

Date Issued: September 16, 2014  
Georgia Letter Ruling: LR SUT-2014-12  
Topic: Service Provider-Colocation

This letter is in response to your request for guidance on the application of Georgia sales and use tax to the Colocation Services described below.

### **Facts**

Taxpayer provides customers with access to carrier dense interconnections through their state of the art carrier-neutral colocation centers. Taxpayer offers customers direct interconnection to an aggregation of bandwidth providers, broadband access networks (DSL/cable) and international carriers. Customers locate their equipment in a Center, in order to utilize “third party” technology to connect with business partners, service providers, and networks.

1. Cross Connect - Under the Cross Connect service, customers are provided access and use of a bundle of fiber optic cable which allows the customer’s equipment to establish a connection to its business partners, service providers and networks. Taxpayer does not transmit data through the cables. Taxpayer charges each customer a fixed monthly amount on a recurring monthly basis under a license agreement for access and use of the “dark” fiber optic cable. The Cross Connect charge is stated separately in contracts and on invoices. The Cross Connect service is provided to customers in addition to other services rendered within the Center or from a remote location (i.e., another Center).
2. Electrical Power - The Centers contain multiple Internet connections with major Internet backbones, redundant electricity combined with backup generation and power conditioning and redundant mechanical and security systems to ensure that the physical environment is suitable for computers and safe from intruders. Taxpayer provides customers access to and use of a live power circuit to power their equipment located in the Center. Taxpayer purchases the electrical power at retail from a Georgia electric utility and pays the applicable taxes and fees, including sales tax, to the utility. Taxpayer passes along to customers the cost of the taxes and fees paid to the utility. Taxpayer does not hold a certificate of authority issued to telecommunication companies by the Georgia Public Service Commission, nor does Taxpayer hold a certificate of public convenience and necessity issued to electric service providers by the Georgia Public Service Commission.

### **Issues**

1. Are Taxpayer’s charges for Cross Connect services subject to the tax?
2. Are Taxpayer’s charges for electrical power service subject to the tax?

### **Analysis**

All retail purchases and sales of tangible personal property are taxable unless provided for otherwise.<sup>1</sup> Tax is levied and imposed upon the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property and on services described in this article that occur in this state.<sup>2</sup> “Sale” means any transfer of title or possession, transfer of title and possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner, or by any means of any kind of tangible personal property for a consideration.<sup>3</sup> However, unlike sales of tangible personal property, which are generally presumed taxable, sales of services are not subject to the tax unless the service is specifically designated as taxable.

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<sup>1</sup> O.C.G.A. §§ 48-8-1; 48-8-30(b).

<sup>2</sup> O.C.G.A. § 48-8-30.

<sup>3</sup> O.C.G.A. § 48-8-2(33)(A).

### *Service Providers in General*

The general rule in Georgia is that service providers are end users and consumers and liable for the tax on all tangible personal property used to provide their service. Code Section 48-8-63 specifically provides as follows:

“... (b) Each person who orally, in writing, or by purchase order contracts to furnish tangible personal property and to perform services under the contract within this state shall be deemed to be the consumer of the tangible personal property and shall pay the sales tax imposed by this article at the time of the purchase. Any person so contracting who fails to pay the sales tax at the time of the purchase or at the time the sale is consummated outside the limits of this state shall be liable for the payment of the sales or use tax. This Code section shall not relieve the dealer who made the sale from such dealer's liability to collect and pay the tax on purchases by a contractor.

(c) Each person who contracts to perform services in this state and who is furnished tangible personal property for use under the contract by the person, or such person's agent or representative, for whom the contract is to be performed, when a sales or use tax has not been paid to this state by the person supplying the tangible personal property, shall be deemed to be the consumer of the tangible personal property so used and shall pay a use tax based on the fair market value of the tangible personal property so used irrespective of whether any right, title, or interest in the tangible personal property becomes vested in the contractors.

