

## SUMMARY

**TAX:** Sales and Use Tax

**TAA NUMBER:** 12A-010

**STATUTE CITES:** Section 212.031, Florida Statutes (F.S.)

**RULE CITES:** 12A-1.070, Florida Administrative Code (F.A.C.)

**ISSUE:** Whether Taxpayer is required to collect and remit sales tax on the total Lease rent paid by Lessee or whether Taxpayer is required to collect sales tax only on that portion of the Lease rent that is attributable to the portion of the Property that is used by Lessee.

**QUESTION:** Is the Taxpayer required to collect and remit sales tax on the total Lease rent paid by Lessee or is Taxpayer is required to collect sales tax only on that portion of the Lease rent that is attributable to the portion of the Property that is used by Lessee.

**ANSWER:** Under the current Lease Agreement, Taxpayer is required to collect and remit sales tax on the total Lease rent paid by Lessee. Collecting sales tax only on the portion of the Lease rent that is attributable to the portion of the Property that is used by Lessee is counter to the Legislative intent provided in section 212.031(2)(b), F.S., that prohibits inverse pyramiding. As provided, "the amount of tax due the state shall not be decreased by any such progression of transactions." In order for the tax-exempt status of the Sublessee to apply, the Taxpayer would be required to enter into a lease agreement directly with the Sublessee.

April 6, 2012

Re: Subject: Technical Assistance Advisement – TAA 12A-010  
Sales and Use Tax –Sublease of Real Property  
Section 212.031, Florida Statutes (F.S.)  
Rule 12A-1.070, Florida Administrative Code (F.A.C.)  
XX ("Taxpayer")  
FEI # XX

Dear XX:

This is in response to your letter dated December 30, 2011, requesting this Department's issuance of a Technical Assistance Advisement ("TAA") pursuant to section 213.22, F.S., and Rule Chapter 12-11, F.A.C., concerning the sublease of commercial real property to a governmental entity. An examination of your letter has established you have complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

### **Facts**

Your letter provides the following in part:

Taxpayer owns commercial real property (the "Property") located in . . . Florida. The Property is known as the . . . Center and consists of a parcel of realty on which an office building and related improvements have been constructed. The total useable space for the Property consists of approximately 104,700 square feet. In 2004, Taxpayer entered into an agreement (the "Lease") with XX ("Lessee") for the lease of the Property. . . .

In 2009, Lessee entered into an agreement (the "Sublease") with XX (the "Sublessee") for the sublease of a portion of the Property. . . . Under the Sublease, the Sublessee subleases and uses approximately 76,000 square feet of the 104,700 leased by Lessee from Taxpayer (i.e., approximately 73% of the Property). Sublessee is a political subdivision of the State of Florida to which FDOR has issued a sales tax Certificate of Exemption.

Taxpayer's invoices to Lessee have included Florida sales tax calculated on the entire rent amount due from Lessee under the Lease. Since the time the Lease was executed in 2004, Taxpayer has collected this sales tax from Lessee and remitted it to FDOR. Recently, however, Lessee has asserted that Taxpayer should not collect sales tax on that portion of the Lease rent that is attributable to the space subleased by Sublessee because Sublessee is a sales tax-exempt entity. More recently, Lessee has actually refused to remit such taxes to Taxpayer. It is Taxpayer's understanding that Lessee does not collect or remit sales tax from Sublessee on the rent paid to Lessee under the Sublease.

### **Requested Advisement**

The Taxpayer requests that the Department issue a Technical Assistance Advisement addressing whether Taxpayer is required to collect and remit sales tax on the total Lease rent paid by Lessee or whether Taxpayer is required to collect sales tax only on that portion of the Lease rent that is attributable to the portion of the Property that is used by Lessee.

