SUMMARY

No sales tax, intangible tax, nor documentary stamp tax is imposed on any portion of a transaction whereby a governmental unit leases its land and improvements to an investor, who then pays to the governmental unit an advance lease payment for the entire term of the lease, a part of which is retained by the governmental unit and the retaining portion of the advance lease payment is then used by a separate entity to pay the sublease payment required of a trust created by the governmental unit who subleases the land and improvements from the investor which land and improvements are then sub-subleased back to the governmental unit.

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Jun 02, 1998

Re: Technical Assistance Advisement 98A-042

Real Property Lease-Leaseback

Sections 196.012(6), 196.199(2), 201.02, 201.08,

212.031(1)(c), and (2)(b), 212.06, 212.08(6),

Rules 12A-1.038, 12A-1.070, F.A.C.

XXX (herein County, or alternatively Head Lessor, or Sub-sublessee)

XXX, and XXX (collectively Facility)

XXX (herein Trust, or alternatively, Head Lessee or Sublessor)

XXX (herein Equity Investor)

XXX (herein Sublessee or Sub-sublessor)

XXX (herein Lender)

Dear :

This is a response, styled a Technical Assistance Advisement, to your letter dated February 27, 1998, and the letter dated May 14, 1998, wherein it is asked whether a proposed transaction in certain real property, identified as Facility, is subject to state taxes including sales or use tax, documentary stamp tax, and intangible tax, when County, as the owner of Facility, seeks to lease Facility to Trust, which then will simultaneously sublease Facility to Sublessee, which, in turn, will sub-sublease Facility back to County. The Facility will be leased by County to Trust pursuant to a lease styled Head Lease, the term of which is to be approximately 36 1/2 years. Trust, as described in the Trust Agreement, Article II, Section 2.01 is a business trust organized under the laws of Delaware and in section 3.01 the trustee of Trust is authorized to, among other grants of authority, pay the initial rent payment to County pursuant to the Head Lease and to sublease Facility to Sublessee.

The Trust will sublease Facility to Sublessee for an initial term (herein Basic Term), as described in section 3 of the agreement identified hereafter as Sublease, of approximately 14 years. Sublessee, as described in the Participation Agreement is a Florida business trust, the sole beneficiary of which is County. The Sublease may be extended (herein Sublease Renewal Term) for approximately 15 years if so elected by the Sublessor under the Sublessee Renewal Option, as provided in Section 14(b)(i) of the Sublease, or may be deemed to have made the election to extend as allowed under Section 14(c), 14(d)(ii)C, 14((iii)(B) when all the requirements of Section 14(d)(i) have been met.

Sublessee will sub-sublease Facility to County, for an initial term of approximately 14 years in accordance with a document identified hereafter as the Sub-sublease, which term may be extended for an approximate 15 years period on a date styled the Basic Term Expiration Date. The Sub-sublease will have essentially the same terms and conditions as those of the Sublease between Trust and Sublessee. Note is made that the amount of the rent paid by Sublessee to Trust will be slightly less than the amount paid by County to Sublessee, as revealed on the single sheet on which columnar comparisons are depicted of the rent payments to be made pursuant to both the Head Lease and the Sublease.

Attached to both letters were copies of the relevant agreements between the parties, including other supplemental information.

Relationship of the parties

Trust, a Delaware business trust, is to receive the principal benefits from this transaction. It is to be formed by Equity Investor, which will be beneficial owner of Trust.

Sublessee, a trust created under Chapter 609, F.S., is to be formed and capitalized by County. The sole beneficiary of Sublessee is County. In accordance with Section 14 of the Sub-sublease

"... the Sub-sublessee shall have the option... to purchase from the Sub-sublessor at the end of the Sub-sublease Basic Term Expiration Date the Head Lease Rights and Obligations with respect to all (but not less than all) of the Facility...." In the event that the Purchase Option is exercised by Sub-sublessee the Sub-sublessor, as provided in Section 14(a) of the Sub-sublease,

"... shall exercise and perform its corresponding option under Section 14(a) of the Sublease."

This right is identified in Section 14 of the Sublease as the Purchase Option.

