

FLORIDA TECHNICAL ASSISTANCE ADVISEMENT

TAA 04M-002 (Nov. 16, 2004)

SUMMARY

Sales and Use Tax:

QUESTION: Whether the distribution and leaseback of the facilities described is exempt from Florida sales tax as a financing arrangement/mortgage.

ANSWER - Based on Facts Below: In reviewing all of the relevant documents related to the transaction, it was determined that this particular transaction was more akin to a "financing arrangement" than a "lease" for purposes of Chapter 212, F.S. The following factors were considered during our determination: (1) Recognizing the clear and unambiguous language of the relevant documents while keeping in mind that substance is always preferred over form; (2) Recognizing that, for there to be a mortgage, there must be a debt secured thereby; (3) Examining if "rent" is fixed to debt service, as opposed to the rental market value of the property; (4) Determining whether the buyer/lessee is a single purpose financing corporation created prior to the transaction in order to facilitate the loan process; (5) Examining whether the short-term and long-term risks pass to the "so-called buyer"; and (6) Recognizing that the proper recording of a "debt" requires the transfer of title shortly after the end of a "lease" term. Other factors exist, however, these six (6) were considered most relevant under the specific facts presented.

Documentary Stamp Tax:

QUESTION #1: Whether the "lease" is considered a "financing arrangement", and treated as a mortgage subject to documentary stamp tax.

ANSWER #1 - Based on Facts Below: Upon review of all of the relevant documents related to the transaction, the Deed, Lease, Mortgage and other relevant agreements are all part of the same financing agreement, it was determined that the "lease" is a "financing arrangement" treated as a mortgage and is subject to documentary stamp tax under s. 201.08(1), F.S., based on the total amount of "principal", constituting the amount provided for the payment by the Tenant to the Landlord of funds to satisfy its obligations to Lender under the lease.

QUESTION #2: Is the transaction subject to documentary stamp tax under s. 201.02, F.S?

ANSWER #2 - Based on Facts Below: Since the deed, lease mortgage and other relevant agreements are all part of the same financing agreement treated as a mortgage as they are intended to secure

the payment of money to the Lender, no tax is due on such documents under s. 201.02, F.S.

Intangible Tax:

QUESTION: Whether the "lease" is considered a "financing arrangement", and treated as a mortgage subject to nonrecurring intangible tax.

ANSWER - Based on Facts Below: As the "lease" is considered a "financing arrangement", the Lease facility is subject to the nonrecurring intangible tax imposed under s. 199.133, F.S., since it is an obligation secured by Florida real property.

November 16, 2004

Re: Technical Assistance Advisement No. 04M-002
Florida Documentary Stamp Tax; Intangible Tax; and Sales
and Use Tax
Real Property Transaction - Financing Arrangement/Lease of
Real Property
Related Party Commercial Real Property Rentals
Sections 199.133, 199.185, 201.02, 201.08, 697.01(1),
697.02, 212.02, 212.031 and 608.471(3), F.S.
Rules 12B-4.014(1), 12B-4.052(7), 2B-4.053(2), and 12A-
1.070, F.A.C.
XXX ("Taxpayer/Tenant")
XXX ("Landlord")
XXX ("Direct Parent")
XXX ("Indirect Parent")
XXX ("Lender")
XXX ("Owner")

Dear :

This is in response to your recent request for a Technical Assistance Advisement dated September 1, 2004, regarding application of documentary stamp tax, intangible tax and sales and use tax to the transaction described below.

Issues

Do the Deed, Lease, and Mortgage, when considered with other relevant agreements pertaining to the same overall transaction, together constitute a single mortgage? If answered in the affirmative, is the transaction subject only to documentary stamp tax under s. 201.08, F.S., and not to documentary stamp tax under s. 201.02, F.S.?

If the Deed, Lease, and Mortgage, when considered with other relevant agreements pertaining to the same overall transaction, are together construed to be a single mortgage, is the transaction subject to intangible tax under s. 199.133, F.S.?

Is the distribution and leaseback of the real property described exempt from Florida sales tax under Section 212.031, F.S., because it is a "financing arrangement/mortgage" rather than a "lease?"