### **Applicable Authority and Discussion**

Section 212.031(1)(a) and (c), F.S., imposes a tax on the "total rent or license fee" charged for the renting, leasing, or letting of any real property. This privilege is taxable at a rate of 6 percent of the total rent charged for the use of the property, which may include base rent, percentage rents, or similar charges. Rule 12A-1.070(4)(b), F.A.C., provides that tax is payable on all considerations due and payable by the tenant or other person 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. Rule 12A-1.070(7)(a), F.A.C., provides that when a tenant sublets or assigns some portion of taxable leased property, the tenant is required to register as a dealer and collect and remit the tax on all such sub-rentals or assignments.

Section 212.031(2)(b), F.S., prohibits both pyramiding and inverse pyramiding of the tax by providing the "intent of this Legislature that only one tax be collected on the rental or license fee payable for the occupancy or use of any such property, that the tax so collected shall not be pyramided by a progression of transactions, and that the amount of tax due the state shall not be decreased by any such progression of transactions."

In light of the Legislative intent that prohibits the pyramiding of sales tax, Rule 12A-1.070(8) and (9), F.A.C., provide measures that eliminate the pyramiding of sales tax in cases where commercial real property is subleased.

Rule 12A-1.070(8), F.A.C., provides that when a lessee sublets a portion of the leased property, the lessee is to pay sales tax on the full amount of rent paid to the landlord and collect sales tax on the full amount of rent paid by the subtenant. In such cases, the lessee is authorized to a proportional credit for the tax paid to the prime lessor on tax collected for the space that the lessee subleases.

In this case, the Lessee is subleasing the property to an exempt entity and is not collecting sales tax on the rent received. Therefore, the Lessee can not claim a credit for the tax paid to the prime lessor on tax collected for the space that the lessee subleases.

Rule 12A-1.070(9), F.A.C., provides that when a lessee sublets or assigns all, or substantially all, of his or her interest in the premises, or retains only an "incidental portion" of the premises, the lessee may register as a dealer and issue a resale certificate to the landlord in lieu of paying the tax, collect and remit sales tax on the portion subleased, and remit use tax on that portion of the premises retained.

Rule 12A-1.070(9), F.A.C., does not define the term "incidental." Absent a statutory definition, words should be given their plain and ordinary meaning, and one looks to the dictionary for the plain and ordinary meaning of words. Sudath Van Lines, Inc. v. Department of Environmental Protection, 668 So.2d 209 (Fla. 1st DCA 1996); Specialty Restaurants Corp. v. City of Miami, 501 So. 2d 101, 102 (Fla. 3rd DCA 1987). The term "incidental" is defined by American Heritage College Dictionary @ 687 (Third Edition, 2000) as, "[o]ccurring or likely to occur as an unpredictable or minor accompaniment; of a minor, casual, or subordinate nature." You provide that the Lessee is retaining the use of 23% of the Property.

The Lessee's lease of approximately 24,000 square feet of commercial real property did not occur as an unpredictable or minor accompaniment to the sublease of the property to the Sublessee. The Lessee entered into the primary lease of the Property prior to the sublease of property to the Sublessee. The amount of property retained by the Lessee is not considered to be subordinate or minor in relation to the total property subleased to the Sublessee. As such, the provisions of Rule 12A-1.070(9), F.A.C., do not apply to the instant case.

### Conclusion

The Department cannot advise Taxpayer to collect sales tax only on the portion of the Lease rent that is attributable to the portion of the Property that is used by Lessee. Such authorization is counter to the Legislative intent provided in section 212.031(2)(b), F.S., that prohibits inverse

Technical Assistance Advisement

Page 4 of 4

pyramiding. As provided, "the amount of tax due the state shall not be decreased by any such progression of transactions." In order for the tax-exempt status of the Sublessee to apply, the Taxpayer would be required enter into a lease agreement directly with the Sublessee.

Under the current Lease Agreement, Taxpayer is required to collect and remit sales tax on the total Lease rent paid by Lessee.

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 that 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 taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Brinton Hevey  
Tax Law Specialist  
Technical Assistance and Dispute Resolution  
850/717-6839

Record ID: 116230