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State and Local Tax Alert: Sales Tax on Data and Communication Cabling Just Changed. Does It Impact You?

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The Ohio Board of Tax Appeals (BTA) recently issued a decision that reverses 20 years of case precedent regarding the classification of voice and internet cable installed into commercial buildings. The case involved sales tax paid by the owner of an owner occupied office building on the purchase and installation of standard CAT-5 and CAT-6 cabling.

The installer and the owner treated the transaction as a sale of tangible personal property on which sales tax was paid. The owner later applied for a refund claiming the transactions involved the incorporation of cable into real property, making the installer (not the owner) the consumer for sales tax purposes. The Tax Commissioner relied on a prior decision of the BTA decided in 1998 which characterized transactions involving data communication cable as sales of tangible personal property. However, the BTA sided with the owner. It reversed the prior decision and ruled that the owner received and consumed nontaxable real property.

The BTA reasoned that this type of communication cabling would be usable by other businesses who might later occupy the building and that the cabling was not designed to meet technical requirements of a specific business. The utility of the cabling was generic. Thus, its installation qualified as a real property construction contract. The BTA did not address fiber optic cable and it did not consider installation of trunk lines over easements and rights-of-way for communication or network service providers. Vorys feels these additional facts likely would warrant different tax results.

Although the scope of this decision is narrow (CAT-5 and CAT-6 cabling common in office and commercial buildings), its effect on your sales and use tax obligations could be significant. The most material impact will be felt by:

1. Cable installers and contractors. These types of businesses should immediately review their purchasing and sales practices to determine the correct tax compliance. It may be that these

businesses will need to consider two lines of purchases and sales (one for real property construction contracts and one for sales involving installation of tangible personal property). In the first instance, the businesses owe sales or use tax on their purchase of cable and should not charge the property owner sales tax on the contract sales price. In the second instance, where the cable retains its character as tangible personal property, the businesses should not pay sales or use tax on cable purchases. They should collect sales tax from the property owner on the full amount charged (or obtain a certificate of exemption in place of the tax). Audit risks for nonconforming past conduct also should be considered.

2. Building owners that have purchased installed communication and data cabling should review those contracts and billings to consider potential refund claims.

Vorys sees the prospects of an appeal by the Tax Commissioner as very low. We expect that the commissioner will issue a new Information Release in the coming weeks. The release will be instructive on line drawing (e.g., buried trunk lines, fiber optic cabling) and whether the Department of Taxation will apply the new case retrospectively in audits or only prospectively.

Whether your business purchases data and communication cabling to use in your own building or purchases cabling to install for use by others, you should evaluate the Ohio sales and use tax consequences in light of this new case law. The tax attorneys at Vorys can assist in any or all phases of this review. We represent both cable installers and building owners, so we have the breadth of experience and knowledge of the law to help your business.

Please contact Tony Ehler (614.464.8282 or tlehler@vorys.com) or Hilary Houston (614.464.4968 or hjhouston@vorys.com) if you have any questions.