Florida Department of Revenue

Commercial Rental Standard Industry Guide
PURPOSE

This guide provides an auditor with information on the subject industry. This information will assist an auditor in recognizing areas to test for compliance with Florida sales and use tax laws.

After reviewing this guide, an auditor will be better able to understand issues involving:

- Tax implications affecting the subject industry;
- Sales tax issues likely to surface relating to the subject industry; and
- Relevant statutes, rules, court cases and other technical documents

Helpful tax publications provided by the Department of Revenue available online (See hyperlinks):

Industry Specific:
- Sales and Use Tax on Commercial Real Property
- Sales and Use Tax on Rental of Living or Sleeping Accommodations

General:

- Sales and Use Tax Guide for Business Owners
- Audit Information
- Florida Sales and Use Tax
- Discretionary Sales Surtax
- 2013 Florida Statutes
- Florida Administrative Code Rule 12A

These reference materials and the technical documents cited herein have been provided as informational guidelines for performing tax audits and are intended to be used as internal management memoranda. They are not rules, orders, or policy statements of general applicability, and as such, do not represent the formal position of the Florida Department of Revenue. No representation is made regarding the Department’s opinion of the precedential value of the court cases cited herein. They are provided for informational purposes only. Statutes, rules, court cases, or other technical documents subject to change are current as of the publication date of this document. Refer to the Tax Law Library for an updated listing of such documents. The Tax Law Library can be accessed through the Department of Revenue web site: http://www.myflorida.com/dor/
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OVERVIEW OF METHODS OF OPERATION

General Overview

The size and nature of rental or lease operations vary. A commercial rental transaction often involves the lease or rental of land, buildings, office or retail space, convention or meeting rooms, airport tie-downs, or parking and docking spaces. It may also involve the granting of a license to use real property for placement of vending, amusement or newspaper machines. The transaction may be short term, such as hourly or weekly, or for a longer term, such as a period of 1 to 99 years. The transaction may involve a single person renting one location to a third party or a related party, such as a wholly owned business or corporation; or it may involve a large management company leasing space for many clients.

All persons who engage in the business of renting, leasing, letting, or granting a license for the use of any real property are exercising a taxable privilege unless the real property is:

- Assessed as agricultural property under Section 193.461;
- Used exclusively as dwelling units;
- Properties subject to tax on parking, docking, or storage spaces (See Section 212.03(6), F.S.);
- Recreational property or the common elements of a condominium when subject to a lease between the developer or owner thereof and the condominium association;
- Public or private street or right-of-way occupied or used by a utility for utility purposes;
- Property used at an airport exclusively for the purpose of aircraft landing or taxying or property used for the purpose of loading or unloading passengers or property onto or from aircraft or for fueling aircraft;
- Property used at a port authority exclusively for the purpose of ocean going vessels for the purpose of loading or unloading passengers or cargo onto or from such a vessel or used at a port authority for fueling such vessels;
- Property used as an integral part of the performance of qualified production services in connection with the production of a qualified motion picture;
- Leased to a person providing food and rink concessionaire services within the premises of a convention hall, arena, or publicly owned recreational facility;
- Property occupied pursuant to an instrument calling for payments which the department has declared, in a Technical Assistance Advisement issued on or before March 15, 1993, to be nontaxable (See Rule 12A-1.070(19) (c), F.A.C.);
- Property used or occupied predominately for space flight business purposes.
**Buildings and Offices**

The rental or lease period for buildings and offices is usually covered by a written contract. These contracts may be short or long term.

The property owner (lessor) may improve the realty to meet the specifications of prospective or actual tenants or may improve the realty to his or her specifications and then advertise for prospective tenants.

The property owner may improve the property to meet the desires of a lessee and then bill the lessee for the total cost of the improvements. The property owner may allow the lessee to improve the property with contract stipulations requiring that either title to the improvements transfers to the lessor upon termination of the lease or that the lessor restore the property to the same state as when the lease was signed.

The property owner may include in the lease contract an option allowing the lessee to purchase the property on or after a given date at a specified price.

The property owner may include utilities and various services as an inducement to tenants, or the property owner may require a lessee to provide all utilities and services, allowing the tenant to select the desired services.

The property owner may require the lessee to pay real property taxes, either directly to the tax collector or by reimbursing the owner, or the property owner may pay the taxes without additional charges to the tenant.

The rent may be set at a fixed charge, or based on a percentage of sales, or a combination of both or in any manner agreed to by the parties.

