STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PARK PLACE MANUFACTURED HOUSING, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 04-0415
DEPARTMENT OF REVENUE,	)	
Respondent.	)	

SUMMARY RECOMMENDED ORDER

This case is before Administrative Law Judge John G. Van Laningham on the parties' cross-motions for summary recommended order, which were fully briefed as of May 25, 2004.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether state use tax is due and payable on transactions wherein the taxpayer rented mobile homes to persons for use as private residences (which the lessees were required to maintain, repair, and insure), pursuant to leases

under which the lessee would acquire title to his home upon payment in full of the total rent.

PRELIMINARY STATEMENT

In February 2004, the Department of Revenue filed a motion with the Division of Administrative Hearings ("DOAH") asking that the file on Petitioner's request for hearing be reopened, the parties having been unable to reach agreement regarding the propriety of the tax assessment that had been at issue in DOAH Case No. 02-2669, a matter which the undersigned, at the parties' request, had returned to the agency in September 2002 prior to a hearing on the merits. By order dated February 5, 2004, the undersigned reopened the case as DOAH Case No. 04-0415.

On March 1, 2004, the parties filed a Joint Motion to Cancel Hearing, together with a Stipulation of Facts, and a Stipulation As to Exhibits. The parties requested that the final hearing, which was scheduled to occur on March 16, 2004, be canceled because there were no longer any genuine issues of material fact in dispute. In lieu of a hearing, the parties wanted to present their legal arguments via cross-motions for summary recommended order, based on a set of stipulated facts. By order dated March 2, 2004, the undersigned canceled the final hearing and established a briefing schedule.

On March 12, 2004, the parties timely filed their respective motions for summary recommended order. Thereafter, Petitioner's and Respondent's memorandums in opposition to each other's motion were received, on March 18 and March 22, 2004, respectively.

Then, while this case was under consideration, the undersigned directed the parties to submit supplemental briefs on the question whether the pertinent lease instrument constituted a "conditional-sale type lease" for the use of tangible personal property, as defined in Florida Administrative Code Rule 12A-1.071(1)(d). By order dated May 3, 2004, which was entered after telephone conferences had been held with the parties on April 21 and April 30, 2004, the undersigned established May 28, 2004, as the deadline for submissions addressing this issue. The parties complied with the order, filing a Joint Supplemental Submission on May 25, 2004.

All of the parties' papers have been carefully considered, including the joint exhibits, which were identified, and received by stipulation into evidence, as Exhibits 1, 2A, 2B, 2C, 3A, 3B, 4A, 4B, 5, 6A, and 6B. The undersigned appreciates the high level of cooperation between the parties in the submission of this case.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2003 Florida Statutes.

STIPULATED FACTS

The following statement of the facts was taken from the parties' joint Stipulation of Facts, which the undersigned reorganized and edited a bit for clarity and supplemented with quotations from the pertinent lease instrument.

The Parties

1. Petitioner Park Place Manufactured Housing, Inc. ("Park Place") is a Florida corporation whose principal place of business is located at 5012 West Lemon Street, Tampa, Florida. Park Place's primary business is the refurbishing and selling of used mobile homes to the general public. Park Place is subject to the taxes imposed under Chapter 212, Florida Statutes.

2. Respondent Department of Revenue ("Department") is the agency of state government authorized to administer the tax laws of the State of Florida.

The Lease Option Rental Agreement

3. Park Place initially acquires used mobile homes for its inventory by extending resale certificates to the sellers. No sales tax is paid on these sales because they are tax-exempt sales for resale.

4. Used mobile homes are repaired on site. Materials used in the repair are purchased tax-exempt. When Park Place sells a used mobile home to a customer, sales tax is collected and remitted to the Department upon transfer of title.

5. Park Place leases some of the used mobile homes in its inventory to persons who cannot otherwise qualify to buy a home. For these transactions, Park Place uses an instrument styled "Lease Option Rental Agreement." A copy of the Lease Option Rental Agreement form is attached as Appendix I to this Summary Recommended Order.

6. All leases are for a period of greater than six months. Each contains the following provision transferring title to the lessee upon payment in full of the total rent:

> Lessee and Lessor agree that upon full and final satisfaction of the indebtedness, as indicated in (3) above and a 30 day notice in writing to Lessor, title to the mobile home referenced above shall immediately pass to the Lessee. Lessee shall be responsible for any and all fees and/or taxes to effect the transfer of title.

The lessee has the right to prepay the outstanding indebtedness at any time.

7. The Lease Option Rental Agreement is subject to the lessee's being approved for residency in the mobile home community where the mobile home is located.[1] The Lease Option Rental Agreement further requires the lessee to abide by all the rules and regulations of such community.

8. The lessee enters into a separate lease agreement with the operator of the mobile home park where the mobile home is located. The mobile home park operator is not Park Place but a

separate legal entity. The shareholder of Park Place has an ownership interest in the mobile home community.

9. The Lease Option Rental Agreement allows the lessee to remove the mobile home from the designated mobile home community only if the mobile home was "paid for in full" at least six months earlier and the "lot rental amount is current." Otherwise, the mobile home must remain at the location specified in the agreement.

10. Under the Lease Option Rental Agreement, the lessee is

> responsible for all repairs and maintenance and shall purchase all necessary labor, materials and supplies without allowing any lien to be created upon the property on account of such repairs. No alterations of the home is [sic] permitted without specific written approval from Lessor. Lessee [further] agrees to maintain the condition of the subject mobile home in good appearance and working order.

