

SUMMARY

DOCUMENTARY STAMP TAX

QUESTION: When a mortgage is cancelled and replaced by a deed and lease facility (synthetic lease), are the deed or lease facility subject to documentary stamp tax?

ANSWER - Based on Facts Below: The deed to the entity holding bare legal title and the lease facility (synthetic lease) together are considered a "mortgage." The deed to the entity holding bare legal title during the term of the synthetic lease is not subject to tax under s. 201.02, F.S. The Lease facility is subject to tax on the principal amount of the "mortgage" under s. 201.08, F.S. At the end of the lease facility when the debt is repaid, the deed from the entity holding bare legal title back to the former owner is not subject to documentary stamp tax under s. 201.02, F.S.

INTANGIBLE TAX

QUESTION: When a mortgage is cancelled and replaced by a deed and lease facility which together are construed to be a "mortgage," is the lease facility (synthetic lease) subject to intangible tax?

ANSWER - Based on Facts Below: The lease facility (synthetic lease) is construed to be a "mortgage." It creates a lien against the real property, and is subject to the nonrecurring intangible tax under s. 199.133, F.S.

SALES AND USE TAX

QUESTION: Does the subject Lease Agreement between Taxpayer and Lessor, when considered with all other relevant documents to the same transaction, constitute a financing arrangement, rather than a lease or rental of commercial real property?

ANSWER - Based on Facts Below: Yes. Crucial factors

contained in the documentation of the transaction indicate that the transaction is in the nature of a mortgage rather than an operating lease and as such, payments made by Taxpayer, pursuant to the Lease Agreement, will not be subject to sales tax imposed pursuant to section 212.031, F.S.

Jun 05, 2002

Re: Technical Assistance Advisement No. 02M-005

Documentary Stamp Tax, Intangible Tax, Sales and Use Tax;
Whether the Subject Real Property Transaction Creates a
Mortgage Refinancing/Lease Facility
Sections 199.133, 199.185, 201.02, 201.08, 212.031(1)(a),
(c), 697.01(1), and 697.04 F.S.
Rules 12B-4.014(1), 12B-4.052(7), and 12B-4.053(2), F.A.C.
XXX (hereinafter, First Corporation, Seller, Lessee)
XXX (hereinafter New Corporation, Purchaser, Lessor)
XXX (hereinafter Mortgagee Bank)

Dear :

This is in response to your initial request, dated XX, received XX, closed until receipt of additional requested information and documentation, and your latest request, dated XX, for the Department's issuance of a Technical Assistance Advisement ("TAA") concerning the above referenced parties and matter. Your letter has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of section 213.22, F.S.

You have asked for an opinion on whether converting the debt represented by an existing mortgage to a synthetic lease would entail documentary stamp tax, intangible tax, or sales and use tax.

FACTS AS PRESENTED BY PETITIONER

Summary of Plan to Restructure Existing Documents:

Because certain religious laws prohibit the direct charging of interest, the existing mortgage and certain other documents are to be "restructured" as a synthetic lease to meet these requirements.

First Corporation (Seller/Lessee) owns fee simple title to real property located in Florida. The property is presently encumbered by a first priority mortgage and financing agreement in favor of Mortgagee Bank.

The plan is to create a new special or single purpose corporation whose sole purpose is to hold bare legal title to the real property during the existence of the new Lease Facility (synthetic lease). New Corporation (Purchaser/Lessor) will obtain an assignment of the existing mortgage from Mortgagee Bank. First Corporation (Seller/Lessee) will deed the property to New Corporation (Purchaser/Lessor). In exchange for the deed, New Corporation will cancel the existing mortgage and the attendant promissory notes.

