FLORIDA
DEPARTMENT OF REVENUE
Executive Director
Marshall Stranburg

QUESTION: ARE ANY THE PARTICULAR REAL PROPERTY LEASES OF NURSING HOMES (GIVEN THE FACTS OF THIS SITUATION) SUBJECT TO SALES AND USE TAX FOR COMMERCIAL RENTALS?

ANSWER: NO.

May 22, 2014

Re: Technical Assistance Advisement – TAA 14A-012
Taxability of Real Property Leases
Sales and Use Tax – Commercial Rentals
Sections 212.031(1)(a)2., 212.03, 212.08(7)(i), Florida Statutes (F.S.)
Rule 12A-1.070, Florida Administrative Code (F.A.C.)

Dear XXX:

This is in response to your letter dated XXX, 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., regarding the taxability of certain commercial real property leases. An examination of your letter has established that 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.

ISSUE

The issue involves the taxability of real property leases and the subsequent subleases involving property used for nursing and assisted living homes.

FACTS AS PRESENTED

XXX, XXX and XXX (collectively, the "Land Owners") collectively own fourteen skilled nursing facilities ("Nursing Homes") and one assisted living facility ("ALF"), collectively (the "Facilities"). The Facilities are leased under Chapters 400 and 429, Florida Statutes. Taxpayers are a collection of nursing homes and an assisted living facility requesting a technical assistance advisement from the Department relating to the taxability of real property leases, subleases and sub-subleases of properties used as nursing homes and an assisted living facility, operated in the state of Florida. The Land Owners own the land and the buildings that comprise the real estate for each of the Facilities, but do not personally operate the Facilities. The Facilities are licensed as nursing homes and the ALF is licensed as an assisted living facility under the respective Florida statutes.

The Land Owners lease these properties to XXX ("the Lessee") pursuant to three written lease agreements (collectively, the "Tier 1 Leases"). There is one Tier 1 lease for each of the three Land Owners. The Lessee then subleases the facilities to XXX (the "Sublessee")[1] pursuant to a single written sublease, (collectively, the "Tier 2 Leases"). The Sublessee then sub-subleases the facilities to the Facility Operators, (collectively, the "Tier 3 Leases"), pursuant to a separate written lease with each Facility Operator. The Facility Operators collect the monies from the persons residing at the facilities. You indicate the aggregate amount of the lease amounts due under Tier Leases 1-3 are equivalent.

You indicate the Facility Operators primarily use the Facilities for the care of persons who are ill, aged, infirm, mentally or physically incapacitated, or for any reason are dependent upon special care or attention. You further provide:

> The Facilities include a lobby; residential units; common areas, such as hallways and a lobby; administrative offices for operating the Facilities; janitorial and storage closets; laundry rooms; nurses' stations; dining and kitchen facilities; areas for physical and occupational therapy; and health, wellness and recreational areas. Surrounding the Facility buildings are landscaped grounds and parking lots for resident, employees, and visitors. Even though The Facility Operators staff and operate the Facilities, The Facility Operators do not operate their businesses within any of the Facilities, and do not lease any space in any of the Facilities to, a bank, beauty shop, gift shop, or similar commercial enterprise not related of the primary operation of the Facilities.

You also provide the following:

> Some of the tangible personal property used at each of the [facilities] is owned by the [operators], and some is owned by the [Land Owners]. The tangible personal [property] owned by the [Land Owners] is leased to the [Lessee] pursuant to the Tier 1 Leases, subleased by [the Lessee] to [the Sublessee] pursuant to the Tier 2 Leases, and sub-subleased by [the Sublessee] to [Sub-sublessees] pursuant to the Tier 3 Leases.

The consideration for the tangible personal property is not delineated in the leases.

Both the Lessee and the Sublessee are registered with the Department as dealers for sales tax purposes. The Lessee issues a resale certificate to each of the Land Owners with respect to the Tier 1 Leases. The Sublessee also issues a resale certificate to the Lessee with respect to the Tier 2 Leases.

TAXPAYER POSITION

It is your position that the rent payments made by the Lessee to the Land Owners are not subject to sales tax because the Lessee can provide resale certificates in lieu of sales tax. Further, you assert, that resale certificates can also be provided by the Sublessee to the Lessee. Taxpayer also asserts that the sales tax due under the Tier 1 and Tier 2 Leases are exempt from sales tax because the rent paid by the Lessee to the Owners is tax exempt. With regard to the Tier 3 lease, it is your position that no portion of the lease payments (from the operators) is for anything other than the provision of dwelling units and care of the nursing home residents. You cite Beverly Enterprises of Florida, Inc. v. DOR, Fla. 18th Cir. Ct. 1996 (Case No. 94-2259-CA-16-L), and s. 212.031(1)(b), F.S., as authority.