Additionally, the agreement provides that

> [d]uring the term [hereof], Lessee shall at its sole expense, provide and keep in force, insurance coverage on the mobile home, including fire and windstorm insurance, with Lessor named as the additional insured. Such coverage shall be equal to 100% of the full insurable value of the mobile home. All insurance provided for under this agreement shall be effected under enforceable policies issued by insurers licensed to do business in this state. Certificates of insurance verifying that the specified coverage has been secured shall be provided by Lessee to Lessor at or prior to the commencement of the term of this Agreement and thereafter within 10 days

> prior to the expiration of such policies. Such policies shall provide that the same may not be cancelled without at least 10 days prior written notice to the Lessor. In the event that Lessee fails to deliver to Lessor certificates of such insurance, Lessor may cause such insurance to be issued and the cost thereof charged to the lessee as additional rent.

11. The Lease Option Rental Agreement requires the mobile home to be occupied as a "private dwelling" by the lessee and his immediate family, who are specifically identified in the agreement.

12. On its federal income tax returns, Park Place reports the income derived from the mobile homes leased under the Lease Option Rental Agreement using Form 8825, entitled "Rental Real Estate Income and Expenses of an S Corporation."

The Audit and Protest

13. The Department is authorized to conduct audits of taxpayers and to request information to ascertain their tax liability, if any. Exercising its authority, the Department conducted an audit of Park Place to determine whether Park Place was properly collecting and remitting sales and use tax to the Department. The audit covered the period from December 1, 1993, through November 30, 1998.

14. On January 26, 2000, the Department sent to Park Place its Notice of Proposed Assessment showing that Park Place owed the Department additional sales and use tax, local government

infrastructure surtax, and indigent care surtax in the amounts of $20,437.52, $1,358.33, and $1,358.33, respectively; penalties in the amounts of $10,218.82, $679.24, and $679.24, respectively; and interest through January 27, 2000, in the amounts of $9,334.81, $595,79, and $595.79, respectively, making a total assessment in the amount of $45,257.87. Against these totals, credits of $5,853.95, $78.33, and $67.72 have been applied to the tax and interest categories, reflecting payments made by Park Place on June 27,2002.

15. The Department contends that the above-referenced taxes are due on the transactions wherein Park Place leased mobile homes under the Lease Option Rental Agreement. These transactions are the only transactions in dispute.

16. Park Place timely filed a written protest of the Department's proposed assessment.

17. On September 27, 2001 the Department issued its Notice of Decision as to the protest of Park Place. It sustained the assessment as originally issued.

18. Park Place asked the Department to reconsider, and on May 1, 2002, the Department issued its Notice of Reconsideration, which sustained the assessment as originally issued.

CONCLUSIONS OF LAW

I. Jurisdiction

19. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

II. Taxes and Terms

20. To understand and appreciate the present dispute requires familiarity with three distinct types of tax levied under Chapter 212, Florida Statutes: the tax on sales of tangible personal property, the transient rentals tax, and the use tax.

21. The tax on sales of tangible personal property, which is well known to consumers, is imposed under Section 212.05, Florida Statutes, which provides, in pertinent part, as follows:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.
> (1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
> (a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at

> retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

(Emphasis added.)

22. The transient rentals tax is levied under Section 212.03, Florida Statutes, which states:

> (1) It is hereby 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 to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, roominghouse, or tourist or trailer camp. However, any person who rents, leases, lets, or grants a license to others to use, occupy, or enter upon any living quarters or sleeping or housekeeping accommodations in apartment houses, roominghouses, tourist camps, or trailer camps, and who exclusively enters into a bona fide written agreement for continuous residence for longer than 6 months in duration at such property is not exercising a taxable privilege. For the exercise of such taxable privilege, a tax is hereby levied in an amount equal to 6 percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental. Such tax shall apply to hotels, apartment houses, roominghouses, or tourist or trailer camps whether or not there is in connection with any of the same any dining rooms, cafes, or other places where meals or lunches are sold or served to guests.

(Emphasis added.)

23. Finally, the use tax is imposed

> [a]t the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; however, for tangible property originally purchased exempt from tax for use exclusively for lease and which is converted to the owner's own use, tax may be paid on the fair market value of the property at the time of conversion.

§ 212.05(1)(b), Fla. Stat. (emphasis added).

24. With this basic information regarding the three relevant taxes in mind, it is necessary next to consider that mobile homes are classified, by definition, as "tangible personal property." Section 212.02(19), Florida Statutes, defines the term "tangible personal property" to mean and include

> personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses, including electric power or energy, boats, motor vehicles and mobile homes as defined in s. 320.01(1) and (2), aircraft as defined in s. 320.27, and all other types of vehicles.

(Emphasis added.) Thus, the "sale at retail"[2] of a mobile home is taxable under Section 212.05(1)(a) as the sale of tangible personal property, unless an exemption applies.

25. Depending on the circumstances, a mobile home can also be deemed a "roominghouse," even while maintaining its character as tangible personal property. This is made clear in Section 212.02(10)(c), Florida Statutes, which states:

> Every house, boat, vehicle, motor court, trailer court, or other structure or any place or location kept, used, maintained, or advertised as, or held out to the public to be, a place where living quarters or sleeping or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants, whether in one or adjoining buildings, shall for the purpose of this chapter be deemed a roominghouse.