At this point, to replace the debt which was represented by the first priority mortgage, New Corporation (Purchaser/Lessor) will lease the property back to First Corporation (Seller/Lessee) under the conditions of the Lease Facility (synthetic lease), whereby the lease payments will be made to New Corporation. The lease instruments will refer to the payments as principal only to comply with the religious requirements as determined by certain religious legal scholars. In addition to the present outstanding principal amount of the mortgage, an additional amount will be loaned to First Corporation (Seller/Lessee) to fund certain improvements on the property and other fees and costs. No promissory note will be separately prepared to represent the additional amount loaned. The lease instrument will cover the repayment of all principal and interest. When the conditions of the synthetic lease have been met, at the end of the Lease Facility period, New Corporation will reconvey the real property back to First

Corporation.

Description of the Lease Documents:

The Lease Facility will consist of the following agreements:

1. Purchase and Sale Agreement;
2. Deed;
3. Registered Master Lease Financing Facility Agreement (the "Lease Agreement");
4. Supplemental Agreement;
5. Call Option Letter;
6. Put Option Letter; and
7. Tax Matters Agreement.

The Lease Agreement will cover a three-year period. The lease will contain an option to buy and a requirement that First Corporation (Seller/Lessee) must repurchase the property after the three-year period (subject to a possible mutually agreed extension by New Corporation and First Corporation for a period of up to two years). The obligation for repayment of the additional funded amount will be incorporated into the lease documents. The proceeds from the Lease Facility will be used to repay the former mortgage debt owed by First Corporation (Seller/Lessee) to New Corporation (Purchaser/Lessor) and the additional amount loaned to finance the improvements on the real property plus the interest owed on the total debt.

During the term of the Lease Facility, the First Corporation (Seller/Lessee) will be obligated to make quarterly payments of a fixed amount. At the end of the term of the Lease Facility, under Article 23 (Call Right and Put Right), provided all Quarterly Payments and other amounts scheduled to be paid under the lease have been made, First Corporation (Seller/Lessee) will have the right and option to repurchase the Property (in whole but not in part). In addition, New Corporation (Purchaser/Lessor) will have the right and option to **require** First Corporation to repurchase the Property in the event of certain occurrences or at the end of the term of the Lease Agreement on the Final Rent Payment Date for a Purchase

Price equal to the Acquisition Cost (See Schedule 1.01) plus an additional amount determined based upon the number of months from the commencement of the Lease Facility to the date of purchase.

Both the quarterly payments and the additional amounts have been determined based upon the rate of return (6.5% of the Acquisition Cost on an annualized basis) on the purchase price given by New Corporation (Purchaser/Lessor) to First Corporation (Seller/Lessee). The additional amount to be paid represents an additional 1.5% of the purchase price on an annualized basis.

According to the request, the rent should be considered the principal amount of the financing plus interest on the financing. The "interest rate" then, is 8%, consisting of the 6.5% paid as current interest (which takes the form of Quarterly Payments in Schedule 3.01 of the Lease) and the 1.5% paid as simple interest accruing during the course of the financing and payable when the amount of the financing is repaid in full (which takes the form of the scheduled increases in "Early Termination Price" in Schedule 3.01). No "principal" is paid until termination of the financing.

Under the Supplemental Agreement, First Corporation (Seller/Lessee) assumes responsibility for arranging insurance and maintenance, and for filing returns and remitting payment for property taxes with respect to the Property as the "owner" of the property. First Corporation is responsible for its negligence if it does not obtain property insurance, etc. The maintenance of the Property is also the responsibility of First Corporation. The maintenance responsibilities that the Lease removes from First Corporation are placed squarely back with First Corporation (Seller/Lessee) under the terms of the Supplemental Agreement.

Under the Put Option Letter, New Corporation (Purchaser/Lessor) may require First Corporation (Seller/Lessee) to purchase the Property if an event of default occurs under the Lease Agreement or under certain other conditions.

Under the Call Option Letter, First Corporation

(Seller/Lessee) will have the option to purchase the Property from New Corporation for an amount equal to the total purchase price plus a variable amount depending upon the length of time the Lease Facility lasts until the date of purchase.

