



Florida Department of Revenue
Technical Assistance and Dispute Resolution

Jim Zingale
Executive Director

5050 West Tennessee Street, Tallahassee, FL 32399

floridarevenue.com

QUESTION: Whether the leased property meets the statutory definition of a “common element” under s. 212.031(1)(a)4., F.S.

ANSWER: Some portions of the leased property do meet the statutory definition of “common element” under s. 212.031(1)(a)4., F.S. Condominium property included in the ground lease, but not used exclusively as a dwelling unit or is not a common element, is taxable and should be included in the taxable portion of the lease.

June 27, 2023

[REDACTED]

Via Email: [REDACTED]

Re: Technical Assistance Advisement – 23A-015
[REDACTED] (“Petitioner”)
[REDACTED] (“Lessor”)
Sales and Use Tax – Real Property Lease/Common Elements
Section(s) 212.031, 212.04 and 718.108, Florida Statutes - (“F.S.”)
Rule(s) 12A-1.070, Florida Administrative Code - (“F.A.C.”)
BP #: [REDACTED]

Dear [REDACTED]:

This is in response to your letter dated January 4, 2023, requesting this Department’s issuance of a Technical Assistance Advisement (“TAA”) pursuant to Section(s.) 213.22, F.S., and Rule Chapter 12-11 F.A.C, Florida Administrative Code, regarding the matter discussed below. Your request has been carefully examined, and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

REQUESTED ADVISEMENT

Whether the leased property meets the statutory definition of a “common element” under s. 212.031(1)(a)4, F.S.

... although Rule 12A-1.070(1)(a)[9.], F.A.C., has substantially similar language to [s.] 212.031(1)(a)4., [F.S.] the F.A.C. uses slightly different language to describe the owner of the property subject to lease. Despite this distinction, the only reasonable conclusion is that Rule 12A-1.070(1)(a)[9.], F.A.C., must be interpreted in a manner consistent with the Florida Statutes such that [REDACTED] must be considered the "owner" for purposes of s. 212.031(1)(a)4., F.S. ...

* * *

Petitioner asserts that a portion of the property included in the lease is [REDACTED], a public street used for transportation purposes pursuant to a perpetual [REDACTED] easement and is therefore not subject to sales tax pursuant to s. 212.031(1)(a)4., F.S.

Petitioner states that it has not located any case law interpreting s. 212.031(1)(a)4., F.S., but states that TAA 92A-055, interprets the provision and illustrates how the Department previously has interpreted portions of s. 212.031, F.S.

Referencing TAA 92A-055, Petitioner states in part:

... the Florida Department of Revenue ... addressed the question of whether a lease of certain recreational facilities ... met the exception from sales tax under [s.] 212.031(1)(a)4., [F.S.] or if such payments were taxable as "admissions" under the provisions of [s.] 212.04, [F.S.] In determining that [s.] 212.031(1)(a)4., [F.S.] was controlling, the Department confirmed that the facilities in question qualified as "recreational property," exempt from sales tax under [s.] 212.031(1)(a)4., [F.S.]. In making its determination, the Department applied the following three-prong test:

It is with knowledge of this provision[] that the Department alerts you to the fact that s. 212.031(1)(a)4., F.S., allows for an exemption from the tax imposed by that section under the condition that:

1. The Facilities are recreational property or the common elements of a condominium,
2. The lessor of the property is the Corporation as developer or owner of the property, and
3. The lessee is the condominium association in its own right, the association as agent for the unit owners, or the individual unit owners.

* * *

It is Petitioner's position that the [REDACTED] qualifies for the exemption provided under s. 212.031(1)(a)4., F.S. and the Association's rent is not subject to sales tax. Petitioner states that the three-prong test referenced in TAA 92A-055 provides a reasonable framework for the

application of the exemption. In applying this test to the lease at issue, Petitioner contends that each of the three requirements is met and the exception under s. 212.031(1)(a)4., F.S. would apply.

