Jan 31, 1996

Re: Technical Assistance Advisement 96(A)-009
Discretionary Sales Surtax - Term Lease Master Agreement and Term Lease Supplement
Petitioner: XXXX (herein the "Taxpayer or Lessor")
FEI: XXXX
s. 212.054, F.S.
Rule 12A-15.004, F.A.C.

Dear :

This response is in reply to your June 7, 1995, petition for the Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to s. 213.22, F.S., and Rule 12-11, F.A.C. Your petition regards the referenced matter and Taxpayer. The Department has carefully examined your petition and finds it to meet the criteria set forth in Chapter 12-11, F.A.C., requisite to issuance of a TAA. Therefore, the Department is hereby issuing the requested TAA.

DISCUSSION OF FACTS

Your petition and supporting documents impart the following significant information regarding the issues under advisement herein:

> We respectfully request a Technical Assistance Advisement addressing the application of discretionary (local option) sales tax for periods after 12/31/93 on transactions described below, involving the lease of tangible personal property by various Florida entities, from a lessor. The lessor is [Taxpayer] who is located at.... The transaction involves a lease for computer equipment under a term lease master agreement ("master agreement") and term lease supplements ("supplements") between [Taxpayer] as the lessor, and a Florida entity as the lessee.

[Taxpayer], the lessor, is the taxpayer at issue. Taxpayer is not currently under audit by the Florida Department of Revenue. As the surtax is the liability of [Taxpayer] rather than its lessee's, we do not deem it relevant to this request for technical advice to survey our Florida lessee[s] to determine if they are currently under audit by the Florida Department of Revenue.

Facts:

The lessee is located in a Florida county which imposes a discretionary sales surtax. [Taxpayer], the lessor, is an out-of-state leasing company registered as a dealer in Florida. The lessor and lessee agreed to a master agreement for the lease of computer equipment. The master agreement sets forth the terms and conditions by which the hardware equipment is leased to the lessees. An itemization of the leased computer equipment is separately listed on schedules, `supplements', attached to the master agreement. The supplements, which are created when the lease agreement is initially established between the parties and/or when the equipment is upgraded, added to and/or replaced, incorporate the terms and conditions of the master agreement.

Of the various terms and conditions addressed in the master agreements, the more significant provisions, are summarized below:

1) Agreement Term - The Agreement is effective when signed by both parties and may be terminated by either party upon one month's written notice. Each lease then in effect shall survive any termination of the Agreement.

2) Options - There are two basic lease type[s]; `B' is a lease with a fair market value purchase option at the end of the lease and `B prime' is a lease where the lessor assumes for tax purposes that the lessee is the owner.

3) Lease Term - The lease is effective when signed by both parties. The term of the lease expires at the end of the

number of payment periods.

4) Rent - The lessee pays the lessor for each payment period. The lessee['s] obligation to pay begins on the rent commencement date. Rent is invoiced in advance as of the first day of each payment period and is due on the day following the last day of the payment period.

5) Lease Not Cancellable; Lessee's Obligation Absolute - Lessee's obligation to pay shall be absolute and unconditional and shall not be subject to any delay, reduction, set off, defense, counterclaim or recoupment for any reason whatsoever, including any failure of the equipment, programming or licensed program materials or any representations by [Lessor].

6) Sublease and Relocation of the Equipment; Assignment by Lessee - Upon Lessor's prior written consent, which will not be unreasonably withheld, lessee may sublet the equipment or relocate it from the equipment location. No sublease or relocation shall relieve the lessee of its obligations under the lease. The lessee shall not remove the equipment from the United States. The lessee shall not assign, transfer or otherwise dispose of the lease or equipment, or any interest therein, or create or suffer any levy, lien or encumbrance thereof except those created by the lessor.

7) Ownership, Personal Property and Licensed Program Materials - The equipment under lease is and shall be the property of the lessor. Lessee shall have no right, title or interest therein except as set forth in the lease.

8) Taxes - Lessee shall reimburse [Lessor] for, or shall pay directly if so requested by lessor, as additional rent, all taxes, charges and fees imposed or levied by any governmental body or agency, in connection with the purchase, ownership, leasing, possession, use or relocation of the equipment.