See also Fla. Admin. Code R. 12A-1.007(11)(f)2. ("Notwithstanding the fact that a mobile home is subject to a license tax under the Motor Vehicle License Law, it is nevertheless a 'rooming house' within the meaning of Chapter 212, F.S., when it has a fixed location and is used or held out to the public to be a place where living quarters, sleeping, or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants.") Thus, the rental of living quarters in a mobile home qua roominghouse is taxable pursuant to Section 212.03(1), unless an exemption applies.

26. For purposes of the various taxes in question, the term "sale" has special meanings. It is defined in Section 212.02(15), Florida Statutes, which provides:

> (15) "Sale" means and includes:
> (a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.
> (b) The rental of living quarters or sleeping or housekeeping accommodations in hotels, apartment houses or roominghouses,

> or tourist or trailer camps, as hereinafter defined in this chapter.
> (c) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.
> (d) The furnishing, preparing, or serving for a consideration of any tangible personal property for consumption on or off the premises of the person furnishing, preparing, or serving such tangible personal property which includes the sale of meals or prepared food by an employer to his or her employees.
> (e) A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price.

Under this definition, a transaction meeting the conditions of subsection (15)(a)——hereafter, a "15(a) Sale"——and involving tangible personal property in the form of a mobile home constitutes a "sale." Such a transaction would be taxable pursuant to Section 212.05(1)(a) if it were also a nonexempt "sale at retail." At the same time, a transaction meeting the conditions of subsection (15)(b)——hereafter, a "15(b) Sale"——and involving a mobile home qua roominghouse also constitutes a "sale." Such a transaction would be taxable pursuant to Section 212.03(1) provided no exemption(s) were applicable.

27. Section 212.02(14), Florida Statutes, sets forth the definition of the synonymous and interchangeable terms "retail

sale" and "sale at retail." As relevant to this case, each means:

> a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property or services taxable under this chapter, and includes all such transactions that may be made in lieu of retail sales or sales at retail.

§ 212.02(14)(a), Fla. Stat. (emphasis added). From this definition follows the conclusion that all "sales" within the purview of Section 212.02(15) are "retail sales" except sales to persons who intend to resell their purchases "in the form of tangible personal property or [taxable] services."[3] The category of sales that are not retail sales is generally referred to as "sales for resale." See Fla. Admin. Code R. 12A-1.039. Sales for resale are treated as exempt from the tax on sales of tangible personal property. Id.[4]

III. Positions

28. Having described the taxes at issue and some of the relevant terminology, it is now possible to summarize the parties' positions.

A. The Department's Position

29. The Department takes the position that each time Park Place rented a mobile home to a customer pursuant to the Lease Option Rental Agreement, Park Place "used" or "consumed" the mobile home, giving rise to a nonexempt taxable event under

Section 212.05(1)(b). To reach this conclusion, the Department reasons as follows.

30. When Park Place purchased mobile homes for its inventory, it gave the sellers resale certificates as evidence that Park Place intended to resell the mobile homes in the form of tangible personal property. These transactions, therefore, constituted sales for resale, not retail sales; hence, they were exempt from sales tax. The Department agrees that Park Place incurred no tax liability at the time these transactions occurred.

31. When Park Place sold a mobile home to a customer pursuant to a transaction falling under Section 212.02(15)(a), Florida Statutes, and not involving a Lease Option Rental Agreement, the sales tax imposed by Section 212.05(1)(a) became due and payable. Park Place was obligated to collect the sales tax from its customer and remit the revenue to the Department. There is no dispute that Park Place properly collected and remitted the sales taxes payable on such 15(a) Sales.

32. The Department maintains that when Park Place rented a mobile home to a customer under the Lease Option Rental Agreement, Park Place effected a sale as defined in Section 212.02(15)(b), Florida Statutes, rather than a sale as defined in Section 212.02(15)(a).[5] According to the Department, in these alleged 15(b) Sales, Park Place did not rent tangible personal

property in the form of a mobile home; rather, it rented living quarters in mobile homes qua roominghouses. The Department argues that, consequently, the transactions, from Park Place's perspective, were not resales "in the form of tangible personal property" but instead the exercise of a business privilege (i.e. transient rentals) taxable under Section 212.03.

33. It so happens, however, that the particular transactions at issue here were exempt from the transient rentals tax (assuming they were 15(b) Sales, as the Department alleges) because in every instance the lease period was greater than six months. See § 212.03(1), (4), Fla. Stat. (transient rentals tax not applicable to tenancy created under bona fide written agreement for continuous residence for longer than six months' duration). The Department thus concedes (and Park Place concurs) that Park Place was not required to collect from its lessees the sales tax on transient rentals imposed by Section 212.03.

34. Park Place's tax liability arose, says the Department, not under Section 212.03, Florida Statutes, but under Section 212.05(1)(b), every time a mobile home being held for sale (in the Section 212.02(15)(a) sense) was converted to Park Place's own use as property incidental to the operation of a roominghouse. That is, the Department asserts that while the sale (via rental) of living quarters in a mobile home qua

roominghouse is not a sale of tangible personal property, such a transaction entails Park Place's use of tangible personal property, for which use Park Place must pay use tax pursuant to Section 212.05(1)(b), Florida Statutes. The Department thus distinguishes between (a) the mobile home, which undisputedly is tangible personal property and (b) the "living quarters" in the mobile home, which are purportedly something other than tangible personal property. According to the Department, Park Place uses (a) to sell (b).[6]

35. In support of its foundational premise that the sale (rental) of living quarters in a mobile home qua roominghouse is not, and never can be, a sale of tangible personal property,[7] the Department relies upon Florida Hotel and Motel Ass'n v. State Dept. of Revenue, 635 So. 2d 1044 (Fla. 1st DCA 1994)("FHMA"). In that case, a trade association representing members of the hotel and motel industry sought a declaratory statement from the Department proclaiming that hotels' purchases of items of tangible personal property (such as furniture, towels, and soap) for placement in hotel rooms were exempt from sales tax under the "sale for resale" exemption, on the theory that hotels resell such personal property to their guests. Id. at 1045. The Department declined to issue such a statement, holding instead that the purchases at issue were taxable retail sales because the subject pieces of property were not resold but used

in connection with operating hotels. The association appealed. Id.

