Jul 12, 1979

C.P.I. Of Florida, Inc.
Petitioner,

v. CASE NO DOR-79-1

DEPARTMENT OF REVENUE,
STATE OF FLORIDA,
Respondent.
_____/

DECLARATORY STATEMENT

The Department of Revenue, State of Florida, pursuant to s. 120.565, Fla. Stat., and Rule 12-2.13, Fla. Admin. Code, hereby renders the following declaratory statement:

STATEMENT OF THE FACTS

1. Petitioner, C.P.I. of Florida, Inc., is a Florida corporation, duly organized and in good standing, with a principal place of business at 227 Whooping Loop, Altamonte Springs, Seminole County, Florida.

2. Petitioner leases property from Sheldon Heights Construction Company (and others) at a site or sites in Florida where it carries on pizza and Italian-style restaurant business.

3. Petitioner's lease(s) provide(s) that "Lessee, pay as `Additional Rental' all general real estate taxes... assessed against said premises demised hereunder."

4. Petitioner's lease(s) provide(s) further that "all costs, expenses, taxes and obligations... shall be paid by lessee."

5. Petitioner, as lessee, and Sheldon Heights Construction Company, as lessor, are in agreement that the pertinent lease(s) require(s) lessee to pay the 4% sales tax due upon rent, exclusive of such portion of rent as may be repayment of ad valorem taxes.

6. Lessor has advised lessee that it is the position of the Department of Revenue that the 4% sales tax due on the rent paid

under the lease(s) in question includes sales tax upon that sum of money paid by lessee to lessor as "additional rental" for "all general real estate taxes."

7. Lessor maintains that such 4% sales tax on lessee's payment of real estate taxes is due pursuant to s. 212.031, Fla. Stat.

8. Lessee acknowledges that it is liable for the 4% sales tax upon rent (exclusive of rent which is paid as reimbursement of lessor's real estate taxes) under Rule 12A-1.70(15), Fla. Admin. Code, but is in doubt as to its liability for the 4% rental tax on that portion of its rent which constitutes payment of real estate taxes.

ISSUE

Whether the 4% sales tax imposed by s. 212.031(1)(c), Fla. Stat., is applicable to payments of real estate taxes by lessee, on leased premises, pursuant to the terms of the lease.

STATEMENT OF THE LAW

9. Section 212.031(1)(c), Fla. Stat., imposes a tax in the amount of 4% of and on the "total rent charged for the renting, leasing or letting of any real property". It is further provided under s. 212.031(1)(d), Fla. Stat., that:

> Where the rental of any such real property is paid by way of property, goods, wares, merchandise, services or other thing of value, the tax shall be at the rate of 4 percent of the value of the property, services or other things of value.

The above statutory provisions do not specifically mention taxes. However, they clearly indicate a legislative intent to tax the full benefits flowing to the landlord from the lessee for the use of the leased premises. The payment of the real estate taxes by the lessee in question is required under the terms of the lease(s), is the payment of money by the lessee for the lessor's benefit and is an item considered by the lessor and lessee in fixing the amount of rent to be paid to the lessee, C.P.I. of Florida, Inc. Therefore, the payment of real estate

taxes by the lessee, C.P.I. of Florida, Inc., is part of the "total rent charged" for the leasing of the real property in question and is subject to the 4% tax imposed by s. 212.031(1)(c), Fla. Stat.

The identical issue raised the instant Petition was considered by the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, in the case of Seaboard Coast Line Railroad Company v. Askew, Case No. 72-15. The Court ruled that when a lessee, pursuant to the covenants of a lease, pays the ad valorem taxes upon leased real estate, the amount so paid is "rent" within the meaning of the statute so as to be subject to the sales and use tax under s. 212.031, Fla. Stat. In reaching this decision, the Court stated that the language of s. 212.031(1)(d) clearly indicates a legislative intent to tax the full benefits flowing to the landlord for the use of the leased premises. The Court further reasoned as follows:

> When taxes are assessed they become a lien upon the real state. While they do not become a debt of the owner of the fee, they must be paid or the owner will lose property worth many times the amount of the taxes. The payment of these taxes, by the lessee is the payment of money for account of the owner and for his benefit. Although unliquidated at the time of the execution of the lease, the anticipated amount of taxes is an item considered by the parties in fixing the amount of rent paid directly to the owner.

