SUMMARY

QUESTION 1: Is a utility company responsible for determining whether the exemption provided for the sale of electricity to residential households applies to the use of the electricity at a particular location, or whether the location owner is responsible for such determination?

ANSWER - Based on Facts Below: It is the burden of the account owner to establish entitlement to the exemption.

QUESTION 2: Relying upon the customer's written affidavit that electricity will be purchased and used solely for residential purposes, the utility company coded the customer as residential in accordance with its tariff. The utility company subsequently determines that the sale was not exempt. Is the utility company or the utility customer liable to the Department for penalty and interest?

ANSWER - Based on Facts Below: In such instances, the Department will look to the utility customer for any tax, penalty, and interest due if the electricity was used for a non-exempt purpose. The Department will look to the utility company only when the utility company's records indicated an improper or erroneous classification.

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Jul 07, 2000

Re: Technical Assistance Advisement 00A-037
Florida Sales Tax Imposed on Sales of Electricity
Sections 212.08(7)(j), F.S.
Taxpayer: XXX ("Taxpayer")
Sales Tax No.: XX

Dear:

This response is to your petition of May 15, 2000, requesting the Department's issuance of a Technical Assistance Advisement

(TAA) pursuant to s. 213.22, F.S., and Ch. 12-11, F.A.C., on behalf of the referenced Taxpayer regarding the referenced matter. The Department has carefully examined your request and supporting documents and finds them to be in order. Therefore, the Department is hereby issuing the requested TAA to the referenced Taxpayer.

DISCUSSION OF ISSUE

The issue is the application of section 212.08(7)(j), F.S., which provides an exemption for "sales of utilities to residential households or owners of residential models," to a number of factual situations. A discussion of each of these factual situations will be provided after a general discussion of the issue at hand. You have asked whether the utility company is responsible for determining whether the exemption applies to the use of electricity at a particular location, or whether the location owner is responsible for such determination.

You have also requested a determination based on the following situation. Relying upon the customer's written affidavit that electricity will be purchased and used solely for residential purposes, the utility company coded the customer as residential in accordance with its tariff. The utility company subsequently determines that the sale was not exempt. Is the utility company or the utility customer liable to the Department for penalty and interest?

STATUTORY LAW

Section 212.05(1)(e)1.d., F.S., imposes a sales tax on charges for electrical power or energy.

Section 212.08(7)(j), F.S., provides:

> (j) Household fuels.--Also exempt from payment of the tax imposed by this chapter are sales of utilities to residential households or owners of residential models in this state by utility companies who pay the gross receipts tax imposed under s. 203.01, and sales of fuel to

residential households or owners of residential models, including oil, kerosene, liquefied petroleum gas, coal, wood, and other fuel products used in the household or residential model for the purposes of heating, cooking, lighting, and refrigeration, regardless of whether such sales of utilities and fuels are separately metered and billed direct to the residents or are metered and billed to the landlord. If any part of the utility or fuel is used for a nonexempt purpose, the entire sale is taxable. The landlord shall provide a separate meter for nonexempt utility or fuel consumption. For the purposes of this paragraph, licensed family day care homes shall also be exempt.

DISCUSSION

The Statute. Prior to discussion of specific factual situations, several points should be made concerning section 212.08(7)(j), F.S.

1. The statute exempts sales of utilities "to residential households." The statute also states, however, that if any part of the utility is used for a nonexempt purpose, the entire sale is taxable. Thus, the statute contains two requirements: (1) the sale must be to residential households, and (2) there can be no use for a nonexempt purpose. Another way of stating the second requirement is that the use must be exclusively for exempt purposes, which, in the context of the statute, must be taken to mean for "residential" purposes.

2. The statute states that it makes no difference whether the sales of utilities "are separately metered and billed direct to the residents or are metered and billed to the landlord." Thus, it makes no difference in whose name the meters are listed.

3. From the focus on "use" of the property, as well as the statement that it makes no difference whether the actual residents receive the bill, it can be inferred that the legislature was concerned with the use of the residents or occupants and not the use of the landlord. That is, the landlord of an apartment building might own and operate

literally hundreds of apartments for commercial gain, and if the statute required focus on the landlord's use, all apartment residents would be taxed on their purchases of utilities, even though the apartments were their only and permanent residences. The same is true of a landlord who owns multiple single-family houses that are rented to individual families. That rental business might be the landlord's sole livelihood, yet the fact that the landlord is in business does not prevent the houses from qualifying as "residential households."

4. Because it is the use of the occupant of the residential household with which the statute is concerned, the occupant must use the household exclusively for residential purposes. In other words, he or she must make the household his or her residence, temporary or permanent, and engage in no use other than residential.

5. If there is only one meter for multiple units and, accordingly, only one charge for electricity, it is that charge or "sale" that must qualify under the statute. That sale must be to "residential households" for exclusively residential use. Although the sale can be to the landlord of the residential households, if any part of the use is non-residential, the entire sale is taxable. Thus, if the landlord uses part of the electricity for his own purposes, which are not exclusively residential, the entire sale to the complex is taxable. Or, if there is one occupant of a multiple-unit complex that is making a non-residential use of the unit, the sale to the entire complex is taxable. On the other hand, if the units are individually metered, so that a separate sale is being made to each unit, then each sale must be individually considered under the statute.