FACTS PRESENTED BY PETITIONER

Owner owns 100% of the outstanding equity of Indirect Parent. Indirect Parent owns 100% of the outstanding equity of Tenant and Direct Parent. Direct Parent owns 100% of the outstanding equity of Landlord. Landlord is a "disregarded entity" for federal and Florida income tax purposes. Tenant and Direct Parent are subsidiary C corporations of Indirect Parent, and have elected to be included in a consolidated group for federal and Florida income tax purposes....

Tenant owned certain real property located in XXX, Florida, and all improvements thereon (hereinafter the "Property"), which was encumbered by a mortgage in favor of XXX Bank & Trust Company (the "Existing Mortgage"). Tenant operates a retail automobile, parts and service operation on the Property.

Pursuant to a commitment letter dated XX, Lender agreed to provide the Loan for purposes of refinancing the obligations evidenced by the Existing Mortgage on the conditions that (a) title to the Property be held by, and the Loan be advanced to, a bankruptcy-remote single purpose entity (the "SPE Requirement"), (b) owner guaranty the repayment of the Loan, (c) tenant enter into the Lease, and (d) Indirect Parent guaranty the payment of the Lease. Consequently, instead of advancing the Loan directly to Tenant, (i) Direct Parent formed Landlord as a single-member limited liability company with a stated purpose, as set forth in Section 1.2 of the Operating Agreement, of owning the Property, granting the Mortgage and borrowing the Loan, (ii) Tenant conveyed nominal title to the Property to Landlord pursuant to the Deed, (iii) Tenant executed the Lease, (iv) Owner executed the Loan Guaranty, (v) Indirect Parent executed the Lease Guaranty, (vi) Lender advanced the Loan to Landlord, (vii) Landlord paid the net proceeds of the Loan to Tenant in payment for the Property, and (viii) Tenant applied such net proceeds to satisfy the Existing Mortgage in full. Florida documentary stamp tax... was paid upon the recordation of the Deed, and documentary stamp tax... and nonrecurring intangible tax? were paid upon recordation of the Mortgage.

As an integral part of the overall financing arrangement with the aforementioned parties, Landlord and Tenant entered into the Lease. The term of the Lease is coterminous with the Loan. The Lease provides cross default provisions with the Loan. The intent

of the Lease is to ensure that Tenant retains the benefits and burdens of owning the Property and to provide for the payment by Tenant to Landlord of funds to satisfy its obligations to Lender under the Loan Documents. The Lease Guaranty executed by the Indirect Parent runs to the benefit of Lender as well as Landlord. But for Lender's express requirement, Landlord would not have been formed and Tenant would have retained title to the Property directly.

Lease Agreement

As presented in the "Witnesseth" statements included in the opening section of the Lease, "...the parties to this Lease intend that this Lease shall be treated as a financing arrangement, rather than a lease or rental arrangement." As such, the parties to the Lease intend that the Lease be treated as a financing arrangement, rather than a lease or rental arrangement. The relevant terms of the lease are summarized below:

1.

Lease Term - Article 2. The Lease term commences on the date that the Landlord purchases the Property (as it is made part of the Loan, by reference, in Article 1, Section 1.1(f) of the Loan), and terminates thirty days after all liabilities and obligations of the Landlord under the Loan documents are indefeasibly paid in full, unless the term has terminated earlier in accordance with certain provisions of the Lease. The thirty day period subsequent to the indefeasible payment date of the Loan is provided solely to allow adequate time to prepare the necessary documents to evidence satisfaction of the Loan.

2.

Rent - Article 3. Under Article 3, the Tenant is obligated to pay "Base Rent" directly to the Lender. In general, Base Rent equals the amount of principal and interest payable to the Lender with respect to the Loan. In addition, the Tenant is obligated to pay "Additional Rent" to the Landlord. The term "Additional Rent" is defined in the Lease to include, at the option of the Landlord, "all costs, expenses, and obligations, together with all interest and penalties thereon, required to be paid by Tenant under this Lease, including, without limitation, the Termination Value, and all expenses Landlord incurs because of Tenant's default under any of the terms, covenants and conditions of this Lease, including, without limitation, attorney's and legal assistants' fees and costs incurred prior to trial, on any appeal, and in any bankruptcy proceeding."

3.

Taxes; Utility Charges - Article 4. The Tenant is obligated to pay all costs for the use, occupancy, or operation of the Property. These costs include all utility charges and property taxes with respect to the Property.