9) Casualty Insurance; Loss or Damage - Lessor will

maintain, at its own expense, insurance covering loss of or damage to the equipment with a $5,000 deductible per incident. If any item of equipment is lost, stolen, destroyed or irreparably damaged for any cause whatsoever (Casualty Loss) before the date of installation, the lease for that item will terminate. If any item of equipment suffers casualty loss, or is otherwise damaged, on or after the installation date, the lessee shall promptly notify the lessor[.] If the lessor determines that the item can be economically repaired, the lessee shall place the item in good condition and working order and the lessor will reimburse the lessee the reasonable cost of such repair, less the deductible. If not so repairable, the lessee shall pay the lessor the lesser of $5,000 or the fair market value of the equipment immediately prior to the casualty loss. Upon the lessor's receipt of payment the lease for that item shall terminate.

10) Liability Insurance - The lessee shall obtain and maintain comprehensive general liability insurance, in an amount of $1,000,000 or more for each occurrence, with an insurer having a `Best's Policyholders' rating of B+ or better. The policy shall name lessor as an additional insured as lessor's interests may appear and shall contain a clause requiring the insurer to give lessor at least one month's prior written notice of the cancellation, or any alteration in the terms of the policy. Lessee shall furnish to lessor, upon request, evidence that such insurance coverage is in effect.

Each supplement incorporates the terms and conditions of the master lease agreement and separately lists the computer hardware equipment. Although the lease payment is computed as a percentage of the aggregate acquisition cost of the equipment, one aggregate monthly payment amount is identified in the supplement addressing the rental payment terms subject to the conditions of the master lease. Lease payments payable in this aggregate amount are remitted monthly to the lessor. Additional supplements may be attached to the master lease listing other components/computer hardware leased at a subsequent date

which are subject to the governing provisions of the master lease.

A careful examination has been made of the copy of the Term Lease Master Agreement (the "Master Lease") submitted with your request. The following relevant text is quoted from the preamble of the Master Agreement:

> A Supplement shall refer to and incorporate by reference this Agreement and, when signed by the parties, shall constitute the lease (Lease) for the Equipment specified therein....

Also of significance to the issue under advisement is section 18 of the Master Agreement which provides the following regarding the options to purchase equipment under the Master Agreement and corresponding Supplements:

> PURCHASE OF EQUIPMENT. If Lessee is not then in default under the Lease, Lessee may, upon three months prior written notice to Lessor, purchase equipment upon expiration of the Lease. Under Option A or B, the purchase price shall be objectively determined by Lessor by using the projected **fair market sales value** of the Equipment as of such expiration
>
> date plus, for Equipment under Option A, any recapture of investment tax credit and any tax due thereon. Under Option B Prime (B') the purchase price shall be an amount determined by multiplying the Unit Purchase Price by the Purchase Option Percent for such Equipment. (Emphasis Supplied)

Moreover, we quote section 20 of the Master Lease in part regarding the financing statements:

> ... Lessee shall execute and deliver to Lessor for filing any Uniform Commercial Code financing statements or similar documents Lessor may reasonably request.

Lastly, in our telephone conversation of September 26, 1995, you

were able to clarify that the purchase option amount under the Option B Prime (B') may or may not exceed the lesser of $100.00 or 1 % of the contract amount. However, you further advised that the Taxpayer has been accruing and remitting full tax on the Option B Prime leases from their inception as conditional sales.

REQUESTED ADVISEMENT

You endeavor to receive the Department's advice that:

1. The aggregate monthly rental payment[s] attributable to the lease of computer hardware equipment pursuant to the terms of the master lease are subject to an application of the discretionary county surtax on the first $5,000 of the single aggregate lease payment per month to [the Lessor].

2. Alternatively, in the absence of an application of the surtax to the payment in the manner described in paragraph 1. above, the monthly rental payment attributable to the lease of computer hardware is subject to an application of the discretionary county surtax on the first $5,000 of the aggregate monthly payment to [the Lessor] on a per supplement basis.