**Parking and Docking**

Pursuant to Section 212.03(6), F.S., “It is the legislative intent that every person is engaging in a taxable privilege who leases or rents parking or storage spaces for motor vehicles in parking lots or garages; who leases or rents docking or storage spaces for boats in boat docks or marinas; or who leases or rents tie down or storage space for aircraft at airports. For the exercise of this privilege, a tax is hereby levied at the rate of 6 percent on the total rental charged”.

When a person leases land or a facility for the purpose of parking or docking and collects the tax on charges for parking or docking, the prime lease of the land or parking or docking facility is not taxable. If any areas are used for free parking, the entire consideration paid by the lessee to the lessor is taxable (See Rule 12A-1.070(13), F.A.C.).

If the prime lessee uses any portion of the property for other than parking or docking that portion must be addressed separately (used or re-rented).
Note: Parking and docking are subject to tax under Section 212.03(6), F.S., and not Section 212.031, F.S.

Licenses
The term license to use real property describes property where the tenant has very limited use and control. A carnival using a mall parking lot or a cigarette vendor using space in a restaurant for his vending machine are examples of licenses to use real property.

A license to use real property agreement usually only permits the licensee to operate in a general area and only at times when the licensor either permits or requires the licensee’s presence. The space used by the licensee is usually generally defined. For example, the restaurant operator may put the vending machine in any location, not necessarily, where the vending machine operator wants it. Businesses like a Kiosk located in the middle of the aisles or hallways of the mall, operate under a license to use the property and may occasionally be required to relocate.

The following transactions involving real property illustrate taxable license agreements:

- A contract, expressed or implied, which permits a person, pursuant to a privilege to use or occupy the real property of another for any purpose;
- An agreement between a department store and a licensee to provide space within the store for the licensee even though the licensee does not have exclusive right to any specific area within the store;
- An agreement by the owner of real property granting someone permission to install and maintain coin-operated vending and/or amusement machines on the premises, such as:
  - Proceeds received by property owner or tenant from a full-service vending machine not owned;
  - Proceeds received by property owner or tenant from an amusement machine not owned or rented;
  - Proceeds received by property owner or tenant from laundry machines not owned or rented;
- An agreement between the owner of real property and an advertising agency for the use of real property to display advertising matter such as pamphlet centers; or
- License agreements allowing others to occupy real property

Note: Caution should be exercised when reviewing transactions that involve the payment of concession fees by beach vendors to counties or municipalities. In Lloyd Enterprises v. Department of Revenue, 651 So.2d 735 (Fla. 5th DCA 1995) the court ruled that the concession fees paid by Lloyd to the county, were not for the use of real property, but were imposed upon Lloyd by the county, as its obligation to regulate use of the beach. Because of this ruling, tax should not be imposed on similar concession fees, because they are not considered a license to use real property.
ACCOUNTING SYSTEMS

The accounting systems can vary from the very complex automated system of a major leasing company to the simple cash basis of an individual. However, advances in computer and accounting software technologies have made sophisticated electronic accounting systems available to even the smallest landlord. The auditor may review electronic records as is or request that the taxpayer download them for the audit.

For sales tax purposes, cash basis accounting should be used for reporting and remitting tax on commercial rental consideration. Rent should be reported when either cash is paid or other consideration has been made. For example, if the tenant is required to pay Ad Valorem taxes to the county tax collector on behalf of the lessor, sales tax is due on the consideration when the Ad Valorem taxes are paid.

Sales/rentals are recorded in the landlord’s chart of accounts. In the tenant’s records, payments for rent expense can be allocated to the various expense accounts such as rent, property taxes, utility expense, miscellaneous, cleaning, and repair/maintenance accounts. How these expenses are accounted for will determine whether the proper tax has been collected and remitted.

Example: The landlord may be properly taxing the base rent and common area maintenance but failing to include Ad Valorem tax in the taxable base.

Occasionally a taxpayer will argue that accounting entries indicating rental expense or rental income are “mere journal entries” without economic substance and therefore are not indicative of a taxable transaction (Reference St. Johns Trading Company, Inc. v. Comptroller of Florida and Dept. of Revenue, State of Florida, DOAH Case No. 84-1652 (Final Order January 3, 1985)). An auditor faced with a taxpayer asserting this position should carefully review all of the books and records to ascertain whether the journal entries represent rental consideration flowing between the tenant and landlord as they appear on their face. Federal Income Tax returns should be reviewed to determine how the taxpayer is handling the issue of “rent” for Federal purposes, and bank statements and checks should be examined to determine if any actual funds were transferred to satisfy the “rent” charge.

