1. Can separately itemized nontaxable service charges included under the single agreement be excluded from sales tax?

   No. Separately itemized nontaxable service charges included under a restoration of services agreement cannot be excluded from sales tax pursuant to the definition of sales price under s. s. 212.02(16), F.S., which includes services that are a part of the sale.

2. Do any of the services provided qualify as exempt rentals of tangible personal property with an operator?

   No. None of the services provided under the restoration of services agreement would qualify as exempt rentals of tangible personal property with an operator.

3. Are separately itemized charges for potable water exempt from sales tax?

   Yes. Separately itemized charges for potable water under a restoration of services agreement would be exempt from sales tax pursuant to s. 212.08(4)(a)1., F.S.

4. Are separately itemized transportation charges, mobilization charges, and demobilization charges exempt from sales tax?

   Separately itemized “service” charges for transportation under a restoration of services agreement that are applied at the sole option of Taxpayer pursuant to the holding in B&L Concepts would not be subject to tax. Mobilization and demobilization charges that are strictly charges for “transportation” would be included in the Department’s response to transportation charges not being subject to tax. However, should these latter charges contain services other than transportation, see the Response to Question No. 1.
Re: Technical Assistance Advisement 19A-013
Florida Sales and Use Tax
XXXX (“Taxpayer”)
BP#: XXXX
XXXX Storm Restoration Services
Sections 212.02(15)(a), (20), 212.031, 212.05, 212.06, 212.08(4)(a)1., (13), Florida Statutes (F.S.)

Dear XXXX:

This letter is in response to your request dated March 21, 2019, and received in this office on April 29, 2019, for issuance of a Technical Assistance Advisement (“TAA”) pursuant to Section 213.22, F.S., and Rule Chapter 12-11, F.A.C., concerning manufacturing exemptions. An examination of your request has established you complied with the statutory and regulatory requirements for issuance of a TAA. Therefore, the Department is hereby granting your request for a TAA.

**STATED FACTS**

XXXX. Taxpayer understands when a storm impacts the state, logistical support is a critical component in ensuring its customers experience a quick, low cost and effective restoration of power. Therefore, Taxpayer has sought to enter into agreements with turn-key logistics providers for storm restoration services. Taxpayer has provided a copy of the request for proposal of the turnkey storm restoration services.

The service provider agrees to transport, stage, provide, manage, and teardown various types of sites as required by Taxpayer in the event of a storm. Types of sites include:

- Main turn-key sites — used for parking of vehicles, feeding, laundry, sanitation, and potentially lodging of crews.
- Pre-development sites — used for parking of vehicles prior to storm landfall allowing for crews to be in Taxpayer system ready to deploy post landfall.
- Processing sites — used for incoming crews.
- Micro-sites — used to alleviate extra drive time for crews and get them closer to damaged areas. Micro-Sites must be capable of serving breakfast, box lunches, and dinner that is delivered from the main staging site. Micro-Sites are located within approximately 20 miles of a turn-key site.

The service provider agrees to mobilization immediately upon receipt of a notice to proceed from Taxpayer. Service provider must provide all equipment on site within twelve hours after arrival. Service manager will provide all employees, facilities, and power to provide crewmembers three
meals, showers, laundry, parking, and alternative housing. Additionally, Taxpayer has the option to include modular offices at any site. Turn-key site pricing is based on the number of crewmembers who will be present at the site.

A significant portion of the cost under the agreement is for the catering of meals for crewmembers. The service provider must be prepared to serve the first catered meal within six hours upon arrival. The service provider must provide all necessary means to provide meals (refrigeration, food, water, waste water removal, etc.). Dining structures must be completely erect with tables, chairs, flooring, lighting, and HVAC.

In addition to catering, the service provider will provide alternative housing, showering, and laundry services. Alternative housing must be supplied with cots/roll-away beds, pillows, linens, lights, HVAC with ability to maintain 70 degree to 78 degree temperatures. Alternative housing must be capable of providing its own electrical generation. Adequate shower units/heads with a minimum of 1 head per 10 people, must be provided to ensure sufficient hot shower time without creating long waiting lines (based on 8-10 minute showers). Daily supplies (soap, shampoo, towels) must be provided. Supplier shall maintain and sanitize all showers units daily. Service provider must provide sturdy laundry bags, tags/tagging equipment and sufficient personnel to provide the full-service laundry service. Laundry service includes a tracking mechanism and a claims process for crewmembers.

