Dear:

This acknowledges receipt of your letter of April 14, 1993, to the Department of Revenue, requesting a Technical Assistance Advisement, regarding the transaction described below.

FACTS

XXX (hereinafter, Taxpayer) and XXX (hereinafter, Affiliate) are members of an affiliated group of corporations that join in the filing of a consolidated U.S. Corporation Income Tax Return. Affiliate intends to acquire real and personal property business assets, located out-of-state (hereinafter, Out-of-State Property). Taxpayer is the owner of real and personal property business located in Florida (hereinafter, Florida Property), substantially all of which are like-kind to the Out-of-State Property. With respect to Taxpayer, the transaction qualifies as a like-kind exchange under Internal Revenue Code Section 1031.

Taxpayer and Affiliate are considering entering into a transaction wherein Taxpayer will transfer the Florida Property to Affiliate in exchange for the Out-of-State Property. In the event the value of the Florida Property exceeds the value of the Out-of-State Property, the difference will be paid by Affiliate to Taxpayer in cash.

Over 85 percent of the total assessed value of the Florida Property, as determined by the XXX represents the assessed value of real property elements. Title to the personal property
elements of the Florida Property will pass from Taxpayer to Affiliate in Florida. Taxpayer will not itemize nor otherwise separately state nor price each individual item of tangible personal property.

The proposed transaction involves "themed" and "non-themed" property. A majority of assets in the Florida Property, and a significant portion of the tangible personal property in the Florida Property and Taxpayer's other businesses, is the themed property, which is unique to Taxpayer's amusement parks business and reflects the businesses' themed characteristics; such property includes, but is not limited to, rides, displays and exhibits. Non-themed tangible personal property, on the other hand, is used in the maintenance, administration or recreational aspects of Taxpayer's business.

When themed tangible personal property is replaced, it is destroyed, whereas non-themed tangible personal property is generally disposed of through sales to Taxpayer's employees or auctions to the general public. The sales of non-themed tangible personal property are conducted daily for employees; and auctions open to the general public are conducted six to 12 times per year. Taxpayer collects sales tax on all sales, except for sales of boats, motor vehicles, etc. (where the purchaser pays tax at the time such items are registered or titled), and except where the purchaser extends a resale certificate or consumer's certificate of exemption. These previous sales of non-themed tangible personal property are not part of a series of sales related to, nor in any way connected to, the proposed exchange.

Non-themed tangible personal property is either permanently affixed to the realty and essential to the operation of the themed property; or is tangible personalty such as cash registers, air compressors, retail display cases, and other property which is used in the day to day operation of Taxpayer's business. All non-themed tangible personal property is of a nature which would be adaptable to other businesses that cater to the public.

In general, the non-themed tangible personal property
assets which are elements of the Florida Property and are sold to employees or through public auctions consist of the following types of property:

(a) machinery and equipment,
(b) surplus merchandise (i.e., inventory)
(c) motor vehicles, boats, and other such items requiring registration with the state or federal government,
(d) office furniture and equipment, and
(e) merchandising furniture, fixtures and equipment.

With regard to the above listed property, specifically, surplus merchandise, in (b) above, you state that appropriate resale documentation will be obtained. Also, with regard to motor vehicles, boats, and other such items requiring registration with the state or federal government, listed in (c) above, you state that appropriate sales taxes will be paid at the time of titling or registration.

Moreover, you have received prior Letters of Technical Advice (hereinafter, LTAs), dated March 10, 1993, and April 2, 1993, wherein the Department reviewed this transaction and only addressed the themed property in the former, and then upon your request, in the latter LTA, the discussion on the applicability of documentary stamp taxes was excluded, and the tax treatment of the non-themed property was addressed.

ISSUE

Whether the exchange of the themed and the non-themed property is exempt from Florida's sales tax:

(1) as an occasional or isolated sale exemption;
(2) as it relates to the sale of aircraft, boats, mobile homes and vehicles (i.e., item (c), above);
(3) as a sale for resale exemption (i.e., item (b), above); and/or
(4) as the part and parcel of real property exemption, since the items of tangible personal property that are being exchanged by Taxpayer will not be separately stated, but will be sold in conjunction with the real
estate for a lump sum amount.

Whether the inclusion of cash or a note has any bearing on the tax treatment of the items of tangible personal property encompassed in the sale or transfer of real property?

DISCUSSION

(1)
Occasional or Isolated Sales

Section 212.02(2), F.S., define the term "business", in pertinent part as follows:

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

Section 212.02(16), F.S., defines the term "sale" as:

"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." (Emphasis added).

As provided in the above statutory quote, the exchange of tangible personal property is considered to be a sale, for sales and use tax purposes. Thus, absent any exempting provisions, the exchange of tangible personal property is subject to tax.

However, Rule 12A-1.037, F.A.C., provides in pertinent part as follows:

"(1)(a) Occasional or isolated sales of tangible personal property made by a person who does not hold himself out as engaged in business are exempt. However, this exemption never applies to occasional or isolated sales of aircraft, boats, mobile homes, motor vehicles, or other vehicles in this state of a class or type required to be registered,
licensed, titled, or documented in this state or by the
United States Government... or to sales made by those
persons who hold themselves out as engaged in a business,
notwithstanding the fact that their sales may be few and
infrequent.

"(b) An exempt occasional or isolated sale occurs when the
sale is made by the owner of tangible personal property
under the following circumstances:

"1. The seller does not hold himself out as engaged in
business and such sales or series of sales occur no more
frequently than 2 times during any 12 month period. The
third sale or series of sales of tangible items during any
12 month period makes that person engaged in that business,
and that person is required to register as a dealer and to
collect and remit tax on the third sale or series of sales
and on all subsequent sales."

