IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO.: 09-CA-1503

RUEHL NO. 925, LLC,
a foreign limited liability company,

Plaintiff,

v.

STATE OF FLORIDA DEPARTMENT OF
REVENUE, an agency of the State of Florida,

Defendant.
_____/

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, RUEHL No. 925, LLC ("RUEHL") by and through counsel sues the State of Florida, Department of Revenue and alleges as follows:

The Parties

1. RUEHL is an Ohio limited liability company with its principal headquarters in New Albany, Ohio. RUEHL is authorized to and does conduct business in the State of Florida.

2. Defendant, the Florida Department of Revenue (the "Department"), is an agency established under the laws of the State of Florida.

Jurisdiction and Venue

3. This is an action to contest an assessment by the Department against RUEHL of sales and use tax and interest made pursuant to Chapter 212, Florida Statutes. This Court has subject matter jurisdiction pursuant to § 72.011, Fla. Stat.

4. The Department denied RUEHL the relief sought in this Complaint. The Department's denial constitutes final agency action. RUEHL has exhausted all administrative remedies and an actual and justiciable case or controversy exists.

5. RUEHL obtained a waiver of the requirements of § 72.011(3)(b), Fla. Stat. pursuant to Fla. Admin. Code Rule 12-3.007. A true copy of the Department's waiver is attached as Exhibit "A."

6. Venue is proper in this Court pursuant to § 72.011(4)(a), Fla. Stat.

Nature of the Controversy

7. This action seeks to resolve a current controversy between RUEHL and the Department concerning a sales and use tax assessment by the Department against RUEHL. The Department has assessed sales and use tax on tenant improvements (the "Improvements") deemed made by RUEHL pursuant to retail commercial leases entered into between Abercrombie & Fitch Stores, Inc. as tenant ("Abercrombie") and each commercial landlord.

8. The Improvements were made to leased premises that were subject to two leases: (1) the lease between Abercrombie and Aventura Mall Venture dated August 21, 2006 (the "Aventura Lease") and (2) the lease between Abercrombie and Tampa Westshore Associates Limited Partnership dated November 14, 2003 (the "Westshore Lease"). RUEHL was not a party to either the Aventura Lease or the Westshore Lease.

9. On October 1, 2008, the Department issued an assessment to RUEHL for $259,695.68 in sales and use tax and interest of $72,544.58 (the "Assessment") for the period July 1, 2004 through June 30, 2007 (the "Audit Period"). A copy of the Assessment is attached as Exhibit "B."

10. Through this Complaint, RUEHL seeks a judgment from this Court declaring that the Department wrongly issued the Assessment to RUEHL and therefore it is voided in its entirety. In the event this Court finds that RUEHL was the proper party to the Assessment, RUEHL seeks a judgment from this Court declaring that: (1) the Improvements are not properly characterized as "rent" under Fla. Stat. § 212.031(1)(c) and therefore the Assessment is voided in its entirety or (2) even if the value of the Improvements constitutes "rent" under Fla. Stat. Section 212.031(1)(c), there is no liability for the tax until the termination of each of the Aventura Lease and the Westshore Lease and therefore the Assessment is voided in its entirety.

Factual and Legal Allegations

11. All factual allegations below are true and correct for all periods during the Audit Period and for all Improvements at issue in the Assessment.

12. RUEHL is a wholly-owned affiliate of but separate legal entity from Abercrombie.

13. RUEHL is one of several wholly-owned Abercrombie specialty brand retailers of casual clothing for men and women.

14. Abercrombie negotiated and executed the Aventura Lease and the Westshore Lease on behalf of RUEHL.

15. Abercrombie was contractually obligated to pay rent to each commercial landlord under the Aventura Lease and the Westshore Lease.

16. RUEHL was not contractually obligated to pay rent to either commercial landlord under the Aventura Lease or the Westshore Lease.

17. Under each of the Aventura Lease and the Westshore Lease, Abercrombie had the option, but not the obligation, subject to each commercial landlord's approval, to construct tenant improvements or use existing tenant improvements.

18. Abercrombie exercised its option under both the Aventura Lease and the Westshore Lease to construct the Improvements.

19. Both the Aventura Lease and the Westshore Lease provide that each commercial landlord owns all tenant improvements constructed on the leased property.

