

duties. Of course, if the interest so disclosed does, in fact, represent a substantial conflict with the public duties of the officer or employee, he should divest himself of one or the other of such interests.

073-429—November 26, 1973

TAXATION

RENTAL OF REAL PROPERTY ALONG WITH SALE OF SERVICES; TAX LIABILITY ON GIFT WRAPPING; DUES IN MERCHANTS' ASSOCIATION AS PART OF RENT

To: Lew Brantley, Senator, 8th District, Jacksonville

Prepared by: J. Kendrick Tucker, Assistant Attorney General

QUESTIONS:

1. Is the total payment taxable as "rent" when a department store subleases a certain department therein to a tenant for a sum certain when a part of the payment, which the parties do not intend to be rent, is for services to the sublessee?
2. Is it arbitrary and discriminatory not to exempt a gift box or gift wrapping which encloses purchases (and for which no charge is made to the customer) from the sales tax when rules of the state Department of Revenue exempt an ordinary merchandise bag used by a retail merchant to enclose a customer's purchase?
3. Is it arbitrary and discriminatory to tax dues paid to a retail merchants' association in a shopping mall which are made mandatory in the landlord's lease, but not paid directly to the landlord but to the retail association and used strictly to advertise and promote business for all the merchants in the said shopping mall as rent?

SUMMARY:

If a store which subleases a portion of its leased space to a tenant for a certain sum and provides services to the tenant with a portion of the rent being allocated for such services, then the sum is not taxed as rent if the parties intend not to treat it as rent, the agreement between the parties does not treat the sum as rent, the services rendered are separable and not incidental to the furnishing of the space, the rental and service charges are separately stated and billed, and the services furnished are not otherwise taxable. It would be discriminatory and unlawful not to exempt from the sales tax the receiving by customers of gift boxes or gift wrapping for which no charge is made because there is not a "sale" to the customer of the gift box or paper or wrapping services since there is no separate charge or consideration for such and in any event such gift boxes or gift wrapping are not taxed pursuant to the rules of the Department of Revenue. It is not arbitrary or discriminatory to impose the sales tax on dues paid by a tenant to a merchants' association pursuant to the terms of the lease because such payments are presumably part of the consideration for rental of the space to the tenant.

Your first question is answered as discussed below. Your second question is answered in the affirmative and your third question is answered in the negative.

The answer to your first question depends upon factual and legal determinations as to the terms of the agreement between the parties, the nature of the "services" rendered, and, of course, the intent of the parties. Since I am not

apprised of the nature of the services performed or the specific terms of the agreement, I will limit my comments to an enumeration of the relevant principles of law.

Section 212.05, F. S., provides 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, *or who rents or furnishes any of the things or services taxable under this chapter* (Emphasis supplied.)

Section 212.031, F. S., provides as follows:

(1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, or letting any real property

If the services furnished are incidental to the furnishing of the space to the tenant, then the transaction is taxable pursuant to §212.031, *supra*. Such services should be appurtenant to the use of the premises and reasonably essential to the use and enjoyment of the premises as contemplated by the parties. Attorney General Opinion 069-67 and *S. S. Jacobs Co. v. Weyrich* 164 So.2d 246 (1 D.C.A. Fla., 1964).

If, however, the payments are for services that are not incidental to the furnishing of the space, are separable from the rental of the space, and the rental and service charges are separately stated, all of which are consistent with the intent of the parties, and the service charges are not otherwise taxable (as, *e.g.*, service charges for the furnishing of tangible personal property), then said payments for services would not be a rental of real property taxable under Ch. 212, F. S. Attorney General Opinion 069-67.

If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays . . . [is measured by the total cost of article and services]. If the service rendered in connection with the article sold does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax-exempt as to the other. [*Snite v. Department of Revenue*, 74 N.E.2d 877, 880 (Ill. 1947).]

Although the above-quoted case applied to the sale of services along with the sale of tangible personal property it is my opinion the rule is equally applicable to the sale of services along with the rental of realty as in the case at hand. Section 212.05, *supra*.

In addition, the Department of Revenue, charged with the assessment and collection of the sales tax, has issued regulations pursuant to its rule-making authority as provided in §§212.17 and 212.18, F. S., that prescribe the tax treatment of the rental of realty along with the sale of services.

Rule 12A-1.70(9), Florida Administrative Code (F.A.C.), provides as follows:

When the owner of a business, or the operator of a business who is a lessee, provides floor space to any person, and in addition thereto and in connection therewith also provides certain services to such person such as display, delivery, wrapping, packaging, telephone, credit, collection or accounting, *the amount charged by the lessee to such person constitutes the rental of real property, and where the charges for such services are not*

separately stated in the agreement and on the invoices or other billings, the total consideration paid under the agreement is taxable. Where the charges for such services are separately stated in the agreement and on the invoices or other billings, only those charges for floor space are taxable. . . . (Emphasis supplied.)

Thus, pursuant to the above-cited regulation and authorities, certain services provided by a lessee to a sublessee which are separable and not incidental to the lease of the floor space and which are separately stated in the agreement and in the billings are exempt from the sales tax.

