

Status: Law amended see Ch. 90-132, L.O.F., effective 7/1/90
and Rule 12B-4.013(27), F.A.C. effective 2/13/91
(amended existing rule)

Nov 28, 1984

Re: Technical Assistance Advisement #84(B)4-008

Assignment of lease subject to mortgage

Dear

This is in response to your request for a Technical Assistance Advisement as to the applicability of the Florida documentary stamp tax and surtax to the following transaction:

"I. BACKGROUND INFORMATION

"Seller, a XXX limited partnership, (i) is the owner of certain buildings and other improvements known as the XXX (the 'Improvements'), (ii) is the lessee under a ground lease (the 'Ground Lease') of certain land, including the land underlying the Improvements (the 'Land') and (iii) is the maker of each of three promissory notes secured by three separate mortgages, all of which are currently held by XXX. The subject property (the 'Project') is a major shopping center, luxury hotel and parking facility located in XXX Florida. It consists of an enclosed shopping mall (308,000 sq. ft.), a store leased to XXX, leasable office space, a parking garage (2,700 car capacity) and a luxury class high-rise hotel. The Project is being operated in conjunction with certain adjacent premises owned and operated by XXX pursuant to a reciprocal easement agreement. The entire Project is managed under contract (the 'Property Management Agreement') by a management company, XXX, which is the parent of Seller's corporate general partner, XXX. The hotel is managed under subcontract (the 'Hotel Management Agreement') between XXX and XXX.

"1. The Land was originally owned in fee simple by Seller.

On XXX, Seller conveyed the Land to XXX. Pursuant to the sale-leaseback agreement, XXX then leased the Land back to Seller under the Ground Lease. Subsequently, Seller and XXX mortgaged their respective interests (i.e. XXX fee interest in the Land and its interest as Lessor under the Ground Lease and Seller's leasehold estate under the Ground Lease) to XXX under the mortgages described in the text. Subsequently, XXX in fact acquired all of XXX fee interest in the Land and XXX interest as Lessor under the Ground Lease.

"XXX a XXX corporation authorized to transact business in the State of Florida, (i) is the lessor under the Ground Lease, (ii) is the fee owner of the Land, and (iii) is the mortgagee under each of three separate mortgages which are secured by a lien on the Improvements, the Ground Lease and the fee interest in the Land 1/. The first mortgage (the 'First Mortgage') dated XXX secures a promissory note in the original principal amount of XXX which was executed in favor of XXX of XXX but was subsequently assigned to XXX. The First Mortgage, having a principal balance outstanding of XXX at the time of assignment, was modified by a Modification of Mortgage among XXX and Seller dated as of XX. The Modification of Mortgage reflected and secured a future advance of XXX made thereunder and evidenced by a promissory note given by Seller to XXX in the amount of XXX. Also as of XXX, the promissory note in the original principal amount of XXX was restated to form a restated promissory note in the principal amount of XXX.

"The second mortgage (the 'Second Mortgage'), also dated XXX, secures a promissory note in the original principal amount of XXX which was executed in favor of XXX but was subsequently assigned to XXX. The third mortgage (the 'Third Mortgage'), dated as of XXX, secures a promissory note in the original principal amount of XXX executed in favor of XXX. The First, Second and Third Mortgages are collectively referred to herein as the 'Mortgages'. Each of the Mortgages secures a nonrecourse obligation. To date, the aggregate principal balance under the Mortgages is approximately XXX. This principal balance includes an advance by XXX in the approximate amount of XXX for payment of 1983 real estate taxes, which advance is not evidenced

by a promissory note or any other additional instrument executed by the Seller.

"II. SUBJECT TRANSACTION

"Seller is presently in default under the Mortgages and the Ground Lease held by XXX. In a transaction somewhat similar to a deed in lieu of foreclosure, intends, XXX intends, pursuant to a purchase and sale agreement (the 'Purchase Contract') to purchase, subject to the Mortgages, all of Seller's interests in the Project and, in consideration thereof, to pay to Seller XXX in cash and to assume certain of Seller's outstanding liabilities. XXX will not, however, assume any of Seller's liability under the Mortgages.

"In particular, Seller shall sell, assign and convey to XXX all of the following:

"(a) Seller's interest in the Improvements;
"(b) Seller's interest as lessee under the Ground Lease;
"(c) Seller's interest under the Property Management Agreement and the Hotel Management Agreement; and
"(d) Any and all other rights and interests of Seller in or to the Project, including, but not limited to, personally, leases, contracts, licenses, permits, plans, trade marks, etc.

XXX consideration to Seller shall include all of the following:

"(a) Cash sum of XXX
"(b) Assumption of outstanding liabilities of Seller in connection with the Project. Equitable will not assume the liabilities of Seller under the Mortgages, but will instead take all of Seller's interests in the Project subject to the Mortgages.
"(c) A covenant not to sue Seller for any liability arising under the Mortgages or the Ground Lease."

Chapter 83-220, Laws of Florida, imposes a discretionary surtax not to exceed \$.45 per each \$100 or fraction thereof based on the consideration paid or to be paid on all transfers

of real property, except a single family residence, in the same manner as Chapter 201, F.S. Florida Resolution XXX, imposed the surtax at the XX rate.

Further, Rule 12B-4.13(27), F.A.C., provides:

"(27) Assignment of Lease or other Conveyance of Leasehold Interest in Realty: All assignments of leases or other conveyances of leasehold interests in real property for a present consideration are taxable under Section 201.02, Florida Statutes, based upon the total consideration, which includes any mortgage assumed by the assignee. However, any mortgage which is not assumed, does not constitute taxable consideration even though paid by the assignee.

(Attorney General Opinion 074-350, November 13, 1974, 1974 Annual Report of Attorney General, Page 578); Department of Revenue v. Dix, 362 So.2d 420 (1st DCA Fl. 1978), Cert. Den. April 11, 1979."

In addition, the case of Department of Revenue v. Bichimer, 390 So.2d 822, stated that where the lease requires that upon termination of the lease the buildings are to revert to the lessor, the buildings are not deemed to be owned by the lessee or transferred by the lessee pursuant to an assignment of the lease.

Since XXX is taking Seller's interest subject to the mortgage and the mortgage encumbers a leasehold interest and the fee interest, with the fee already held by XXX the amount of the mortgages will not be taxable consideration for the transfer for either the documentary stamp tax or the XX surtax. The is also not taxable consideration. However, the XXX cash consideration will be taxable at the XX rate for documentary stamp tax and the XX rate for the surtax, making a total tax due of XXX.

As to the documentary stamp tax required under s. 201.08, F.S., the tax will not be required as there is no new written obligation executed to pay money.

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 and your request are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of s. 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the department before disclosure. In an effort to protect confidential information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or this response.

Sincerely,

James E. Silvey
Technical Assistant

JES/ll