

SUMMARY

A travel agent provides vacation packages to client for a lump sum charge. Travel agents are required to pay tax on the purchase of the taxable components of vacation packages when such packages are sold to clients for a lump sum charge. The travel agent may not enter into a bona fide written lease agreement for the greater than six months in duration to avoid tax on the purchase of transient accommodations, because the travel agent will assign the right to use those rooms to clients for periods of less than six months.

Sep 09, 1998

Re: Technical Assistance Advisement 98A-070

Sales and Use Tax - Taxability of Bona Fide Written Lease
for Greater Than Six Months by Travel Agent

Sections: 212.02, 212.03 212.04, F.S.

Rules: 12A-1.060, 12A-1.061, F.A.C.

Petitioner: XXX (herein "Travel Agent")

Dear :

This letter is a response to your petition dated August 10, 1998, for the Department's issuance of a Technical Assistance Advisement ("TAA") concerning the above referenced party and matter. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

FACTS

From your request:

[Travel Agent], a foreign corporation located in XXX, sells

vacation packages consisting of air transportation to the United States, hotel accommodations and rental cars for its customers to utilize during their vacation in the U.S. The fee paid to [Travel Agent] for the package is a lump sum amount since there is no separate itemization of the price of the airline ticket, hotel room and rental car. Payment is made to [Travel Agent] in the currency of the country where located (not U.S. dollars). The amount charged to the customer equals [Travel Agent's] cost of the various items included in the package plus a mark-up. [Travel Agent] pays sales tax on their purchases of the various components of the vacation packages whenever tax is due.

[Travel Agent] is proposing entering into a bona fide written rental agreement with a hotel to lease a specific number of rooms for a specified period greater than six months. [Travel Agent] will be charged for all of the rooms enumerated in the contract on a monthly basis, regardless of whether each room is used each night. Additionally, [Travel Agent] will have direct control over the usage of the rooms. As part of the agreement, the hotel will grant to [Travel Agent] the right to the exclusive use, possession or occupancy of the rooms. Furthermore, [Travel Agent] may enter upon any of the hotel rooms included in the contract. [Travel Agent's] personnel may use some of the hotel rooms when traveling to the U.S. on business. However, most of the rooms will be used by [Travel Agent's] customers as part of the vacation package which was purchased in XXX.

Travel Agent was previously issued a Letter of Technical Advice on this subject dated May 6, 1998.

REQUESTED ADVISEMENT

You endeavor to elicit advice whether the rental of a specific number of hotel rooms by a travel agent for a period greater than six months, pursuant to a written agreement, qualifies as a transaction exempt from both Florida sales tax and local hotel taxes pursuant to Section 212.03, F.S.

TAXPAYER'S POSITION

From your request:

Pursuant to Section 212.03(1), F.S., Florida sales tax, and where applicable, local hotel tax, is imposed on the renting, leasing, or letting of any living quarters or sleeping accommodations in connection with any hotel, apartment house, roominghouse, or tourist or trailer camp. However, this section also provides an exemption from sales tax for any person who has entered into a bona fide written rental agreement for a period longer than 6 months in duration for continuous residence at any one hotel. The Department's rule 12A-1.061, F.A.C., further clarifies the application of this exemption by stating clearly that the lessee need not necessarily occupy the leased property, provided the lease agreement conveys the intent of the parties that the lessee will have possession or at least have **the right** to use or possess the premises.

In a similar situation, the Department has previously ruled [in TAA 93A-035] that when the lessee and the lessor have in good faith executed a signed, written agreement that provides for the tenant's right to occupy the living accommodations for a period longer than six months, such agreement is considered a "bona fide written lease for longer than 6 months in duration" for purposes of the exemption granted under s. 212.03, F.S. Additionally, the Department has historically opined that if an airline or other business enters into a bona fide written lease agreement with a hotel for the continuous lease of a certain number of rooms for a period longer than six months, the rental payments for that number of rooms are exempt from sales tax regardless of who actually uses the room.

It is hereby submitted that the hotel, by execution of the lease agreement, is granting to [Travel Agent] the right to occupy the rooms for a period exceeding six months in duration. It is conceivable, although not likely, that [Travel Agent] personnel could use all of the hotel rooms

during the lease period. The fact that others, e.g. [Travel Agent's] customers, will be using most of the rooms should have no bearing on the exemption provided in s. 212.03(1), F.S. Further foundation is given to the fact that the statute does not specify who must actually occupy the room. The only requirement is that the person renting the room **be granted the right** to occupy the room. By virtue of the lease agreement, [Travel Agent] will be granted the right to occupy all of the rooms, and could occupy them at any time.