[1] You indicate one of the properties is not wholly leased to the Sublessee. You indicate a portion is subleased to a "Renal Care" facility. You indicate taxes are collected and remitted by the Sublessee on this rent.

Finally, you cite s. 212.08(7)(i), F.S., as authority for not taxing the proceeds received by the Operators from the residents.

LAW AND DISCUSSION

Section 212.031(1)(a)2., F.S., provides ". . . 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 unless such property is . . . [u]sed exclusively as dwelling units."

Further, s. 212.031(*1*)(b), F.S., provides in part:

> When a lease involves multiple use of real property wherein a part of the real property is subject to the tax herein, and a part of the property would be excluded from the tax under … subparagraph (a)2., … the department shall determine, from the lease or license and such other information as may be available, that portion of the total rental charge which is exempt from the tax imposed by this section. The portion of the premises leased or rented by a for-profit entity providing a residential facility for the aged will be exempt on the basis of a pro rata portion calculated by combining the square footage of the areas used for residential units by the aged and for the care of such residents and dividing the resultant sum by the total square footage of the rented premises . . . .

Rule 12A 1.070(14)(b), F.A.C., provides that only areas accessed and used by the facility residents are exempt. However, a lower court (18th Circuit Court) has ruled that only areas of a nursing home used for commercial purposes are subject to tax on commercial rentals. The Department has followed this ruling regarding the facilities at issue. See Beverly Enterprises of Florida, Inc. v. DOR, Fla. 18th Cir. Ct. 1996 (Case No. 94-2259-CA-16-L).

Rule 12A-1.070(9), F.A.C., provides:

> If a tenant or other person sublets or assigns his interest in all of the leased or licensed premises, or retains only an incidental portion of the entire premises, then such tenant or other person may elect not to pay tax on the prime lease or license, provided that such tenant or other person shall register as a dealer and collect and remit tax due on the sub-rentals or assignments and pay the tax due on the portion of the rental charges or license fees pertaining to any taxable space which he retains. If the tenant or licensee elects not to pay the tax to his landlord, or other person granting the right to occupy or use such real property, he should extend to his landlord or such other person a resale certificate.

As all of the property is subleased, the Owners may accept a resale certificate from the Lessee. In turn, the Sublessee may submit a resale certificate in lieu of tax to the Lessee. The rental payments made by the Facility Operators are not subject to tax, because the entire leased areas are used by the operators as an assisted living facility. The court found in Beverly that only those areas used for commercial purposes were subject to sales and use tax. Your request does not identify any such commercial areas. Further, as the lease is silent regarding any consideration for the tangible personal property owned by the Owners, the Department construes that the tangible personal property in this instance does not alter the taxability of the transactions.

With regard to the payments made by the residents of the facilities, s. 212.08(7)(i), F.S., provides:

> Hospital meals and rooms.--Also exempt from payment of the tax imposed by this chapter on rentals and meals are patients…of any hospital or other physical plant or facility designed and operated primarily for the care of persons who are ill, aged, infirm, mentally or physically incapacitated, or otherwise dependent on special care or attention. Residents of a home for the aged are exempt from payment of taxes on meals provided through the facility. A home for the aged is defined as a facility that is licensed or certified in part or in whole under chapter 400, chapter 429, or chapter 651, or that is financed by a mortgage loan made or insured by the United States Department of Housing and Urban Development under s. 202, s. 202 with a s. 8 subsidy, s. 221(d)(3) or (4), s. 232, or s. 236 of the National Housing Act, or other such similar facility designed and operated primarily for the care of the aged.

Accordingly, the charges to the residents for living accommodations, made by the Facility Operators, are exempt from sales and use tax.

CONCLUSION

Resale certificates can be provided by the Lessee to the Owners. Further, resale certificates can be provided by the Sublessee to the Lessee. Accordingly, the rent payment made under both the Tier 1 and Tier 2 Leases are exempt from sales tax. With regard to the Tier 3 lease, no portion of the lease payments (from the Facility Operators) is for anything other than the provision of dwelling units and care of the nursing home residents, therefore, no sales tax is due on the rent paid by the Facility owners. The payments made to the operators, by residents, for living accommodations are not subject to sales and use tax.

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

Sincerely,
R. Clay Brower
Revenue Program Administrator
Technical Assistance and Dispute Resolution
(850) 717-6306

RCB/
Ctrl No: 160828