20. RUEHL operated the retail commercial locations under the Aventura Lease and the Westshore lease and reimbursed Abercrombie & Fitch Procurement Services, LLC ("Procurement"), a single-member limited liability company wholly-owned by Abercrombie, for the cost of the Improvements.

21. In the Department's audit of RUEHL, the Department assessed sales and use tax against RUEHL on the reimbursement paid by RUEHL to Procurement for the construction cost of the Improvements.

Count I

22. RUEHL realleges and reincorporates the allegations of paragraphs 1 through 21 as if fully set forth herein.

23. The Improvements that are the subject of the Assessment were constructed by Procurement under the terms and conditions of the Aventura Lease and the Westshore Lease.

24. RUEHL was not a party to either the Aventura Lease or the Westshore Lease.

25. No lease, sublease, or other contractual agreement exists outlining the terms and conditions of the relationship between either Abercrombie or Procurement and RUEHL.

26. There is no evidence to demonstrate that reimbursement amounts paid by RUEHL to Procurement for the Improvements constructed under the Aventura Lease and the Westshore Lease were intended to be "rent" under Fl. Stat. § 212.031(1)(c).

27. The Department's Assessment of RUEHL with respect to the Improvements constructed by Procurement under the Aventura Lease and the Westshore Lease is invalid and should be abated in full.

Count II

28. RUEHL realleges and reincorporates the allegations of paragraphs 1 through 21 as if fully set forth herein.

29. The District Court of Appeal for the Fifth District's decision in *Department of Revenue, State of Florida v. Seminole Clubs, Inc.*, 745 So.2d 473 (1999), states the proper test with respect to whether amounts paid are considered "rent" under Fl. Stat. § 212.031(1)(c).

30. In *Seminole Clubs*, the court held that tenant improvements are in-kind rent under Fl. Stat. § 212.031(1)(c) when the construction of the improvements is *required by the landlord for the tenant to maintain possession of the leasehold.*

31. Under both the Aventura Lease and the Westshore Lease, Abercrombie was given the *option* but not the obligation to make the Improvements or use existing tenant improvements.

32. Neither Abercrombie, RUEHL nor Procurement were contractually obligated, under either the Aventura Lease or the Westshore Lease to construct the Improvements.

33. There exists no contractual provision which states directly or indirectly that if RUEHL failed to reimburse Procurement for the cost of the Improvements it would be required to vacate the premises leased by Abercrombie.

34. The Department's Assessment of RUEHL with respect to the Improvements constructed by Procurement under the Aventura Lease and the Westshore Lease is invalid and should be abated in full.

Count III

35. RUEHL realleges and reincorporates the allegations of paragraphs 1 through 21 as if fully set forth herein.

36. Fl. Stat. § 212.031(1)(c) states that the value of all "rent" paid is subject to sales and use tax.

37. Fl. Admin. Code. Rule 12A-1.070(4)(f) outlines the timing of the sales and use tax liability with respect to the payment of rent and provides in part "tax shall be due and payable at the time of receipt of the rental or license fee payment by the lessor or other person who receives the rental payment."

38. In the Assessment, the Department used the construction cost at the time of completion of the Improvements as the value of the rent paid under Fl. Stat. § 212.031(1)(c).

39. When the Improvements were constructed it was impossible to determine what, if any, of the Improvements, will be reused by a future tenant.

40. The Improvements have no "value" under Fl. Stat. § 212.031(1)(c) to the Landlords until such time as a future tenant has made the decision to reuse any of the Improvements in its unique build-out of the retail space.

41. The Department's Assessment of sales and use tax and interest with respect to the Improvements constructed by Procurement on behalf of RUEHL under the Aventura Lease and the Westshore Lease is invalid and should be abated in full.

WHEREFORE, RUEHL respectfully requests that judgment be entered against the Department and in favor of RUEHL:

a. declaring that RUEHL is not the proper party to whom the Assessment should be directed;

b. alternatively, invalidating that portion or portions of the Assessment determined by the Court to be unlawful; and

c. Such other relief as is just and equitable.