In summary, Section 212.03(l), F.S., provides, an exemption from sales tax for rental of living accommodations for a period of greater than six months pursuant to a bona fide written agreement without any restrictions on who must occupy the room. [Travel Agent] intends to execute such a written agreement with a hotel. The facts in this case are virtually identical to the Department's previous ruling wherein it was determined that this exemption applies to block rentals of hotel accommodations. Consequently, Florida sales tax should not apply to the lease of the hotel rooms by [Travel Agent] as described above. As an exempt component of vacation packages, no sales tax or hotel tax would be paid on the long term lease of the hotel rooms. (emphasis in original)

DISCUSSION, ANALYSIS, AND CONCLUSION OF LAW

Section 212.02(12), Florida Statutes (1997), provides:

"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 includes any political subdivision, municipality, state agency, bureau, or department and the plural as well as the singular number.

Section 212.03, F.S. (1997), provides in pertinent part:

(1) It is hereby 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 to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, roominghouse, or tourist or trailer camp. However, any person who rents, leases, lets, or grants a license to others to use, occupy, or enter upon any living quarters or sleeping or housekeeping accommodations in apartment houses, roominghouses, tourist camps, or trailer camps, and who exclusively enters into a bona fide written agreement for continuous residence for longer than 6 months in duration at such property is not exercising a taxable privilege. For the exercise of such taxable privilege, a tax is hereby levied in an amount equal to 6 percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental. Such tax shall apply to hotels, apartment houses, roominghouses, or tourist or trailer camps whether or not there is in connection with any of the same any dining rooms, cafes, or other places where meals or lunches are sold or served to guests.

* * *

(4) The tax levied by this section shall not apply to, be imposed upon, or collected from any person who shall have entered into a bona fide written lease for longer than 6 months in duration for continuous residence at any one hotel, apartment house, roominghouse, tourist or trailer camp, or condominium, or to any person who shall reside continuously longer than 6 months at any one hotel, apartment house, roominghouse, tourist or trailer camp, or condominium and shall have paid the tax levied by this section for 6 months of residence in any one hotel, roominghouse, apartment house, tourist or trailer camp, or condominium....

Section 212.04(1), F.S. (1997), provides in pertinent part:

(a) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who sells or receives anything of value by way of admissions.

* * *

(d) No additional tax is due on an admission if the admission is incorporated as part of a package sold by a travel agent; if the package includes admissions and transient rentals, transportation, or meals; and if there is no separate itemization of the admission, transient rental, transportation, or meal in the sales price of the package. This paragraph does not apply if the actual price charged for the admission by the dealer to a travel agent is less than the price charged to unrelated parties under normal industry practices and the dealer and the travel agent are members of the same controlled group of corporations for federal income tax purposes. (Emphasis Supplied)

Rule 12A-1.061, Florida Administrative Code, provides in pertinent part:

(1) ... [E]very person is exercising a taxable privilege when engaging in the business of renting, leasing, letting, or granting licenses to others to use transient accommodations, unless the rental charges or room rates are specifically exempt.

* * *

(8) SUBLEASES OR ASSIGNMENTS.

(a) Any person who has the right to the use or possession of any transient accommodation and who subrents, subleases, sublets, or licenses a portion of the accommodation is required to register as a dealer and collect and remit the applicable tax due on all such subrents, subleases, sublets, or licenses to the proper taxing authority, except as provided in subsection (1) of this rule.

(b) The dealer may elect to issue a resale certificate to the property owner or the property owner's representative to purchase transient accommodations exempt from tax or take a credit for the tax that was paid to the owner or owner's representative for transient accommodations when:

1. the transient accommodations are subrented, subleased, sublet, or licensed by the dealer to other guests or

tenants; and

2. the dealer collects the applicable tax from the guest or tenant.

(c) Dealers must remit the applicable tax due to the proper taxing authority on the portion of the rental charges pertaining to any transient accommodation that was purchased tax exempt but is used by the dealer.

* * *

(15) BONA FIDE WRITTEN LEASES.

(a) Transient accommodations that are leased under the terms of a bona fide written lease for periods longer than six months for continuous residence by the individual or entity leasing the transient accommodations to which the written lease applies are exempt. The exemption will not be allowed or disallowed based on the number of days in the rental period, but will be disallowed if the rental period is not longer than six "months," as defined in paragraph (b).

