

SUMMARY

QUESTIONS: (1) What portion, if any, of the rental payments from a lessee to a lessor is subject to Florida sales tax when the real property of the subject lease is a hotel complex? (2) What is the proper handling of Florida sales tax involving a prime lessee subletting commercial real property to third-party commercial operators within a hotel complex? (3) Is the granting of an easement for storm water drainage subject to Florida sales tax wherein the easement is not part of the real property subject to the lease in question?

ANSWERS - Based on Facts Below: (1) The leasing of the areas of the hotel complex, not exclusively used as dwelling units, are subject to Florida sales tax. (2) Because pyramiding of tax is prohibited under Florida law, care must be taken to ensure the proper handling of subleases in this context. Therefore, we refer the reader to the body of the TAA. (3) This easement was not subject to Florida sales tax because it was not part of the lease in question and no consideration was exchanged for its use.

Dec 08, 2003

Subject: Technical Assistance Advisement 03A-058

Lease and Sublease of Hotel Property and the Grant of
an Easement

Sales and Use Tax

Sections 212.031 and 213.22, F.S. ("Florida Statutes")

Rule 12A-1.070, F.A.C. ("Florida Administrative Code")

Dear :

This response is in reply to your letter dated October 23, 2003, requesting the Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to Section 213.22, F.S., and Chapter 12-11, F.A.C., regarding Florida sales tax treatment of a lease

and sublease of hotel property as well as the granting of an easement. An examination of your letter has established that you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for issuance of a TAA.

You provided the following documents:

A transmittal letter and a detailed request for a TAA (both dated October 23, 2003), the "Master Lease" at issue, a Power of Attorney, a "Statement of Deletions", and a bound compilation of the relevant authority you cite to support your positions.

ISSUES

1. What portion, if any, of the rental payments from a lessee to a lessor is subject to Florida sales tax when the real property of the subject lease is a hotel complex?
2. What is the proper handling of Florida sales tax involving a prime lessee subletting commercial real property to third-party commercial operators within a hotel complex?
3. Is the granting of an easement for storm water drainage subject to Florida sales tax wherein the easement is not part of the real property subject to the lease in question?

FACTS

Your letter of October 23, 2003, provides in part:

Our law firm represents... (the "Company")....

The Company owns certain real property in [County] (the "Property"). The Company intends to enter into a lease agreement (the "Lease") with... (the "Tenant") ... pursuant to which the Company will lease the Property to the Tenant for a term of 11 years....

The Company also owns certain real property that is contiguous to the Property, which real property comprises

an undevelopable wetland, conservation buffer and retention pond. None of this additional real property owned by the Company will be leased by the Tenant. However, pursuant to the Lease, the Company will grant the Tenant an easement to dispose of storm water runoff from the Property into the retention pond owned by the Company.

* * *

During our telephone conversation of November 6, 2003, you clarified that the easement in question is not part of the Lease but is incorporated into the Lease by reference. (The easement is addressed in "Exhibit A" of the Lease.) The easement is within a parcel of property that is specifically excluded from the leased property. You provided that it was the intent of the parties to grant an easement for purposes of permitting storm water to flow from the leased property into the wet land area adjacent to the leased property and that no consideration was exchanged for the granting of this easement; nor is any exchange of consideration contemplated under the Lease.

Your letter continues, providing in part:

* * *

Upon commencement of the term of the Lease, the Property will consist of [a hotel complex]. Throughout the term of the Lease, the Tenant will operate the Property as a hotel facility and, in connection therewith, will provide guest accommodations, together with related amenities, e.g., pool and pool deck areas, fitness room, restaurants and shops, and parking spaces.

Immediately after the commencement of the lease term, the Company will begin conversion of the Property... and in connection with such conversion, will begin construction of a new lobby building and modification of certain of the existing hotel buildings (collectively, the "Conversion").... The Conversion is expected to be completed on or about the first anniversary of the commencement of the Lease.