The typical hotel or motel cannot qualify for the exemption because the hotel or motel may use some of the electricity for its own commercial purposes. (In other words, not all of the electricity is being passed through for the use of residents, however temporary. Some of the electricity is being directly used by the landlord). However, a hotel can have units on its property that are individually metered. The use of those units must be examined separately.

6. Section 212.03, F.S., dealing with transient rentals, has nothing whatsoever to do with section 212.08(7)(j), F.S. There are no cross references, and the statutes have entirely different purposes. It merely confuses the issues that must be examined under section 212.08(7)(j), F.S., to think in terms of the test for transient rentals under section 212.03, F.S. The landlord of an apartment building in which every apartment is subject to annual leases is just as much in business as is the landlord of an apartment building in which there are no leases, or in which every lease is month-to-month. As noted under point four, it is not the use of the landlord that is of concern under section 212.08(7)(j), F.S.; it is the use of the apartment occupant.

7. The statute imposes no requirements as to ownership (whether the property is owned by a hotel company, a partnership, a corporation, or other entity), no requirements as to type of business (whether the property is operated as a hotel, marina, apartment building, or RV park), no requirements as to advertising (whether the properties are being held out for short-term or long-term rental), and no requirements as to type of units (whether the units are apartments, cottages, rooms, houses, or condominium units). Those factors are simply not relevant to the application of the statute.

8. It is the burden of the account owner to establish entitlement to the exemption. The account owner must establish from its books and records that it is entitled to the exemption because a particular unit was used exclusively for residential purposes. See Department of Revenue v. Anderson, 403 So.2d 397 (Fla. 1981); Housing by Vogue, Inc. v. Department of Revenue, 403 So.2d 478 (Fla. 1 DCA 1981); Pioneer Oil Co. v. Department of Revenue, 401 So.2d 1319 (Fla. 1981), affirmed, 422 So.2d 3 (Fla. 1982); State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973).

Responsibilities of Utility Companies. In TAA 98A-068R, we stated the responsibilities of utility companies in connection with the exemption provided in section 212.08(7)(j), F.S. We stated that an electric utility company must make a decision

when a customer's account is opened whether sales tax should be collected on its charges to the customer. We stated that the Department would accept the utility company's decision when the following three factors were present:

1. The unit to which the electricity is sold must be coded as "residential," based on the utility company's tariffs filed with the Public Service Commission.

2. The utility company must have on file an application for services or other certification from the customer attesting to the fact that the electricity is being purchased for exclusive residential household use. We stated that the certification need not be a formal document; it could be as part of an application for service, or it could be inferred from a pattern of billing statements that referred to the service as being residential.

3. The utility company must have accepted the certification in good faith.

We noted that even though the utility company's classification would not be disturbed when those three factors were present, the Department would look to the account owner for any tax, penalty, and interest due if the electricity was used for a non-exempt purpose. The Department would look to the utility company only when the utility company's records indicated an improper or erroneous classification.

PRESENTATION AND RESPONSES TO FACTUAL SITUATIONS

1.a. A residence that is rented out on a daily or weekly basis[,] such as a second home, condominium or trailer in a mobile ho me park[,] where the account is in the name of the owner rather than the occupant, a real estate company or other company and may have an out of state address.

b. A residence that is rented out on a daily or weekly basis[,] such as a second home, condominium or trailer in a mobile home park[,] where the account is in the name of a real estate company or other company.

c. A residence that is rented out on a daily or weekly basis[,] such as a second home, condominium or trailer in a mobile home park[,] where the account is in the name of an out-of-state company.

The requirements of section 212.08(7)(j), F.S., are that (1) the electricity be sold to a "residential household" and (2) the electricity be used exclusively for residential purposes. Therefore, it is the use of each second home, each unit of a condominium, and each mobile home or "trailer" located in a mobile home park that is determinative. Although each of these types of residential units may qualify as "residential households" in the sense that each is occupied by someone residing there, either permanently or temporarily, it is possible that some of the units may be used for commercial purposes, such as an individual conducting a commercial business from the unit.

To the extent that each second home, each unit of a condominium, and each mobile home or "trailer" located in a mobile home park is (1) separately metered and (2) used exclusively for residential household purposes, either permanently or temporarily, the exemption provided in s. 212.08(7)(j), F.S., would apply. It makes no difference in whose names the meter accounts are listed.

1.d. When a landlord or reality company transfers a residential electric service to their name during the cleanup between renters or to show a unit for sale or rental.

The transfer of residential electric service for a "unit" to the property owner, or reality company, between renters is not determinative of whether the electric service is exclusively for residential use. In the event that the use of the unit during periods between renters is for the purpose of cleaning the unit and showing the unit to prospective renters, the use of the unit remains exclusively for residential household use. In the event that the landlord or reality company uses the unit for any non-residential purpose, such as a temporary office, the sale of electric service to the unit becomes taxable.

