the Site License Agreement. Taxpayer obtained its use rights pursuant to an Asset Purchase Agreement with Prior Broadcast Company.

Taxpayer provided copies of the Asset Purchase Agreement, the Site License Agreement, the Consent to Assignment from Ground Lessor, copies of the original Memorandum of Lease between Landowner and Ground Lessee, and the Assignment and Assumption of Ground Lease between Prior Broadcast Company and Ground Lessee.

The parcel involving the ground lease is 18.4 acres, and the Site License Agreement is for 2056 square feet. In addition to the Tower Site rental location, there are other tenants located on the parcel. Taxpayer provided the parcel description as "Exhibit A." It provides that the parcel that the Tower Site is located as follows:

The Land is described and depicted as follows:

PARCEL 1:

XXX

XXX

XXX

XXX

PARCEL 2:

XXX

XXX

XXX

XXX

XXX

The request provides that the Site License Agreement provides for the tower and fixtures. Taxpayer provided two Site License Agreements, both of which provide, in pertinent part, the following description of the leased property:

1. Premises. Licenser currently leases, licenses or owns a parcel of land ("Land") and owns and operates a telecommunications tower ("Tower") located thereon commonly known as [Tower Site] (the Tower and Land are, collectively, the "Site"). The Land is more particularly described in Exhibit A attached hereto and incorporated herein. Licenser hereby licenses to Licensee and Licensee licenses from Licenser, (a) the portion of the Land on which is currently located an equipment shelter that is owned by Licensee and used in connection with its radio operations (the "Equipment Shelter") and (b) space on the Tower at the _____-foot level (antennas mounted on the tower with a center of radiation at approximately _____feet above grade) (collectively, the "Premises") and grants Licensee the right to install utility cables, conduits and pipes from the existing utility termination point on the Premises; said premises and right-of-way for access being substantially described in Exhibit B2 annexed hereto. Notwithstanding the foregoing, Licenser grants Licensee the non-exclusive right to use the Land to access the Premises and to install, maintain and repair utilities serving the Premises and improvements thereon.

The property appraiser website does not provide for a right-of-way for the parcel, except for the railroad right-of-way, which is on the Landowner's parcel, but not on the Tower Site.

Taxpayer provided surveys and photographs of the parcel that Tower Site is located. The surveys provide for three 20-foot guy-wire easements extending from Tower Site. One of the easements extend over the access road that the Site License Agreement allows Taxpayer to use to access the Tower Site. The railroad right-of-way on the parcel is not on the Tower Site portion of the parcel. Based on the survey, it is unclear to what extent that the utility easement is located on Tower Site. The survey map reflects that the access roads encircle Tower Site.

Taxpayer's Argument

It is Taxpayer's position that its lease of tower space and fixtures for the transmission of radio signal meets the qualification requirements for the sales tax exemption provided in section 212.031(1)(a)5., F.S. Taxpayer argues that: (i) the tower is located on a private right-of-way where poles, conduits, fixtures, and similar improvements are located; (ii) that the property is occupied by a utility or provider of communications; and (iii) the property is used for utility or communications purposes.

Taxpayer maintains that the documents, including the survey, and the legal descriptions provide for a 20' wide easement/right-of-way on which the tower site is located.

As provided in Paragraph 1 of the Site License Agreements, Taxpayer leased the portion of the ground lease on which the tower and fixtures for Taxpayer's equipment are located. Taxpayer was also granted the right to install utility cables, conduits, etc. on the leased premises and right-of-way on which it is located, as well as access to the leased premises on the same right-of-way. In May 2019, Ground Lessee surveyed the Tower Site. The surveys and photographs of the Tower Site clearly reflect that Tower Site is located not only on the right-of-way, but also a private road that encircles the tower site. Other easements depicted in the surveys are "guy wire" easements for the tower, not access easements.

Although not relevant in determining applicability of the sales tax exemption, Tower Site is enclosed by fencing as required for all tower sites by the Federal Communications Commission and other applicable laws and regulations. The presence of legally required fencing does not alter the facts that the tower site is located on a right-of-way and a private road. To view otherwise would disqualify all cellular and communications tower sites from the exemption, violating the legislative intent of section 212.031, F.S.

Applicable Law and Discussion

Section 212.031(1)(a)5, F.S., provides:

(1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or

granting a license for the use of any real property unless such property is:

5. A public or private street or right-of-way and poles, conduits, fixtures, and similar improvements located on such streets or rights-of-way, occupied or used by a utility or provider of communications services, as defined by s. 202.11, for utility or communications or television purposes. For purposes of this subparagraph, the term "utility" means any person providing utility services as defined in s. 203.012. This exception also applies to property, wherever located, on which the following are placed: towers, antennas, cables, accessory structures, or equipment, not including switching equipment, used in the provision of mobile communications services as defined in s. 202.11. For purposes of this chapter, towers used in the provision of mobile communications services, as defined in s. 202.11, are considered to be fixtures.

Two separate exemptions from taxation on the rental, lease, or license to use real property are contained within s. 212.031(1)(a)5, F.S. One exemption applies to property that constitutes a public or private street or right-of-way, on which certain improvements or fixtures are located, while the other applies to property used for mobile communication services. Since Taxpayer is not a mobile communication provider, it is only pertinent to discuss the exemption given to property located on a right-of-way.

To qualify for the exemption for the property that constitutes a public or private street or right-of-way, on which certain improvements or fixtures are located, the following elements¹ must be satisfied:

- 1) The property is a public or private street or right-of-way;
- 2) Poles, conduits, fixtures, and similar improvements are located on such street or right-of-way;
- 3) The property is occupied or used by a utility or provider of communications services as defined by s. 202.11; and
- 4) The property is used for utility, communications, or television purposes.