The Tax Matters Agreement specifies that both First Corporation (Seller/Lessee) and New Corporation (Purchaser/Lessor) agree that for United States tax and accounting purposes, the Lease Facility will be treated as a loan, and that First Corporation (Seller/Lessee) will be treated as the owner of the Property. First Corporation, New Corporation (Purchaser/Lessor) and each Investor will report the U.S. tax consequences of the Lease Facility consistent with the agreed treatment.

REQUESTED RULINGS

Taxpayer has requested that we express our opinion as to the taxability of a deed and a mortgage which is being refinanced as a synthetic lease in an increased amount. The transaction would require a deed to a new corporation as well as a conformation of the mortgage in an increased amount to be reissued as a lease with an option to buy.

In regard to your sales tax inquiry, you have requested an advisement that the subject Lease Agreement between Lessee and Lessor, when considered with all other relevant documents to the same transaction, constitutes a financing arrangement, rather than a lease or rental arrangement. Therefore, payments made in accordance with the Lease Agreement would not be subject to sales tax pursuant to section 212.031, F.S.

DISCUSSION AND LAW

Documentary Stamp Tax:

Section 697.01(1), F.S., provides:

All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose

or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

Section 697.02, F.S., provides:

A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.

See also Rule 12B-4.052(7), F.A.C. The statutes and rule demonstrate that even though an instrument may not be denominated as a mortgage, it may nonetheless be treated as such.

"An instrument must be considered a mortgage regardless of its form, if, when taken alone or in connection with the surrounding facts, it appears to have been given for the purpose of securing the payment of money. First Mortgage Corp. of Stuart v. deGive, 177 So.2d 741, 746 (Fla. 2nd DCA 1965). See also, Watkins et ux. v. Burnstein, 152 Fla. 828, 14 So.2d 569 (1943) (deed and lease with option to purchase considered a single transaction constituting a mortgage). Even though a document may be called a lease or other document, to properly determine the true nature of the transaction, the intention of the parties and the substance of the agreement actually determine what type of document it actually is. See Bridgestone/Firestone, Inc. v. Department of Revenue, DOAH Case 92-2483, FALR 4874 (1993), 15 FALR 4874 (1993). Thomas v. Thomas, 96 So. 2d 771 (Fla. 1957) (absence of a promissory note evidencing debt did not prohibit transaction from being classified as a mortgage).

The proposed sale/leaseback transaction proposed in this request is a financing arrangement (rather than a Landlord/Tenant relationship), to substitute the Lease Facility in place of the existing mortgage. First Corporation was and is the "owner" of the property currently being paid for by means of

the Lease Facility. New Corporation is merely acting as a financing vehicle, and not as a landlord. The existing promissory notes and mortgage are to be assigned from Mortgagee Bank (Lender) to New Corporation (Purchaser/Lessor) and then canceled. If a new document is executed that replaces the remaining obligation (which is not an exempt renewal of the primary document), the new document, Lease Facility (synthetic lease) is considered a mortgage subject to tax under s.201.08(1), F.S.

The documents presented specify that the elements of ownership (taxes, maintenance, etc.) remain during the lease period with the prior owner (First Corporation) and are not the ultimate responsibility of New Corporation (Purchaser/Lessor). At the end of the lease period when the last required payment is made to New Corporation, New Corporation will give a deed conveying the title to the property back to First Corporation.

Here, both the deed and the Lease Facility (synthetic lease) to New Corporation (Purchaser/Lessor) together are considered a mortgage, because they are intended to secure the payment of money. New Corporation will hold bare legal title until First Corporation completes paying the total Acquisition Price of the property. The two documents together (deed and lease) constitute a new mortgage issued after the original promissory notes and mortgage were cancelled. Therefore, the synthetic lease (considered a mortgage) would not constitute a "renewal" of the original mortgage which was cancelled. Documentary stamp tax under s. 201.08(1), F.S., would be calculated on the total amount of "principal" or the remaining amount due under the original mortgage plus the additional amount loaned under the lease for the intended improvements to the real property.

