

employees who were lawfully employed by the boards of county commissioners to serve as secretaries to circuit judges may be "grandfathered in" to state employment, just as they were "grandfathered in" following the adoption of the new Antinepotism Law in 1969, should a circuit judge desire to do so.

Accordingly, your question is answered in the negative.

073-352—September 19, 1973

TAXATION

SALES TAX EXEMPTION FOR HOTEL CATERING TO ELDERLY PERSONS

To: J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee

Prepared by: J. Kendrick Tucker, Assistant Attorney General

QUESTIONS:

1. Is a hotel which caters primarily to elderly persons, but which is not licensed either as a nursing home or as a home for the aged under §400.062, F. S., relieved, under §212.08(7) (d), F. S., of the responsibility for collecting the sales tax on the lump sum charge it makes to its occupants for rooms and meals?

2. Should your answer to question 1 be in the negative, and in the event that the hotel qualifies as an exempt facility under §212.03(7) (a) and (b), F. S., on the basis that more than 50 percent of its occupants lease or rent living accommodations thereat as their permanent or principal place of residence, may the Department of Revenue require payment of sales tax on sales of meals to such occupants by requiring a reasonable allocation of a portion of the charge for meals when the hotel makes a lump sum charge to its occupants for rooms and meals?

SUMMARY:

Under §212.08(7) (d), F. S., a hotel which caters primarily to elderly persons and is designed and operated primarily for the care of persons who are ill, aged, infirm, or dependent on special care or attention is exempt from payment of sales taxes on the lump sum charges to its occupants for rooms and meals notwithstanding the fact that the hotel is not licensed as a nursing home or a home for the aged pursuant to Ch. 400, F. S., because there is no requirement in Ch. 212, F. S., nor in any other statute that the designated facilities be licensed to be entitled to the exemption. If a hotel qualifies as an exempt facility from sales taxes on rental charges under §212.03(7) (a) in that more than 50 percent of its occupants lease or rent living accommodations as their permanent or principal place of residence and the hotel furnishes meals along with the rooms and makes a lump sum charge to its occupants for the rooms and meals, then the hotel must pay sales tax on the charges for the meals and must allocate a portion of the lump sum charges to that of meals and report such monthly to the Department of Revenue because §212.11 requires such an allocation and report.

Your first question is answered qualifiedly in the affirmative. Your second question is answered in the affirmative.

Chapter 212, F. S., in general terms provides for the imposition of a sales tax on meals served by an establishment as well as for rental of rooms. However, §212.08 grants specific exemptions in certain instances from the sales tax as imposed on the

sale of meals and the rental of rooms. Section 212.08(7) provides in pertinent part as follows:

(d) *Hospital meals and rooms.*—Also exempt from payment of the tax imposed by this chapter on rentals and meals are patients and inmates 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. (Emphasis supplied.)

You state in first question that the hotel caters primarily to elderly persons but is not licensed as a nursing home or as a home for the aged pursuant to §400.062, F. S.

The licensing requirements of Ch. 400, F. S., for nursing homes and homes for the aged are as follows:

(6) "Facility" means any institution, building . . . which undertakes through its ownership or management to provide for a period exceeding twenty-four hour nursing care, personal care, or custodial care for three or more persons . . . who by reason of illness, physical infirmity, or advanced age require such services . . . [Section 400.021(6).]

(7) "Nursing home" means a facility which provides nursing services as defined in chapter 464. [Section 400.021(7).]

(8) "Home for the aged" means a related health care facility which provides personal care and custodial services to the aged. [Section 400.021(8).]

* * * * *

. . . facilities shall be licensed in the following categories.

- (1) Nursing home.
- (2) Home for aged. . . . [Section 400.041]

* * * * *

(1) It is unlawful to operate or maintain a facility without first obtaining from the division a license authorizing such operation. [Section 400.062(1).]

* * * * *

(1) It is unlawful for any person or public body to establish, conduct, manage, or operate a home as defined in this chapter without obtaining a valid current license. [Section 400.241(1).]