4.

Condition of the Property and Release of Liability - Article 6. The Tenant acquires the property under the Lease in its "as-is, where-is" condition. Landlord makes no warranties or representations with respect to the Property, express or implied, except as otherwise provided in the Lease. Tenant releases Landlord from any and all liabilities Tenant incurs in the course of Tenant's use of the Property that results from claims or injury or damage to person or property. Further, Tenant shall have no recourse against Landlord's title to the Property or any interest therein, other than for liens arising as a result of any lien created by Landlord.

5.

Maintenance and Repair - Article 7. The Tenant is required to maintain the Property in good condition, repair, and working order and, at its sole cost and expense, may at any time and without the consent of the Landlord; make all desired modifications, alterations, improvements and additions to the Property. Moreover, the Tenant has waived the right to require the Landlord maintain, repair, or rebuild the property for legal or insurance requirements or any restriction at any time in effect.

6.

Insurance and Indemnity Requirements - Article 8. The Tenant is required at its expense to maintain insurance coverage with respect to the Property and to indemnify the Landlord from the claims of all persons (such as loss of life, bodily injuries, or otherwise) and to protect the property from perils.

7.

Risk of Loss - Article 10. The Tenant assumes all risk of loss with respect to the Property.

8.

Casualty and Condemnation - Article 11. The Tenant is responsible to comply in full with Landlord's obligation to Lender in the event of casualty or condemnation, and is otherwise responsible to prosecute and finance the completion of the repair and restoration of the property. In general, the Tenant is required to repair the Property in the event of a casualty loss and is entitled to retain any amounts recovered in the event of a casualty loss or condemnation of the Property. In no event does a casualty or condemnation affect Tenant's obligation to pay rent.

9.

Environmental Matters - Article 12. Tenant indemnifies Landlord for any loss, liability, expense, or damage arising out of any failure of the Property to comply with all applicable environmental protections laws, ordinances, rules, and regulations, and any litigation, proceeding, or governmental investigation thereon.

10.

Covenants - Article 16. Landlord requires Tenant to maintain certain financial conditions at all times. These conditions include certain cash flow, operational, and business status/appearance criteria, all of which mirror Landlord's obligations to Lender under the Mortgage. These covenants were included in the Lease as well as the Mortgage so Lender would have the benefit, as a third party beneficiary of the Lease, of having financial covenants from Tenant as well as from Landlord.

11.

Events of Default - Article 17. If the Tenant defaults under the Lease, the Landlord is entitled to recover liquidated damages equal to the Termination Value. Pursuant to Section 17(b) (iv) of the Lease, upon payment of the liquidated damages amount, Landlord has the option, at the Tenant's expense, to assign the Landlord's interest in the Properties to Tenant.

12.

Purchase at End of Lease Term - Article 19. Provided no events of default occur prior to the end of the lease term, Tenant is required to purchase, and Landlord is required to sell, all right, title and interest in the Property at a price equal to the Termination Value, which is defined in Article 1(b) of the Lease.

13.

Net Lease - Article 20. The Tenant's obligations under the Lease are absolute and unconditional and the Lease constitutes a net lease.

Loan Documents

Some relevant terms of the Mortgage are summarized below:

1.

Grant of Security - Article 1. Borrower (Landlord) irrevocably mortgages and grants a security interest to Lender in all of the Property, and (among all other items) all leases and rents, which include the aforementioned Lease (see Section 1.1). Borrower unconditionally assigns to Lender all of Borrower's right, title and interest in and to all current and future leases and rents, and further assigns Lender a license to collect and receive all amounts under such leases and rents (See Section 1.2).

2.

Special Covenants - Article 4. Borrower covenants and agrees that it will consent to existing as a "Single Purpose Entity." To this end, it shall not (among other conditions) engage in any activity other than the ownership, operation and maintenance of the Property; acquire or own any material assets other than the Property; change its legal structure and/or merge without Lender's consent; commingle its assets with the assets of any of its members; incur any other debt than that of the Loan; or make any loans or advances to any third party (See Section 4.2). Borrower further consents to require its "Dealership Tenant"

(Tenant) to maintain certain financial covenants (See Section 4.3).