As to the additional amount loaned under the lease, s. 697.04, F.S., states that where a mortgage or other instrument is given for the purpose of creating a lien on real property, or on any interest in a leasehold upon real property, may, when so expressed therein shall, secure not only existing indebtedness, but also such future advances, whether such advances are obligatory or to be made at the option of the lender.

The amount comprising the "recharacterized interest" would not be subject to tax. Interest which is not a sum certain does not meet the requirements to be subject to the tax under s. 201.08, F.S.

The sale/leaseback was used to effect a mortgage substitute through the means of a deed with collateral documents. There is no documentary stamp tax due on the deed to New Corporation under s. 201.02, F.S., since the deed and lease are considered under s. 697.01, F.S., to be a mortgage. At the end of the lease after repayment of the total debt (mortgage represented by the deed and lease) due to New Corporation, the deed conveying the property back from New Corporation to First Corporation (where the original conveyance to New Corporation was to secure the debt represented by the synthetic lease) is also not subject to tax. Rule 12B-4.014(1), F.A.C.

Nonrecurring Intangible Tax:

The nonrecurring intangible tax under s. 199.133, F.S., is imposed on each dollar of the just valuation of all notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in Florida.

The Lease Facility contains language (Article 23, Call Right and Put Right) which assures New Corporation (Purchaser/Lessor) that First Corporation (Seller/Lessee) will repurchase the property during or at the end of the lease on the Final Rent Payment Date, at which time a special warranty deed, bill of sale, agreements and other legal instruments and documents of conveyance reasonably agreed to by both parties will convey the legal title to the real property back to First Corporation. First Corporation agrees that the Property shall be purchased "as is" and "where is" without warranty, express or implied, by or on behalf of New Corporation.

Since the Lease Facility creates a lien on the real property, under s. 199.133, F.S., nonrecurring intangible personal property tax is due upon the obligation secured by the

real property. Under s. 199.135, F.S., the nonrecurring tax imposed on notes, bonds, and other obligations for payment of money secured by a mortgage, deed of trust, or other lien evidenced by a written instrument presented for recordation is due within 30 days following creation of the obligation. If it is not so presented within 30 days following creation of the obligation, then the tax shall be due and payable within 30 days following creation of the obligation. If the instrument is not recorded, the tax shall be paid to the Department of Revenue. See Rule 12C-2.005(2), F.A.C.

Both parties have agreed in the Lease Facility (synthetic lease) that First Corporation will make the required payments and that First Corporation will receive a deed on the Final Payment Date. The Lease Facility documents act as an agreement for deed, a form of mortgage. See, e.g., State Ex Rel. Forty-Fifty Two-Thirty Corp. v. Dickinson, 322 So.2d 525 (1975 Fla. SCt 3783).

The Lease Facility will be subject to the nonrecurring intangible tax under s. 199.133, F.S., on the Acquisition Cost under Schedule 1.01, which is the total principal amount financed under the lease.

Sales and Use Tax:

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

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

Section 212.031 (1) (c), F.S., provides:

For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property....

Section 697.01 (1), F.S., provides:

All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

Therefore, it must be determined when analyzing the transaction as a whole, in light of the parties' intentions, whether the Lessor is engaged in leasing real property to the Lessee, or whether the transaction is in substance a mortgage arrangement under which bare legal title to the property is held by the Lessor as security for repayment.

Under certain circumstances, for tax purposes, a document structured as a lease may be treated as a mortgage.

Bridgestone/Firestone, Inc. v. Department of Revenue, DOAH Case Number 92-2483, 15 FALR 4874 (1993). The Administrative Hearing Officer in Bridgestone/Firestone stated, "Although a document may be called a lease on its face, this in itself is not dispositive of the issue. Rather, in order to properly determine the true nature of the transaction, it is necessary to examine the intention of the parties and the substance of the agreement." (Paragraph 23). Additionally, the Hearing Officer stated: "Initially, it is noted that a taxpayer can treat an item one way for financial recording purposes and another way for tax purposes...." (Paragraph 24)

In Bridgestone/Firestone, a sale-leaseback transaction was examined. In that case, it was determined that the transaction taken as a whole was a mortgage loan transaction (affirmed by the Department of Revenue in its final order), rather than a lease, and that, as a result, payments made under the agreement were not subject to sales tax.