DATED this 4th day of August, 2009

AKERMAN SENTERFITT

By: _____

Peter O. Larsen
Florida Bar No. 0849146
50 North Laura Street, Suite 2500
Jacksonville, FL 32202
Phone: (904) 798-3700
Fax: (904) 798-3730

Attorney for RUEHL No. 925, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Fed Ex overnight mail this 4th day of August, 2009 to:

Jeffrey M. Dikman, Esq.
Senior Asst. Attorney General
Office of the Attorney General
PL-01, The Capitol
Revenue Litigation Section
Tallahassee, FL 32399-1050

Peter Lu
Attorney

FLORIDA
DEPARTMENT OF REVENUE
Executive Director
Lisa Echevarri

April 16, 2009

Mr. Michael J. Bowen
Akerman Senterfitt
50 North Laura Street, Suite 2500
Jacksonville, Florida 32202-3646

Re: Ruehl No. 925, LLC
Bond Waiver Request
Audit#: 200031023
BPN#: 0001969392
Period: 07/01/2004 through 06/30/2007
Tax Type: Sales & Use Tax

Dear Mr. Bowen:

I am in receipt of your letter requesting a waiver of the provisions of s. 72.011(3)(b), F.S., on behalf of Ruehl No. 925, LLC. Ms. Isabel Nogues, an attorney on our staff, has reviewed both the publicly available financial information and the guaranty of its parent company, Abercrombie & Fitch Co. Based on that review and Isabel's recommendation, the Department is willing to waive the requirements of s. 72.011(3)(b), F.S., with respect to an action by Ruehl No. 925, LLC.

A copy of this letter, as well as the executed guaranty, should be attached to your complaint filed with the circuit court.

Should you have any questions, please give Isabel or me a call.

Sincerely,

Marshall C. Stranburg
General Counsel

EXHIBIT
A
Webber

GUARANTY

FOR AND IN CONSIDERATION of the waiver by the Executive Director of the Department of Revenue of the State of Florida (the "Department") of the requirements of section 72.011(3)(b), F.S., in connection with the filing by RUEHL No. 925, LLC (hereafter "Taxpayer") of an action contesting the legality of the assessment of tax, interest, and penalty made by the Department under Chapter 212, F.S. (the "Assessment"), Abercrombie & Fitch Co. (undersigned Guarantor) does hereby guaranty the full and prompt payment as and when due of so much of the Assessment, together with additional penalties and accrued interest, if any, as is finally determined by the court to be due and payable.

This Guaranty shall be an absolute and continuing guaranty of payment, and shall remain in full force and effect until all obligations guaranteed hereby have been fully satisfied, excused or waived. The liability of the undersigned Guarantor hereunder shall be primary, direct, and immediate. The Department need not resort first to any collateral, or file any suit, or exhaust any remedy against the Taxpayer, any other guarantor, or any other person obligated with respect to the Assessment before proceeding against the undersigned Guarantor.

The Department shall be entitled to recover against the undersigned Guarantor any reasonable costs and expenses, including, but not limited to, attorneys' fees and legal expenses, incurred by the Department in enforcing this Guaranty. This Guaranty has been duly authorized, executed and delivered by the undersigned Guarantor and constitutes the legal, valid, and binding obligation of the undersigned Guarantor, enforceable against the undersigned Guarantor in accordance with its terms.

This Guaranty shall be governed by the internal laws of the State of Florida, shall bind the heirs, executors, legal representatives, and assigns of the undersigned Guarantor, and shall inure to the benefit of the Department, the Department's successors, transferees and assigns.

IN WITNESS WHEREOF, the undersigned has executed the Guaranty on the 15 day of April, 2009.

ABERCROMBIE & FITCH CO.
GUARANTOR

By: _____
SIGNATURE

TYPED NAME: Reid Wilson
TITLE: Senior Director – IP Counsel & Assistant Secretary

Jackie Buday
WITNESS
PRINTED NAME: Jackie Buday

NOTARIAL SEAL STATE OF OHIO

JACKIE BUDAY
NOTARY PUBLIC
STATE OF OHIO
Comm. Expires
September 14, 2011

FLORIDA
DEPARTMENT OF REVENUE

DR-831
R.10/03

10/01/2008

NOTICE OF PROPOSED ASSESSMENT

RUEHL NO 925 LLC
6301 FITCH PATH
NEW ALBANY OH 43054-9269

Audit Number : 200031023
Tax : Sales and Use Tax
ID Number : 30-0255820
Audit Period : 07/01/2004 - 06/30/2007

The Notice of Proposed Assessment ("Notice") sets forth the following deficiency, consisting of tax, penalty, and interest, resulting from an audit of your books and records for the period indicated above. Schedules of the various transactions supporting the basis for the proposed assessment have previously been provided to you.