* * *

(c) For the purposes of this subsection, a "bona fide written lease" is a written document that clearly demonstrates that the parties' intent is that the lessee will have the exclusive use or possession, or the right to the exclusive use or possession, of the transient accommodations to which the lease applies.

* * *

(g) A "bona fide written lease" for periods longer than six months for continuous residence by the individual or entity leasing the transient accommodations to which the written lease applies will not be constituted when:

* * *

2. the lease contains a provision that would entitle the lessor of the leased transient accommodations to sublease, subrent, sublet, or license the accommodations to other persons for periods of six months or less;

3. the lease does not provide the lessee with the right to occupy the transient accommodations for the entire duration of the lease period;... (Emphasis Supplied)

Rule 12A-1.005, F.A.C., provides in pertinent part:

(7) SALES OF VACATION PACKAGES.

(a) A dealer owes tax on purchases of any taxable components of a vacation package which he sells. Such taxable components may include, but are not limited to, admissions, transient rentals, rental cars, and meals.

(b) No tax is due on the sale of a vacation package unless the selling dealer itemizes the taxable components and sells the taxable components for more than was paid for them. If the itemized components are sold for more than the dealer paid for them, he must register and collect and remit tax on the itemized taxable components, and may take a credit for taxes previously paid. (Emphasis Supplied)

Section 212.04(1)(d), F.S., implies, and Rule 12A-1.005(7)(a), F.A.C., specifically states that a travel agent must pay tax on the purchase of taxable components of vacation packages. Section 212.03(4), F.S., and Rule 12A-1.061(15)(a), F.A.C., provide an exemption for the rental of living accommodations in hotels when the person renting the accommodations enters into a bona fide Rule 12A-1.061(15)(c), F.A.C., describes in part what constitutes a bona fide written lease. The lessee, in this case the travel agent, must have exclusive use or possession of the leased premises. Rule 12A-1.061(8), F.A.C., provides that a lessee who assigns the right to use the transient accommodations to a third party must register as a dealer and collect tax from the tenant. Clearly, if the travel agent is assigning the use of the accommodations to its customers during the course of the travel agent's business in providing vacation packages, the travel agent itself does not have exclusive use or possession of the leased accommodations. Therefore, the travel agent may not enter into a written lease for greater than six months in duration to avoid the tax. The travel agent could, in theory, register as a dealer, extend a resale certificate to the hotel for its purchase of the accommodations, then collect and remit tax on the subsequent assignment to its customers.

However, under the proposed situation, the travel agent intends

to make a lump sum charge to the client. The lump sum charge would not separately itemize the charge for the room. The travel agent is not required to collect tax on lump sum charges for travel packages, but is required to pay tax on the taxable components thereof, including the transient accommodations. Rule 12A-1.005(7), F.A.C.

Technical Assistance Advisement #93A-035, referenced by the taxpayer in its request, is dissimilar to the situation contemplated by the taxpayer. It discussed whether payments pursuant to a written lease agreement for greater than six months in duration for transient accommodations become taxable if the tenant breaks the lease before six months pass. The TAA was issued prior to the rewrite of Rule 12A-1.061, F.A.C., which became effective November 30, 1997. Additionally, a technical assistance advisement is only binding to the party and specific set of circumstances that it addresses.

The taxpayer has asserted that the Department has "historically opined" that an airline or other business could obtain an exemption on transient accommodations by entering into a lease agreement for greater than six months in duration regardless of who actually uses the room. The taxpayer did not provide reference to any particular instance in which this assertion has occurred. Additionally, this author is not aware of any such opinions issued where occupancy by anyone other than the business's own employees was contemplated. Furthermore, as stated previously, a technical assistance advisement is only binding to the party and the specific set of circumstances that it addresses.

The travel agent is renting transient accommodations for sale as part of a lump sum vacation package. The travel agent assigns the use of the room to its client. The travel agent is required to pay tax on the taxable components of lump sum travel packages that it sells. A person may only avoid paying tax on the purchase of transient accommodations, the use of which is assigned to a third party, by registering as a dealer, and collecting tax on the payment received for such assignment. The travel agent is not receiving payment for the right to use the accommodation; it is selling lump sum travel packages with no

separate charge for the transient accommodations. Therefore, a travel agent may not enter into a bona fide written lease of greater than six months, and obtain an exemption from sales tax on transient accommodations.

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 upon 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 from that which is 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 Section 213.22, F.S. Your name, address, and any other details that might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such 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,

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