REGISTRATION AND FILING REQUIREMENTS

A real property rental registration may include a number of locations under a single roof, such as a shopping center. However, if a taxpayer has a number of registrations, the Department, upon request of the taxpayer, may inactivate all registrations except for one in each county where the taxpayer has rental locations. These registration numbers are referred to as county prime numbers. All rental transactions in the county are reported under the prime number.

By County

Every person who rents, leases, or grants a license to use real property must register as a dealer. The dealer is required to register for each place of business being rented, leased, or licensed (See Rule 12A-1.060, F.A.C.).
Self-accrual Authority
Tenants may apply for self-accrual authority with the Department if:

- The tenant rents from a number of independent property owners who, apart from rentals to the purchaser in question, would otherwise not be obligated to register as dealers Section 212.183(4), F.S.; or
- Where the tenant, who is required to remit sales tax electronically as provided under Section 213.755, F.S., rents from a number of independent property owners

Also, see Rule 12A-1.0911, F.A.C.

Tax Due
Tax is due when the rent consideration is received by the landlord (See Section 212.031(3), F.S.). Sales and use tax imposed on the rental, lease, or license of certain facilities is not due and payable to the Department of Revenue until the first day of the month following the last day of the event if certain conditions are met. Such tax becomes delinquent on the 21st day of the month following the event’s last day. This due date only applies if:

- The rental, lease, or license is for the use of a convention hall, exhibition hall, auditorium, stadium, theater arena, civic center, performing arts center, or a privately owned recreational facility;
- The event last no more than 7 consecutive days; and
- Tax is collected at the same time of payment for the rental, lease, or license.

Discretionary Sales Surtax
In addition to the 6% sales and use tax, Florida counties may elect to impose discretionary surtaxes or local option tourist development taxes on transactions that occur within the county. The tourist development taxes may be administered by the county or state and apply only to transient rental accommodations. Commercial rentals, leases, or licenses to use real property are not subject to tourist development taxes.

Discretionary sales surtaxes are administered by the state. Surtax should be collected and remitted to the Department, if real property is leased or rented, or if a license to use is granted within a county that imposes surtax. The $5,000 cap that applies to sales of tangible personal property does not apply to commercial rental transactions. If the commercial rental occurs within a surtax county, the entire consideration paid for the leasing, renting, or licensing to use real property is subject to the 6% sales tax plus the applicable surtax.

GENERAL TAX CONSIDERATIONS
Florida sales or use tax is due on the total consideration paid in exchange for a lease, rental, or license to use real property, unless the transaction is specifically exempt. In addition to the base or percentage rent, other charges such as common area maintenance (CAM), parking, utility charges, Ad Valorem taxes, and cleaning services may also be subject to tax as additional rental consideration, if the tenant does not have the option to
accept or reject the services. When the consideration is paid in the form of property, goods, wares, or other items of value, tax is owed on these considerations. Unlike transactions involving tangible personal property, where tax is due upon the sale, sales or use tax is due on taxable rental consideration, when the consideration is received by the lessor or person receiving the rental or license fee.

The consideration paid by the lessee to the landlord may be in the form of mortgage payments. Under certain circumstances, a document structured as a lease may be treated as a mortgage. A mortgage is not subject to sales and use tax. The auditor should examine the terms of the arrangement to determine the intent of the parties. The arrangement will be considered a mortgage rather than a lease if it appears that the consideration was given for the purpose of securing the payment of money. A mortgage may exist if the terms indicate the following: the risk of loss adheres to the tenant, the tenant appreciates the property and claims the interest expense on the federal return, and the consideration paid represents a value of interest in the property versus fair market rental value.

Also see Hialeah, Inc. v. Dade County, 490 So.2d 998 (Fla. 3rd DCA 1986), Cinque v. G&G Corporation, 442 So.2d 1034 (Fla. 3rd DCA 1983), and TAA 96M-002.

**SUBMerged (UNDERWATER) LAND**
The bottoms of certain lakes, rivers, creeks, etc., are owned by the state, and commercial use of the bottomland requires a lease from the state, which is a commercial rental.

**SPECIFIC EXEMPTION**
The exemptions contained in Sections 212.031(1)(a)12., and 212.031(10), expired effective July 1, 2009.