With regard to the requirements set forth in s. 212.031(1)(a)4., F.S., Petitioner provides the following explanations to support that it qualifies for the exemption:

1. *The Facilities are recreational property or the common elements of a condominium.*

Petitioner states that this requirement is broader than articulated in TAA 92A-055, which addressed whether “facilities” that were not part of the common areas qualified for the exception as “recreational property.” The test is more properly phrased as whether the leased property qualifies as “recreational property” or “common elements” of the condominium.

It is Petitioner’s opinion that the leased property is the land (ground) underneath the [REDACTED] [REDACTED] as well as a portion of [REDACTED] [REDACTED]. However, it is noted that beginning on [REDACTED] [REDACTED], the [REDACTED] [REDACTED] assumed sole responsibility for the use and operation of [REDACTED]. In connection with this change, the Association will receive a discount against the rent due. Petitioner states that the term “common elements” is not defined in Chapter 212, F.S. Section 718.108, F.S., provides in part:

1. “Common elements” includes within its meaning the following:
 - a. The condominium property which is not included within the units.
 - b. Easements through units for conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to units and the common elements.
 - c. An easement of support in every portion of a unit which contributes to the support of a building.
 - d. The property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements.

(2) The declaration may designate other parts of the condominium property as common elements.

* * *

Referencing TAA 92A-055, Petitioner restates that “[i]t is a basic tenet of statutory construction that, ‘every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.’”

It is Petitioner’s opinion that under this guidance the ground underneath the condominium as well as the portion of [REDACTED], which is included in the lease through [REDACTED], are “[t]he condominium property which was not included within the units” “and should therefore, qualify as common elements for purposes of s. 212.031(1)(a)4., F.S.

2. The lessor of the property is the Corporation as developer or owner of the property

It is Petitioner’s opinion that the second requirement is satisfied – in that [REDACTED], the lessor, is the owner of the property.

3. The lessee is the condominium association in its own right, the association as agent for the unit owners, or the individual unit owners

With regard to the final requirement, Petitioner states that the lease was assigned to the Association by [REDACTED] – the Developer of the [REDACTED] [REDACTED] through an [REDACTED] [REDACTED]. The Association’s lease of the property is separate and distinct from any rights of ownership of any improvements to the property including the condominium building). Accordingly, the lessee in this case is the condominium association which satisfies the third requirement.

Petitioner contends that based on the plain language of s. 212.031(1)(a)4., F.S. and the guidance from s. 718.108, F.S. and TAA 92A-055, it is clear that the rental of “common elements” of a condominium, when subject to a lease between the owner of the real property, [REDACTED], and the condominium association, Petitioner, is not subject to Florida sales tax; since the property meets the statutory definition of a “common element,” payments of rent by the Association (the lessee) to [REDACTED] (the lessor and owner of the Property) satisfies the requirements for the exception under s. 212.031(1)(a)4., F.S. Therefore, Florida sales tax should not apply to the lease, which is consistent with [REDACTED]’s non-application of sales tax to the lease from [REDACTED] to [REDACTED].

Upon review of the [REDACTED], [REDACTED], the following points are noted:

* * *

C. Assignee is the Condominium Association established to govern and operate the Condominium, all as more particularly described in the Declaration.

D. Assignor now desires to assign to Assignee, and Assignee now desires to obtain from Assignor, each and every of the obligations under the Lease.

* * *

2. Assignor does hereby assign unto Assignee, the following (collectively, the “Assigned Rights and Obligations”):

(a) each and every of the obligations of the lessee under the Lease, whether financial or otherwise, and/or attributable to the leasehold estate under the Lease, including without limitation, the obligation for the payment of the aggregate annual Minimum Rent and additional rent due [REDACTED] and/or any successor to the landlord’s interest in and to the Lease and the posting and maintaining of any security deposits required under the Lease;...

* * *

3. Assignee does hereby accept the Assigned Rights and Obligations and assumes and agrees to perform all of the obligations, liabilities, covenants, agreements terms, provisions and conditions of the Lease on the part of the lessee to be performed therein arising after the date of this Assignment, but solely as they relate to Phase II.