10. Furthermore, the imposition of the 4% rental tax under s. 212.031(l)(c), Fla. Stat., upon that portion of the rent which constitutes payment of real estate taxes does not amount to a tax upon a tax as contended by the Petitioner. This follows from the fact that the sales tax imposed by Ch. 212, Fla. Stat., and ad valorem taxes assessed against real property are entirely separate and distinctly different taxes.

The sales tax is not a tax on personal property or services but is a tax on the privilege of selling the same. Gaulden v. Kirk, 47 So.2d 567 (Fla.1950); Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964). Further, the sales tax

imposed on the privilege of renting property is not tax on the property. Zero Food Storage Division of American Consumer Industries, Inc. v. Department of Revenue, 330 So.2d 765 (Fla. 1st D.C.A. 1976).

In the Seaboard Coast Line Railroad Company case, supra, the Plaintiff contended that the sales tax imposed upon the rent paid by lessee and consisting of ad valorem taxes upon the leased real estate was a tax upon a tax, violating of s. 1, Art. I of the Constitution of Florida and the due process clause of the Federal Constitution. In holding this argument to be unfounded, the Court stated as follows:

> ... No tax is imposed upon a tax. A tax is imposed upon a transaction and measured by the rent. In every rental transaction the amount of taxes upon the rented property is necessarily considered by the parties in determining the rent to be charged and paid whether the taxes be paid by the landlord from a fixed monthly or annual rent or paid for the landlord by the tenant.

Thus, it is clear that the sales tax imposed on the rental payments in question is a tax upon a transaction and is in no sense a tax upon a tax any more than a stamp tax on a deed is a tax on the real estate transferred by the deed, or an income tax on the landlord's income is a tax upon the real estate.

11. Finally, Petitioner contends that it is in doubt as to its liability for the 4% rental tax upon that portion of its rent which constitute payment of real estate taxes because of the provisions of s. 212.031(2)(b), Fla. Stat., and Rule 12A-1.70(4), Fl. Admin. Code. Both the statute and the rule provide that only one tax shall be collected on the rental payable for the occupancy or use of real property and the tax so collected shall not be pyramided by a progression of transactions.

The language of s. 212.031(2)(b), Fla. Stat., clearly indicates a legislative intent to address the situation where a landlord rents to tenant and the tenant subsequently sublets to a subtenant. The intent of s. 212.031(2)(b), Fla. Stat., in such

a situation, is to place only one tax on the rental of the property, for there is only one tenant occupying or using the real property, even though a series of leases and subleases may be in effect at the same time on the same property.

Further support for the above interpretation of s. 212.031(2) (b), Fla. Stat., is found in s. 212.031(2)(a) and 212.12(12), Fla. Stat. Section 212.031(2)(a) places the rentals tax on the tenant and provides as follows:

> (2)(a) The tenant actually occupying, using or entitled to the use of any property the rental from which is subject to taxation under this section shall pay the tax to his immediate landlord or other person granting the right to such tenant to occupy or use such real property.

Section 212.12(12), Fla. Stat., states:

> (12) It is hereby declared to be the legislative intent that wherever in the constitution, administration or enforcement of this chapter there may be any question respecting a duplication of the tax, that the end consumer, or last retail sale shall be the sale intended to be taxed and insofar as may be practicable there be no duplication or pyramiding of the tax.

Thus, it is apparent from the above provisions that the intent of s. 212.031(2)(b), Fla. Stat., is to place only one tax on the rental of real property, to be paid by the ultimate consumer on that amount of real property which he occupies so as to prevent the duplication or pyramiding of the tax. See Zero Food Storage Division of American Consumer Industries, Inc. v. Department of Revenue, supra.

However, as the rentals tax and the real estate tax in question are separate and different taxes, no duplication or pyramiding of the rentals tax is involved in this case which would bring into play the provisions of s. 212.031(2)(b), Fla. Stat.

12. Accordingly, the payment of real estate taxes on leased

premises by the lessee, C.P.I. of Florida, Inc., pursuant to the terms of the 1ease, is subject to the 4% rentals tax imposed by s. 212.031(1)(c), Fla. Stat.

Respectfully submitted and entered this 12th day of July, 1979.

Randy Miller
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