36. The court affirmed. It reasoned that the essential nature of an innkeeper's business, as defined in the common law and reflected in present-day regulations, is to provide "overnight accommodations, together with attendant services," comprising an indivisible "package . . . of real property, tangible personal property and services." Id. at 1047. Viewing this "package" as, in effect, the finished product that hotels and motels offer for sale to their patrons, the court found that "guest-room furniture, furnishings, and consumables are, in realty, nothing more than amenities incidental to the business." Id. The association's proposed division of the transaction between a hotel and its guest into two taxable components——namely, a 15(a) Sale of tangible personal property and a 15(b) Sale of sleeping accommodations——was "artificial," the court believed. Id. It concluded that the sale of an innkeeper's "package" simply does not entail the discrete resale of tangible personal property purchased for use in the guest room, and hence that the purchase of such property is not exempt from sales tax. Id.[8]

37. In attempting to demonstrate that FHMA is on point with the present dispute, the Department argues that Park Place, like the hoteliers there, offered a rental "package" each time

it proposed to enter into a Lease Option Rental Agreement. According to the Department, this "package" consisted of the mobile home lease plus the separate but "interdependent" (the Department's term) lot lease with the mobile home park. The Department contends that, just as in FHMA the innkeepers' purchases of guest-room furnishings were deemed subject to the retail sales tax because such property is merely incidental to the package provided to hotel guests, so too Park Place's use of mobile homes should be considered taxable because the essential nature of the subject transactions was to provide a "package" of "living accommodations" rather than to convey tangible personal property. The merits of the Department's argument in this regard will be discussed below.

38. The Department also relies upon Florida Administrative Code Rule 12A-1.007(11)(f), which provides as follows:

> 1. The rental of a mobile home as tangible personal property is taxable. A mobile home purchased tax exempt for exclusive rental as tangible personal property is subject to use tax if the mobile home ceases to be used for the purpose for which it was purchased. The owner shall accrue and pay to the Department of Revenue use tax computed on the fair market value of the mobile home at the time it is used for any purpose other than exclusively for rental as tangible personal property.
> 2. Notwithstanding the fact that a mobile home is subject to a license tax under the Motor Vehicle License Law, it is

> nevertheless a "rooming house" within the meaning of Chapter 212, F.S., when it has a fixed location and is used or held out to the public to be a place where living quarters, sleeping, or housekeeping accommodations are supplied for pay to transient or permanent guests or tenants. The purchase of a mobile home to be used as living accommodations within the purview of Section 212.03, F.S., is taxable at the time of purchase even though the mobile home may be untagged or have affixed thereto a motor vehicle license tag or an "RP" decal.

(Emphasis added.) The Department urges that, pursuant to this Rule, a dealer's purchase of a mobile home to be used by the dealer's tenants as transient living accommodations is taxable at the time of purchase "or at the time the mobile home is used as living accommodations." Dept.'s Mot. for Sum. Rec. Order at 14. This argument will be addressed below.

B. The Taxpayer's Position

39. Park Place's position is relatively easy to summarize. It proceeds according to the following logic. (1) Park Place purchases mobile homes tax-exempt, legitimately taking advantage of the "sale for resale" exemption. (2) When Park Place leases a mobile home pursuant to the Lease Option Rental Agreement, it effects a "retail sale" of the property——specifically, a 15(b) Sale. (3) As a 15(b) Sale, the transaction is taxable under Section 212.03. (4) All of the transactions at issue involved agreements of more than six-months' duration, and hence each qualified for the exemption from the transient rentals tax

provided in Section 212.03. (5) Because mobile homes are tangible personal property, the retail sale of such property—— even a 15(b) Sale——does not constitute a taxable "use" of the property. (6) Thus, Park Place does not incur use tax liability when it leases mobile homes pursuant to a Lease Option Rental Agreement.

40. Of these six points, only the fifth and sixth are genuinely controversial; the parties generally agree on the first four. The bone of contention arises from the Department's insistence, previously discussed, that in making a 15(b) Sale of a mobile home, Park Place converts the mobile home qua tangible personal property to its own use, conveying to the lessee not tangible personal property or something in the form of tangible personal property, but, as in FHMA, a "package" of "living accommodations." For its part, in distinguishing FHMA, Park Place writes:

> [T]he Petitioner [here] is not providing a package of real property or various services to their [sic] tenants, but rather is leasing a single item of tangible personal property (ie. [sic] the mobile home) in a discrete transaction. Clearly the mobile homes at issue in this case are not amenities incidental to the business, but

> rather the essential nature of the contract between the parties.

Pet.'s Resp. in Opposition at 3.