DISCUSSION OF LAW

The following statutory, administrative, and case law is relevant to addressing the issue under advisement herein:

Section 212.054, F.S.: (2)(a) The tax imposed by the governing body of any county authorized to so levy pursuant to s. 212.055 shall be a discretionary surtax on all transactions occurring in the county which transactions are subject to the state tax imposed on sales, use, services, rentals, admissions, and other transactions by this part. The surtax, if levied, shall be computed as the applicable rate or rates authorized pursuant to s. 212.055 times the amount of taxable sales and taxable purchases representing such transactions. If the surtax is levied on the sale of an item of tangible personal property or on the sale of a

service, the surtax shall be computed by multiplying the rate imposed by the county within which the sale occurs by the amount of the taxable sale. The sale of an item of tangible personal property or the sale of a service is not subject to the surtax if the property, the service, or the tangible personal property representing the service is delivered within a county that does not impose a discretionary sales surtax.

(b) However:

1. The tax on any sales amount above $5,000 on any item of tangible personal property and on long distance telephone service shall not be subject to the surtax. For purposes of administering the $5,000 limitation on an item of tangible personal property, if two or more taxable items of tangible personal property are sold to the same purchaser at the same time and, under generally accepted business practice or industry standards or usage, are normally sold in bulk or are items that, when assembled, comprise a working unit or part of a working unit, such items must be considered a single item for purposes of the $5,000 limitation when supported by a charge ticket, sales slip, invoice, or other tangible evidence of a single sale or rental. The limitation provided in this subparagraph does not apply to the sale of any other service....

(3) For the purpose of this section, a transaction shall be deemed to have occurred in a county imposing the surtax when:

(a)1. The sale includes an item of tangible personal property, a service, or tangible personal property representing a service, and the item of tangible personal property, the service, or the tangible personal property representing the service is delivered within the county. If there is no reasonable evidence of delivery of a service, the sale of a service is deemed to occur in the county in which the purchaser accepts the bill of sale...."

The $5,000.00 cap on the tax base subject to Discretionary Sales Surtax ("Surtax") represents a partial exemption from Surtax. In construing any statutory exemption, the Department must adhere to and be guided by the long-standing and fundamental

precept of statutory construction, established by the Florida Supreme Court, which mandates that exemptions from or exceptions to taxing statutes must be strictly construed against the taxpayer. See Asphalt Pavers v. Dept. of Revenue, 584 So.2d 57 (Fla. 1st DCA 1991); Dade Cty. Taxing Auth. v. Cedars of Lebanon, 355 So.2d 1205 (Fla. 1978), reh. den. April 5, 1978; Williams v. Jones, 326 So.2d 425 (Fla. 1975), reh. den. March 4, 1976; Straughn v. Camp, 293 So.2d 689 (Fla. 1974); United States Gypsum Company v. Green, 110 So.2d 409 (Fla. 1959).

Rule 12A-15.004, F.A.C.: Specific Exemptions.

(1) Except as provided in this section, any transaction subject to the state sales and use tax imposed on sales, use, rentals, admissions, and other transaction by Part I, Chapter 212, F.S., is subject to the surtax, if the transaction occurs in a taxing county. A transaction that is not subject to state sales and use tax is not subject to the surtax.

(2)(a)1. The surtax does not apply to the sales amount above $5,000 on any item of tangible personal property. However, the surtax does apply to the first $5,000 of the sales amount on any item of tangible personal property and to all other transactions which are subject to the state tax imposed on sales, use, rentals, and other transactions by Part I, Chapter 212, F.S., without limitation, except as provided in (3) below....

(b)1. For purposes of administering the $5,000 limitation on any item of tangible personal property, if two or more taxable items of tangible personal property are sold to the same purchaser at the same time and, under generally accepted business practice or industry standards or usage, are normally sold in bulk or are items which, when assembled, comprise a working unit or part of a working unit, such items shall be considered a single item for purposes of the $5,000 limitation when supported by a charge ticket, sales slip, invoice, or other tangible evidence of a single sale or rental....

(c) In the lease or rental of tangible personal property each lease or rental payment made by a lessee or rentee, or contracted to be paid by a lessee or rentee represents one taxable transaction. Liability for the immediate payment

of the tax on all the payments required under the lease or rental does not arise at the time of the execution of the lease or rental.