Assessment Authority: CHAPTER 212, F.S.

Tax		$	259,695.58
Penalty		$	0.00
Penalty - Fraud		$	0.00
Penalty - Other		$	0.00
Interest Through	10/01/2008	$	72,544.58
Total Deficiency		$	332,240.26
Less: Payment(s)		$	(- 37,548.91)
Less: Offset (s)		$	0.00
Balance Due		$	294,691.35

Plus additional daily interest to be computed from 10/02/2008 at 66.77 per day. See Page 2, "Addendum to Notice of Proposed Assessment" for explanation of interest rates (if applicable).

If you do not agree with the proposed assessment set forth in this notice, you may seek a review of the assessment through one of the following: (a) an informal written protest; (b) an administrative hearing; or (c) a judicial proceeding. Procedures for these various types of actions are set forth in the enclosed brochure.

If you elect to file an informal written protest, your protest must be filed with the Department no later than 12/01/2008, unless you request and receive an extension prior to this date. If an informal written protest is not timely filed, the proposed assessment will become a FINAL ASSESSMENT on 12/01/2008.

If you choose to request either an administrative hearing or judicial proceeding, your request must be filed no later than 01/29/2009 or 60 days from the date the assessment becomes a Final Assessment. This time limit is mandated by statute and cannot be waived by the Department. The petition for an administrative hearing must be filed with the Department. For judicial proceedings, a complaint must be filed with the appropriate Clerk of the Court.

If a balance is due and you agree with this proposed assessment, please return your payment, along with the NOPA remittance coupon, in the enclosed envelope within 60 days from the date of this Notice.

Unless otherwise indicated, the amount shown on this notice may not include credits, payments, Notices of Tax Actions, delinquency notices or other billings previously issued by the Department.

NOTE: If you are protected by Federal Bankruptcy Law, no payment is required except as provided by Title 11 United States Code (U.S. Bankruptcy Code).

Refer questions and correspondence to:

Compliance Support Process
Post Office Box 5139
Tallahassee, FL 32314-5139
Phone: (850) 922-5923 Fax: (850) 488

Lisa Echeverri, Executive Director

By : _____

Val Gouch, Compliances Support Process Manager

EXHIBIT
B

FLORIDA DEPARTMENT OF REVENUE

Addendum to Notice of Proposed Assessment
Schedule of Tax, Penalty and/or Interest

DR-838
N.10/03

10/01/2008

RUEHL NO 925 LLC
6301 FITCH PATH
NEW ALBANY OH 43054-9269

Audit Number : 200031023
Tax : Sales and Use Tax
ID Number : 30-0255820
Audit Period : 07/01/2004 - 06/30/2007

I. 12% Interest Rate		II. Market Interest		III. Combined Liability			
Applied Period		Applied Period		Combined Applied Period			
Tax $	Interest Through 10/01/2008 $	Tax $	Interest Through 10/01/2008 $	Tax $	Penalties $	Interest Through 10/01/2008 $	Total $
0.00	0.00	259,695.68	72,544.58	259,695.68	0.00	72,544.58	332,240.26
					Less: Payments		(37,548.91)
					Offsets		0.00
					Balance Due		$ 294,691.35

I. Twelve (12) Percent Interest Rate: For taxes due on or before December 31, 1999, an interest rate of 12% per annum applies, except for Corporate Income and Emergency Excise Taxes. The additional daily interest amount for this portion of the liability is $ 0.00

II. Market Interest Rate: For taxes due on or after January 1, 2000, a floating interest rate applies. This rate will be updated January 1 and July 1 of each year. The additional daily interest amount for this portion of the liability is $66.77. For current and prior interest rates, contact Taxpayer Services at 1-800-352-3671 (in Florida only) or 850-488-6800 and select information on Taxes or Forms from the option menu. You may also access the information at: http://www.myflorida.com/dor

III. Combined Liability: This column combines columns I and II and represents the total tax, penalties and interest assessed. The combined daily interest amount is $66.77. Please include additional interest accrued from 10/02/2008 through the date your payment is postmarked.

