



Interim Executive
Director
Marshall Stranburg

QUESTION: Whether sales tax must be collected during “rent free” periods in which rent income is recorded for financial accounting purposes or when rentals from real property are paid to the landlord.

ANSWER: Sales tax must be collected on rentals of real property leases when rental consideration is received.

October 3, 2012

Subject: Technical Assistance Advisement – TAA 12A-023
Sales and Use Tax
Real Property Rentals
Section 212.031, Florida Statutes (“F.S.”)
Rule 12A-1.070, Florida Administrative Code (“F.A.C.”)

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX), Petitioner (“Taxpayer”)
FEI#: XXXXXXXX
Business Partner#: XXXXXXXX

Dear Mr. XXXXX:

This letter is a response to your firm’s petition dated July 20, 2012, for the Department’s issuance of a Technical Assistance Advisement (“TAA”) concerning the above referenced party and matter. Your petition has been carefully examined, and the Department finds it to be in compliance with the requisite criteria set forth in Rule Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

Issue

Whether Taxpayer is required to collect or pay sales tax on an amount recorded as rental income during the “rent free” periods provided for by Taxpayer’s leases when no consideration was received.

Facts

The petition provides, in part:

Child Support Enforcement – *Ann Coffin, Director* • General Tax Administration – *Maria Johnson, Director*
Property Tax Oversight – *James McAdams, Director* • Information Services – *Tony Powell, Director*

www.myflorida.com/dor
Tallahassee, Florida 32399-0100

Taxpayer owns commercial property located in Florida that it leases to tenants. As an inducement to tenants to lease its properties, it is not uncommon for Taxpayer to offer “rent free” periods under a lease. These rent free periods may be for several months or longer depending on the circumstances. Taxpayer’s leases state that no rent is due from the tenant for these designated rent free periods. There are no special conditions for receipt of the rent free periods other than general compliance with the lease terms. In other words, these rent free periods are not conditioned on the tenant making some other payment or performing any service or providing any other or additional consideration to Taxpayer. For bookkeeping purposes, Taxpayer does reflect the portion of “free rent” that would have otherwise been paid as “rental income.” However, this “free” portion of rental income is amortized as an expense to the property over the term of the lease. . . . [T]here is no amount actually payable by or received from the tenant.

The petition further provides that Taxpayer collected tax based on the bookkeeping entries from its commercial tenants and remitting it to the State. Recently, however, a tenant objected to paying the sales tax on the free rent based on the fact that no rent was actually paid.

A copy of the Taxpayer’s standard form lease agreement and exhibits was provided, as well as the following explanation: Actual leases vary as to which exhibits are included. The rent free period is addressed in Schedule L of the agreement. The determination whether a tenant receives a rent free period is done on a case by case basis. Schedule L provides, in part, the following:

So long as Tenant is not in default under the Lease, Tenant shall not be required to pay Basic Rent for the first . . . months of the Term of the Lease (herein called the “Basic Rent Free Period”).

All other terms and provisions of the Lease shall, however, remain in full force and effect during the Basic Rent Period and thereafter including without limitation the payment of Additional Rent for Additional Services, including but not limited to, after-hours HVAC, electricity in excess of electricity required for normal office use, and any other special services requested by Tenant.

Taxpayer Position

The petition provides:

Regarding commercial leases of real property, section 212.031(1)(c), Florida Statutes, imposes the sales tax ‘. . . on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee.’ Similarly, Rule 12A-1.070(4)(f), Florida Administrative Code, provides that the tax on commercial rentals is due ‘at the time of the receipt of the rental or license fee payment.’

Taxpayer asserts that “[i]t is clear from these provisions that sales tax is due only on amounts charged by the lessor or paid by the lessee. In the present case, there is no amount charged or paid for the rent free periods. Although tax is imposed on ‘any consideration’ paid for the rental

of realty, nothing of any value is required of the tenant . . . other than compliance with the general terms and conditions of the lease.” The petition further provides that “accounting entries in the absence of the payment of actual consideration are not sufficient to create a sales tax liability.” The petition cites to Southern Paving Company v. Department of Revenue, 399 So.2d 11 (Fla. 1st DCA 1981). The petition further states:

As a lessor, Taxpayer is only concerned with collecting the correct amount of sales tax due to the State. However, as an agent of the State in the collection of the tax, Taxpayer must not impose or collect any more from its tenants than the amount that is actually due. In this case, Taxpayer believes that sales tax is not imposed for periods when no rent is charged to or paid by the tenant.

Ruling requested

The petition requests binding advice to the effect that Taxpayer is not required to collect or pay sales tax for the “rent free” periods.

Applicable Law and Discussion

Section 212.031(1)(a), (c), (d), and (3), F.S., provides, in part, the following:

(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. Such charges shall be included in the total rent or license fee subject to tax under this section whether or not they can be attributed to the ability of the lessor's or licensor's property as used or operated to attract customers. . . .