In analyzing the instant transaction in its entirety, an analogous determination is made. A Landlord/Tenant relationship

does not exist between Lessee and Lessor. There is no "total rent or license fee" paid by the Lessee. The Lessor is not the landlord, because the transaction represents a financing arrangement rather than a lease. This is based upon the following factors:

(1) The Lessee's principal aim in entering into this complex transaction is to secure financing for the acquisition of the subject property. The Lessor is created solely to serve as a single purpose financing entity. As a consequence, the Lessor is not in the business of engaging in the conveyance of a lease or the grant of a license to use real property. Rather, the Lessor is created to serve as an integral part of the entire financing arrangement. The Lessor is not a landlord but serves more in the capacity of an administrator of the transactions. The following language from the Tax Matters Agreement clarifies the purpose of the transaction:

Section 1. (a), Tax Matters Agreement, provides:

It is expressly agreed that [Lessor] and the [Lessee] have entered into the Overall Transaction and the Transaction Documents intending such agreements to accomplish a single transaction, and intending such transaction to be characterized as a mere financing in the amount of the Acquisition Cost bearing simple interest at the rate of 8% per annum (of which 6.5% is payable on a current basis each quarter and 1.5% is payable when the principal amount of the financing is repaid) for all income tax and accounting purposes and intending for [Lessee] to be considered the owner of the Property for such income tax and accounting purposes....

(2) There is no economic substance to the Lease Agreement beyond insuring amortization of the debt. The Lessor does not receive a rental or license fee in the ordinary sense of the economic owner of property attempting to maximize income from an investment by charging a rent or fee determined by the market value of the improvements. Rather, the "rent" payments here are equal to the interest on the Loan. See Schedule 3.01 Rent, Tax Matters Agreement section 1 (a).

(3) Finally, unlike the typical Landlord-Tenant Relationship, here Lessor may require Lessee to purchase the property upon the occurrence of specific events. Lessor may require Lessee to purchase the property if an event of default occurs under the Lease Agreement. See Lease Agreement, Article 17, section 23.02. Lessor may require Lessee to purchase the property for other events, such as the taking of the property by a governmental authority or termination of the Lease Agreement. See Lease Agreement, sections 6.01, 23.02, Put Option Letter. Additionally, in the event that the property is damaged or destroyed, constituting Total Loss, Lessee is obligated to pay casualty insurance proceeds to Lessor in an amount equal to the Purchase Price of the Property. See Supplemental Agreement, section 3 (c).

Furthermore, Lessee is not a tenant of Lessor for the following reasons:

(1) As noted earlier, as rent, Lessee pays monies the sum of which is directly equal to the interest on the Loan rather than a sum that is representative of fair market rent.

(2) Any monies received by Lessee through a sublease of the property are assigned to Lessor and serve as additional security for the transaction. This requirement is delineated in section 13.03 of the Lease Agreement, which provides:

[Lessee] hereby assigns to [Lessor], and grants to [Lessor] a security interest in, all of its right, title and interest in each of the End User Leases and all rents and other amounts payable to the [Lessee] thereunder, as security for the obligations of the [Lessee] hereunder.

(3) Lessee has control over the granting of easements on the property. See Lease Agreement, section 13.01.

(4) Upon the expiration of the Lease Agreement, or any time before, Lessee shall have the option to purchase the property

from Lessor for an amount equal to the principal and interest owed on the loan. See Call Option Letter, Tax Matters Agreement, section 1 (a), Lease Agreement, section 23.01, Schedule 3.01, Rent.

(5) Furthermore, Lessee agrees to purchase the Property "as is" without warranty, express or implied, by or on behalf of Lessor. See Lease Agreement, section 23.03 (d).

