

## SUMMARY

**QUESTION:** Whether the lease of or license to use real property, owned by a city in fee simple, for the purpose of providing a beach concession that rents tangible personal property, is subject to sales tax pursuant to Section 212.031, F.S.

**ANSWER - Based on Facts Below:** Yes. The Agreement between the City and the Concessionaire is a taxable license to use real property. As defined in Section 212.02(2), (10), and (12), F.S., the City is a person engaged in the business of granting a license for the use of real property. Specifically, the City and the Concessionaire voluntarily entered into the Agreement via a formal proposal process for the license of the real property, which the City owned in fee simple. There was no city ordinance or other municipal mandate requiring the Agreement or the license fees. Thus, like Dade County in IPC Sports, Inc. v. Department of Revenue, 829 So.2d 330 (Fla. 3rd DCA 2002) and unlike Volusia County in Lloyd Enterprises, Inc. v. Department of Revenue, 651 So.2d 735 (Fla. 5th DCA 1995), the City can legally enter into leases or licenses for the use of real property it owns for the purpose of providing a beach concession of tangible personal property.

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Feb 03, 2004

Subject: Technical Assistance Advisement 04A-008  
Lease or License for the Use of Real Property  
Sales and Use Tax  
Section 212.031, Florida Statutes (F.S.)  
Rule 12A-1.070, Florida Administrative Code (F.A.C.)  
XXX

Dear :

This is in response to your letter dated December 15, 2003,

requesting a written technical assistance advisement regarding the taxability of payments made to the Taxpayer by its beach equipment rental concessionaire.

### **FACTS**

Your letter provided the following facts:

\* \* \*

On August 8, 2000, the [Taxpayer] issued a Request for Proposals for Beach Equipment Rental Concession (the "RFP"). On September 8, 200[1], [First Concessionaire] submitted a proposal in response to the RFP (the "Proposal"). On January 4, 2001, the [Taxpayer] and [First Concessionaire] entered into an agreement pursuant to which [First Concessionaire] was to operate a beach equipment rental concession [on the beach]. The RFP and the Proposal are attached as an exhibit to the Agreement. A copy of the Agreement, with the RFP and Proposal attached, is enclosed. The second "WHEREAS" paragraph of the Agreement provides for a term of one year, with two potential renewals of one year each, and the last "WHEREAS" paragraph of the Agreement provides for 12 equal installments of \$2,650, plus applicable sales tax.(FN 1)

The land on which Concessionaire operates is specifically described on Page 1 of the RFP. The [Taxpayer] has fee simple title to this land. The [Taxpayer] grants other licenses of real property to other persons or entities.

On December 21, 2001, the Agreement was assigned to [another beach equipment rental company] ("Concessionaire").... Concessionaire contends that its payments are not subject to sales tax. A copy of the Renewal and Assignment of Agreement is enclosed.

\* \* \*

### **TAXPAYER POSITION**

Your letter provides your position as follows:

\* \* \*

Lloyd Enterprises, Inc. v. Department of Revenue, 651 So.2d 735 (Fla. 5th DCA 1995) is a case involving similar, but distinguishable facts that held the fees paid by a beach concessionaire were not taxable. In Lloyd, Volusia County received a concession fee from Lloyd Enterprises, Inc. and other concessionaires. The court held that such payments were not subject to sales tax, based on the findings that (i) the County's "business" was to regulate the use of the beach under the Unified Beach Code and (ii) the contracts between the concessionaires and the County were more in the nature of acknowledgements of the County's regulation than voluntary contracts.

In our situation, there is no code that in any way affects the beach equipment rental concession. In other words, the concession is not a function of the [Taxpayer's] regulatory authority over the beach. The relationship between the [Taxpayer] and the Concessionaire was established solely as a result of the RFP process and is embodied solely in the concession agreement

In IPC Sports, Inc. v. Department of Revenue, 829 So.2d 330 (Fla. 3d DCA 2002), IPC and Miami-Dade County entered into an agreement for IPC to conduct a professional tennis tournament during a two-week period each year on property owned by the County. IPC paid a license fee to the county for the right to conduct the tennis tournament. There was no County ordinance that required a tennis tournament to be held on the County-owned property.

The IPC court, in a decision primarily quoting a decision of an administrative hearing officer upon which the Department of Revenue based its final order, determined that the agreement between IPC and Miami-Dade County did not involve the police or regulatory power of the County at all and was a voluntary agreement not required by law. Similarly, the agreement between Concessionaire and the [Taxpayer] does not involve the police or regulatory power of the [Taxpayer] and is a voluntary agreement not required

by law. Lastly, the Court noted that Miami-Dade County had fee simple title to the land that was subject to its agreement with IPC, while in Lloyd, Volusia County did not have any ownership interest in the property on which the concessionaires operated. As stated previously, the [Taxpayer] owns the property on which Concessionaire operates

IPC also discussed the "engages in the business of" language of Section 212.031(1)(a), Florida Statutes. First it cited Regal Kitchens, Inc. v. Department of Revenue, 641 So.2d 158 (Fla. 1st DCA 1994) for the principle that said language can refer to even a single transaction. Later in the opinion, IPC states that the agreement between IPC and the County "is not an isolated event, since the County also grants other licenses or leases of real property to others...." While it is curious that the opinion first says that one transaction can constitute a business and later mentions that the IPC license was not the only one granted by the County, the fact that the [Taxpayer] grants multiple licenses appears to make this a non-issue.

