SUMMARY

Sales tax is not imposed on any payments made by any of the parties to the following transaction: a lease of municipally owned real property and tangible personal property when first leased by the municipality to a private business trust which is a registered dealer and which tenders a resale certificate to the municipality; a sublease of the same property to a second trust which is created by the municipality; and the sub-sublease of the property back to the municipality for continued use for governmental or public purposes.

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Dec 11, 1998

Re: Technical Assistance Advisement 98A-090
Lease, Sublease and Sub-sublease of County Owned Property
Sections 196.012(6), 196.199(2), 201.02(1), 201.08, 212.02(14)(a), 212.031(1)(c), (2)(b), 212.06, 212.08(6), F.S.
Rules 12A-1.038, 12A-1.070(9), F.A.C.
XXX (herein County, or alternatively, Headlessor or Sub-Sublessee)
XXX owned bus and rail maintenance facilities, and parking garages (herein Facilities)
XXX (herein Investor I), and XXX (herein Investor II, collectively herein Investor)
XXX (herein Owner Trust, or alternatively Trustee or Headlessee)
XXX (XX) Limited (herein Lender)
XXX (herein XX, or alternatively Sublessee/Sub-Sublessor)
XXX (XX) Limited (herein Payment Agreement Issuer)
XXX (herein Payment Agreement Guarantor)
XXX (herein Letter of Credit Issuer)
XXX (herein Letter of Credit Guarantor)
XXX (herein Surety Provider)

Dear :

This is a response, styled a Technical Assistance Advisement, to your letter dated XX, wherein you asked whether, as to solely the real property in some instances, and the real property and tangible personal property in the remaining instances, which comprise the Facilities owned and operated by the County, a lease, sublease, and sub-sublease of such property to various entities will create, as to any such entities, a liability for Florida sales tax, ad valorem property tax, intangible tax, or documentary stamp tax. You have provided the Department with documentation of the transactions, which include a copy of a memorandum sent to the Federal Transit Administration (herein Memorandum), and copies of other contracts including the Participation Agreement, with Appendix A; Head Lease; Sublease; Loan and Security Agreement; Equity Letter of Credit; and, the Insurance and Indemnity Agreement.

Note is made that there are 6 locations of the Facilities, each of which is subject separately to all the same documentation herein. Further, as to some of the Facilities, solely real property is subject to the lease/leaseback provisions, while in the remaining Facilities, both real property and tangible personal property are subject to the lease/leaseback. In all instances, the County will remain in possession of the Facilities and will continue to operate the Facilities solely for governmental or public purposes.

In some of the 6 separate transactions the Owner Trust, in all instances a Delaware business trust, will be formed by Investor I. In the remainder of the instances, Owner Trust will be formed by Investor II. In all instances either Investor I or Investor II will be the sole beneficiary of the Owner Trust. Irrespective that two different equity investors will be the beneficial owners of their respective Owner Trusts, all documentation described in the following discussion will be identical. Hereafter Investor I and Investor II will be identified as Investor.

The representative transaction applicable to all of the Facilities is described as follows:

Lease Agreements

County, as the owner of the Facilities, seeks to lease Facilities to Owner Trust, which then will simultaneously sublease Facilities to SPE, a Florida trust formed pursuant to provisions of Chapter 609, F.S., the settlor and sole beneficiary of which is the County. The SPE, in turn, shall sub-sublease the Facilities back to the County. The Facilities will be leased by the County to Owner Trust pursuant to Section 2 of the Headlease and the Participation Agreement, the term of which is to be 49 years.

Owner Trust, as described by you, is a business trust organized under the laws of Delaware. The Department was not provided with a copy of the Trust Agreement creating the Owner Trust. Simultaneously with the execution of the Head Lease, Owner Trust will sublease the Facilities to the SPE, pursuant to the Sublease, for an initial term of 21 years (herein Initial SubLease Term) with an option to renew for a term of 18 years (herein the SubLease Renewal Term). The SPE will simultaneously sub-sublease the Facilities pursuant to the Sub-Sublease, to the County.