(6) At the closing of such purchase, Lessor shall convey its title to the Property to Lessee and shall execute a bill of sale transferring to Lessee all property, including cash, owned, held or thereafter received by Lessor in connection with the Property, including any tax, insurance, or other reserves or escrows being held by Lessor in connection with the Property and any insurance or condemnation awards payable in relation to the Property. See Lease Agreement, section 23.03 (b).

(7) Typical obligations of ownership, risk, and maintenance belong to Lessee, rather than to Lessor. Section 7.01 (a) of the Lease Agreement places the obligation of ordinary maintenance on Lessee, and provides:

[Lessee] shall, at its sole cost and expense, take good care ... of the Property, and the alleyways, passageways, sidewalks, curbs and vaults adjoining the Property and keep the same ... in good order and condition, ... and make necessary nonstructural repairs thereto ... (hereinafter called "**Ordinary Maintenance**")....

Lessee also appears to be responsible for the payment of ad valorem taxes, insurance, and structural maintenance. Pursuant to our telephone conversations and the additional information submitted, you state that ultimately the economic responsibility for these items belongs to Lessee. You note that, for religious reasons, Lessee cannot be responsible for these items on the lease but that Lessee can and does assume responsibility for such items under the Supplemental Agreement. In such regard, it should be noted that the Preliminary Statement of the Supplemental Agreement originally places this economic burden on Lessor but goes on to provide that the parties have agreed that

Lessee will undertake responsibility for performance of these items. The following paragraphs of the Supplemental Agreement are pertinent to this issue:

Section 1 of the Supplemental Agreement provides:

Agreement. [Lessor] and [Lessee] hereby agree that [Lessee] shall undertake responsibility for the matters described in Sections 2, 3 and 4 below (the "**Obligations**"), and [Lessee] hereby agrees to perform the Obligations, all on the terms and conditions of this Supplemental Agreement.

Section 2 of the Supplemental Agreement provides:

Structural Maintenance. [Lessee] agrees that, during the Term, it shall at all times (i) determine whether any portion of the Property requires any Structural Maintenance and (ii) perform and provide all such Structural Maintenance. [Lessee] shall keep accurate, complete and current records of all Structural Maintenance performed or provided on the Property and shall provide copies thereof to [Lessor] promptly on demand.

Section 3 of the Supplemental Agreement provides:

Insurance and Restoration. (a) [Lessee] agrees that during the Term, it shall at all times obtain and maintain in effect fire and extended coverage property insurance (and such other insurance as Lessor may reasonably request) on an "all risk" replacement cost basis

(b) Upon the occurrence of damage or destruction to the Property not constituting a Total Loss, [Lessee] agrees to undertake such restoration and repair of the Property to its value ... immediately prior to such damage or destruction. [Lessee] shall arrange for insurance proceeds equal to the cost of such restoration and repair ("**Required Proceeds**") to be used for such restoration and repair. [Lessor] relinquishes any interest in any insurance proceeds other than the Required Proceeds....

(c) Upon the occurrence of a Total Loss, [Lessee] shall arrange for insurance proceeds equal to the aggregate Early Termination Price of the Property to be paid to [Lessor], and [Lessor] relinquishes any interest in any other insurance proceeds....

Section 4 of the Supplemental Agreement provides:

Property Taxes. [Lessor] hereby authorizes [Lessee] to prepare and file, on behalf of [Lessee], all property tax reports and filings required to be made in relation to the Property. [Lessor] further authorizes [Lessee] to pay and remit to the taxing authorities all property tax payments required to be made in relation to the Property.

