

Oct 12, 1993

RE: TAA 93A-069

Sales and Use Tax on Real Property Lease Between Related
Entities: Payment to Mortgagee

Section 212.031, F.S.

Rule 12A-1.070, F.A.C.

XXX (Hereinafter referred to as "Lessor")

XXX (Hereinafter referred to as "Lessee")

Dear :

Your letter of June 30, 1993, requested a Technical Assistance Advisement, concerning the above referenced matter. This response constitutes a Technical Assistance Advisement under Chapter 12-11, Florida Administrative Code, and is issued to you under the authority of s. 213.22, Florida Statutes.

DISCUSSION OF FACTS

The following significant facts are recounted from your letter:

"[Lessors] are the owners of certain real property consisting of land and building located in XXX. [Lessor] leases this real property to [Lessee], a family operated corporation in which [Lessors] owns eighty percent (80%) of its stock. The remaining twenty percent (20%) is owned by [Lessor's] two children. [Lessor] and the two children are officers of [Lessee] and operate [Lessee] on a day-to-day basis.

"[Lessor] acquired the subject real property in January, 1990 and entered into a lease agreement dated January 31, 1990 with [Lessee] for an initial term of two years. Recently, a second one year extension to the original lease documented was executed effective through February 28, 1994.

"On February 1, 1993, the initial three year promissory note between only [Lessor] and the mortgagee matured and a new three year note was executed. To provide additional security and comfort to the lender, [Lessee] was added as an additional primary obligor to this instrument. It is contemplated, however, that [Lessee] will make payment(s) to the mortgagee directly for principal and/or interest under such promissory note in which [Lessee] is a primary obligor. When such payment(s) are made, there will be no reduction or offset of rent due [Lessor] under the aforementioned lease agreement. Therefore, the monthly rent due [Lessor] through February, 1994 will be paid in accordance with the terms of the renewal and extension agreement and any payment to mortgagee by [Lessee] will be due to [Lessee's] obligation created by the promissory note in which it is a primary obligor."

Your letter includes copies of the aforementioned lease agreement, renewal and extension agreement, and two promissory notes. It is noted that both the lease agreement and the renewal and extension agreement contain provisions for the payment of applicable sales tax.

REQUESTED ADVISEMENT

You request advisement on the following issue:

"[W]hether any payment by [Lessee] directly to the mortgagee under the promissory note dated February 1, 1993 for principal and/or interest without any reduction or offset of rent due [Lessor] would be deemed to be rent subject to the state's sales tax rather than repayment of debt under said note."

RELEVANT AUTHORITY

The ensuing passages quoted from the Florida Statutes and the Florida Administrative Code are pertinent to your request for advice:

Section 212.08(13), F.S.,

"No transactions shall be exempt from the tax imposed by this chapter except those expressly exempted herein...."

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

"(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....

"(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.

"(d) When the rental or license fee 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 6 percent of the value of the property, goods, wares, merchandise, services, or other thing of value. (Emphasis Supplied)

Rule 12A-1.070(4), F.A.C., describes the imposition of sales tax on all considerations due and payable by the tenant in exchange for the right to use or occupy the demised real property:

"(b) The tax shall be paid at the rate of... 6 percent... on all considerations due and payable by the tenant or other person actually occupying, using, or entitled to use any real property to his landlord or other person for the privilege of use, occupancy, or the right to use or occupy any real property for any purpose...."

DISCUSSION/RESPONSE

By operation of the above cited statute and administrative rule, the sales tax is levied on all considerations due and payable by the tenant for the privilege to occupy or use real property. It is immaterial whether such consideration is paid directly to the lessor/owner of such real property or to his designee. Further, such consideration may be paid by way of

property or other thing of value.

In such circumstances as those related in your request where both lessor/owner and tenant/lessee are liable on the mortgage secured by the real property, while the liabilities of both may be reduced, the lessor/owner enjoys the additional benefit of having its equity in the property increased. It is the Department's position that this reduction of the lessor/owner's liability on the promissory note and increase in equity on the property is the payment of an "other thing of value" under the express provisions of section 212.031(1)(d), F.S., and is thereby fully subject to tax under that statute. Further, there is no statutory provision to exempt or except from tax such considerations between related entities.

This position is supported by the court's decision in the case of Seaboard Coast Line Railroad Company v. Rueben O'D. Askew, Case No. 72-15 (2d Cir., 1972). The Court made the following observation:

"A lease of real property vests in the lessee the right to use, occupy and enjoy the leased premises subject, of course, to the terms of the lease. The consideration paid by the tenant for the privilege conferred by the lease is 'rent.' Rent may be payable in cash, or in some commodity, or by rendering specified services. Rent may be payable directly to the lessor or to some other person either specified in the lease or directed by the lessor...."

The Court went on to observe that Section 212.031, F.S., imposes a tax upon "... 'the total rent charged' for the renting, leasing or letting of real estate" and further observed that the language in this section "... clearly indicated a legislative intent to tax the full benefits flowing to the landlord for the use of leased premises."

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,

Delores Overcash
Technical Assistant

DO/
Ctrl #9679