41. Park Place has not advanced an argument in its litigation papers refuting the Department's assertion regarding the operation of Florida Administrative Code Rule 12A-1.007(11)(f)2. In a letter to the Department dated June 22, 2000, however, Park Place's representative at the time argued that Rule 12A-1.007(11)(f)2 was "irrelevant under the circumstances" because Park Place had purchased the subject "mobile homes exclusively for leasing purposes, not to live in them." The undersigned assumes that this remains Park Place's position and will deal with the merits of the argument below.

IV. Analysis

A. Primary Rationale

42. Having carefully considered the positions of the parties, the undersigned is unable to agree that the transactions at issue involved the rental of "living quarters or sleeping or housekeeping accommodations" in a roominghouse. Rather, it is concluded that the subject transactions were 15(a) Sales of tangible personal property, subject to retail sales tax pursuant to Section 212.05, not the transient rentals tax of Section 212.03.

43. In reaching this conclusion, the undersigned starts with the broadly inclusive language of Section 212.02(15)(a), Florida Statutes, which (to repeat) provides:

> Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

It is undisputed that, for a consideration, Park Place transfers possession of mobile homes, which are tangible personal property, to its lessees pursuant to written lease agreements. Were it not for Section 212.03, most everyone would probably agree that these transactions were taxable "sales" of tangible personal property within the meaning of Section 212.02(15)(a), Florida Statutes.

44. Section 212.03 complicates matters, of course, by raising the possibility that Park Place has rented living quarters in mobile homes qua roominghouses, rather than leased mobile homes qua tangible personal property. But is that really what Park Place has done? The undersigned thinks not, for several reasons.

45. First, it is clear from a review of the Lease Option Rental Agreement that lessees took, not just a room in a roominghouse, but the whole mobile home, lock, stock, and barrel. In fact, each lessee not only got possession of the

entire mobile home, he was also given the duties of maintaining, repairing, and insuring the whole of the property. Just as taking a room in a hotel is distinguishable from leasing a hotel, there is also quite a difference between leasing living quarters in a mobile home and leasing a mobile home, which latter is essentially what the lessees did here. It is concluded that the lessees received more rights and responsibilities——more property interests——than Section 212.03 contemplates a transient renter would receive in connection with a lease granting merely the right to use living quarters in a mobile home.

46. Second, lessees who entered into the Lease Option Rental Agreement received a mobile home to live in——but no beds, furniture, household goods, housekeeping services, security, amenities, or routine maintenance. They were certainly not paying "guests" (as are hotel patrons) and were "tenants" only in a relatively technical sense. Thus, it is at least debatable whether the lessees purchased "living quarters or sleeping or housekeeping accommodations" as that phrase is used in Section 212.03, where the language seemingly connotes something more than a livable structure or shelter. In any event, it is plain that Park Place did not provide any goods (except the mobile home) or services as part of a "package" of accommodations

supplied to its lessees. In this respect, Park Place is distinguishable from the innkeepers in FHMA.

47. The Department's argument that the "package" consisted of the mobile home lease and the required lot lease is unpersuasive. For one reason, each lessee entered into a lot lease, not with Park Place, but with a separate legal entity (the mobile home park operator) that independently contracted with Park Place's lessees to provide homesites. While it is true that the Lease Option Rental Agreement required lessees to use their mobile homes solely as private dwellings and prohibited them from moving the homes from a specified mobile home park during the lease term, these conditions were designed to protect Park Place's interest in the mobile homes, which were essentially collateral for the indebtedness incurred by the lessees; they were not part of a "package" that Park Place provided to the lessees.

48. For another reason, it is not unusual for a mobile home lot to be offered for lease, as here, by a person who does not also lease mobile homes. See, e.g., § 723.002(1), Fla. Stat. (Chapter 723 does not apply to mobile home park lot tenancies when both the mobile home and the lot are rented). Thus, unlike the situation in FHMA, the taxpayer here is not attempting artificially to divide a unified package of goods and services into separate sales; rather, the Department is trying

to unite legitimately and conceptually distinct transactions, to reach the artificial conclusion that Park Place has offered a rental "package" when in fact it has marketed only mobile homes.

49. A third basis for concluding that Park Place has not rented living quarters in mobile homes qua roominghouses is this: Each of Park Place's lessees who paid all of the monthly installments through the end the Lease Option Rental Agreement's term (or prepaid the balance due) became the owner of his mobile home, taking title free and clear. With each month's payment, therefore, the lessee acquired some equity in the mobile home, gradually purchasing the tangible personal property over time. The lessee's right to claim this equity was conditioned, to be sure, on payment in full of the total rent specified in the Lease Option Rental Agreement——but such a condition on the transfer of title or possession of property does not remove a transaction from the definition of "sale" found in Section 212.02(15)(a), Florida Statutes. The fact is that some portion of the monthly installment payment——probably a large portion—— was attributable not to the lessee's right to use living quarters in a mobile home, but to his purchase of the mobile home.

50. Ultimately, the undersigned concludes that, in economic reality, these deals involved the purchase of mobile homes on the installment plan, not the transient rentals of

living quarters in mobile homes. The relationship between Park Place and its lessees more resembled that of creditor/debtor than that of innkeeper/guest or landlord/tenant. In sum, the transactions at issue were 15(a) Sales subject to taxation under Section 212.05. Section 212.03, Florida Statutes, was not implicated.