Sales and Use Tax

TAXPAYER'S POSITION

Your letter of September 1, 2004, provides, in part:

* * *

In Bridgestone/Firestone, a sale-leaseback transaction was examined. In that case, it was determined that the transaction taken as a whole was a mortgage loan transaction (affirmed by the Department of Revenue in its final order), rather than a lease, and that, as a result, payments made under the agreement should not be subject to Florida sales tax.

In analyzing the instant transaction in its entirety, an analogous determination should be made. A true landlord/tenant relationship does not exist between Tenant and Landlord. Thus, there is no "total rent or license fee" paid by Tenant. The Landlord is not the landlord, because the transaction represents a financing arrangement rather than a true lease. In this arrangement, rent is not determined on the basis of prevailing market forces in the business of renting, leasing, letting, or granting a license for the use of any real property. Rather, the rent payable under the Lease is exactly equal to the principal and interest payable on the Loan made by Lender to Landlord. Amounts received by Landlord as rent are merely passed through and paid to Lender. The terms of the Lease differ from those found in a typical operating lease for real property. Tenant bears the entire risk of loss on the Property, which indicates a financing arrangement due to the complete absence of a transfer of risk of loss. Furthermore, Tenant is responsible for all charges, insurance, taxes, and other costs associated with the ownership of the Property, but has no recourse or reduction in rent for property defects, damage to the Property, title defects, offsets, restrictions, or interference with use or similar conditions. All environmental issues are at the cost and expense of Tenant. So long as no default has occurred under the Lease, casualty and condemnation proceeds belong to Tenant with no reduction in rent. If the Property is destroyed, Tenant must purchase the Property for the Loan balance (assuming restoration cannot occur within eighteen months subsequent to the destruction date). Tenant also has the benefit of any future appreciation in the value of the Property because, at the end of the Lease term, Tenant is required to purchase the Property for the Termination Value rather than the fair market value of the Property.

* * *

Discussion and Law

Documentary Stamp Tax:

Section 697.01(1), F.S., provides:

All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

Section 697.02, F.S., provides:

A mortgage shall be held to be a specific lien on the property therein described, and not a conveyance of the legal title or of the right of possession.

See also Rule 12B-4.052(7), F.A.C. The statutes and rules demonstrate that even though an instrument may not be denominated as a mortgage, it may nonetheless be treated as such.

An instrument must be considered a mortgage regardless of its form, if, when taken alone or in connection with the surrounding facts, it appears to have been given for the purpose of securing money. First Mortgage Corp. of Stuart v. deGive, 177 So.2d 741, 746 (Fla. 2nd DCA 1965). See also Watkins et ux. v. Burnstein, 152 So.2d 569 (1943) (deed and lease with option to purchase considered a single transaction constituting a mortgage). Even though a document may be called a lease, to properly determine the true nature of the transaction, the parties' intention and the substance of the agreement determine what type of instrument it actually is. See Bridgestone/ Firestone, Inc. v. Department of Revenue, DOAH Case 92-2483, 15 FALR 4874 (1993). Thomas v. Thomas, 96 So.2d 771 (Fla. 1957) (absence of a promissory note evidencing debt did not prohibit transaction from being classified as a mortgage).

As described in the Lease, and specifically stated, the proposed transaction is a financing arrangement, rather than a true landlord/tenant relationship. Under the terms of the Lease, the elements of ownership remain during the lease period with Tenant. Tenant's payments under the Lease terms are exactly equal to the principal and interest payable on the Loan made by Lender to Landlord. Tenant is required to purchase the Property for the Termination value rather than the fair market value at the end of the lease term. Tenant is the true owner of the Property, currently being paid for by Tenant's payments under the lease. Landlord was formed only to act as a financing vehicle and as a condition of obtaining financing from Lender. Landlord will merely hold title to the Property until Tenant completely pays off the Loan.

Sales and Use Tax

APPLICABLE STATUTES AND RULES

Section 212.02, F.S., provides in part:

* * *

(2) "Business" means any activity engaged in by any person, or caused to be engaged in by him or her, with the object of private or public gain, benefit, or advantage, either direct or indirect....

* * *

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

* * *

Section 212.031, F.S., provides in part:

(1)(a) It is 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 for the use of any real property....

* * *

(c) For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges....