(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. . . .

Rule 12A-1.070(4)(b) and (f), F.A.C., provides, in part, the following:

(b) The tax shall be paid at the rate of ... 6 percent on or after February 1, 1988, on all considerations due and payable by the tenant or other person actually occupying, using, or entitled to use any real property to his landlord or other person for the privilege of use, occupancy, or the right to use or occupy any real property for any purpose.

(f) The tax shall be due and payable at the time of the receipt of the rental or license fee payment by the lessor or other person who receives the rental or payment....

Section 212.03(1)(a), F.S., provides that Florida sales tax applies to the privilege of engaging in the business of renting, leasing, letting, or granting a license for the use of real property. Section 212.031(1)(c), F.S., provides the tax on this privilege is levied on the total rent charged and paid for such real property by the person charging or collecting the rental. Section 212.031(1)(d), F.S., provides that the rental consideration may be paid in a manner other than money. It provides that rent may be paid by way of “property, goods, wares, merchandise, services, or other thing of value.”

Rent is defined as “consideration paid, usually periodically, for use or occupation of property.” Casella v. Canaveral Port Authority, 827 So.2d 308, 310 (Fla. 5th DCA 2002)(Citing Black’s Law Dictionary 1299 (7th ed. 1999)). Consideration includes either a benefit to the promisor or a detriment to or obligation upon the promisee. 68 Am.Jur. 2d Sales and Use Taxes §66.

Detriment to an acquiring party may constitute consideration for a transfer of assets. *Id.* Consideration is not limited to a money consideration and may include an assumption of liability or other thing of value. *Id.*

In Seaboard Coastline Railroad Company v. Askew, Case #72-15 (Fla. Cir. Ct., 2nd Cir., Leon Co., 1972), the court addressed the issue of what is included as rental consideration and held as follows:

The consideration paid by the tenant for the privilege conferred by the lease is “rent.” Rent may be payable in cash, or in some commodity, or by rendering specified services. Rent may be payable directly to the lessor or to some other person either specified in the lease or directed by the lessor.... Section 212.031 imposes a tax upon “the total rent charged” for the “renting, leasing or letting” of real estate.... While taxes are not specifically mentioned, this language clearly indicates a legislative intent to tax the **full benefits flowing to the landlord for the use of leased premises**.... The payment of these taxes by the lessee is the payment of money for account of the owner and for his benefit.... A [sales] tax is imposed upon a transaction and measured by the rent. In every rental transaction the amount of taxes upon the rented property is necessarily considered by the parties in determining the rent to be charged and paid whether the taxes be paid by the landlord from a fixed monthly or annual rental or paid for the landlord by the tenant. (**Emphasis Supplied**)

Section 212.12(5), F.S., provides authority to the Department to make an estimated assessment from the best information available when records are not provided to the Department during an audit. In such cases, a journal entry reflecting rental income presumably reflects rental consideration received of which an assessment is prima facie correct. The party assessed has the burden to demonstrate otherwise. Landlords have the burden to keep and maintain all records regarding a transaction to which the reported rental income relates. In this instance, Taxpayer provided the lease agreement that provides for rent free periods.

The entries in this instance reflect income over the entire period of the lease with an amortization expense amount reducing the net income from rentals in other periods. This type of accounting treatment is consistent to that provided for by financial accounting standards regarding certain types of leases including rent free periods. See Financial Accounting Standards Board (“FASB”) Technical Bulletin Number 85-3 and FASB Bulletin Number 88-1. Both Bulletins refer to Statement of Financial Accounting Standards Number 13, paragraphs 15 and 19b.

The accounting treatment reflected in the Bulletins is not intended to reflect rental consideration received at the time of receipt, as is provided for by section 212.031(3), F.S., but to reflect an accounting representation of the lease for financial accounting purposes. Since the entries reflecting the amortized “rent free” period income do not reflect actual rental consideration received, the tax does not apply on the amortized “rent free” period income. Taxpayer is required to collect and remit sales tax in periods when rental consideration is received and on any additional rental consideration received during the “rent free” period. Taxpayer’s books and records should reflect the receipt of funds paid pursuant to Taxpayer’s lease agreements even though rental income is recognized in a different period for financial accounting purposes.

Conclusion

Taxpayer is not required to collect or pay sales tax on an amount recorded as rent income during the “rent free” periods provided for by Taxpayer’s leases when no consideration was received. However, the tax applies when the rental consideration is received in the other periods and on any additional rental consideration received during the “rent free” period.

This response constitutes a Technical Assistance Advisement under Section 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 Section 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 Section 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

Technical Assistance Advisement

Page 6

taxpayer. Your response should be received by the Department within 10 days of the date of this letter.

Respectfully,

Chuck Wallace
Senior Attorney
Technical Assistance & Dispute Resolution
(850) 717-7541

Record ID: 128830