Throughout the term of the lease, the specific areas

comprised by the Property will be dividable into the following three categories: (1) those areas used for the benefit and enjoyment of the hotel's guests, as to which the guests will have an exclusive or non-exclusive license or right to use...; (2) those areas used by the Tenant for its operation of the hotel business, which are not open to access by hotel guests...; and (3) those areas that will be subleased by the Tenant to third parties....

Upon commencement of the term of the Lease, the Property will include a total square footage of 1,203,362, which total square footage will comprise the aforementioned three categories of the Property and the following square footage areas:

Table 1: Pre-Conversion Areas Used Exclusively by Tenant for Its Own Purposes

<u>Area</u>	<u>Square Footage</u>
Pervious Area Used for Construction	11,500
Parking Spaces in Excess of Rooms	3,800
Service Building A (Round House)	10,000
Service Building B (Engineering/Laundry)	2,500
Storage Space	3,328
2 - Cabanas (Pool Bars)	800
Mechanical Building	2,100
Restaurant	2,840
Dining Area	2,009
Bar	448
General Store	803
Food Court	495
Buffet Area	352
Reservations, Accounting, Executive, Sales and Front Offices	3,756
Kitchen Area and Offices	<u>3,135</u>
Total Area Used Exclusively by Tenant	47,866

Table 2: Pre-Conversion Areas Used by Guests

<u>Area</u>	<u>Square Footage</u>
Pervious Areas - Gardens, Landscaped Areas	294,889
Total Roadways and Parking Spaces Not in	275,341
Excess of Rooms	
...Guest Rooms	410,456
Pool and Pool Deck Areas	17,197
(no fee imposed)	
Service Cores - Elevators	22,680
Fitness Room (no fee imposed)	1,067
Sidewalks	120,904
Front Desk, Lobby, Game Room, Gift Shop,	<u>11,799</u>
Guest Services	
Total Area Used by Guests	1,154,333

**Table 3: Pre-Conversion Areas Subleased by
Tenant to Third-Parties**

<u>Area</u>	<u>Square Footage</u>
Shared Revenue Games	207
Timeshare Area	105
Photography Area	60
Kid's Spa	152
Gift Shop	495
ATM Machine	12
Movie Bar	32
Business Center	<u>100</u>
Total Area Subleased to Third Parties	1,163

Upon completion of the Conversion, the Property will include a total square footage of 1,220,762, which total square footage will comprise the aforementioned three categories of the Property and the following square footage areas:

**Table 4: Post-Conversion Areas Used Exclusively by
Tenant for Its Own Purposes**

<u>Area</u>	<u>Square Footage</u>
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Parking Spaces in Excess of Rooms	3,800
Service Building A (Round House)	10,000
Service Building B (Engineering/Laundry)	2,500
Storage Space	3,328
2 - Cabanas (Pool Bars)	800
Mechanical Building	2,100
Restaurant	2,085
Dining Area	3,500
Bar	448
General Store	803
Food Court	860
Buffet Area	890
Banquet Rooms	3,623
(fees will be imposed for use)	
Showroom Backstage Area	312
Commons Building - Kitchen Area; Reservations, Accounting, Executive, Sales, Front and Kitchen Offices	12,355
Lobby Building - Non Guest Area	<u>8,562</u>
Total Area Used Exclusively by Tenant	55,966

Table 5: Post-Conversion Areas Used by Guests

<u>Area</u>	<u>Square Footage</u>
Pervious Areas - Gardens, Landscaped Areas	295,341
Total Roadways and Parking Spaces	275,341
Not In Excess of Rooms	
...Guest Rooms	410,456
Pool and Pool Deck Areas	17,197
(no fee imposed)	
Service Cores - Elevators	22,680
Fitness Room (no fee imposed)	1,067
Sidewalks	120,904
Front Desk, Lobby, Game Room, Guest Services	12,042
Banquet Room Lobby	800
Showroom	3,076
Rotunda	1,725
Lobby Building - Vestibule and Lobby	<u>2,486</u>

Total Area Used by Guests 1,163,115

**Table 6: Post-Conversion Areas Subleased by
Tenant to Third-Parties**

<u>Area</u>	<u>Square Footage</u>
Shared Revenue Games	414
Timeshare Area	105
Photography Area	150
Kid's Spa	285
Gift Shop	455
ATM Machine	12
Business Center	<u>260</u>
Total Area Subleased to Third Parties	1,681