The Supplemental Agreement continues to provide that Lessor agrees to pay Lessee the actual costs of performing the obligations specified in sections 2, 3, and 4 above and estimates this cost at XX, to be made on each rent payment date. See Supplemental Agreement, section 5 (b). However, Schedule 3.01, Rent, provides that Lessee will pay Lessor the amount of XX on each rent payment date for the estimated costs incurred by Lessor for the property taxes, property damage insurance and structural maintenance. See Schedule 3.01, Rent, section 1 (a), (b). You note the result is that payments made by Lessor to Lessee pursuant to section 5 of the Supplemental Agreement and payments for the same amount made by Lessee to Lessor pursuant to Schedule 3.01, Rent, result in a monetary payment netting zero; and Lessee is left with the responsibility for payment of the property taxes, insurance, and structural maintenance costs as indicated in sections 1, 2, 3, and 4 of the Supplemental Agreement. Thus, it would appear that Lessee is initially paying for these items itself as the items become due, and the subsequent exchange of XXX by the parties is merely to satisfy religious requirements, but does not alter the fact that Lessee is ultimately responsible for the payment of these items. Please be advised, if this is not the case, and the Lessor is in any way bearing the ultimate costs of these items, it is the Department's position that a Landlord-Tenant Relationship exists and the rental payments are subject to the sales tax imposed pursuant to section 212.031, F.S.

All risk of loss for the property belongs to Lessee. If, during the term of the Lease Agreement, the property is damaged or destroyed, constituting total loss (i.e., damage or destruction of more than two-thirds of the buildings), Lessee is obligated to pay casualty insurance proceeds to Lessor in an amount equal to the Purchase Price of the Property. See Supplemental Agreement, section 3 (c).

Lessee's payment obligations under the Lease Agreement are "absolute and unconditional." Section 3.02 (a) of the Lease Agreement provides:

...[T]his Agreement is a net lease, and [Lessee] acknowledges and agrees that [Lessee's] obligations hereunder, including without limitation its obligation to pay all Rent and all amounts payable hereunder, shall be absolute and unconditional under any and all circumstances and shall be paid without notice or demand, and without any abatement, reduction, diminution, setoff, defense, counterclaim or recoupment whatsoever, including without limitation... counterclaim or recoupment due or alleged to be due to, or by reason of, any past, present or future claims which [Lessee] may have against [Lessor]

Finally, for United States tax and accounting purposes, Lessor and Lessee agree that the subject transaction will be treated as a loan. Lessee will be treated as the owner of the Property. Lessee, Lessor, and each Investor will report the U.S. tax consequences of the transaction consistent with this agreed treatment. See Tax Matters Agreement, section 1.

DEPARTMENT'S POSITION

Documentary Stamp Tax:

The deed to New Corporation is not subject to documentary stamp tax under s. 201.02, F.S., because it is considered with the Lease Facility as a part of the financing arrangement. The deed from New Corporation back to First Corporation is not subject to documentary stamp tax under s. 201.02, F.S., because

it is the reconveyance of realty conveyed to secure a debt after payment of the debt.

The Lease Facility is subject to documentary stamp tax under s. 201.08, F.S., based on the Acquisition Cost defined in Schedule 1.01 (original remaining principal balance of the mortgage plus the additional amount advanced for improvements on the property). The Lease Facility represents a lien on real property as security for the debt. The Lease Facility does not represent an exempt renewal of the previous mortgage.

Intangible Tax:

The Lease Facility is subject to nonrecurring intangible tax under s. 199.133, F.S., because it is an obligation secured by a lien on real property.

Sales and Use Tax:

Based on the facts, law, and analysis as presented, a determination is made that the subject transaction is in the nature of a mortgage rather than a lease and, as such, payments made by Lessee, pursuant to the Lease Agreement, will not be subject to sales tax imposed pursuant to section 212.031, F.S. However, please be advised, as indicated earlier, if the Lessor rather than the Lessee is ultimately bearing any of the costs for maintenance, ad valorem taxes, and insurance, the rental payments are subject to the sales tax.

This response constitutes a Technical Assistance Advisement under s. 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 s. 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 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 s. 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 this letter.

Sincerely,

M.E. Clemens, C.P.A.
Senior Tax Specialist
Technical Assistance and Dispute Resolution
Office of General Counsel

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