Upon demobilization, service provider must leave the designated site clean and in like condition as found. Supplier must document with photographs site conditions upon arrival at site to establish site conditions prior set up. Taxpayer will conduct a site inspection after demobilization prior to acceptance of the demobilized site. If site is found to be in an unacceptable condition, service provider must clean and/or repair site location to return to like condition as found. If supplier fails to clean and/or repair site, Taxpayer will deduct from any payments due the costs incurred by Taxpayer to clean or repair site. Service provider must be completely off-site with 72 hours of notice of teardown.

Invoicing occurs in multiple forms. One service provider charges a flat fee per day with separately itemized mobilization, demobilization, arrival transportation, and departure transportation charges. Another service provider itemizes charges for meals, site equipment/logistics services, and mobilization/demobilization. The third service provider separately itemizes additional items and services.

**TAXPAYER’S REQUESTED ADVISEMENTS**

Based on the facts and analysis set forth above, Taxpayers request the following guidance:

1. Can separately itemized nontaxable service charges included under the single agreement be excluded from sales tax?
2. Do any of the services provided qualify as exempt rentals of tangible personal property with an operator?
3. Are separately itemized charges for potable water exempt from sales tax?
4. Are separately itemized transportation charges, mobilization charges, and demobilization charges exempt from sales tax?

**LAW & DISCUSSION**

Generally, services are not subject to tax under Chapter 212, F.S. Section 212.05(1)(i), F.S., enumerates those transactions that are subject to sales and use tax. The restoration service contracted for by Taxpayer is not a taxable service. However, performance by the service provider under the contract requires usage of real property for staging, housing and parking as well as an extensive amount of reusable tangible personal property (tents, chairs, cots/beds, equipment, etc.) and property that is fully consumed (meals, soap, shampoo, etc.). The rental or license to use real property is subject to tax under s. 212.031, F.S., and the sale or use of tangible personal property is subject to tax under s. 212.05 and 212.06, F.S., on the retail sales price; unless specifically exempt from tax under Chapter 212, F.S.

Section 212.02(15)(a), and (20), F.S., provides, in part, the following:

(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.* (Emphasis Added)

****

(20) “Use” means and includes the exercise of any right or power over tangible personal property incident to the ownership....

The term “sales price” is defined under s. 212.02(16), F.S., and it provides in pertinent part that:

“Sales price” means the total amount paid for tangible personal property, *including any services that are a part of the sale*, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, *without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever*. “Sales price” also includes the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property..... (Emphasis Added)
No identifiable charge is made to Taxpayer for the rental or the license to use real property; nor was an argument presented by Taxpayer indicative of a charge. Taxpayer concedes that charges for meals for immediate consumption and required equipment under the agreement such as portable toilets, offices, and campers used by Taxpayer and crewmembers are taxable.

However, Taxpayer set forth several arguments against taxation of various other items of tangible personal property and services that are itemized for inclusion in its contracted restoration services. Taxpayer asserts, (1) the holding under *Warning Safety Lights of Georgia, Inc. v. Florida*, 678 So.d 1377 (1996) for nontaxable use of tangible personal property with an operator is applicable, (2) its service contracts are distinguishable from *American Telephone and Telegraph Co. v. Florida*, 764 So.2d 665 (2000) which taxes tangible personal property that is inextricably intertwined with the sale of engineering services and (3) certain charges for tangible personal property and other identified services are exempt or not subject to tax, such as water and transportation. At the core of Taxpayer’s arguments is itemization of various services contracted for under the agreement and also sales or leases of tangible personal property.

Per Taxpayer, it enters into contracts with the service providers to deliver *all services and equipment necessary* for the turn-key storm restoration sites. The service provider sets up and controls complete turn-key sites *XXXX specifications as to placement and function*. Ultimately, the service provider contracts to perform certain work under its direction, and XXXX does not take possession or have any direction or control over the physical operation of the site logistics. Therefore, in accordance with *Warning Safety Lights of Georgia, Inc. v. Florida*, Taxpayer asserts stand-alone charges for electrical wiring, plumbing, parking, etc., would not be subject to tax.

A “sale” of tangible personal property includes any transfer of right to the property for consideration and “use” includes having the right or power over tangible personal property that has been sold; transfer of title is not a condition of use. As an initial matter, the “sales price” upon which tax is computed upon for the sale of tangible personal property includes any services that are a part of the sale. See s. 212.02(16), F.S. The electrical wiring, plumbing, and parking referenced by Taxpayer constitute services and the use of real property. Therefore, these items are subject to tax as a taxable component of the sales price under the described contracts. Regarding *Warning Safety Lights*, irrespective of taxation based on the definition of sales price, the facts and holding in that case would still be inapplicable. In that case, the court addressed whether the use of temporary traffic control devices, permanent signs, and road markings in a DOT subcontract by WSLG was a *rental of tangible personal property*. Again, at issue here are services and the usage of real property; not the rental of tangible personal property.