Prior to that date the following exemptions applied:

Effective July 1, 2000 - June 30, 2009, that part of the charge for the lease, sublease, license, or rental of real property that is based on a percentage of a concessionaire’s sales may be exempt from sales tax. This exemption only applies to concessionaires who:
- Sell souvenirs, novelties, or other event-related products; and
- Use a portion of the premises at a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility during an event held at such facility.

Examples of separately stated charges that qualify for exemption are:
- Charges for advertising,
- Credit card processing,
- Laborers,
- Stagehands,
- Ticket takers,
- Event staff,
• Security personnel,
• Cleaning staff, and
• Other event related personnel.

Note: While separately stated charges for food, drink, or services may not be taxable as additional rental consideration, these charges could still represent taxable sales or uses. Food and drink may be taxable if not purchased for resale or qualify for the general groceries exemptions found in Section 212.08; F.S. and services may be taxable under Section 212.05, F.S.

Note: Certain separately stated charges imposed on a lessee or licensee as additional real property rental consideration may be exempt from sales and use tax. This exemption applies if the charges are:
• Imposed by a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center,
• Performing arts center, or a publicly owned recreational facility; and,
• For food, drink, or services that are either required or available in connection with the lease, or
• License to use real property.

Note: Effective July 1, 2000, no sales or use tax is due for prior taxable periods on the exempt transactions addressed above that are effective July 1, 2000 –April 30, 2002 & 2006, if the tax has not actually been collected by the facility. However, all tax collected must be remitted to the Department of Revenue, and no refunds can be paid by the Department.

Aircraft landing, taxiing, loading, unloading passengers
Property used at an airport exclusively for the purpose of aircraft landing or aircraft taxiing or property used by an airline for the purpose of loading or unloading passengers or property onto or from aircraft or for fueling aircraft is exempt, pursuant to Section 212.031(1)(a)7., F.S.; Rule 12A-1.070(1) (a) 6. F.A.C. provides specific guidance for these fact patterns.

Airport; Retail concessionaire services within the premises
Tax is due on the rental of real property in this situation, but not due on a license to use the real property pursuant to Section 212.031(1)(a)10., F.S. In addition, this exemption only applies to retail concessionaire services involving the sale (but not the leasing) of food and drink or other tangible personal property.

Agricultural property
Property assessed as “agricultural property” under Section 193.461, F.S., is exempt from Florida sales tax imposed by Section 212.031, F.S. (See Section 212.031(1)(a)1., F.S.).
**Concessionaire services**

Space leased, subleased, licensed or rented to a food and drink concessionaire within the premises of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, publicly owned recreational facility, or any business operated under a permit issued pursuant to Chapter 550, F.S., is exempt from the sales tax imposed by Section 212.031, F.S. (See Section 212.031(1)(a)10., F.S.).

Although the Legislature did not specifically define “concessionaire services” for purposes of the exemption, the term “concessionaire” generally refers to one holding a concession, and the term “concession” is defined in Webster's New International Dictionary as: “5. A grant or lease of a portion of premises for some specific use, or of a right to enter upon premises for some specific purpose; as, a concession at a fair for a lunch counter” (See TAA-01A-025).

The various facilities listed in this statute have not been defined by the Legislature. The terms used to describe the exempt facilities should be given their “plain and ordinary” meaning. For example, a publicly owned library is a “publicly owned recreation facility” using the “dictionary” meaning of the words “recreation” and “facility”(See TAA 05A-019).

Occasionally taxpayers argue that because part of the space they lease is used for food or drink concessionaire services, the entire lease should be exempt from tax, however, the lease or license referred to in Section 212.031(1)(a)10., F.S., refers to a lease of a portion of the premises of a facility, or in the case of a license, a grant of the right to provide services within the facility, but the exemption does not encompass the lease of the entire facility (See TAA 04A-048).

**Convention halls, etc.; Separately stated charges imposed by –**

Upon a lessee or licensee for food, drink, or services required or available in connection with a lease or license to use real property, including charges for laborers, stagehands, ticket takers, event staff, security personnel, cleaning staff, and other event-related personnel, advertising, and credit card processing, are exempt from the tax imposed by this section (See Section 212.031(10), F.S.).