This option, if exercised by the trustee of Sublessee, will extinguish all agreements because, in such an event, in accordance with Section 12A of the Participation Agreement "... the Sublessee, the Sublessor, the Equity Investor and the Lender shall... effect a merger of the Sublessor into the Sublessee...." Section 12A further states that the merger shall be a statutory merger in which "... the Sublessee shall be the surviving entity and shall assume all of the obligations of the Sublessor..."

In all such events after the Purchase Option is exercised by Sub-sublessee and the subsequent merger of County and Sublessee, the County would be, simultaneously, the head lessor, head lessee, and sublessee. If the Purchase Option is not exercised by County then you cite the following elections available to County:

(i) permit the Sublease to expire, in which case the Trust, as Head Lessee under the Head Lease Term, will retain (for itself or its assigns) possession of the properties for the remainder of the Head Lease Term; or (ii) cause the Sublessee to continue the Sublease for the Sublease Renewal Term, in which event the Sublessee will be obligated to extend annual rental payments thereunder... for the balance of the Sublease Term , without any further options to purchase the Trust's rights under the Head Lease.

County is a Florida county which owns, in fee, the land and improvements of Facility.

Payments to be made by the parties

Trust, at the closing of this transaction, will make one payment, in the sum of approximately $65,000,000 to County, pursuant to the Head Lease, as a prepayment of rent. This payment is designated in the Head Lease in Section 3(b) as Advance Rent Payment. This amount, as you state, is "... approximately 60% to 90% of the fair market price..." of Facility. Trust will derive about 80 percent of the rent prepayment amount from a nonrecourse loan extended to it by Lender. Equity Investor will provide, itself, the remaining 20 percent of the Advance rent Payment. At the anniversary date of the fifth year after the termination of the Head Lease, which date is January 3, 2040, Trust will also make what is described in the Head Lease as a Deferred Rent Payment, in an amount of approximately $710,000,000 to County, in the event that the Purchase Option is not exercised by both Sub-sublessee and Sublessee.

You provide the information that the loan made by lender will be executed and delivered outside Florida and that the loan will not be secured by any Florida real property. Lender is not incorporated or domiciled in Florida.

County will retain for its own use approximately $4,000,000 as compensation for its participation in this transaction. The remaining sum, less expenses, of approximately $60,300,000 will be used to capitalize Sublessee.

Sublessee will pay part of this capitalization, in the sum of approximately $50,300,000, pursuant to an agreement styled Payment Undertaking Agreement (herein PUA), to an entity identified in the PUA as Payment Undertaker, an affiliate of Lender, which will under the PUA have the duty to tender rental payments required of Sublessee to Trust in an amount equal to the debt service on the loan. The amount of this portion of its capitalization will equal whatever is the balance of the principal of the loan made by Lender to Equity Investor.

The remaining portion of the capitalization of Sublessee, in an amount of approximately $10,000,000, will be invested in what is described as a Guaranteed Investment Contract (herein GIC) the provider of which is also an affiliate of Lender. The investment will accrue, at the end of the Initial Sublease Term which is approximately 17.5 years, to an amount which will equal the Fixed Purchase Price if such option is exercised by County. The affiliate of Lender, which issues the GIC (herein GIC Provider), is not to be incorporated or domiciled in Florida.

Sublessee will also grant a security interest in the PUA and the GIC to Trust to secure Sublessee's obligation under the Sublease; Trust will further assign such security to Lender to secure the non-recourse loan agreement. If the Purchase Option is not elected by Trust, then this investment will be returned to County provided the County has at that time provided what you describe as "... alternative collateral in the event the Sublease is extended."

The surety bond issued to Trust ensures that the full equity termination value is available to Trust in the event of an early termination of this transaction.

Should the Head Lease be terminated before its term, then the Equity Investor would receive a refund of the applicable portion of the prepaid rent. The early termination could be occasioned, as you enumerate, by a default by County under the Head Lease; by a default of the County under the Sub-Sublease, or default by Sublessee under the Sublease; by legislation or decision by a governmental body that caused participation of the County in this transaction is to be terminated; or, by as you state, "... a casualty event rendering the Properties unusable...."

The Department especially notes that the operation of Facility by County prior to and during this transaction will continue undisturbed, and the title to Facility with the exception of the leased land, as explained above, will remain in County. Further, neither the Lender, Payment Undertaker, nor the GIC Provider will be incorporated or domiciled in Florida.