The failure of a nursing home or home for the aged to be licensed pursuant to the above-quoted sections of Ch. 400, F. S., does not in my opinion preclude the nursing home or home for the aged from receiving an exemption from sales taxes pursuant to §212.08(7) (d), *supra*. If the "hotel which caters primarily to elderly persons" as stated in your first question merely houses and feeds people who are predominantly "elderly," then factually the requirements of §212.08(7) (d) appear not to be met and the hotel would not, of course, be entitled to the exemption from the sales tax. Operating as a hotel which primarily houses elderly people would not appear to meet the requirement that the facility provide "care" for aged persons or persons otherwise dependent on "special care or attention." A factor in determining whether a hotel was in fact designed and operated under the requirements of §212.08(7) (d) would, in my opinion, be whether it is licensed as a nursing home or

home for the aged. Hotels licensed as such would appear to establish that they were in fact caring for the aged, infirm, or ill due to the licensing requirements for nursing homes and homes for the aged.

If, however, the hotel you have referred to in your first question factually meets the requirements of §212.08(7) (d), *supra*, i.e., the plant or facility is designed and operated primarily for the care of persons who are aged, infirm, or otherwise dependent on special care or attention, then the benefit of the sales tax exemption pursuant to §212.08(7) (d) could not be denied to the hotel merely because it was not licensed as a nursing home or a home for the aged pursuant to Ch. 400, F. S. *Cf.*, *Maxwell v. Good Samaritan Hospital Ass'n, Inc.*, 195 So.2d 255 (4 D.C.A. Fla., 1967) and *Nolan-Peeler Motors v. Wood*, 175 So. 523 (Fla. 1937). I find no authority in Ch. 212, F. S., or any other area of law that purports to deny a tax exemption merely because the taxpayer failed to meet a licensing requirement imposed by another chapter of the law. In addition, I find no authority in Ch. 400, *supra*, that purports to deny a sales tax exemption to nursing homes or homes for the aged for failure to become licensed. *Cf.*, AGO 071-96 and AGO 051-323, Sept. 20, 1951, Biennial Report of the Attorney General, 1951-1952, p. 492. Rather, Ch. 400 provides for specific penalties when a nursing home or home for the aged operates without a license.

- (3) Violation of any provision of this chapter or of any minimum standard, rule, or regulation adopted pursuant thereto shall constitute a misdemeanor of the second degree [Section 400.241(3).]

Indeed, the purpose of Ch. 400, F. S., as stated in §400.011, is to "provide for the development, establishment, and enforcement of basic standards for the health, care, and treatment of persons in nursing homes and related health care facilities."

Although tax exemptions must be construed strictly against the taxpayer, *Sugar Cane Growers Coop. of Fla. v. Florida Rev. Com'n.*, 179 So.2d 393 (2 D.C.A. Fla., 1965), strict construction of the exemption should not force a conclusion that the legislature intended other than that which it expressed in plain language if the exemption is reasonable. *Green v. Eglin AFB Housing, Inc.*, 104 So.2d 463 (Fla. 1958). Section 212.08(7) (d), *supra*, has specifically and clearly exempted facilities designed and operated primarily for the care of persons who are ill, aged, infirm, or otherwise dependent on special care or attention. Thus, if it can be shown factually that the hotel in question is such a facility, then the sales tax exemption may not be denied to the hotel solely because it is not licensed pursuant to Ch. 400, F. S.

Your second question assumes that the hotel qualifies as an exempt facility from sales taxes for rental charges under §212.03(7) (a) and (b), F. S., in that more than 50 percent of its occupants lease or rent living accommodations thereat as their permanent or principal place of residence. You then ask whether the department may require payment of sales tax on sales of meals to occupants of such hotel by requiring a reasonable allocation of a portion of the charge for meals where the hotel makes a lump sum charge to its occupants for both rooms and meals.

Section 212.03, F. S., provides in pertinent part as follows:

212.03 Transient rentals tax; rate, procedure, enforcement, etc.—

(1) It is hereby 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 living quarters, sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, rooming house*

* * * * *

(7) (a) The tax levied by this section *shall not apply to or be imposed upon or collected on the basis of rentals to any person who resides in any*

building or group of buildings intended primarily for lease or rent to persons as their permanent or principal place of residence.

(b) It is the intent of the legislature that *this subsection provide tax relief for persons who rent living accommodations* rather than own their homes, while still providing a tax on the rental of lodging facilities that primarily serve transient guests. (Emphasis supplied.)

Section 212.03(7), *supra*, pursuant to its above-quoted terms exempts only rentals to any person "who resides in any building or group of buildings." It does not exempt taxes on sales such as the sale of meals. Thus, the sale of meals at such hotel is not exempt from the sales tax, assuming the hotel does not meet the requirements of §212.08(7) (d), *supra*, as discussed in the answer to your first question.