* * *

THE TAXPAYER'S POSITION

As to Issue #1, your letter provides in part:

* * *

Application of Sales Tax to Rental Payments Attributable to Areas Not Subleased

... it is the Company's position that, prior to the completion of the Conversion, only the areas listed in Table 1 (i.e., 47,866 sq. ft.), and, upon completion of the Conversion, only the areas listed in Table 4 (i.e., 55,966 sq. ft) are included in the numerator for purposes of determining the percentages of the total rental payments made by the Tenant to the Company pursuant to the Lease that are subject to sales tax pursuant to Section 212.031, Florida Statutes. The denominator consists of the total square footage of the Property subject to the lease (including the areas that the Tenant will Sublease), or 1,203,362 square feet before the Conversion, and 1,220,762 square feet upon completion of the Conversion. [A pre-conversion percentage of 3.978%, and a post-conversion

percentage of 4.585% were arrived at]

* * *

As to Issue #2, your letter provides in part:

Application of Rental Payments Attributable to Subleased Areas

* * *

In accordance with Rule 12A-1.070, Fl. Admin. Code, it is the Company's position that, prior to the completion of the Conversion, the Tenant may take a credit against the sales tax applicable to the rental payments it receives for the subleased areas equal to the sales tax applicable to .10% [calculated on the total square footage subleased by Tenant divided by the total square footage subject to the Lease] of the total rent paid by the Tenant to the Company pursuant to the Lease.

* * *

In accordance with Rule 12A-1.070, Fl. Admin. Code, it is the Company's position that, upon completion of the Conversion, the Tenant may take a credit against the sales tax applicable to the rental payments it receives for subleased areas equal to the sales tax applicable to 0.14% [calculated on the total square footage subleased by Tenant divided by the total square footage subject to the Lease] of the total rent paid by the Tenant to the Company pursuant to the Lease.

* * *

As to Issue #3, your letter provides in part:

* * *

Exemption of Easements

It is the Company's position that, based on [two TAA's], no sales tax is due in connection with the grant of the easement by the Company to the Tenant pursuant to the Lease.

* * *

APPLICABLE STATUTES AND RULES

Section 212.031, F.S., provides in part:

(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:

* * *

2. Used exclusively as dwelling units.

* * *

(b) When 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., subparagraph (a)2., subparagraph (a)3., or subparagraph (a)5., 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....

(c) 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 by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges....

* * *

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

(b) It is the further intent of this Legislature that only one tax be collected on the rental or license fee payable for the occupancy or use of any such property, that the tax

so collected shall not be pyramided by a progression of transactions, and that the amount of the tax due the state shall not be decreased by any such progression of transactions.

* * *

Section 213.22(1), F.S., provides in part:

... Technical assistance advisements shall have no precedential value except to the taxpayer who requests the advisement and then only for the specific transaction addressed in the technical assistance advisement, unless specifically stated otherwise in the advisement....

Rule 12A-1.070, F.A.C., provides in part:

(1)(a) Every person who rents or leases any real property or who grants a license to use, occupy, or enter upon any real property is exercising a taxable privilege unless such real property is:

* * *

2. Used exclusively as dwelling units.

* * *

(5) Only one tax on the rental or license fee payable from the occupancy or use of any real property from which the rental or license fee is subject to taxation under s. 212.031, F.S., shall be collected, and the tax shall not be pyramided by a progression of transactions; however, the amount of tax due the State of Florida shall not be decreased by any such progression of transactions.

* * *

(8) When a tenant (lessee) or other person occupying, using, or entitled to use any real property (licensee) sublets or assigns some portion of the leased or licensed property, he may take credit on a pro rata basis for the tax that he paid to his landlord or other such person on the space that he subleases or assigns. Proration shall be computed on square footage or some other basis acceptable to the Executive Director or the Executive Director's designee in the responsible program. For example, Tenant leases 200 square feet of floor space for \$400 and pays

Landlord \$24 rental tax. Tenant subleases 100 square feet, or one half, of the space to Subtenant for \$300 and collects \$18 tax which he remits to the State, less a credit of \$12 for tax that he paid to his landlord on the space that he subleased to Subtenant. (One half of \$400 is \$200 and 6 percent of this amount is \$12.)