(d) Where a purchase order is issued by the purchaser to the selling dealer, or an agreement is made between the selling dealer and the purchaser which is reduced to writing, that provides for the purchase of a specific quantity of tangible personal property which, according to the terms and conditions set out in the purchase order or agreement, is to be delivered to the purchaser within a definite specified time, such transaction constitutes one sale for purposes of the $5000 limitation. Delivery of the tangible personal property so ordered within the time specified in the purchase order or agreement will constitute one sale notwithstanding that due to the nature of the property it must be delivered in installments or that multiple deliveries may be necessary to consummate delivery to the purchaser. In the absence of a written purchase order or written agreement reflecting the above conditions, each individual delivery of tangible personal property is to be considered one sale. Each individual delivery of tangible personal property on purchase orders for indefinite quantities or open-end purchase orders is considered to be one sale....

Also relevant to the issue under the advisement are the following provisions of Rule 12A-1.071(1)(d),(e), and (f), F.A.C.:

(d) Where a contract designated as a lease transfers substantially all the benefits, including depreciation, and risks inherent in the ownership of tangible personal property to the lessee, and ownership of the property transfers to the lessee at the end of the lease term, or the contract contains a purchase option for a nominal amount, the contract shall be regarded as a sale of tangible personal property under a security agreement (commonly referred to as a conditional-sale type lease) from its inception. The purchase option shall be regarded as a nominal amount if it does not exceed $100 or 1 percent of the total contract price, whichever is the lesser

amount.

(e) Whether a lease is a conditional sale-type lease or an operating lease shall be determined in accordance with the provisions of the agreement, read in light of the facts and circumstances existing at the time the agreement was executed. Taxpayers who calculated and paid taxes on leases entered into after January 2, 1989, pursuant to any amendments to paragraph (1)(d) of this rule adopted after January 2, 1989, shall be deemed to be in compliance with the requirements of this rule.

(f) In the case of a conditional sale-type lease executed on or after the effective date of this rule, the Executive Director or the Executive Director's designee in the responsible division will consider these to be sales and purchases from their inception with tax due and payable at the moment the contractual agreement is entered into or when the property comes to rest in this state if at a later date. Charges for interest or financing are taxable unless the rate of interest or the actual amount of interest charged is separately stated on the customer's contract.

An agency's administrative interpretation of a statute by rule has been accorded great deference by the courts, and will not be overturned unless the agency's interpretation of the statutes is clearly erroneous; reviewing court will defer to any interpretation within the range of possible interpretation. See Pershing Industries v. Department of Banking, 591 So.2d 991, 993 (Fla. 1 DCA 1991); Eager v. Florida Keys Aqueduct Authority, 580 So.2d 771 (Fla. 3 DCA 1991); Natelson v. Department of Ins., 454 So.2d 31 (Fla. 1 DCA 1984); State ex rel. Szabo Food Serv., Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1973), reh. den. Jan. 9, 1974.

CONCLUSIONS OF LAW

First, based on the text quoted above from the preamble of the Master Agreement, the Department is compelled to find that each Supplement constitutes a separate lease. Further, the Department finds that Supplements which are written with Option A or B constitute operating leases. Additionally, the Department finds that Supplements which are written with Option

B prime constitute conditional-sale contracts only in those instances where the purchase option turns out to be an amount which does not exceed the lesser of $100.00 or 1% percent of the contract price. See Rule 12A-1.071(1)(d), F.A.C., above.

However, in the case of Supplements which are written with Option B prime where the purchase option turns out to be an amount exceeding the lesser of $100.00 or 1% percent of the contract price, the Department finds that such Supplements constitute operating leases for Florida sales and use tax and Surtax purposes.

Therefore, the Department finds that the $5,000 cap applies to the Supplements as follows:

1. In the case of a Supplement which is written with Option A or B, the $5,000 cap will be applied independently to each installment (payment) under the Supplement consistent with the provisions of Rule 12A-15.004(2)(c), F.A.C.

2. In the case of a Supplement which is written with Option B prime where the purchase option turns out to be an amount exceeding the lesser of $100.00 or 1% percent of the contract price, the $5,000 cap will be applied independently to each installment (payment) under the Supplement consistent with the provisions of Rule 12A-15.004(2)(c), F.A.C.

3. In the case of a Supplement which is written with Option B prime where the purchase option turns out to be an amount which does not exceed the lesser of $100.00 or 1% percent of the contract price, the $5,000 cap will be applied once to the gross proceeds required under the Supplement rather than independently to each installment (payment) under the Supplement.

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,

Daniel M. Wagner, Jr.
Tax Law Specialist

DW/
Control No. 21766