(d) When the rental or license fee of any such real property is paid by way of property, goods, wares, merchandise, services, or other thing of value, the tax shall be at the rate of 6 percent of the value of the property, goods, wares, merchandise, services, or other thing of value.

* * *

(3) The tax imposed by this section shall be in addition to the total amount of the rental or license fee, shall be charged by the lessor or person receiving the rent or payment in and by a rental or license fee arrangement with the lessee or person paying the rental or license fee, and shall be due and payable at the time of the receipt of such rental or license fee payment by the lessor or other person who receives the rental or payment....

* * *

Section 608.471, F.S., provides in part:

* * *

(3) Single-member limited liability companies and other entities that are disregarded for federal income tax purposes must be treated as separate legal entities for all non-income-tax purposes. The Department of Revenue shall adopt rules to take into account that single-member disregarded entities such as limited liability companies and qualified subchapter S corporations may be disregarded as separate entities for federal tax purposes and therefore may report and account for income, employment, and other taxes under the taxpayer identification number of the owner of the single-member entity.

Rule 12A-1.070, F.A.C., provides in part:

(1)(a) Every person who rents or leases any real property or who grants a license to use, occupy, or enter upon any real property is exercising a taxable privilege....

* * *

(4)(c) Ad valorem taxes paid by the tenant or other person actually occupying, using, or entitled to use any real property to the lessor or any other person on behalf of the lessor, including transactions between affiliated entities, are taxable.

* * *

(19)(a) The lease or rental of real property or a license fee arrangement to use or occupy real property between related "persons," as defined in s. 212.02(12), F.S., in the capacity of lessor/lessee, is subject to tax.

(b) The total consideration, whether direct or indirect, payments or credits, or other consideration in kind, furnished by the lessee to the lessor is subject to tax despite any relationship between the lessor and the lessee.

(c) The total consideration furnished by the lessee to a related lessor for the occupation of real property or the use or entitlement to the use of real property owned by the related lessor is subject to tax, even though the amount of the consideration is equal to the amount of the consideration legally necessary to amortize a debt owned by the related lessor and secured by the real property occupied, or used, and even though the consideration is ultimately used to pay that debt.

* * *

DISCUSSION

Sales and Use Tax:

The issue presented requires us to make a determination as to whether the transaction involving Tenant and Landlord is a "financing arrangement/mortgage" or a "lease." The distinction between the two is significant for Florida sales tax purposes. In Florida, the renting of commercial real property is a taxable privilege. See Section 212.031, F.S. While some transactions may

be governed by a document entitled "Lease," the true character of the transaction may be more akin to a "financing arrangement" or "mortgage," and in such event, the transaction would not be subject to Florida sales tax under Chapter 212, F.S. See Bridgestone/Firestone, Inc. v. Department of Revenue, DOAH Case 92-2483, 15 FALR 4874 (1993).

Various factors have been identified in addressing this issue. The clear and unambiguous language of the relevant documents will be respected (See Emergency Associates of Tampa, P.A. v. Sassano, 664 So.2d 1000 (Fla. 2d DCA, 1995)), keeping in mind that substance is always preferred over form (See Markell, et al. v. Hilbert et al., 140 Fla. 842, 192 So. 392 (Fla. 1939)). For there to be a mortgage, there must be a debt secured thereby. See Bank of Miami Beach v. Fidelity and Casualty Company of New York, 239 So.2d 97 (Fla. 1970). A financing arrangement may be found where the "rent" is fixed to debt service as opposed to the rental market value of the property. See Sun Oil Company v. Commissioner of Internal Revenue, 562 F.2d 258 (3rd Cir. 1977). Where the buyer/lessee is a single purpose financing corporation, a financing arrangement may be found. See Bridgestone/Firestone. A review as to whether the short-term and long-term risks pass to the "so-called buyer" is relevant to our analysis. See Bridgestone/Firestone. Finally, the proper recording of a "debt" requires the transfer of title shortly after the end of a lease term. See Bridgestone/Firestone.

1. The language of the Lease Agreement and other relevant documents.

The clear and unambiguous language of the "Lease Agreement" must be given its plain and ordinary meaning. See Emergency Associates of Tampa, P.A. v. Sassano, 664 So.2d, 1000 (Fla. 2d DCA, 1995). A review of the Lease Agreement's "Witnesseth" provisions reveals a provision which states:

... the parties to the Lease intend that this Lease shall be treated as a financing arrangement, rather than a lease or rental agreement.