As to these facts you argue that no sales or use tax may be imposed on any of the payments required to be made by any of the parties because a resale certificate may be issued by Owner Trust to County in accordance with the Head Lease. Owner Trust, will in turn, receive a resale certificate from Sublessee, pursuant to the Sublease. The money paid to Sublessee by County required by the Sub-Sublease is exempt because County is a governmental body enumerated in s. 212.08(6), Florida Statutes.

With respect to documentary stamp tax you assert that all of the rent payments required by the Head Lease, Sublease and Sub-Sublease are only promises to pay rent which are not subject to documentary stamp tax. The provisions for the return of any unearned prepaid rent defeats an argument that the lessees are purchasing an interest in real property. You also argue that statutory merger of Sublessee and Owner Trust which will occur concurrently with the excise of the Fixed Purchase Option by citing that the excise of the Fixed Purchase Option will concurrently result in a statutory merger of Sublessee and Owner Trust as a statutory merger. You add that since the loan will be made, executed and delivered outside of Florida and will not be secured by any real property in Florida, no documentary stamp tax is applicable.

As to intangible tax, you assert that the GIC and the PUA are exempt from intangible tax because both are in the nature of a cash deposit or a purchased annuity. You also state that Properties will continue to be operated for a public purpose by County.

Department Response

Sales Tax - Department Response

Florida sales tax, as you posit, may not be imposed on any payment made pursuant to the planned Head Lease, Sublease, or the Sub-sublease, as these agreements have been described in your letter dated February 27, 1998, in the letter dated May 14, 1998, and as provided in the documents which were attached to both communications. You provided the Department with the following documents: Head Lease Agreement, Sublease Agreement, Sub-Sublease Agreement, Participation Agreement, Trust Agreement, and a document providing definitions and rules of usage of the terms found in all of the above cited documents.

As to the Sub-Sublease, s. 212.08(6), F.S., exempts from the tax any payments made by certain enumerated governmental entities, including a county of the state, when pursuant to a sale such payment is made directly to the selling dealer. The administrative rule which interprets the statute is Rule 12A-1.001(9)(a), Florida Administrative Code.

Considering the instant facts, the payments pursuant to the Sub-Sublease are to be made directly by County, the Sub-Sublessee, to the Sub-Sublessor. As a consequence, these payments in consideration of the lease of real property, are exempt under s. 212.08(6), Florida Statutes.

As to the Head Lease, and the Sublease of Facility, s. 212.031(1)(c), F.S., imposes sales tax on the total rent or license fee given for the right to use or occupy real property. Rule 12A-1.070, F.A.C., interprets s. 212.031, F.S., and in subsection (9) of the administrative rule a provision allows the tender of a resale certificate by a subtenant or assignee in the instance of a lessee which sublets or assigns all of the real property, or when such lessee retains only an incidental portion of the real property under sublease or assignment.

Although the statutes do not contemplate the application of sale for resale concepts to the lease and re-lease of real property, the statutes do prohibit the pyramiding of taxes upon the same transaction. See Section 212.031(2)(b), F.S. Thus, for example, a lease of real property from January 1, 1997, to January 31, 1997, and a re-lease of that same property for the same period of time should not result in tax on both the original lease and the re-lease. Thus, for administrative convenience and to ensure that the pyramiding does not occur, the rules provide for the use of resale certificates in lease transactions involving real property under certain very limited circumstances.

Rule 12A-1.038(1), F.A.C., provides for the tender of a resale certificate under conditions described in the rule. Rules 12A-1.039(1), F.A.C., and 12A-1.070(9), F.A.C., identify the sub-lease of real property as an appropriate use of a resale certificate only where substantially all of the property is re-leased. The rules provide that retention of an incidental portion of the property will not prevent the sub-lease from being viewed as a sub-lease of all of the leased property. Thus, since the Head Lessee and the Sublessee will lease Facility to, respectively, the Sublessee and the Sub-sublessee, the Head Lessee and the Sublessee may each properly provide a resale certificate to County when County is both the Head Lessor and the Sub-sublessee. The Head Lessee and the Sublessee will be thereby excused from collecting sales tax on their lease and sublease of the Facility.

