SUMMARY

No sales tax is applicable to any payments made by the parties when facilities owned by a municipality are leased to a business trust who then leases the facilities back to the municipality, when the business trust is a registered dealer before the transaction and extends a resale certificate to the municipality.

****

Dec 08, 1998

Re: Technical Assistance Advisement 98A-091
Lease and Leaseback of Municipal Property
XXX (herein Trustee, or alternatively, Owner Trust)
XXX (herein Investor)
XXX (herein Lender)
XXX (herein Payment Undertaker)
XXX (herein Beneficial Interest Purchaser)
XXX (herein GIC Issuer)
XXX (herein GIC Guarantor)
Sections 196.012(6), 196.199(2), 201.02(1), 201.08, 212.02(14)(a), 212.06(2)(j), 212.07, 212.031(2)(b), 212.08(6), 213.22, F.S.
Rules 12A-1.001(9)(a), 12A-1.038(5)(a), 12A-1.070, 12A-1.071, F.A.C.

Dear :

This is a response, styled a Technical Assistance Advisement, to your letter dated XX, wherein you described a certain planned transaction, to which the Municipality, the Investor and other named entities are parties or participants, involving the lease by, and the immediate lease back to, the Municipality of two separate electric generating plants, certain facilities used in common by both plants, together with land on which the plants are situated, all of which are owned by the Municipality. You ask that the following fact pattern be reviewed with respect to any liability of any of the parties for the payment of sales tax, intangible tax, documentary stamp tax, or ad valorem property tax.

Parties

In addition to the identification of the parties and participants in the planned transaction which appear above, note is made that the Owner Trust will not be organized under the laws of Florida.

The Investor, which is both the sole settlor and the sole beneficiary of the Owner Trust, will not be incorporated in, nor domiciled in Florida. Further, neither the Lender, Payment Undertaker, nor the GIC Issuer will be incorporated in, nor domiciled in Florida.

Leases

The transaction involves two Heads Leases, one which leases the real property and the other which leases the tangible personal property, collectively styled Head Leases, the lessee of which is the Owner Trust, and the terms of which are each 38 years. Simultaneously with the execution of the Head Leases, a single sublease (herein Sublease) of all the property (tangible personal property and real property) is executed between the Owner Trust and the Municipality. The term of the Sublease is approximately 19 years (herein Initial Sublease Term), with an option available to the Owner Trust to extend the Sublease by another 13 years (herein Renewal Option) if the Municipality does not exercise its option to purchase the rights (herein Purchase Option) of the Owner Trust at the expiration of the Initial Sublease Term.

Financing

The essence of the transaction is the advance rental payment in the aggregate of approximately $248 million to be made at closing of the transaction by the Owner Trust to the Municipality in accordance with the Head Leases. This amount is the sum of approximately $108 million which Owner Trust is to receive from Investor, with the remainder of approximately $140 million which is to be gained by the Owner Trust from a nonrecourse loan from Lender.

Municipality is to retain approximately $36 million for its own municipal purposes. The balance of the advance rental payment of approximately $212 million will be paid by the Municipality to the Payment Undertaker and to the GIC Issuer. The Payment Undertaker will possess certain rights and obligations in accordance with the Payment Undertaking Agreement. The GIC Issuer will possess certain rights and obligations in accordance with a Collateralized Investment Agreement. The only other rental payments required to be made by Owner Trust will total approximately $1.5 billion, which will be paid approximately 4 years after the termination of the Head Leases but only if the Municipality has not exercised the Purchase Option.

The Payment Undertaker will make payments, pursuant to the Payment Undertaking Agreement, on behalf of the Municipality to Owner Trust in periodic amounts which are represented by the debt portion of the rents required of the Municipality under the single Sublease. Also, the Payment Undertaker will make payments to Owner Trust in amounts as represented by the debt portion of the early termination value under the Sublease, and will, should the Municipality choose to exercise the Purchase Option, make the payment to Owner Trust as presented by the debt portion of the Purchase Option.