The Department of Revenue, charged with the enforcement of the sales tax law pursuant to Ch. 212, F. S., is in my opinion authorized to require from the hotel a reasonable allocation of a portion of the charge for rooms and meals to that of meals if the hotel makes a lump sum charge to its occupants for both rooms and meals. The taxpayers' and the Department of Revenue's duties are as follows:

(c) *The term "dealer" is further defined to mean every person . . . who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein. [Section 212.06(2).]*

. . . [I]t shall be the duty of all dealers to make a return . . . to the department . . . showing the rentals, admissions, gross sales or purchases as the case may be, arising from all . . . sales or purchases, taxable under this chapter during the preceding calendar month. . . . [Section 212.11(1).]

(b) *In the event any dealer or other person charged herein . . . fails to make a report and pay the tax as provided by this chapter; or makes a grossly incorrect report . . . then, in such event, it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period of retail sales of such dealer (Emphasis supplied.) [Section 212.12(6).]*

(1) Any person required to pay a tax imposed under this chapter . . . who renders a return or makes a payment of a tax with intent to deceive or defraud the state . . . or otherwise fails to comply with the provisions of this chapter . . . may be required by the department to show cause at a time and place to be set by the department . . . requiring such books, records or papers . . . relating to the business of such person for such tax period . . . respecting the sale, use, consumption . . . of real or personal property within the state . . . or the failure to make a true report thereof At said hearing, in the event such person fails to produce such books, records or papers, or to appear and answer questions . . . then the department is authorized under this chapter to estimate any unpaid deficiencies in taxes to be assessed against such person upon such information as may be available to it and to issue a distress warrant for the collection of such taxes [Section 212.14(1).]

Thus, the dealer or hotel is required to report its taxable sales in the monthly report to the department and would of necessity have to allocate a portion of the amount charged for rooms and meals to that of meals and remit the sales tax accordingly. Cf., Rule 12A-1.70(7), Florida Administrative Code. If the dealer or

hotel failed to make such allocation and pay the tax due, then the department may make an estimate of the amount charged for meals pursuant to the procedures of the above-quoted statutes.

073-353—September 19, 1973

PROBATE AND GUARDIANSHIP

FEES TO BE COLLECTED UNDER TRANSITION RULE 14

To: *W. Gray Dunlap, Pinellas County Attorney, Clearwater*

Prepared by: *Rebecca Bowles Hawkins, Assistant Attorney General*

QUESTIONS:

1. What filing fee must be collected by the clerk for entry of orders of dismissal pursuant to the provisions of Transition Rule 14 in probate and guardianship cases?
2. What fees should be collected by the clerk in probate and guardianship cases filed prior to October 1, 1972, which are closed by proceedings other than by order of dismissal under the provisions of Transition Rule 14?

SUMMARY:

Under the Florida Supreme Court's Transition Rule 14, probate and guardianship estates that have been inactive for more than one, three, or ten years (depending upon the value of the estate) as of July 18, 1973, may be dismissed, after notice, unless good cause is shown for the proceedings to remain pending. The order of dismissal must be entered by the clerk without charge. If not dismissed, upon good cause shown, the fees for further proceedings in such inactive cases shall be those prescribed by the old county judges' fee schedule, §36.17, F. S. 1971.

AS TO QUESTION 1:

Under revised Art. V, State Const., and §26.012, F. S. [Ch. 72-404, Laws of Florida], jurisdiction over probate and guardianship proceedings formerly adjudicated by the county judge is now vested in the circuit court. In order to effect an orderly transition of these matters to the circuit courts of this state and to secure a true inventory of the case load of such courts, the Supreme Court adopted Transition Rule 14, providing for the dismissal, after notice, of probate and guardianship estate proceedings in which no action has been taken for one year, three years, or ten years, depending upon the value of the estate (less than two thousand five hundred dollars, between two thousand five hundred dollars and ten thousand dollars, and over ten thousand dollars, respectively), unless a party shows good cause in writing at least five days before the hearing why the proceeding should remain pending. When such proceedings have been pending without action for twenty years or more, they may be terminated without notice, other than posting a list of such estates in the courthouse.

The provision of the rule relating to fees reads as follows:

- (e) No further filing fees shall be required or collected by the Clerk for the entry of orders of dismissals pursuant to this rule. *These estates shall be closed in accordance with the fee schedule in effect on January 1, 1972. (Emphasis supplied.)*

There is no ambiguity in the rule with respect to the filing fee chargeable for the entry of an order of dismissal of an inactive case. The rule says in plain and simple terms that no filing fee shall be collected by the clerk for such an order.