51. While this case was under consideration, the undersigned directed the parties to submit supplemental briefs on the question whether the Lease Option Rental Agreement constituted a "conditional-sale type lease" for the use of tangible personal property, as defined in Florida Administrative Code Rule 12A-1.071(1)(d). This Rule provides:

> Where a contract designated as a lease transfers substantially all the benefits, including depreciation, and risks inherent in the ownership of tangible personal property to the lessee, and ownership of the property transfers to the lessee at the end of the lease term, or the contract contains a purchase option for a nominal amount, the contract shall be regarded as a sale of tangible personal property under a security agreement (commonly referred to as a conditional-sale type lease, from its inception. The purchase option shall be regarded as a nominal amount if it does not exceed $100 or 1 percent of the total contract price, whichever is the lesser amount.

52. By way of background, Rule 12A-1.071 divides the set of all leases for the use of tangible personal property into "operating leases" and "conditional-sale type leases." Both

subsets of leases are subject to retail sales tax under Section 212.05. However, the timing of the tax liability is different for each category. On an operating lease, sales tax on the amount of each periodic payment becomes due as the payment is made, whereas with respect to a conditional-sales type lease, the tax is assessed against the entire contract price, payable at the inception of the contract.

53. In response to the undersigned's inquiry, the parties filed a Joint Supplemental Submission, wherein they have argued that the Lease Option Rental Agreement is not a conditional-sale type lease because it conveys something less than "substantially all the benefits, including depreciation," and risks of ownership to the lessee. The dispositive fact, according to the parties, is that Park Place continued to take deductions on its federal income tax returns for depreciation of the leased mobile homes. Thus, they contend, the lessees did not receive the tax advantages of depreciation——and hence lacked substantially all the benefits of ownership.

54. The undersigned is not persuaded. He doubts as a threshold matter that owners who use their mobile homes as primary residences can claim depreciation on the property for federal income tax purposes——but that issue need not be explored here. More important is that Park Place's deductions for depreciation could not have interfered with any lessee's

beneficial use and possession of his mobile home or reduced the risk of loss that was upon each lessee. In short, the undersigned believes that the Lease Option Rental Agreement falls squarely within Rule 12A-1.071(1)(d) and thus was a conditional-sale type lease.

55. Upon reflection, however, the undersigned realizes that he asked the parties too narrow a question. It really does not matter, for present purposes, whether the Lease Option Rental Agreement was a conditional-sale type lease or an operating lease; what is important is whether the subject agreement constituted a lease for the use of tangible personal property. In other words, what matters, more broadly, is whether the transactions at issue constituted 15(a) Sales, taxable under Section 212.05.

56. Having found above that, irrespective of whether the agreements should be deemed operating or conditional-sale type leases, the transactions at issue were taxable as retail sales under Section 212.05, the unavoidable conclusion is that Park Place is not liable for the use tax as assessed. This is because, in short, Park Place did not "use" tangible personal property; it "sold" the property. See § 212.05(1)(b), Fla. Stat. (use tax applies when tangible personal property is not sold but is used or consumed).[9]

B. Alternative Rationale

57. Although the undersigned rejects the parties' characterization of the disputed transactions as involving transient rentals within the ambit of Section 212.03, he would recommend that the assessment not be sustained even if Section 212.03 were applicable, for the following reasons, which are offered as an alternative basis for decision.

58. As has been mentioned, the transient rental of living quarters in a roominghouse is by definition a "sale." See § 212.02(15)(b), Fla. Stat. Such a sale, moreover, being a "sale to a consumer or to any person for any purpose," constitutes a "retail sale" or a "sale at retail." See § 212.02(14(a), Fla. Stat. Sales meeting the definition of Section 212.02(15)(b), Florida Statutes, which we have been referring to as "15(b) Sales," are taxable pursuant to Section 212.03.

59. The Department assumes that if a transaction is taxable under Section 212.03, then the transaction cannot be a sale of tangible personal property,[10] because such a transaction would be taxable under Section 212.05.[11] Contrary to the Department's assumption, however, nothing in Section 212.03 forecloses the possibility that a 15(b) Sale might constitute a sale of tangible personal property taxable under the more specific taxing statute (Section 212.03) instead of under the more general taxing statute (Section 212.05). Cf., e.g.,

McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994)(specific statute covering a particular subject always controls over statute covering the same and other subjects in more general terms).

60. Of course, many——probably most——15(b) Sales could not reasonably be classified as sales of tangible personal property. After all, the archetypal 15(b) Sale entails, as explained in FHMA, the provision of a package consisting of real property, tangible personal property, and services. The Department's assumption, therefore, would usually hold. But the transactions at issue here are obviously not archetypal 15(b) Sales. This is because (1) no real property was involved, (2) no services were provided, and (3) no incidental tangible personal property or amenities were furnished.

61. In fact, the only thing, really, that lessees got under the Lease Option Rental Agreement (besides financing) was a mobile home. And a mobile home is tangible personal property. Under the facts of this case, therefore, it is concluded that if Park Place were selling living quarters in transactions falling under Section 212.03, then it was selling living quarters in the form of an article of tangible personal property. Moreover, the tangible personal property here was not, as were the furnishings in FHMA, merely incidental to the transactions at issue; it was,

rather, essential to the transactions, the raison d'être for them.[12]

62. This is, it should be emphasized, a fact-specific conclusion. Again, most 15(b) Sales could not be considered sales of tangible personal property. It is easy, indeed, to imagine a situation where the rental of a room in a mobile home would not constitute a sale of tangible personal property. Suppose, for example, that the mobile home owner held a license pursuant to Chapter 509, Florida Statutes, to operate the home as a public lodging establishment falling within the classification of "roominghouse." See § 509.242, Fla. Stat. (enumerating the classifications of public lodging establishments). Suppose, further, that this licensee regularly rented a room in the mobile home for "transient occupancy" (as defined in Section 509.13(11)), providing the customary innkeeper's services as described in FHMA. Based on these hypothetical facts, the undersigned would likely conclude that the licensee was not selling living quarters in the form of tangible personal property, but rather was selling living quarters that happened, incidentally, to be situated in tangible personal property.