Taxpayer asserts that it leases tower space and fixtures on a communications tower located on a private "right-of-way". The legislature did not define the term "right-of-way" for purposes of the exemption contained in section 212.031(1)(a)5., F.S., however, the term has been defined in Florida Statutes, in other contexts. For example, s. 177.031(16), F.S., defines the term, for purposes of land boundaries, to mean "land dedicated, deeded, used, or to be used for a street, alley, walkway, boulevard, drainage facility, access for ingress and egress, or other purpose by the public, certain designated individuals, or governing bodies." Section 403.503(27), F.S., defines the term, for purposes of environmental control relating to the

¹ See Cox Radio, Inc., Case Number DOR-07-2-DS.

Florida Electrical Power Plant Siting Act, to mean "land necessary for the construction and maintenance of a connected associated linear facility, such as a railroad line, pipeline, or transmission line."

Although a right-of-way typically refers to a roadway it can mean other things as well. While the words "road" and "way" are frequently used interchangeably, the word "way" is more generic, including many things besides roads. A road is more properly any piece of land used or appropriated for travel, whereas private ways may include any one of innumerable other variety of ways. 20 Fla. Jur. 2d, Easements ss. 1, p. 340. Moreover, the statute uses the phrase "street or right-of-way" indicating that the term right-of-way means something other than a road or street. Accordingly, s. 610.103(10), F.S., establishes that the term "public right-of-way" includes the use of areas on or above, or below, a public roadway, highway, street, sidewalk, alley, etc., for use by cable and video services providers.

Where the Legislature uses exact words or phrases, though in different statutory provisions, it may be assumed that they were intended to mean the same thing. Fla. Jur. 2d Statutes s. 133. The term "right-of-way" used in s. 212.031(1)(a)5., F.S., with no distinguishing gloss or definition, must be used in the common sense meaning. Pederson v. Green, 105 So.2d 1 (Fla. 1958). Adherence to that principle is required because the legislature is presumed to know the plain and ordinary meaning of the terms it uses and if other than the plain meaning is intended, the legislature has the power to define the term used. Brooks v. Anastasia Mosquito Control District, 148 So.2d 1239, 1242 (Fla. 4th DCA 1976).

Although, the courts have determined that the term "right-of-way" does not necessarily mean a legal and enforceable incorporeal right such as an easement. The term has been construed to mean not only a right of passage over the land of another, but it is also used to describe the strip of land on which an existing road is located. Lovey v. Escambia County, 141 So.2d 761 (Fla. DCA 1962). However, to expand the definition of "right-of-way" beyond a passageway to include fixed locations not involving a utility, or an area providing access, is contrary to the plain meaning of the use of the term "right-of-way."

The survey maps provided by Taxpayer demonstrate that the leased premises have at least two roads, and three preexisting guywire easements that extend from the tower over two roads that encircle the land where the tower and improvements were constructed on. The photographs identify walkways and areas in which vehicular traffic is possible. The documents provide for a railroad right-of-way. Based on the documentation provided, the leased premises (0.0472 acres) only include a portion of the 18.4 acres of land owned by the initial landlord. Based on the maps, the railroad right-of-way is not part of the leased premises. Most of the road is not part of the leased premises. Even though Taxpayer may use the existing private roads to access the tower site, the tower site is not part of such roads, or private right-of-way, but just encircled by them.

Based on the information provided, only the sidewalk areas and the encircling private roads constitute a right-of-way. These sidewalks and encircling roads are not used for communications purposes. Furthermore, an easement is not considered a right-of-way. While an easement constitutes a property interest, a right-of-way does not create a property interest and may be extinguished.

The tower in question is not constructed on a private right-of-way. However, s. 212.031(1)(b), F.S., indicates in pertinent part that “[w]hen a lease involves multiple use of real property wherein a part of the real property is subject to the tax herein, and a part of the property would be excluded from the tax under subparagraph (a)1. [. . .] the department shall determine, from the lease or license and such other information as may be available, that portion of the total rental charge which is exempt from the tax imposed by this section. [. . .].” Therefore, even if the leased premises contain a private right-of-way, the portion of the lease regarding the encircled area where the Tower is erected, is subject to the tax.

To qualify for the tax exemption provided in s. 212.031(1)(a)5., F.S., Taxpayer must satisfy all the requirements. The courts have determined that exemptions from, or exceptions to, taxing statutes are strictly construed against granting the exemption or exception. United States Gypsum Company v. Green, 110 So.2d 409 (Fla. 1959), and State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973). Although Taxpayer is a communications provider, using the Tower Site premises for communications purposes, the Tower is not erected on a public or private right-of-way. Also, the guy wire easements are not on the road, but over the road. In regard to Taxpayer’s argument that all cellular and communication towers would be subject to tax based on the Department’s position fails to consider the second sentence in s. 212.031(1)(a)5., F.S., which does not require to be located on a street or right-of-way when used for mobile communication services. That exclusion allows for the tower to be located anywhere.

Concluding Statement

Based on the information and documentation provided, Taxpayer’s lease of space on the Tower Site does not satisfy the qualification requirements for the sales tax exemption provided in s. 212.031(1)(a)5., F.S.

This response constitutes a Technical Assistance Advisement under section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice as specified in section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes, or judicial interpretations of the statutes or rules, upon which this advice is based, may subject similar future transactions to a different treatment than that expressed in this response. You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and

are subject to disclosure to the public under the conditions of section 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material, and this response, deleting names, addresses, and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Ivonne De Feria Molini

Ivonne De Feria-Molini
Tax Law Specialist
Technical Assistance & Dispute Resolution