* * *

According to the Declaration of [REDACTED], A Condominium (“Declaration”), [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]:

i. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

ii. [REDACTED]
[REDACTED]
[REDACTED]

[Redacted]

iii. [Redacted]

iv. [Redacted]

v. [Redacted]

[See also [Redacted]]

The "Submission Statement" found in [Redacted] of the Declaration, provides in part:

... [Redacted]

Additionally, the "Submission Statement", provides that "[Redacted]"

██
██
██ ...”

The following relevant definitions related to the Declaration are provided in ██████████:

██████████ defines “Association” or “Condominium Association” to mean ██████████, a Florida corporation not for profit, the sole entity responsible for the operation of the Condominium.

██████████ defines “Common Elements” to mean and include:

- a. The portions of the Condominium Property which are not included within either the Units and/or the Association Property, which includes, without limitation, the ██████████ and the portions of Vacated ██████████ contained within the Condominium Property.
- b. All structural columns and bearing walls regardless of where located.
- c. Easements through Units for conduits, ducts, plumbing, wiring and other facilities for furnishing of utility and other services to Units, the Common Elements and/or the Association Property.
- d. An easement of support in every portion of a Unit which contributes to the support of the Building.
- e. The property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements and/or the Association Property.
- f. Any and all portions of the Life Safety Systems ... regardless of where located within the Condominium Property.
- g. Any other parts of the Condominium Property designated as Common Elements in the Declaration, which shall specifically include the surface water management system, if any serving the Condominium.

The term “Condominium Property” as defined by ██████████ of the Declaration means “the leasehold estate in the Land, improvements and other property or property rights described in ██████████ ...”

██████████ defines ██████████, its successors, nominees, affiliates, and such of its assigns as the “developer” to which the rights of Developer are specifically assigned. Developer may assign all or a portion of its rights hereunder or all or a portion of such rights in connection with specific portions of the Condominium. In the event of any partial assignment, the

assignee shall not be deemed the Developer, but may exercise such rights of the Developer as are specifically assigned to it. Any such assignment may be made on a nonexclusive basis. Any assignment (partial or in full) of the Developer's rights, the assignee shall not be deemed to have assumed any of the obligations of the Developer unless, and only to the extent that it expressly agrees to do so in writing.

The term "improvements" as defined under [REDACTED], means "all structures and artificial changes to the natural environment (exclusive of landscaping) located or to be located on the Condominium Property, including, but not limited to, the Building."

[REDACTED] states that the term "land" shall have the same meaning given to it in [REDACTED] - which states in part, "the Developer is the owner and holder of a leasehold estate in certain land located in [REDACTED]."

Regarding "Limited Common Elements," [REDACTED] of the Declaration provides in part:

If applicable, any other portion of the Common Elements which, by its nature, cannot serve all Units but serves one Unit or more than one Unit (i.e., any hallway and/or elevator landing serving a single Unit or more than one (1) Unit owned by the same Owner) shall be deemed a Limited Common Element of the Unit(s) served and shall be maintained by said Owner. In the event of any doubt or dispute as to whether any portion of the Common Elements constitutes a Limited Common Element or in the event of any question as to which Units are served thereby, a decision shall be made by a majority vote of the Board of Directors of the Association and shall be binding and conclusive when so made.

With regard to Percentage Ownership and Shares in Common Elements, [REDACTED] of the Declaration, provides in part:

The undivided percentage interest in the Common Elements and Common Surplus, and the percentage share of the Common Expenses, appurtenant to each Unit, is as set forth on Exhibit "3" ..., same having been determined based upon the total square footage of the applicable Unit in uniform relationship to the total square footage of each unit.