63. But here, in contrast, where Park Place surrendered possession of the entire mobile home to the lessees, where the lessees were required to maintain, repair, and insure the homes,

where no housekeeping or related services were provided, and where the tenants acquired conditional equity in their properties, the most reasonable conclusion is that the transactions fundamentally involved the sale (not "use") of tangible personal property, even if the transactions fell under Section 212.03, as the parties maintain.

64. The last issue to resolve is whether, as the Department urges, Florida Administrative Code Rule 12A-1.007(11)(f)2 supports the imposition of use taxes against Park Place. To repeat for emphasis, this Rule provides, in pertinent part, as follows:

> The purchase of a mobile home to be used as living accommodations within the purview of Section 212.03, F.S., is taxable at the time of purchase even though the mobile home may be untagged or have affixed thereto a motor vehicle license tag or an "RP" decal.

65. Park Place's argument for the inapplicability of this Rule takes advantage of the Rule's failure to identify the relevant actor(s). Thus, as Park Place reads the Rule, it means:

> The purchase of a mobile home <u>by any person</u> to be used as living accommodations <u>by that person</u> within the purview of Section 212.03, F.S., is taxable . . . .

(Underlined language added.) Construing the Rule in this manner permits Park Place to contend that, because Park Place does not

purchase mobile homes for the purpose of living in them, the Rule does not apply.

66. The problem with Park Place's argument is that the Rule, while admitting some ambiguity, does not naturally lend itself to the interpretation Park Place would place upon it. Instead, the Rule more reasonably should be understood as meaning:

> The purchase of a mobile home by a dealer to be used as living accommodations by the dealer's patrons within the purview of Section 212.03, F.S., is taxable . . . .

(Underlined language added.) Thus, the Rule cannot be dismissed as easily as Park Place would like.

67. Nevertheless, it is concluded that Rule 12A-1.007(11)(f)2 is not dispositive, for two reasons. The first is that the purpose of the Rule is not to extend the reach of the taxing statutes by purporting to make taxable certain transactions that otherwise would not be, but to make clear that the taxability of the type of transaction referenced is not affected by the fact that the mobile home "may be untagged or have affixed thereto a motor vehicle license tag or an 'RP' [i.e. "real property"] decal."

68. Second, and more important, the Rule should be understood to include an implicit qualification, namely, that the type of transaction referenced is taxable unless otherwise

exempt.[13] Such a proviso is necessary to avoid conflict, to the extent reasonably possible, between the Rule and other provisions of law that might be in pari materia with the Rule. Cf., e.g., Escambia County Council on Aging v. Goldsmith, 465 So. 2d 655, 656 (Fla. 1st DCA 1985)(construction of statutes dealing with same subject should avoid conflict between the two and find operations which preserve both).

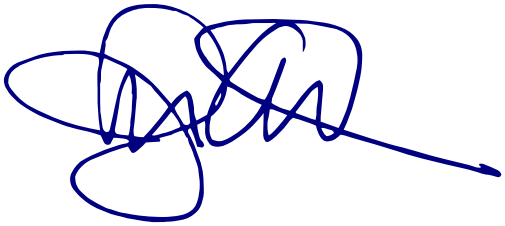
69. Accordingly, it is concluded that Park Place's purchases of mobile homes are tax-exempt as sales for resale, and that this remains true regardless whether a given mobile home is subsequently sold (leased) pursuant to a Lease Option Rental Agreement. In the latter event, the transient rentals tax will be due on the rent charged, to the extent that that transaction is not otherwise exempt.

70. Further, Rule 12A-1.007(11)(f)2 does not purport to impose the use tax on transactions, such as the ones at issue, involving the lease of living quarters composed exclusively of an article of tangible personal property.[14] Therefore, the Rule notwithstanding, because the transactions in dispute involved the sale of tangible personal property, Park Place is not liable for use tax. See § 212.05(1)(b), Fla. Stat. (use tax applies when tangible personal property is not sold but is used or consumed).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order withdrawing the tax assessment against Park Place.

DONE AND ENTERED this 25th day of June, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2004.

ENDNOTES

[1]/ This is an implicit condition of the agreement.

[2]/ The definitions of "sale" and "sale at retail," which are terms of art, will be examined presently.

[3]/ Section 212.02(14)(c) clarifies the general definition of "retail sales" quoted in the text, identifying certain transactions that are not retail sales. Arguably these are exceptions too, but none applies here, and their existence does not materially detract from the principal point made above, namely, that all sales are retail sales except sales for resale.

[4]/ Because Section 212.05(1)(a) imposes the sales tax only on retail sales of tangible personal property, it seems that sales for resale (which by definition are not sales at retail) should not be considered exempt from the tax but rather outside the reach of the taxing statute. Such distinction is of no importance in this case, however, and so, following convention, the undersigned will refer to "sales for resale" as exempt, rather than nontaxable, events.

[5]/ In either event, the sales at issue were retail sales, because none of Park Place's customers in the transactions at hand was a dealer leasing mobile homes for resale.