In your second question you note that current law exempts from the sales tax merchandise bags used by a retail merchant to enclose customers' purchases. You then ask if it is arbitrary or discriminatory to fail to exempt from the sales tax gift boxes or gift wrapping which enclose similar purchases and for which no charge is made to the customer. The relevant rules of the Department of Revenue [Rule 12A-1.40, F.A.C.] provide as follows:

(1) Items actually accompanying the product sold to the final buyer or ultimate consumer without which delivery of the product is impracticable on account of the character of the contents and for which there is no separate charge are exempt. These items include such things as . . . paper bags

(6) The charge a store makes for gift wrapping the merchandise it sells is taxable.

Thus, paper bags are exempt, pursuant to the above-cited rule, not only when the merchandiser buys them but also when he give them to his customers. *See also*, §212.02(3)(c), F. S. Gift wrapping is taxable, pursuant also to the above-cited rule, when the store charges for it.

Section 212.02, F. S., provides, in part, as follows:

(2) "Sale" means and includes:

(a) Any transfer of title or possession, or both, exchange, barter, lease or rental in any manner or by any means whatsoever of tangible personal property *for a consideration* (Emphasis supplied.)

Gift wrapping is not taxable to the customer when the store does not charge the customer for it because there is not, in my opinion, a "sale" of the paper within the meaning of the above-cited statute. In addition, when a rule or statute enumerates the things on which it operates, it must be construed as excluding from its operation all things not expressly mentioned. *Ideal Farms Drainage Dist. v. Certain Lands*, 19 So.2d 234 (Fla. 1944) and *Florida Livestock Board v. Gladden*, 76 So.2d 291 (Fla. 1954). The rule provides for the taxation of gift wrapping upon a certain condition, *i.e.*, when the customer is charged for it. I must therefore conclude that gift wrapping may not be taxed to the customer under other conditions not mentioned in the rule. *See also*, *Scripto, Inc. v. Carson*, 105 So.2d 775 (Fla. 1958).

It is accordingly my opinion that it would be discriminatory and unlawful not to exempt from the sales tax gift wrapping or gift boxes for which no charge is made to the customer.

Your third question raises the issue of whether it is arbitrary and discriminatory to impose the sales tax on dues paid directly to a retail merchants' association in a shopping mall when such dues are required to be paid by the terms of the lease of a business occupying the mall and when such dues are used to advertise and promote business for all merchants in the mall. This inquiry has been previously ruled on by me in AGO 070-151 in which I concluded that such dues

were taxable rental because the lease required them to be paid and in fact designated such as rent. Since I find no change in statutory or judicial authority, I consequently affirm the prior opinion.

I have not been apprised of the terms of the lease you are concerned with regarding how the payment of dues is described. However, even if the lease were silent as to the description of the payments, I nevertheless must conclude that if the payment of such dues is part of the consideration for the rental of the floor space and not a collateral contract entered into by the parties, then such dues are rent subject to the sales tax. Section 212.031(1)(d), F. S., *Seaboard Coast Line Railroad Company v. Askew*, Circuit Court, Second Judicial Circuit, Case No. 72-15, 1972, and AGO 070-151.

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PUBLIC PROPERTY

LOCAL AUTHORITY MAY NOT PROHIBIT SWIMMING ON PUBLIC BEACH

To: Jere Tolton, Representative, 6th District, Fort Walton Beach

Prepared by: Michael Parrish, Assistant Attorney General

QUESTION:

Does the Okaloosa Island Authority have the authority to ban all swimming along a portion of the Gulf of Mexico coastline of Santa Rosa Island?

SUMMARY:

The Okaloosa Island Authority is without authority to ban all swimming along the foreshore of the Gulf of Mexico coastline of Santa Rosa Island, title to which is held by the State of Florida in trust for all the people under Art. X, §11, State Const.

Section 1(4) of Ch. 29336, 1953, Laws of Florida, which creates the Okaloosa Island Authority, defines the geographic area under its authority as "such portion or portions of Santa Rosa Island as may be owned by Okaloosa County, Florida, or in which said county may have a proprietary interest, from time to time." Article X, §11, State Const., provides that

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, *in trust for all the people*. (Emphasis supplied.)

The foreshore on the Gulf is held by the state in trust for the public, the traditional purposes of which are fishing, swimming, boating, and other public uses authorized by law; and such purposes may not be excluded or unduly abridged or the trust completely alienated except as may be authorized by the constitution and then only in the public interest. *See* annotations, at p. 522, *et seq.*, 26A F.S.A.

Under Ch. 253, F. S., all lands held by the state by virtue of its sovereignty, including beaches below the high water lines, are administered and controlled by the Trustees of the Internal Improvement Trust Fund.

I am advised that the State of Florida has not alienated its title to any of the foreshore or beaches along the Gulf coast of Santa Rosa Island. Therefore, inasmuch as the Okaloosa Island Authority neither owns nor has any sovereign or