Although Lloyd held that certain concession payments were not taxable, its facts are distinguishable from the facts of IPC and from the current facts regarding Concessionaire and the [Taxpayer.] Therefore, Concessionaire's payments to the [Taxpayer] appear to be taxable.(FN 2)

### **APPLICABLE STATUTES AND RULES**

Section 212.02, F.S., provides in pertinent part:

The following terms and phrases when used in this chapter have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

\* \* \*

(2) "Business" means any activity engaged in by any person, or caused to be engaged in by him or her, with the object of private or public gain, benefit, or advantage, either direct or indirect. Except for the sales of any aircraft, boat, mobile home, or motor vehicle, the term "business"

shall not be construed in this chapter to include occasional or isolated sales or transactions involving tangible personal property or services by a person who does not hold himself or herself out as engaged in business, but includes other charges for the sale or rental of tangible personal property, sales of services taxable under this chapter, sales of or charges of admission, communication services, all rentals and leases of living quarters, other than low-rent housing operated under chapter 421, sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, and all rentals of or licenses in real property, other than low-rent housing operated under chapter 421, all leases or rentals of or licenses in parking lots or garages for motor vehicles, docking or storage spaces for boats in boat docks or marinas as defined in this chapter and made subject to a tax imposed by this chapter

\* \* \*

(10) "Lease," "let," or "rental" means leasing or renting of living quarters or sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps and real property, the same being defined as follows:

\* \* \*

(i) "License," as used in this chapter with reference to the use of real property, means the granting of a privilege to use or occupy a building or a parcel of real property for any purpose.

\* \* \*

(12) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit and also includes any political subdivision, municipality, state agency, bureau, or department and includes the plural as well as the singular number....

Section 212.031, F.S., provides in pertinent 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....

## **RESPONSE**

Section 212.031(1)(a), F.S. states 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 real property..." unless such property is specifically within an exemption. Section 212.02(12), F.S., defines "person" to include political subdivisions and municipalities. Section 212.02(2), F.S., defines "business" as "any activity engaged in by any person, or caused to be engaged in by him or her, with the object of private or public gain, benefit, or advantage, whether direct or indirect...." Therefore, a municipality, as a person, may engage in the business of licensing any property it owns, which is a taxable privilege.

As stated in your letter, there are two relevant cases. In Lloyd Enterprises, Inc. v. Department of Revenue, 651 So.2d 735 (Fla. 5th DCA 1995), the Fifth District Court of Appeal found that a "license agreement" for conducting business on New Smyrna Beach between Volusia County and a Concessionaire was not taxable. The Lloyd Court specifically held that Volusia County did not enter into the business of renting, leasing, or licensing real property because Volusia was acting in accordance with an ordinance regulating the County's duties in maintaining the beach and the County was merely the public trustee of the beach, which was owned by the State of Florida.

Based on these two key facts, the holding in Lloyd was distinguished by the Third District Court of Appeal in IPC Sports, Inc. v. Department of Revenue, 829 So.2d 330 (Fla. 3rd DCA 2002). First, Dade County and IPC had voluntarily entered into a license agreement allowing IPC for the exclusive use of the property, whereas the Lloyd "license agreement" was mandated by a county ordinance. Second, Dade County owned the subject real property in fee simple. Thus, the IPC Court held Dade County was engaging in the business of granting a license to use real property to IPC and tax was due pursuant to Section 212.031(1)(a), F.S.

Applying these holdings to the facts of your letter, the Agreement between the Taxpayer and the Concessionaire is a taxable license to use real property. Pursuant to Section 212.031, F.S., the Taxpayer is a person engaged in the business of granting a license for the use of real property.

Specifically, the Taxpayer and the Concessionaire voluntarily entered into the Agreement via a formal proposal process for the license of the real property. There was no city ordinance or other municipal mandate requiring the Agreement. Furthermore, the Taxpayer, like Dade County in IPC and unlike Volusia County in Lloyd, owns the subject real property in fee simple and can legally enter into leases or licenses as the owner thereof.

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,

Sebrina L. Wiggins  
Attorney

Technical Assistance and Dispute Resolution

(850) 488-6386

Ctrl# 58038

Enclosure

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FOOTNOTE 1. On Page 8 of the Proposal, the amount proposed is \$2,500. While not significant to the issues raised in this letter, the correct amount as negotiated by the parties subsequent to submittal of the Proposal but prior to execution of the agreement is \$2.650, plus applicable sales tax.

FOOTNOTE 2. Concessionaire is responsible for any tax that is due on payments made by Concessionaire to the (Taxpayer). As a result, the (Taxpayer) is urging no particular determination with regard to the taxability of such payments. The (Taxpayer's) primary purpose in sending this request is to resolve this issue.