Refer questions and correspondence to:

Compliance Support Process
Post Office Box 5139
Tallahassee, FL 32314-5139
Phone: (850) 922-5923 Fax: (850) 488-0325

FLORIDA
DEPARTMENT OF REVENUE

NOPA Remittance Coupon

DR-839
N.10/03

10/01/2008

RUEHL NO 925 LLC
6301 FITCH PATH
NEW ALBANY OH 43054-9269

[redacted]

To ensure proper credit, please detach and include the preprinted remittance coupon below when submitting payments.

The amount of interest owed has been calculated through the interest Through date shown on the NOPA. When submitting your payment, please remember to include the additional interest amount accrued since that date.

To calculate the additional interest amount, multiply the number of days since the Interest Through date times the daily interest amount. The daily interest amount is also shown on the NOPA.

Detach For Processing

DR-839
N.10/03

NOPA Remittance Coupon

Service Center:
Business Partner: 1969392
Audit Number: 200031023

[redacted]

Check Number:
Tax Type: Sales and Use Tax
Remittance Total:

RUEHL NO 925 LLC
6301 FITCH PATH
NEW ALBANY OH 43054-9269

0600 0 20070630 0001003059 4 6200031023 0000 3

FLORIDA
DEPARTMENT OF REVENUE
Executive Director
Lisa Echeverri

02/17/2009

Michael Bowen & Pete Larsen
Akerman Senterfit
50 N. Laura St., Suite 2500
Jacksonville, Fl. 32202

Re: Notice of Decision
RUEHL NO 925 LLC (the Taxpayer)
BPN: 0001969392
Audit # : 200031023
Sales and Use Tax
Period: 07/01/2004 - 06/30/2007

Proposed Assessment Amount:	$	332,240.26
Sustained Amount:	$	332,240.26
Balance Due:	*$	303,396.25

* Includes payments and updated interest through 02/17/2009. Interest continues to accrue at $54.78 per day until the postmark date of payment.

Dear Mr. Bowen & Mr. Larsen:

This is the Department's response to the protest letter postmarked 11/25/2008, filed against the referenced assessment. The letter of protest, the case file, and other available information have been carefully reviewed. This reply constitutes the issuance of our Notice of Decision, pursuant to the provisions of Rule 12-6.003, Florida Administrative Code (F.A.C.). It represents our position based on applicable law to the issues under protest.

ISSUE

The issue is whether certain reimbursements paid to a parent company for real property improvements, represented additional commercial rental.

FACTS

The proposed assessment relates to payments made by the Taxpayer to its parent company, Abercrombie & Fitch Stores, Inc. (the Parent). The payments represented reimbursements for

amounts paid by the Parent pursuant to two lease agreements between the Parent and Aventura Mall Venture, a Florida general partnership and Tampa Westshore Associates Limited Partnership (the Lessors). In both lease agreements the Parent is named as the lessee. However, the Taxpayer occupied the leased premises and made all lease payments[1] to the Lessors. The agreements contained language requiring the Parent to maker certain real property improvements, subject to approval by the Lessors[2]. Further, the agreements were clear that tenant improvements were to be the property of the Lessors[3]. The Parent paid third party contractors for all of the required improvements. Once the improvements were made and paid for, the Taxpayer reimbursed the Parent for all costs of the required improvements. The referenced assessment proposes taxing these reimbursements made to the Parent.

TAXPAYER ARGUMENT

It your position the proposed assessment, as it relates to amounts incurred by the Taxpayer, is inappropriate because these amounts were capital improvements made solely for the benefit of the tenant. You argue that the improvements were not paid in lieu of rent and are only usable by the tenant. Accordingly, in spite of the contractual language indicating landlord ownership of the improvements, they have no economic value because no future tenant can ". . . reap the benefits of the improvements." You indicate that these facts differentiate with those in Department of Revenue , State of Florida v. Seminole Clubs, Inc., 745 So.2d 473 (November 19, 1999) 5 DCA., where the court found that certain real property improvements constituted additional rent, subject to tax. In Seminole, you assert, the subject property was single purpose (golf course and hotel). Accordingly, you argue that the improvements did benefit the landlord because ". . . (1) a higher rent could be charged to a new tenant compared to if no improvements had been made or (2) the lessor could take over the property and operate the business immediately upon termination of the lease and reap the benefits of the improvements." In this case, you argue, the landlord reaps no such benefits.