A review of the "Operating Agreement of [Landlord]" indicates that it is a "single purpose entity" whose business nature is to engage solely in the activities necessary to secure the financing in question.

While the language of these documents is clear and unambiguous as to the intent of the parties, we must continue our review to determine the true substance of the transaction.

2. The existence of a debt or other obligation.

"It is well settled in this and other jurisdictions that there can be no mortgage unless there is a debt to be secured thereby or some obligation to pay money." Bank of Miami Beach v. Fidelity

and Casualty Company of New York, 239 So.2d 97, 99 (Fla. 1970), quoting Nelson v. Stockton Mortgage Co., 1930, 100 Fla. 1191, 130 So. 764. The Florida Supreme Court continued its analysis by citing to Holmberg v. Hardee, 90 Fla. 787, 108 So. 211 (1926):

In Holmberg this court pointed out that a deed absolute in form cannot be held to be a mortgage without proof of an obligation to be secured by it, "either in the form of an antecedent debt between the parties, or a loan, debt, or *assumption of liability*." (emphasis added). [emphasis in original opinion]

A debt does exist, as evidenced by the Landlord being the named "Borrower" on the mortgage. Indications of the debt are found throughout the documents provided with your request.

3. Nature of the "Basic Rent".

In determining that a transaction involved a financing agreement and not a lease, it has been noted that the lessee pays monies the sum of which is directly related to the loan amount rather than a sum that is representative of fair market rent. In Bridgestone/Firestone's analysis of Sun Oil Company v. Commissioner of Internal Revenue (562 F.2d 258 (3rd Cir. 1977)), a financing agreement was found wherein:

[T]he rents (had) no visible connection with the economic value of the property but (were) evidently related to a fixed interest return on the advances. Bridgestone/Firestone at 4889, para. 38.

According to the Lease Agreement, the "Base Rent" is an amount equal to the principal and interest payable to Lender, paid directly to the Lender and "... shall be paid absolutely net to Lender, so that this Lease shall yield to Lender the full amount thereof, without setoff, deduction or reduction." Lease Agreement at Section 3(a). The Tenant is also required to pay all expenses and taxes related to the property as "additional rent." Lease Agreement at Section 4.

At this point, we note that Rule 12A-1.070(19)(c), F.A.C., provides that mortgage payments made by a lessee on behalf of a related party lessor are subject to Florida sales tax because the payments are viewed as "consideration" for the right to use or occupy commercial real property. Additionally, Rule 12A-1.070(4)(c), (d) and (e), F.A.C., provide that ad valorem taxes, common area maintenance fees and utility bills paid by a lessee for the benefit of the lessor are also subject to Florida sales tax.

4. The purpose of the Landlord.

In determining the practical business substance of the transaction, it is also necessary to determine if the buyer is a

single purpose financing corporation.... Bridgestone/Firestone, at 4884, para. 27

In the Bridgestone/Firestone case, "FIRELCO" was formed especially to aid Firestone in its goal of "off-balance sheet financing."Bridgestone/Firestone, at 4880, para. 8. The Hearing Officer found that FIRELCO was indeed a single-purpose financing corporation. Id., at 4884, para. 28.

As described in the "Operating Agreement" of the Landlord, the Landlord was formed as a "single purpose entity" for the limited business purposes described above in the "Facts" section of this response. Section 1.2 of the "Operating Agreement" provides:

Single Purpose Entity. ... The nature of the business and of the purposes to be conducted and promoted by the [Landlord] is to engage solely in the following activities:

- (a)
to acquire those certain parcels of real property ... located in [City, County], State of Florida (the "Property");
- (b)
to own, hold, sell, assign, transfer, operate, lease, mortgage to Lender, and otherwise deal with the Property;
- (c)
to borrow the Loan ... and to issue notes and other documents to evidence and secure the Loan; and
- (d)
subject to the Separateness Covenants ..., to exercise all powers enumerated by the Act necessary or convenient to the conduct, promotion or attainment of the business or purposes otherwise set forth herein.

Under the Operating Agreement, the Landlord has strictly limited permitted business activities and is a single purpose entity created to facilitate this financing arrangement.