The real property lease at issue has been amended [REDACTED] – with the [REDACTED] amendment to the Agreement of Lease being dated [REDACTED]. Under the terms of the "Amended Lease" Petitioner is tenant for a portion of the leased premises. Additionally, Petitioner is responsible for a portion of [REDACTED] and currently pays rent based on the area occupied by the [REDACTED] as well as a portion of the property occupied by another tenant. It is Petitioner's opinion that pursuant to the Amended Lease, it is not liable for sales tax on the real property lease as those portions of the lease are believed to be common elements.

LAW AND DISCUSSION

Section 212.031(1)(a), F.S., declares it is 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 real property. For the exercise of such privilege, tax is levied at the rate of 5.5 percent (5.5%) of the total rent charged for the use and occupancy of real property, by the person charging or collecting the rental fee. See s. 212.031(1)(c), F.S. The total rent or license fee includes "all considerations due and payable by the tenant ... to his landlord ... for the privilege of use, occupancy or the right to use or occupy any real property for any purpose." See Rule 12A-1.070(4)(b), F.A.C. However, s. 212.031(1)(a)2., F.S., excludes real property from the tax when such property is "used exclusively as dwelling units." This includes the residential units and common areas.

Section 212.031(1)(a)4., F.S., provides an exemption for recreational property or the common elements of a condominium "when subject to a lease between the developer or owner thereof and the condominium association in its own right or as agent for the owners of individual condominium units or the owners of individual condominium units." Section 212.031(1)(a)4., F.S., continues: "However, only the lease payments on such property shall be exempt from the tax imposed by this chapter, and any other use made by the owner or the condominium association shall be fully taxable under this chapter."

Section 212.031(1)(b), F.S., addresses situations in which the leased property is multi-use property that includes areas that are not subject to the tax, such as property used exclusively as a dwelling unit, and other areas that are subject to the tax imposed by s. 212.031, F.S. Section 212.031(1)(b), F.S., provides that the allocation is based on the lease agreement and other available information. Although, an allocation using square footage information is used as an example in Rule 12A-1.070, "F.A.C.", the Department will use reasonable methods to determine the taxable rental amount. See Rule 12A-1.070(14)(a), F.A.C.

Petitioner opines that the leased property, which in this case is the "ground" underneath the condominium meets the statutory definition of "common elements" of the condominium when subject to a lease between [REDACTED] – the owner of the real property and Petitioner - the condominium association; therefore, the payments for rent would be exempt from sales tax. However, while the definition of "common elements" does include portions of the condominium property that is not included in the units," the condominium property which is "the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium," any condominium property that is included in the ground lease, but not used exclusively as a dwelling unit or is not a common element as contemplated by [REDACTED] of the Declaration, is taxable and should be included in the taxable portions of the lease.

CONCLUSION

Some portions of the leased property do meet the statutory definition of "common element" under s. 212.031(1)(a)4., F.S. Condominium property included in the ground lease, but not used

exclusively as a dwelling unit or is not a common element is taxable and should be included in the taxable portion of the lease.

This response constitutes a TAA 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, 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 TAA, 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 ten (10) days of the date of this letter.

If you have any further questions with regard to this matter and wish to discuss them, you may contact me directly at (850)717-6701.

Sincerely,

Shundra McClean

Shundra McClean

Tax Law Specialist

Technical Assistance & Dispute Resolution

(850)717-6701

Record ID: 7000898936

cc:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

TADR Satisfaction Survey

The Florida Department of Revenue invites you to complete the online TADR Satisfaction Survey to help us identify ways to improve our service to taxpayers. The survey is an opportunity to provide feedback on your recent experience with the Department's office of Technical Assistance and Dispute Resolution (TADR). To access the survey, place the following address in your browser's access bar:

<https://tadr.questionpro.com>

When you open the survey, you'll be asked to enter the following information. This information will enable you to complete and submit the survey.

Notification number: 7000898936

Respondent code: 44

Tax type: Sales and Use Tax

Correspondence type: Technical Assistance

If you need technical assistance accessing the survey, please email Douglas Charity at douglas.charity@floridarevenue.com.

Thank you.