You further contend that the Taxpayer is under no obligation to make any improvements if existing improvements meet the requirements of its remodeling plan at lease execution. You state, "[t]hus, [the Taxpayer]'s tenant improvements are optional under the Agreements."

Additionally, you assert that even if the subject leasehold improvements constitute rent, such improvements are not received by the Lessors until lease termination. You cite Rule 12A-1.070(4)(f), F.A.C, as authority stating in pertinent part that ". . . sales tax with respect to rent is due and payable at the time or receipt of such payment."

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[1] These amounts represented both minimum rent and percentage rents. See page 3 of the Aventura Mall lease and page D1, of the International Plaza lease.

[2] Section 8.05, page 14, of the Aventura lease, provides that the ". . . [l]essee shall be required to totally remodel the Premises . . .." Article V, section 5.01, of the Standard Form, related to the International Plaza lease provides that the lessee shall ". . . provide all work of whatsoever nature in accordance with its obligations set forth in Exhibit B . . .."

[3] Article XVI, section 16.01, of the Standard Form, related to the International Plaza lease provdes that the tenant improvements ". . . shall when installed attach to the fee and become and remain the property of the lessor." Section 5.01(b), page D2, of the International Plaza lease provides that the leasehold improvements ". . . shall at all times be the sole property of the landlord . . .."

In a letter dated February 10, 2009, with regard to the relationship between the Taxpayer and the Parent, you indicated your opinion that the "build out" costs reimbursed to the Parent can only represent a benefit to the Lessors (assuming agreement on the interpretation of the relevant landlord-tenant relationship). You state, "[a]s you aware, the lease agreements between [the Landlords] and [the Parent] state that any tenant improvements made to the property – presumably whether done by [the Parent] or parties on its behalf – become the immediate property of [the Lessors]. As a result, even though the Company is making payments to [the Parent] for the cost of the build-out, the tenant improvements are for the benefit of [the lessors] – not [the Parent]."

LAW & DISCUSSION

Section 212.031(1)(c), Florida Statutes (F.S.), provides for the taxation of rent based on the ". . . total rent charged . . .." Rule 12A-1.070(4)(b), F.A.C., further provides that the tax ". . . shall be paid . . . on all considerations due and payable by the tenant . . .." Rule 12A-1.070(19), F.A.C., provides in pertinent part that "[t]he lease or rental of real property or a license fee arrangement to use or occupy real property between related 'persons,' . . . is subject to tax. " Further this rule provides that the ". . . total consideration, whether direct or indirect, payments or credits, or other consideration in kind, by the lessee to the lessor is subject to tax despite any relationship between the lessor and lessee." Finally, this rule indicates that this consideration is subject to tax even if the amount ". . . is equal to the amount of the consideration legally necessary to amortize debt owned by the related lessor . . . even though the consideration is ultimately used to pay that debt."

There can be no doubt that a rental arrangement, as provided in Rule 12A-1.070(19), F.A.C., exists between the Taxpayer and the Parent. The Taxpayer occupies the premises and pays the Parent's obligated rent payments to the Lessors. In addition, it pays the Parent for the cost of the improvements delineated in the agreements between the Lessors and the Parent. Accordingly, it is this relationship which gives rise to the proposed assessment. The Department takes exception to your position that the reimbursements, paid to the Parent, represent benefits to the Lessors. These payments are made to the Parent notwithstanding that they equal amounts legally owed by the Parent to the Lessors (see Rule 12A-1.070(19)(c), F.A.C.). The Department agrees that the improvements to the real property benefit the Lessors but it is not the transaction taxed. The reimbursements (the subject of the proposed assessment) provided the funds for the improvements required under the subject agreements between the Parent and the Lessors. There can be no doubt that these payments represented consideration to the Parent.

While the Department finds the reimbursements paid by Taxpayer to the Parent as taxable consideration for the right to occupy the premises, we do take exception to your arguments concerning the prime lease between the Parent and the Lessors. Your argument that any benefit to the Lessors should be measured at lease termination is not on point. You contend that only single purpose properties receive any benefit due to the probable build-outs required at lease termination. We reject this analyis. The benefit is immediate. The improvement is made and the value of the demised premises is increased at that point. Further, the cost of the improvements are borne by the Parent. The agreements are clear that these improvements are the property of the Lessors.