Taxpayer also asserts the findings under *American Telephone and Telegraph Co. v. Florida* are not applicable to its service contracts for separately itemized parking, power generation, plumbing, dumpster, and forklift charges. These items are not related to the furnishing, cooling, preparing, or serving of food or drinks.
Although restoration services performed by the service providers are not taxable under s. 212.05(1)(i)1., F.S., they do require extensive consumption of various types of tangible personal property. Without these items of tangible personal property, the services specifically contracted for by Taxpayer could not be performed. Accordingly, all tangible personal property comprising the service contracts are inextricably intertwined for purposes of effecting full performance under the contract as specified by Taxpayer in terms of its needs. It is illogical that the holding under American Telephone and Telegraph Co. v. Florida would only be applicable to select items of tangible personal property as they relate to each other under the contract as opposed to the demands of the entire contract.

In regard to purchases of potable (drinking) water, s. 212.08(13), F.S., states that no transactions shall be exempt from the sales and use tax except those expressly exempted. Florida courts have consistently held that exemptions must not be expanded beyond their express terms and must be strictly and narrowly construed against the taxpayer. The sale of potable water, which contains no artificial carbonation or flavoring, is specifically exempt from tax under s. 212.08(4)(a)1., F.S. Thus, separately stated sales of drinking water, as described per the referenced statute, would not be subject to tax under a restoration service contract.

In Department of Revenue v. B&L Concepts, 612 So.2d 720 (Fla. 5th DCA 1993), the court addressed the application of “services” provided by a furniture lessor. The lessor charged: (1) a late fee for the return of rented property after the expiration of the agreed rental term; (2) an order processing fee to recoup the cost of verifying credit information; and (3) a delivery fee for delivery of the rental property. The Department contended that all three items constituted charges for “services that are a part of the sale” under the statutory definition of “sales price.” However, the Fifth District Court of Appeal held that separately stated service charges required by the lessor are part of the sales price, and that separately stated incidental service charges optional to the lessee or buyer are not part of the sales price. As such, the decision in B&L Concepts indicates that service charges or fees are incidental to the sale and not included in the taxable “sales price” when they are separately stated and either: (i) applied at the sole option or election of the purchaser; or (ii) can be avoided by a decision or action on the part of the purchaser alone. In accordance with B&L Concepts, and charges for delivery fees, separately stated “service” charges for transportation of equipment that is applied at the sole option of Taxpayer, under a contract with a service restoration provider, would not be subject to tax.

1 See Asphalt Pavers v. Dept. of Revenue, 584 So.2d 55 (Fla. 1st DCA 1991), at 57 (citing the rule that exemptions from tax are strictly construed against the taxpayer, with any ambiguity resolved in favor of the administrative agency); State ex rel. Szabo Food Services Inc. v. Dickinson, 286 So.2d 529 (Fla. 1973) (“Exemptions to taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer.”). See also, United States Gypsum Co. v. Green, 110 So.2d 409 (Fla. 1959) (also stating that exemptions from tax are strictly construed against the taxpayer) and Wanda Marine Corp. v. Dep’t of Revenue, 305 So.2d 65, 69 (Fla. 1st DCA 1975).
5. Can separately itemized nontaxable service charges included under the single agreement be excluded from sales tax?

No. Separately itemized nontaxable service charges included under a restoration of services agreement cannot be excluded from sales tax pursuant to the definition of sales price under s. s. 212.02(16), F.S., which includes services that are a part of the sale.

6. Do any of the services provided qualify as exempt rentals of tangible personal property with an operator?

No. None of the services provided under the restoration of services agreement would qualify as exempt rentals of tangible personal property with an operator.

7. Are separately itemized charges for potable water exempt from sales tax?

Yes. Separately itemized charges for potable water under a restoration of services agreement would be exempt from sales tax pursuant to s. 212.08(4)(a)1., F.S.

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Separately itemized “service” charges for transportation under a restoration of services agreement that are applied at the sole option of Taxpayer pursuant to the holding in B&L Concepts would not be subject to tax. Mobilization and demobilization charges that are strictly charges for “transportation” would be included in the Department’s response to transportation charges not being subject to tax. However, should these latter charges contain services other than transportation, see the Response to Question No. 1.

For more information concerning all the taxes administered by the Department of Revenue, please refer to the Department’s Internet site at:

http://floridarevenue.com

This response constitutes a Technical Assistance Advisement under s. 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 s. 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 and 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 s. 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.

Kind Regards,

Alan R. Fulton

Alan R. Fulton
Tax Law Specialist
Technical Assistance & Dispute Resolution
850-717-6735

ARF\tadrstaff
Record ID: 201275