As noted above, there are 6 separate transactions involved in the lease and leaseback of the Facilities. All of the transactions are identical as to form. However, the transactions did differ as to dollar amounts and length of terms. The references to lease terms are intended to be indicative of the 6 lease transactions.

Merger

Prior to the expiration of the Initial SubLease Term, the SPE may elect under provisions of the Fixed Purchase Option as described in Section 20 of the Sublease and in Section 12F of the Participation Agreement, to acquire the Owner Trust by a statutory merger. If this election is made, the County will assume, in addition to its beneficial interest in the SPE, the interest of the Owner Trust. In such an event the County will be the Headlessee, the Sublessee, as well as the Headlessor.

Should the SPE not elect to execute the Fixed Purchase Option, the Owner Trust, as you state on page 5 of your letter, may do the following:

> either (i) permit the Sublease to expire, in which case the Owner Trust, as Head Lessee under the Head Lease, will retain (for itself or it[s] assigns) possession of the [Facilities] for the remainder of the Head Lease Term, or (ii) cause the SPE to continue the Sublease for the SubLease Renewal Term, in which event the SPE will be obligated to make annual rental payments thereunder (in amounts more particularly described in the... Memorandum and exhibits) for the balance of the Sublease Term, without any further options to purchase the Owner Trust's rights under the Head Lease. In the event the Sublease is extended for the Sublease Renewal Term, the Sub-Sublease will be similarly extended.

Payments and Financing

Owner Trusts are to receive, in total, approximately $127 million of which $88.7 million is to be provided pursuant to a limited recourse loan from Lender, and the remainder, in the amount of $38.3 million, is tendered by Investor.

Under the Headlease the Owner Trusts, in total, will pay, at closing, $127 million to the County as a rent prepayment. County will retain an undisclosed amount for its own public purposes. The County will transfer, as a contribution, to the SPE the sum of $88.7, which is the principal amount of the Lender's loan, to the Payment Agreement Issuer in accordance with the Payment Agreement which is executed by the SPE, the Owner Trust, and the Payment Agreement Issuer.

The Payment Agreement is guaranteed by the Payment Agreement Guarantor to the favor of the SPE. The payment made by the Payment Agreement Issuer to the Owner Trust, on behalf of the SPE pursuant to the Sublease, is that amount needed to liquidate the debt owed to Lender. The amount of the rent paid by SPE to the Owner Trust will be slightly less than the amount paid by County to SPE. Both of such individual rent payments will be less than the rent paid by the Owner Trust to the County. Owner Trust is to receive the principal benefits from this transaction.

The SPE will transfer the remainder of the contribution received from County, in the amount of $38.3 million, to the Equity Letter of Credit Issuer in accordance with the Equity Letter of Credit. The Equity Letter of Credit, which is guaranteed by the Equity Letter of Credit Guarantor, is issued in favor of the Owner Trust for the account of the SPE. The SPE will grant a surety interest in the Equity Letter of Credit to the Owner Trust.

Note is made that the amount represented by the Equity Letter of Credit will be the source of the funds needed to be paid to the Investor at the time of the merger of the Owner Trust and the SPE, if such merger is elected by the SPE. If the SPE elects not to exercise the Fixed Option Purchase the funds represented by the Equity Letter of Credit will be returned to the SPE, as provided in the Headlease section 15(e), in which event the County will be required to substitue alternative collateral if the Sublease is extended.

If the Headlease is terminated anterior to the expiration date, the Investor would receive a refund of the amount of prepaid rent, as provided in section 15(e) of the Headlease, applicable to any remaining term of the Headlease. On page 7 of your letter, you describe as follows, the events which would cause the early termination of the Headlease:

> (i) a default by the County of its obligations under the Head Lease, (ii) a default by the SPE of its obligations under the Sublease, or by the County of its obligations under the Sub-Sublease, (iii) the passage of a law/regulation that would prohibit the County or its SPE from continued participation in the transaction, or (iv) a casualty event rendering the subject property unusable, followed by a determination not to rebuild or repair the property.