**Dwelling Units (See also “Residential Facilities for the Aged”)**

Property used exclusively as dwelling units is exempt from the sales tax imposed by Section 212.031(1)(a)2., F.S. While the term “dwelling unit” is not defined by statute, hotel sleeping accommodations are in effect transient dwelling units. Other areas of a hotel facility whose use is appurtenant to and included in the price of the room itself are treated as an extension of the room and therefore as part of a dwelling unit. This would include, for example, hallways and stairways in guest room areas, a parking space if provided with the room at no charge, the registration desk area, or a swimming pool provided for guest use. It would not include those areas used by the hotel to carry on its business such as management or administrative offices, storage areas, employee lounges, or loading docks. It also would not include areas in which the hotel carries on commercial activity that is not provided at any additional charge to those renting sleeping
accommodations, such as restaurants, bars, banquet and meeting rooms, or gift or other shops. See WHI Limited Partnership, d/b/a Wyndham Harbour Island Hotel v. Department of Revenue, DOAH Case No. 98-1194 (Final Order October 17, 2005).

**Franchises, trademarks, service marks, logos or patents**

These are not subject to the tax imposed by Section 212.031(1)(c), F.S.; in cases where the contractual arrangement provides for both payments taxable as total rent and payments not subject to tax, the tax shall be based on a “reasonable allocation” of such payments and not that part which is for the nontaxable payment. For a good discussion on the subject see TAA 03A-002 and TAA 88A-294R.

**Insurance proceeds made for lost rent as a result of a hurricane**

Insurance proceeds made for lost rent as a result of a hurricane are not taxable “rent.” This is because the proceeds from the insurance company are not made in exchange for the right to use or occupy real property. To date, the Department has only issued nonbinding Letters of Technical Advice.

**Joint Ventures**

Revenue generated from a joint venture may not be taxable under Section 212.031, F.S. (See also Conklin Shows, Inc. v. Department of Revenue, 684 So.2d 328 (Fla. 4th DCA 1996)). In order to establish a joint venture, the following essential elements must be proven, in addition to the essentials of an ordinary contract:

- A community of interest in the performance of the common purpose;
- Joint control or right of control;
- Joint proprietary interest in the subject matter;
- A right to share in the profits; and
- A duty to share in any losses that may be sustained

The party alleging the existence of a joint venture has the burden of proving an implied or express agreement as well as all of the necessary elements. While it is unnecessary to produce a written agreement for the purpose of establishing a joint venture, the failure to do so is evidence, however slight, that no such agreement actually existed.

**Lease Termination Charges**

Rule 12A-1.070(4)(g), F.A.C., states that when determining whether or not a lease termination charge is subject to tax as rental consideration the Department will first determine if sufficient documentation exist, such as a lease or other tangible evidence, to establish whether the payment was or was not for the use of real property. If the payment is for the use of real property, it is subject to tax.

If the lease or other tangible evidence is not sufficient to determine whether or not the charge is rental consideration, the Department will look at how the charge or payment was recorded by the lessor or the lessee. When the amount is recorded in the lessor or lessee’s books and records as rental income or expense it is taxable as rental
consideration. If recorded otherwise, the charge is considered a payment to cancel or terminate the lease agreement and is exempt.

If the lessee records the payment as a rental expense, but does not remit tax to the lessor on such payment, then the lessee is required to remit the tax on such charge directly to the Department of Revenue.

**Parking, docking or storage space**
Jerry owns a piece of land and rents it to George, who operates a parking lot on it. George collects Florida sales tax (See Section 212.03(6), F.S.) on the monthly fee he charges people to park there. Because George properly collects and remits Florida sales tax on the parking fee, the lease between Jerry and George for the land is exempt from Florida sales tax (See Section 212.031(1)(a)3., F.S.).

**Prepayments**
Prepayments of rents to avoid an increased tax rate are prohibited. Tenants with leases in effect prior to the effective date of surtax cannot avoid the surtax by prepaying rent. Commercial rentals are taxed at 6% plus the surtax rate for all rentals due on or after the effective date of any surtax.

**Port Authority; Property used at a**
Property used at a port authority, exclusively for the purpose of oceangoing vessels or tugs docking, or such vessels mooring on property used by a port authority for the purpose of loading or unloading passengers or cargo onto or from such a vessel, or property used at a port authority for fueling such vessels is exempt (See Section 212.031(1)(a)8., F.S.) Auditors should be aware that this exemption only applies to “port authority” property. While Florida has several privately owned ports, this exemption is limited to those “port authorities” as that term is defined in Section 315.02(2), F.S. Further, not all property leased will be used “exclusively” for the listed activities.