Therefore, the sale of assets of a business, when such sale
is outside the normal course of trading, may not be subject to
sales tax when the owner of that tangible personal property
(excluding aircraft, boats, mobile homes, motor vehicles or
other vehicles in this state of a type or class required to be
registered, licensed, titled, or documented in this state or by
the United States Government), is also the seller, provided that
such owner has not held himself out as engaged in such business
activity, and as described in Rule 12A-1.037(1)(b)1., F.A.C.,
supra.

Accordingly, it is the Department's position that the
exchange of the themed elements of tangible personal property in
the Florida Property, from Taxpayer to Affiliate is an
occasional or isolated sale, exempt from sales and use tax since
Taxpayer is not in the business of selling themed tangible
personal property and has not made any individual sales of such
property within a 12 month period.

(2)
Aircraft, Boats, Mobile Homes and Vehicles, item (c), supra

As provided in Rule 12A-1.037, F.A.C., and the discussion
on occasional or isolated sales, supra, there is no specific
exemption for the sale or exchange of aircraft, boats, mobile homes, motor vehicles, or any other vehicles of a class or type required to be registered, licensed, titled, or documented in this state or by the United States. Therefore, it is the Department's position that any such items sold or exchanged are not exempt from Florida sales tax.

(3)
Sale for Resale, item (b), supra

Rule 12A-1.038, F.A.C., provides, in pertinent part, as follows:

"(1) It is the specific legislative intent that every sale,... is taxable under Chapter 212, F.S., unless such sale, admission, use, storage, consumption or rental is specifically exempt. The exempt status of the transaction must be established by the dealer. Unless the dealer shall have taken from the purchaser a certificate to the effect that the property or service was purchased for resale and bearing the name and address of the purchaser, the effective date of the certificate and the number of his dealer's certificate of registration, or a certificate bearing the number of his consumer's exemption certificate, and the effective date of the certificate, the sale shall be deemed to be a taxable sale at retail ..."

"(3) A resale certificate is required from every purchaser who purchases tangible personal property or service for resale,... Otherwise, the dealer will be required to collect and remit the tax to the Department of Revenue... "

Rule 12A-1.038(3), F.A.C., provides that a completed resale certificate is required from every purchaser who purchases tangible personal property for resale, subject to the provisions of subsection 12A-1.038(1), F.A.C.; otherwise the selling dealer will be required to collect and remit the tax to the Department. Taxpayer is required to obtain from Affiliate its blanket exemption certificate at the time of purchase, as provided in Rule 12A-1.039, F.A.C., in order to make sales to Affiliate tax exempt.
The Florida Department of Revenue does not supply dealers with preprinted forms which meet the standards of Rule 12A-1.038, F.A.C., and has therefore promulgated Rule 12A-1.039, F.A.C., providing only a suggested form for a blanket resale and exemption certificate, that meets the minimum requirements of Rule 12A-1.038, F.A.C. (A copy of Rules 12A-1.038 and 12A-1.039 is enclosed for your review).

Please be advised that a blanket resale certificate does not expire, as this is not a document issued by the Department. It may continue to be used until the issuer, in this case Affiliate, revokes it by written notice to the supplier, or until such time as the Florida Department of Revenue cancels Affiliate’s sales tax registration, should such an event occur.

Therefore, it is the Department's position that, with regards to the surplus merchandise, if Taxpayer does not take from Affiliate, at the time of sale or exchange, a valid certificate to the effect that the surplus merchandise is purchased for resale, such sale or exchange shall be taxable.

(4)

Real Property - Part and Parcel

The sale of real property is not subject to the sales tax imposed under Chapter 212, F.S. However, transfers of real property may be subject to documentary stamp and intangible personal property tax. You have specifically requested that a ruling with regard to the applicability of either of these taxes not be included in this letter; therefore, none has been provided.

To the extent that the sale of real property is not subject to sales tax, it has been the Department's longstanding position that if the sale of real property encompasses the transfer of certain items of tangible personal property as part of the real estate deal, the presence of the tangible personal property items does not change the nontaxable nature of the transaction, so long as such items are not separately stated and priced in the sales contract, bill of sale, or other tangible evidence documenting the sale.
With regard to the cash payment from Affiliate to Taxpayer, or the extension of a note from Taxpayer to Affiliate, in the event the value of Florida Property exceeds the value of the Out-of-State Property, the Department's position is that the inclusion or exclusion of cash or a note does not affect the determination of the applicability of the sales tax exemption for occasional and isolated sales, or on the determination that items of tangible personal property encompassed in the sale or transfer of real property are not subject to tax as long as there is not separate itemization and pricing of such items.

In sum, the Department concludes that:

- the exchange of the themed property is exempt from sales tax as an occasional or isolated sale;
- the sale of aircraft, boats, and vehicles is not exempt;
- the exchange of the surplus merchandise will be exempt only if at the time of the exchange Taxpayer obtains a valid resale certificate from Affiliate, in accordance with Rule 12A-1.038, F.A.C.;
- the items of themed and non-themed tangible personal property, that are exchanged in conjunction with the real property, which are not itemized or otherwise separately stated or priced, are not taxable, since the sale is for a lump sum amount, as part of the real estate deal; and
- the inclusion of cash or a note does not affect the tax treatment of the occasional and isolated sales or the treatment of items of tangible personal property encompassed in the transfer as part of the real estate.

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 based 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 and your request are public records under Chapter 119, F.S., which are subject to disclosure to the public under the conditions of Section 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or the response.

Sincerely,

Nydia Menendez
Technical Assistant

NM/pb
Con. #8302