5. Short Term and Long Term Risks and Benefits.

In determining the practical business substance of the transaction, it is also necessary to determine ... if the short-term and long-term risks and benefits associated with ownership pass to the so-called buyer....Bridgestone/Firestone, at 4884, para. 27

Under the terms of the Lease, the Tenant assumes most, if not all, of the short term and long term risks and benefits. This would indicate that Tenant is the true owner of the property and that the Landlord is a single purpose entity established for lending purposes.

The short and long term risks that fall on the Tenant can be found in Sections 7 ("Alterations, Improvements and Repairs"), 8 ("Insurance"), 10 ("Indemnity"), 11 ("Casualty and Condemnation") and 12 ("Environmental Matters") of the Lease Agreement. These short and long term risks that fall on the lessee would traditionally be the responsibility of a lessor/owner.

6. Recording as "debt" and transfer of title.

The Hearing Officer in Bridgestone/Firestone considered the standards issued by the Financial Accounting Standards Board ("FASB"). For a "lease" to be reported as a "debt," FASB Statement No. 13 requires that "the lease transfers ownership of the property to the lessee."Bridgestone/Firestone, at 4882, para. 16. FASB 13 has been superseded, in part, by FASB Statement No. 98, which provides in part:

A lease involving real estate may not be classified as a sales-type lease unless the lease agreement provides for the transfer of title to the lessee at or shortly after the end of the lease term.... FAS 98 Summary.

Section 19 of the "Lease Agreement" provides that the Tenant "shall purchase" and the Landlord "shall sell" the property on the earlier of: (1) the "expiration date" (defined in the Lease as thirty days following the termination of the Loan term); or (2) on the date of condemnation or if the property cannot be reasonably replaced or repaired following fire or other casualty (see Section 11(e) of the Lease).

DETERMINATION

Documentary Stamp Tax:

As to the question posed for documentary stamp tax, the lease (considered a mortgage) would not constitute a "renewal" of the original mortgage, which was paid off. Documentary stamp tax under s. 201.08(1), F.S., would be calculated on the total amount of "principal," constituting the amount provided for the payment by Tenant to Landlord of funds to satisfy its obligations to Lender under the Loan Documents under the lease.

Based on the above referenced court cases and cited rule, the Deed, Lease, Mortgage and other relevant agreements are all part of the same financing arrangement to refinance the Existing Mortgage. Since such documents are considered to be a mortgage, because they are intended to secure the payment of money to the Lender, no tax is due on such documents under s. 201.02(1), F.S.

Intangible Tax:

As to the question posed for the nonrecurring intangible tax, the Lease facility is subject to the tax imposed under s. 199.133, F.S., because it is an obligation secured by a lien on real property.

Sales and Use Tax:

Based on all the documents provided, the "Lease Agreement" between Tenant and Landlord is part of a "financing arrangement/mortgage," rather than a lease. Florida sales tax, under Section 212.031, F.S., would not be due on this transaction. This conclusion is based on the following factors.

1.
The Lease Agreement plainly and clearly articulates the intent of the parties. This language is supported by the other documents provided.
2.
This transaction, at its center, is all about securing a loan. The documents provided demonstrate the intent of the parties in securing a loan, rather than creating a "leasing" situation. The "Lease Agreement" was a vehicle deemed necessary in securing the loan.
3.
Basic Rent is directly tied to servicing the debt obligation rather than to a fair market value rent. Standing alone, these payments would be subject to Florida sales tax under Rule 12A-1.070(19), F.A.C. However, in the context of the other facts presented, this factor contributes to the determination that the transaction is a non-taxable financing arrangement/mortgage.
4.
The Landlord is a sole purpose financing entity created specifically to facilitate the loan process. Significantly, the creation of the Landlord was prior to the parties structuring this transaction and not afterwards. Finally, the Landlord is strictly limited to those business activities detailed in the Operating Agreement.
5.
The Short Term and Long Term Risks and Benefits fall to the Tenant, which would indicate ownership.
6.
Thirty days subsequent to the loan terminating, title to the property will be sold to the Tenant, thereby satisfying the requirement of FASB 98 as it relates to the recordation of "debt."

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. 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 from that which is expressed in this response.

You are further advised that this response, your request and related backup 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,

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