(d) Each person who orally, in writing, or by purchase order contracts to perform any service the principal part of which is the furnishing of machinery which will not be under the exclusive control of the contractor shall be liable to collect a sales tax on the rental value of the machinery so used. If labor and other charges are not separated from the rental charge, the person so contracting shall be liable to collect a sales tax on the entire contract price. ...”<sup>4</sup>

Service providers are deemed to be the consumers of certain tangible personal property used or consumed during the provision of a service if the service provider does not separately charge for such property.<sup>5</sup> This category includes property that loses its identity when used and consumed during the provision of services and property that is deemed to be an inconsequential element of the service transaction.<sup>6</sup> In addition, the Department considers items of tangible personal property to be “used or consumed during the provision of a service” even if there is a separate charge for such items when title, possession, use, and control of the items do not pass to the customer. If such property was purchased under terms of resale, the service provider must accrue and remit use tax on the cost price of such property because the property is deemed to be withdrawn from inventory for the service provider's use.<sup>7</sup> In the same manner as a real property contractor or other service provider, Taxpayer is liable for sales and use tax on all tangible personal property used and consumed in the provision of its service.

O.C.G.A. § 48-8-3(22) provides that sales and use tax shall not apply to “[p]rofessional, insurance, or personal service transactions which involve sales as inconsequential elements for which no separate charges are made...” The Department considers the Cross Connect service to be a nontaxable service. However, Taxpayer must collect the tax on any itemized charges it makes for tangible personal property when the customer will receive title to or have rights of possession or control of the tangible personal property for which the charges are made.

### *Charges for Electricity*

In Georgia, a “utility” is defined as “any person who supplies, furnishes or sells a natural gas or electric service.”<sup>8</sup> Anyone that provides a utility service is subject the jurisdiction of the PSC.<sup>9</sup> More particularly, an electric supplier is defined to be within the PSC’s jurisdiction.<sup>10</sup> Therefore if Taxpayer is “selling” electricity it would be subject to the jurisdiction of the PSC. If Taxpayer is “selling” electricity, it would be required to obtain a certificate of public

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<sup>4</sup> O.C.G.A. § 48-8-63.

<sup>5</sup> Ga. Comp. R. & Regs. r. 560-12-1-.14(7)(d).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> O.C.G.A. § 46-2-70(3).

<sup>9</sup> O.C.G.A. § 46-2-70(4).

<sup>10</sup> O.C.G.A. § 46-3-3(3).

convenience and necessity from the PSC prior to constructing, selling, or increasing or decreasing the capacity of a supply-side option. Further, the Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1 through 15, designates exclusive territories to utilities that furnish electricity at retail. Once a territory has been assigned to a utility, as this territory has been assigned to Georgia Power, there are only limited exceptions, not present here, that would allow another utility to sell within a territory assigned to another utility.

Based on the above, it would appear that the actions of Taxpayer do not constitute “selling” electricity such that Taxpayer falls within the jurisdiction of the PSC. Therefore, Taxpayer does not sell electricity at retail and Taxpayer’s itemized charges for electricity are not subject to the tax.

### **Rulings**

The Department does not consider the Cross Connect service offered by Taxpayer to be either a taxable service or a rental/lease of tangible personal property, and thus charges for this service are not subject to the tax. Because Taxpayer’s activities do not fall within the jurisdiction of the PSC, Taxpayer does not sell electricity at retail, and its charges for electricity are not subject to the tax. In the same manner as a real property contractor or other service provider, Taxpayer is liable for sales and use tax on all tangible personal property used and consumed in the provision of its service. Taxpayer must collect the tax on any itemized charges it makes for tangible personal property when the customer will receive title to or have rights of possession or control of the tangible personal property for which the charges are made.

1. Taxpayer’s sales of Cross Connect services are not subject to Georgia’s sales and use tax.
2. Taxpayer’s itemized charges for electrical power are not subject to Georgia’s sales and use tax.

The opinions expressed in this ruling are based upon the information contained in your request and limited to the specific transactions, facts, circumstances and taxpayer in question. Should the circumstances regarding the transactions change, or differ materially from those represented, then this ruling may become invalid. In addition, please be 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 tax treatment than that expressed in this response.