* * *

RESPONSE

Because you have relied on previously issued TAA's in your request, we note that TAA's are of no precedential value pursuant to Section 213.22(1), F.S. In addition, this response is based on the representations made as to the "areas" and the square footages provided.

Issue #1, calculating that portion of a hotel complex lease subject to Florida sales tax

The Lessee will owe Florida sales tax in the amount that results when the rate of 6 percent is multiplied by the fraction of the total lease payment, which fraction is computed as follows: The numerator is the square footage of the land and improvements used by the Lessee in the operation of the business, such as the office area and all spaces, which either are used exclusively by the Lessee, or which do not constitute guest rooms or common areas principally provided to guests. The numerator should also include square footage for which a guest is charged a separate fee to use (e.g., steam room, tennis courts, etc.). See Rule 12A-1.061(3)(b)2., F.A.C. The denominator is the total square footage of the entire area subject to the Lease, including the land and the improvements thereon.

The computation provided in your letter appears to follow the above calculation correctly.

The only "area" which we make note of is: "service cores - elevators." It is our understanding that the term "service core" might encompass a wide-range of "areas" such as elevators, elevator-shafts, lobbies, staircases, mechanical and electrical risers, etc. Care should be taken to insure that the

appropriate distinctions are made for purposes of characterizing these "areas" (i.e., those areas where guests have access versus those areas where guests would not be given access).

Issue #2, calculating the proper handling of Florida sales tax on sublet real property

It is the prime tenant's responsibility to pay tax to the prime landlord on all non-exempt portions of the property being leased ("exempt" portions being those areas used by guests for no additional fee). The prime tenant may take a credit on the tax it collects from sub-lessees. Rule 12A-1.070(8), F.A.C., provides that when the prime tenant sublets or assigns some portion of the leased property, the prime tenant may take credit on a pro rata basis for the tax that he may have paid to his landlord.

A possible method for applying a "credit" under Rule 12A-1.070(8), F.A.C., would first center on the fraction discussed above. The numerator would include that square footage that is made available for subletting to third-parties as that space is not considered "dwelling space." Florida sales tax would be collected by the prime tenant on the subleasing of the spaces. A credit would then be available to the prime tenant on the Florida sales tax it collects from its sub-lessees on a pro-rated basis for the tax paid on the prime lease.

Issue #3, the taxability of the Easement

The issue presented is whether the granting of an easement, not a part of the lease before us, is subject to Florida sales tax under Section 212.031, F.S. In Florida, 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. See Section 212.031(1)(a), F.S. An easement is distinguishable from a license to use real property in that:

... an easement implies an interest in land, which ordinarily is created by a grant and is often permanent, since it runs with the land. Conversely, a license does not imply an interest in the land, but is simply a personal,

unassignable, and ordinarily revocable privilege or permit to do something on the land of another.... 20 Fla Jur 2d Easements and Licenses in Real Property s. 3.

Black's Law Dictionary defines "easement" by saying:

A right of use over the property of another. Traditionally the permitted kinds of uses were limited, the most important being rights of way and rights concerning flowing waters.... Black's Law Dictionary 457 (5th ed. 1979).

Under the facts presented here, it is unnecessary to explore the legal distinctions between easements and licenses to use real property any further, as the easement granted here is not part of the real property under the Lease. "Exhibit A" of the Lease specifically excludes certain lands (namely the wet lands, conservation buffer area and retention pond). The easement is within "Parcel 2" of these excluded pieces of property. The easement is not subject to Florida tax because it is not part of the property being leased under the Lease and no consideration is being exchanged for its use.

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 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 the date of this letter.

Sincerely,

Eric R. Peate

Senior Attorney

Technical Assistance and Dispute Resolution

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