Likewise, your argument concerning the appropriate date that consideration is received, is not on point. The value of the property increases at the moment the improvements are completed (not at lease termination as you suggest).

We also take exception to your position that the subject improvements are optional. The contracts are clear that certain improvements must be made (subject to approval) by the Parent.

CONCLUSION

The Department sustains the assessment.

Enclosed for your convenience is an audit remittance coupon. Payment, including interest to the postmark date of payment, should be returned in the enclosed envelope along with the audit remittance coupon. The check should reflect the audit number.

TAXPAYER APPEAL RIGHTS

This Notice of Decision constitutes the final position of the Department unless a Petition for Reconsideration is filed on a timely basis, in which event the Notice of Reconsideration will be the Department's final position. The requirements for a Petition for Reconsideration are set forth below.

Pursuant to Section 72.011(2), F.S., and Rule Chapter 12-6, F.A.C., the assessment is final as of the date of this Notice of Decision unless you file a written Petition for Reconsideration postmarked within thirty (30) days of the date of this Notice of Decision and addressed to Technical Assistance and Dispute Resolution, Post Office Box 7443, Tallahassee, FL 32314-7443. The Petition for Reconsideration must contain new facts or arguments; otherwise it is subject to dismissal.

Absent a timely-filed Petition for Reconsideration, the assessment reflected in the Notice of Decision is final and you have three alternatives for further review:

1) Pursuant to Section 72.011, F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in circuit court by filing a complaint with the clerk of the court. THE COMPLAINT MUST BE RECEIVED BY THE CLERK OF THE CIRCUIT COURT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION. Section 72.011(3), F.S., provides that no circuit court action may be brought unless you pay to the Department the amount of taxes, penalties and accrued interest assessed by the Department that are uncontested and tender or post a bond for the remaining disputed amounts unless a waiver is granted as provided in that section. Failure to pay the uncontested amounts will result in the dismissal of the action and imposition of an additional penalty in the amount of twenty-five percent (25%) of the tax assessed. The requirements of Chapter 72, F.S. are jurisdictional;

2) Pursuant to Sections 72.011, 120.569, 120.57 and 120.80(14), F.S. and Rule Chapter 12-6, F.A.C., you may contest the assessment in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue, Office of General Counsel,

Post Office Box 6668, Tallahassee, FL 32314-6668. THE PETITION MUST BE RECEIVED BY THE DEPARTMENT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION. The petition should conform to the requirements of the Uniform Rules promulgated pursuant to Section 120.54(5), F.S. Section 120.80(14), F.S., provides that before you file a petition under Chapter 120, F.S., you must pay to the Department the amount of taxes, penalties and accrued interest that are not being contested. Failure to pay those amounts will result in the dismissal of the petition and imposition of an additional penalty in the amount of twenty-five percent of the tax assessed. Mediation is not available pursuant to Section 120.573, F.S. The requirements of Section 72.011(2) and (3)(a), F.S., are jurisdictional for any action contesting an assessment or refund denial under Chapter 120, F.S.; OR

3) Pursuant to Section 120.68, F.S., you may contest the assessment in the appropriate district court of appeal by filing a Notice of Appeal meeting the requirements of Rule 9.110, Florida Rules of Appellate Procedure, with i) the Clerk of the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668 and ii) with the clerk of the appropriate district court of appeal, accompanied by the applicable filing fee. THE NOTICE OF APPEAL MUST BE FILED WITH BOTH THE DISTRICT COURT OF APPEAL AND THE DEPARTMENT OF REVENUE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS NOTICE OF DECISION.

For appellate review purposes the Department will treat factual matters asserted in a protest or petition for reconsideration as allegations, not as established facts.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Richard (Clay) Brower
Tax Conferee
Technical Assistance & Dispute Resolution
(850)922-4837

Enclosure: Audit Remittance Coupon

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceeding before the Technical Assistance and Dispute Resolution Office, should contact that office at 850-488-0717 (voice), or 800-DOR-8331 (TDD), at least five working days before such proceeding. You may also call via the Florida Relay System at 800-955-8770 (voice), or 800-955-8771 (TDD).