1.e. A well pump, pool and/or other common facilities/areas used by the residents and served by meter that is in the name of the Homeowner's Association. If exempt, what documents are required to secure the exception? See TAA 92A-062, TAA 90A-005, TAA 85A-016.

Residential cooperatives, condominiums, timeshares, mobile home parks and similar multi-unit complexes contain common elements that are available for use to all residents of the complex or park. Pool areas, club houses, benches, sidewalks, playgrounds, tennis courts, and similar recreational facilities are often provided without charge for the use by all residents of the complex or park. Although these common elements are not contiguous to each residential unit or park space, they are provided as an extension to each residential unit or park space. To the extent that the use of the common elements is limited to residential use, the electricity provided to the common elements would qualify for the exemption. The fact that an electric meter account is in the name of the Homeowner's Association of the complex or mobile home park does not disqualify the residential household use of electricity in elements common to all residential units or park spaces. It should be noted that any non-residential use of electricity in the common elements, such as admission charges to enter the pool or other recreational areas, would disqualify the sale from exemption.

1.f. Campsite or marina hookups that are individually metered and rented to mobile units (i.e.[,] Recreational vehicles, yachts) for residential use under the utility's tariff and the electric accounts are in the name of the campsite or marina rental sites. See TAA 86A-108. If exempt, what documents are required to secure the exemption?

As each campsite or marina hookup is individually metered, it is the use of each campsite or marina hookup that would be determinative; the use must be for residential purposes, transient or long-term. The owner of the campsite or marina hookup must establish the use of the electricity for each meter. When the owner provides an electric account to a campsite or marina hookup where such electricity is used by the temporary or

long-term resident for residential household purposes, the use of the electricity qualifies for exemption. When the owner uses any portion of the electricity passed through the meter for purposes other than providing the resident at the campsite or marina hookup electricity for residential household usage, the entire sale is taxable.

To exempt the sale of electricity, the campsites or marina hookups must be coded as "residential," based on Taxpayer's tariffs filed with the Public Service Commission. Taxpayer must have on file an application for services or other certification from the owner of the campsite or marina that the electricity for that account is being purchased for exclusive residential household use. Further, Taxpayer must have accepted such application or certification in good faith.

1.g. Campsite or marina hookups that are individually metered and rented to mobile home units for residential use under the utility's tariff and the owner of the campsite charges a usage fee to its renters for electricity use rather than the actual cost of electricity.

See the discussion provided in the response to 1.f. The fact that the owner charges each tenant a usage fee for the electricity, rather than the actual cost of the electricity, does not alter the usage of the electricity. The usage of the electricity is determinative of whether the charge qualifies for the exemption provided for residential household usage of electricity.

1.h. Barns and other [outbuildings] on a farm where the electric customer lives on the farm and sells crops raised on the farm, but the buildings are separately metered from the residence.

Here again, the use of the barns and other outbuildings on the farm to which the electricity is separately metered must be examined to determine whether the use of the electricity is limited for exclusively residential household purposes. In this instance, the electricity in the barns and other outbuildings is used in the process of producing agricultural products for sale,

an activity which extends beyond exclusive residential household use. Although the separate sale to the residence qualifies for the exemption provided for residential household use, the sale to the separately metered barns and other outbuildings does not qualify for the exemption.

1.i. Drinking water wells on the resident's farm used primarily to serve the house but also used for watering troughs (separately metered from the home).

In this instance, we must examine whether the electricity used to provide water to troughs is beyond that for exclusive residential household use. The use of electricity to provide water for animals that are a part of the household would not disqualify the residential household use of the electricity. However, in the event that the electricity is used in providing water in troughs for animals used in a for-profit agricultural endeavor, that use would disqualify the entire sale of electricity to the drinking well. The owner of the farm must establish the use of the water. In the event that the electricity is used for exclusive residential household purposes, Taxpayer is required to maintain the documentation, as previously discussed.

1.j. Time shares and/or condominiums used for vacations by various owners.

Each timeshare unit and each condominium unit may be a residential household, even though in this case the occupant may be residing in the unit on a temporary basis. To the extent that use of electricity to each unit is used for residential household purposes, the exemption would apply. However, in the event that any unit is used for non-exempt purposes while it is not being used as a temporary residence, such as a temporary sales office, that unit would be disqualified from the exemption.

CONCLUSION

It is particularly important to note that the concepts of section 212.03, F.S., have no application to the exemption

granted under section 212.08(7)(j), F.S. The length of residence in a unit is not relevant: a unit used for overnight stays may qualify as a residential household. The important point is that there be no non-residential use of the "sale" of the electricity. That is, there can be no use of the electricity by the operator or landlord of a multiple-unit complex with one meter (other than for the operator's or landlord's own residential purposes) or by an occupant of a unit.

Utility companies have limited responsibilities in connection with the exemption. If Taxpayer acts in accordance with its filed tariffs and accepts in good faith a customer's declaration that the service is residential, the Department will not pursue Taxpayer for any erroneously classified accounts. The Department will, however, look to the account owner, and the account owner has the burden of showing entitlement to the exemption.

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, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Janet L. Young
Tax Law Specialist

JLY/pb
Control No. 41422