The loan made by the Lender will be executed and delivered outside of Florida. You state as well that no Florida real property will be mortgaged to secure the loan made by Lender. The Lender will not be incorporated nor domiciled in Florida. The Equity Letter of Credit Issuer will not be incorporated or domiciled in Florida.

Sales Tax - Department Response

Sales tax may not be imposed on any payment made pursuant to the planned Headlease, Sublease, or the Sub-Sublease, as these agreements have been described in your letter and in the documents identified above which you have provided the Department.

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 the County to the SPE. As a consequence, these payments, whether in consideration of the tangible personal property or real property, are exempt under s. 212.08(6), Florida Statutes.

As to the Headlease and Sublease of the Facilities' tangible personal property, the leases of such property in accordance with the Headlease and Sublease are exempt pursuant to resale provisions as expressed in s. 212.02(14)(a), Florida Statutes. This statute provides that a sale of tangible personal property or a service which is taxable is considered as a "retail sale" except when such sale is made for resale. Rule 12A-1.038, F.A.C., interprets the statute.

Thus, when the tangible personal property of the Facilities is leased, in accordance with the Headlease to Owner Trust, and subsequently leased to the SPE pursuant to the Sublease, none of the payments tendered by either the Owner Trust or the SPE are payments subject to sales tax because each of the payments is made for further resale. Section 212.02(14)(a), F.S., excludes such payments from the tax.

As to the Headlease, and the Sublease of the Facilities' real property, 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.

In sum, no payments made by the Owner Trust, SPE, or the County, under the provisions of the Headlease, Sublease, or the Sub-Sublease as such documents have been provided to the Department are subject to sales tax.

Intangible Tax - Department Response

Under the provisions of the Headlease, Section 8, the only purpose allowed the Head Lessee is the sublease, and sub-sublease of the Facilities. The Sublease, in Section 8(b), 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 such operation is in furtherance of a governmental or public purpose. Therefore, the lease of the Facilities 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 Headlease will not be subject to documentary stamp tax under s. 201.02(1), F.S., since section 15(e) of the Headlease provides that the unearned portion of the prepaid rent must be refunded to the Headlessee. The Headlessor may terminate for any of the reasons described in Section 14 under the legend "Lease Events of Default." In Section 15, the remedies which the County enjoys are set forth in the event of default.

Section 10 of the Headlease describes the rights of the Headlessee in the event of the default by the County . Section 10(i) provides that in the event of the loss or destruction of the property the Headlessee may:

> terminate this Lease and pay or cause to be paid, on a Termination Date not later than 180 days after the occurance of such Event of Loss (a "Loss Payment Date") to the [County], to the extent not theretofore paid as insurance proceeds, (A) the Lease termination Value computed as of the Payment Date, plus (B) any unpaid Lease Basic Rent due before the Loss Payment Date, plus (C) all amounts of Lease Supplemental Rent (including Lease Supplemental Rent attributable to the [Headlessee's] exercise of its rights under this section) due and owing on the Loss Payment Date....

Thus, in reviewing these provisions, a determination is made that this transaction contains an adequate provision for the return of any unearned portion of the prepaid rent made by the Owner Trust. Therefore, it can be construed that the Owner Trust is 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, Florida Statutes.

Any consideration paid for the Fixed 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 Fixed Purchase Option as provided in Section 20 of the Sublease and in Section 12F of the Participation Agreement would not be subject to documentary stamp tax.

Ad Valorem Tax - Department Response

Under current law, the county property appraisers, and not the

Department of Revenue, have the authority and responsibility to determine whether property is entitled to an exemption from property tax. Municipal property leased to a nongovernmental lessee may be exempt from ad valorem taxation if used for a governmental or public purpose. See, s. 196.199, Florida Statutes. See, for example, Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993). The primary jurisdiction for making these factual determinations lies with the county property appraiser, upon a proper application for exemption made consistent with s. 196.011, Florida Statutes.

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, FS, which are subject to disclosure to the public under the conditions of s. 213.22, FS. 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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