As indicated by the Department in an oral communication on March 31, 1998, s. 212.031(2)(b), F.S., bars both the pyramiding and the decreasing of the tax as a result of a progression of real property transactions. Considering the instant facts the average annual payments under the Head Lease would be less than the average annual payments required under either of the respective subleases.

These amounts are depicted in a single page document arranged in a columnar comparison which reveal that the Head Lease payments total $66,958,166 compared to the Sub-sublease and Sublease payments, which are in the same amounts, which total $71,492.440. These amounts when reduced to average annual amounts reveal that the average annual payment given pursuant to the head Lease is $4,292,190 and that pursuant to the subleases the average annual lease amount is $4,582,849. Thus, having found that the payments required of the parties do not decrease through this series of leases of Facility, the provisions of s. 212.031(2)(b), F.S., are not applicable.

Thus, no sales or use tax would be levied on the payments made pursuant to the lease of Facility by County to Trust pursuant to the Head Lease, nor would any such taxes be imposed on the payments to the Trust by Sublessee pursuant to the Sublease if, anterior to any of the transactions, both Trust and Sublessee were registered Florida dealers as that term is defined in s. 212.06, F.S., and extended resale certificates to their respective lessors. Trust would tender such certificate to County, and Sublessee would extend the certificate to Trust.

Intangible Tax - Department Response

Under the provisions of the Head Lease, Section 6(a), the only purpose allowed the Head Lessee is the sublease of the Facility. The Sublease, in Section 6(a), provides the only use of the Facility by the Sublessee is the sub-sublease of the Facility. Consequently, only the Sub-sublessee (which is the County) may operate the Facilities, and that such operation is in furtherance of a governmental or public purpose. Therefore, the lease of the Facility to Trust would be exempt from intangible tax on governmental leasehold estates. No intangible tax will arise with respect to any of the intangible property acquired by, or arising out of, this transaction so long as the ownership, management and control is outside of the State of Florida.

Documentary Stamp Tax - Department Response

The prepaid rent under the Head Lease will not be subject to documentary stamp tax under s. 201.02(1), F.S., since this transaction provides that the unearned portion of the prepaid rent must be refunded to the Head Lessee. The Head Lease may terminate for one of three events: the loss of the Facility as expressed in Sublease Section 9(a); the occurrence of any of the Burdensome Events as provided in Sublease Section 14(e), and as that term is defined in a document which defines the terms and rules of this transaction; and, for what is styled as Events of

Default in Sublease Section 16 and as these default provisions are further explained in Section 16(d) of the Sublease.

In these provisions, the terms Stipulated Loss Value, and Termination Value appear, and each decreases equally over the course of the term of the agreement. At any time during the term of the agreement the remaining portion of the Advance Rent Payment, if it were amortized over the term of the agreement, would equal the Stipulated Loss Value or the Termination Value. Thus, this transaction contains an adequate provision for the return of any unearned portion of the Advance Rent Payment. Therefore, it can be construed that the lessees are not purchasing an interest in real property for a definite period of time, since it is conditioned upon a future event. None of the lease transactions are subject to the documentary stamp under s. 201.08, F.S.

Any consideration paid for the Purchase Option would be subject to documentary stamp tax under s. 201.02(1), F.S., if the option is exercised. Consideration paid in connection with the Sublessor Merger, as that term is defined in the Participation Agreement Section 12A, would not be subject to documentary stamp tax.

Ad Valorem Tax - Department Response

The elected county property appraiser has the authority and responsibility for classifying property as taxable or exempt for ad valorem property taxation purposes. Where the County leases Facility to a nongovernmental lessee but retains title to the property, such property would appear to be exempt from ad valorem taxation as long as the property is used for a "public purpose." See Sections 196.199(2) and 196.012, Florida Statutes. The leasehold interest would be subject to ad valorem property taxation unless the county-owned Facility is used for a "public purpose" as defined in s. 196.012(6), Florida Statutes. Therefore, after a review of the documents presented to the Department, the Facility would not appear to be subject to ad valorem property taxation.

The 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. The technical opinion as to ad valorem property taxation is not binding on the Department as the implementation of this tax is in the province of the office of the county property appraiser.

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 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 the response.

Sincerely,

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