The GIC Issuer will make payments, pursuant to the GIC, on behalf of the Municipality to the Owner Trust, in amounts which represent the equity portion of the rents required to be paid by the Municipality pursuant to the Sublease. The GIC Issuer will make a payment in an amount represented by the equity portion as to any date of an early termination of the Sublease. Should the Municipality choose to exercise the Purchase Option, the GIC Issuer will pay that amount due under the equity portion of the Purchase Option.

Pledged and secured elements of the transaction

The Payment Undertaking Agreement and the GIC are pledged both to the Owner Trust, to secure the Municipality's obligations under the Sublease, and to the Beneficial Interest Purchaser to secure the Municipality's obligations under the Municipality's Swap Agreement. The Owner Trust will assigns its rights under the pledged Payment Undertaking Agreement to the Lender to secure the nonrecourse loan made to the Owner Trust. The Beneficial Interest Purchaser will, in turn, assign its rights to the pledge of both the Payment Undertaking Agreement and the GIC to the Municipality Swap Guarantor.

The amounts described above, as to the funding necessary under the Payment Undertaking Agreement and under the GIC to finance the Purchase Option, will be returned to the Municipality should the Municipality not exercise its rights under the Purchase Option. You further state that such funds will be returned to the Municipality if such option rights are not exercised and if the Owner Trust "... has not exercised its put renewal option or, if the put renewal option has been exercised, provided that the Municipality has at that time provided alternative collateral...."

At the time of the termination of the Sublease, Owner Trust will grant a security interest in the Head Lease Collateral Account to secure its obligation to pay the deferred portion of the rent required under the Head Leases.

In the event of a default under the Sublease, Investor has the option to sell its interest in the Owner Trust to the Beneficial Interest Purchaser, which is an affiliate of the Lender. In such a sale, Investor would receive a payment in settlement of the Swap Agreement with the Beneficial Interest Purchaser in an amount equal to the termination value payment required by the Sublease. You further state on page 4 of your letter that as a result of the settlement of another Swap Agreement (the "Municipality Swap"), the "... Beneficial Interest Purchaser would be entitled to put to the Municipality the entire beneficial interest it received in the Owner Trust and would receive a payment equal to the termination value.... The obligations of the Municipality under the Municipality Swap would be secured by a financial guarantee insurance policy issued by the... Municipality Swap Guarantor."

You provided the Department, on November 23, 1998, with the following documents: Head Lease (Real Property); Head Lease (Tangible Personal Property); Loan and Security Agreement; Lease Agreement; Summary of Terms and Conditions, Participation Agreement; and the Trust Agreement.

Considering these documents, you posit 4 issues. Each of these issues, framed by you, will be replicated, after each of which the Department's position will be expressed.

Department Response

Issue 1. "Will payments required by the [Owner] Trust or the Municipality under the [H]ead [L]eases or [S]ublease be subject to sales or use tax?"

Department Response - Sales tax

Sales tax may not be imposed on any payment made pursuant to the planned Head Leases, nor the Sublease, as these agreements have been described in your letter dated November 6, 1998.

As to the Head Leases, and the Subleases of the Municipality 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. Section 212.06(2)(j), F.S., defines as a "dealer" any person who leases, or who grants a license to use, real property. Section 212.07, F.S., requires that a resale certificate may only be extended by a registered dealer. Rule 12A-1.038(5)(a), F.A.C., states that only a registered dealer may issue resale certificates.

Rule 12A-1.070, F.A.C., interprets s. 212.031, F.S., which imposes sales tax on the lease of or the grant of a license to use real property, and in subsection (9) of the administrative rule, a provision allows the tender of a resale certificate by a lessee to the landlord in the instance when such a lessee sublets or assigns all of the real property, or when such lessee retains only an incidental portion of the real property under a sublease or assignment.

Considering the instant facts, the Owner Trust, as the lessee, will not retain any portion of the leased real property but will instead immediately sublease all of the real property to the Municipality. Thus, Owner Trust, if it is a registered dealer prior to the transaction, may issue a resale certificate to the Municipality and not pay sales tax on the payments pursuant to the real property Head Lease. Similarly, again if registered as a dealer, the Owner Trust could issue a resale certificate as to the tangible personal property.