[6]/ Were it not for the exemption covering "long-term" transient rentals, both the use tax and the transient rentals tax would have been due and payable on the transactions at issue, under the Department's theory.

[7]/ If the sales transactions at issue were sales of tangible personal property (or something "in the form of" tangible personal property), then the use tax would be facially inapplicable, for it does not reach sales of tangible personal property. See § 212.05(1)(b)(use tax applies when tangible personal property is not sold but is used or consumed).

[8]/ The court also rejected the association's argument that collecting sales tax on innkeepers' purchases of hotel room furnishings and thereafter levying the transient rentals tax on guests' bills amounted to unlawful double taxation. No duplicate taxation occurs, the court held, "because the taxes at issue are levied on two separate taxable privileges": the privilege of selling tangible personal property at retail to an innkeeper, on the one hand, and the innkeeper's privilege of operating a hotel or motel, on the other. Id. at 1048. It should be noted, however, that this particular conclusion is subsidiary to (and indeed is driven by) the court's main holding, i.e., that the innkeeper's "package," being indivisible, is offered and sold pursuant to one taxable transaction, a transaction which does not entail the (re)sale of tangible personal property. That is to say, because the court viewed the hotel operators, rather than their patrons, as the ultimate consumers of furnishings and consumables placed in guest rooms, therefore the court could (and indeed was compelled to) hold that no duplicate taxation occurred in imposing the sales tax on the value added to the innkeeper's "package" by the inclusion therein of tangible personal property. Had the court

found to the contrary that hotel guests rather than hotel operators are the ultimate consumers of furnishings and consumables placed in guest rooms, then the association's double taxation argument should have found purchase, for in that case the hotels' acquisitions of the subject tangible personal property would have involved, not the separate taxable privilege of selling tangible personal property at retail, but the nontaxable privilege of selling tangible personal property to a dealer for resale.

[9]/ Of course, if Park Place failed properly to collect sales tax from its lessees, then Park Place might be liable for amounts due and payable under Section 212.05. Such a possibility cannot support the instant assessment, however, for the disputed assessment involves a different tax and a different theory.

[10]/ Keep in mind that, for purposes of the present discussion, it is being assumed for argument's sake that Park Place actually leased living quarters in mobile homes qua roominghouses pursuant to transactions taxable under Section 212.03. The undersigned, to be clear, has concluded otherwise, for reasons discussed.

[11]/ Another way of making essentially the same point is to say that subparts (a) and (b) of Section 212.02(15) are mutually exclusive. This particular assertion is somewhat undermined, however, by the observation that other subparts of Section 212.02(15) clearly overlap. Compare § 212.02(15)(a) with § 212.02(15)(e).

[12]/ For this reason, FHMA is ultimately inapposite. Properly understood, FHMA does not rule out (because the court did not consider) the possibility that a particular 15(b) Sale, taxable under Section 212.03, nevertheless could constitute a retail sale of tangible personal property, so that the dealer need not have paid sales tax upon the acquisition of the property or incurred liability for use tax at the time of the 15(b) Sale.

[13]/ Parenthetically, the Department argues that Rule should be interpreted implicitly to include, as a taxable transaction, the "use" of a mobile home as living accommodations within the purview of Section 212.03, the use tax to be due and payable at the time of such "use." While this might be a reasonable interpretation, it should be noted that the Rule does not specifically mention the use tax.

[14]/ On the other hand, Rule 12A-1.007(11)(f)2 probably would apply to the purchase of a mobile home for use as a roominghouse by a person such as the hypothetical licensee described in the example on page 32, supra. That said, the undersigned notes some inconsistency between Rule 12A-1.007(11)(f)2 and Florida Administrative Code Rule 12A-1.039(1)(b)5, which latter provides that "[t]he lease or rental of real property to a dealer when such property will subsequently be leased, rented, or licensed as transient accommodations by the dealer's tenants" constitutes an exempt sale for resale.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

LEASE OPTION RENTAL AGREEMENT

THIS AGREEMENT, is made and entered into on this _____day of _____, 19___, by and between _____
_____, hereinafter referred to as “Lessor” and _____, hereinafter referred to as “Lessee”

Lessor hereby leases to Lessee, and Lessee leases from Lessor a _____mobile home (Serial No. _____)(Size_____) located at _____
(hereafter “the mobile home”) and Lessor offers to Lessee the option to purchase the mobile home subject to the terms and conditions as set forth below.

1. Lessor hereby leases to Lessee the mobile home to be occupied solely as a private dwelling by Lessee and Lessee’s family consisting of _____.
In no event shall the total number of occupants exceed that permitted by this Agreement without the written permission of Lessor.

2. The term of this Agreement shall be for a period of ____months, commencing on the ___ day of _____, 19__. and terminating on the ____ day of _____, ____.

3. Lessee agrees to pay to Lessor the total rent of $_____ as follows:

a. The sum of $_____, payable upon signing of the Lease Option Agreement.

b. The sum of $_____, payable in equal monthly installments of $_____ beginning on _____, ____, and a like sum on the ____ day of each month thereafter until _____ when the entire remaining unpaid balance shall be due and payable in full.

c. Lessee and Lessor agree that at anytime the Lessee may prepay the remaining outstanding indebtedness.

d. Lessee and Lessor agree that upon full and final satisfaction of the indebtedness, as indicated in (3) above and a 30 day notice in writing to Lessor, title to the mobile home referenced above shall immediately pass