Based upon the specific facts and circumstances described above, the payments made pursuant to the real property portion of the Sublease are not subject to tax under Chapter 212, Florida Statutes.

As to the tangible personal property leased under the Head Leases, note is made that s. 212.05, F.S., imposes sales tax on the privilege of engaging in the business of leasing or renting tangible personal property. Paragraph (1)(c) of the statute imposes the tax on "... the gross proceeds derived from the lease or rental of tangible personal property...." Paragraph (1)(d) imposes the tax on the "... lease or rental price paid by a lessee or rentee, or contracted or agreed to be paid by a lessee or rentee to the owner of the tangible personal property." Rule 12A-1.071, F.A.C., interprets the statute.

The lease by the Municipiality of tangible personal property to the Owner Trust in accordance with the Head Leases is not taxable pursuant to the resale provisions as expressed in s. 212.02(14)(a), Florida Statutes. Rule 12A-1.038, F.A.C., interprets the statute. 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 a sale is made for resale.

Thus, when the tangible personal property of the Municipiality is leased, in accordance with the Head Leases, and subsequently leased by the Owner Trust to the Municipality pursuant to the Sublease, none of the payments tendered by the Owner Trust to the Municipiality 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.

Based upon the specific facts and circumstances described above, the payments made pursuant to the tangible personal property portion of the Sublease are not subject to tax under Chapter 212, Florida Statutes.

In sum, no payments made by either the Owner Trust or the Municipality under the provisions of either the Head Lease or the Sublease, as such documents have been described to the Department, are subject to Florida sales tax.

Issue 2 "Will the prepayment of rent required of the [Owner] Trust under the [H]ead [L]eases agreements be subject to documentary stamp tax?

Department Response - Documentary Stamp Tax

The prepaid rent under the Head Leases will not be subject to documentary stamp tax under s. 201.02(1), F.S., assuming the Head Leases provide that the unearned portion of the prepaid rent must be refunded to the lessees in the event of early termination or default. 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. Neither the Head leases nor the subleases are subject to documentary stamp tax under s. 201.08(1), F.S. However, any collateral assignments of leases recorded in Florida would be subject to the tax imposed under s. 201.08(1), F.S.

Consideration paid in connection with the Purchase Option would not be subject to documentary stamp tax. However, if the option were exercised, tax would be due under 201.02(1), F.S., based on the consideration.

Any of the documents that are recorded in Florida as collateral for the loan are subject to the documentary stamp tax under s. 201.08(1), F.S. The loan documents to be delivered at the closing in New York must be signed, executed, and delivered outside of Florida, otherwise they are subject to the documentary stamp tax under s. 201.08(1), F.S.

Issue 3. " Will the [Municipal property] be subject to ad valorem tax during the term of the Sublease of the [Municipal real property] from the [Owner] Trust to the Municipality?"

Department Response - Ad Valorem Property Tax

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.

Issue 4. "Is the [Owner] Trust's leasehold interest in the [Municipal property] exempt from the governmental leasehold intangible tax during the term in which the [Owner] Trust subleases the [Municipality property] to the Municipality for a governmental or public purpose?"

Intangible Tax - Department Response

Under the provisions of the Head Leases, the lessee is required to operate the leased property as electric generating plants. The property is currently operated as electric generating plants by the government agency. The electric generating plants' operation falls within the governmental or public purpose definition. The lease operation by the Owner Trust, as the electric plants' operator, would also fall within the definition of a governmental or public purpose. The Sublease also requires that the property be operated as electric generating plants. Therefore, the lease of the electric plants to the Owner 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 are outside of the State of Florida.

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 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,

Robert G. Parsons
Tax Law Specialist
Sales Tax
Technical Assistance and Dispute Resolution

Joe Parramore
Tax Law Specialist
Intangible Tax
Technical Assistance and Dispute Resolution

Joy Eldred
Tax Law Specialist
Documentary Stamp Tax
Technical Assistance and Dispute Resolution

John Felton

Tax Law Specialist

Ad Valorem Property Tax

Technical Assistance and Dispute Resolution

Ctrl No.35671