**Public streets for transportation purposes**
Section 212.031(1)(a)6., F.S. provides sales tax is not due on the lease of a public street or road used for transportation purposes. The most typical situation involves the closing of a public street for an art festival, antiques show, etc. The leasing of the street is subject to sales tax because it is not being used for transportation purposes (See Rule 12A-1.070(1)(a)5.b., F.A.C.).

**Qualified production services**
This exemption deals with any activity or service performed directly in connection with the production of a qualified motion picture as allowed in Section 212.031(1)(a)9., F.S. For a good discussion on the subject, see TAA 95A-021.

**Recreational property or common areas of a condo**
Section 212.031(1)(a)4., F.S., allows for an exemption from the sales tax ordinarily imposed by Section 212.031, F.S., if the following conditions are met:
- The Facilities are recreational property or the common elements of a condominium;
- The lessor of the property is the Corporation as developer or owner of the property; and
- The lessee is the condominium association in its own right, the association as agent for the unit owners, or the individual unit owners (See TAA 92A-055)

**Skyboxes**

The rental, lease, sublease, or license for the use of a skybox, luxury box, or other box seats for use during a high school or college football game is exempt from the tax, imposed by this section when the charge for such rental, lease, sublease, or license is imposed by a nonprofit sponsoring organization, which is qualified as nonprofit pursuant to Section 501(c)(3) of the Internal Revenue Code (See Section 212.031(9), F.S.). Also, see TAA 04A-043 for further discussion of this issue.

**Space flight business**

The renting, leasing, letting, or granting a license for the use of real property is exempt from sales tax when the property is used or occupied *predominantly* for space flight business purposes. For purposes of this exemption, "predominantly" means that more than 50% of the real property, or improvements on the real property, is used or occupied for space flight purposes. Section 212.031(1)(a)13., F.S. is specific as to terms and qualifications, and a close reading of it is highly recommended. The Department issued a Tax Information Publication (00A01-16; July 3, 2000) that includes a suggested Lessee's Exemption Certificate.

**Synthetic Leases (“Lease” vs. “mortgage”)**

Businesses will sometimes enter into complex financing arrangements for the purposes of securing financing. In these cases, the financing arrangement is structured pursuant to the demands of the lender. The lender, for various reasons, will place the label of “Lease” on a loan document.

Under certain circumstances, the arrangement is more akin to a non-taxable mortgage, rather than a “lease” which would fall under the scope of Section 212.031, F.S. For a discussion on this topic see TAA 04A-025.

**Utilities, providers of communication services on street right-of-ways**

Pursuant to Section 212.031(1)(a)5., F.S., the lease or license of public or private streets or rights-of-way and poles, conduits, fixtures, and similar improvements located on such streets or rights-of-way, occupied or used by a “utility” (See Section 203.012, F.S.) or a “provider of communication services” (See Section 202.11, F.S.) is exempt. Also exempt is any real property upon which towers, antennas, cables, accessory structures, or equipment (not including switching equipment) used in the provision of mobile communications services. Please note the defined terms included. Examples of this situation would be a cable television provider leasing space over a railroad right-of-way in order to run its wire (See TAA 03A-37).
OTHER ASPECTS OF THE BUSINESS

Inter-company Rentals
It is not uncommon for auditors to review rental or leasing arrangements between parent companies and their subsidiaries. Most of these arrangements are oral and can involve many different considerations other than the base rent. Many of these considerations have been previously discussed and others could range from the sharing of office personnel or equipment to the payment of the mortgage, or include other charges for the benefit of the parent.

Whether you are dealing with a parent-subsidiary, stockholder-sub S corporation or a business, husband renting from his wife, all these transactions are taxable if there is a consideration paid for the right of occupancy. The auditor should not be swayed by the method utilized by these entities to file their Federal Tax returns (consolidated, joint or flow through).

Multi-use property
There are frequently situations where a piece of leased property contains portions subject to tax and other portions that would be exempt from tax (e.g., a hotel). This provision in the statute involves those exempt properties covered by Section 212.031(1)(a) subparagraphs 1., 2., 3., and 5. The provision also involves exempt properties related to certain residential facilities for the aged. The Department is charged with the responsibility of determining what portion of the total rental charge will be exempt. The Department does not have any “one” way of doing this. The Department’s Tax Law Library contains several advisements on this issue. This issue is also discussed as to particular situations throughout this document.

Pyramiding and Inverse Pyramiding of the Tax
Subleases of real property are common and the correct tax application is usually misunderstood by taxpayers. The law provides that only one tax shall apply to each property and the tax shall not be pyramided.

Pyramiding
Subleasing and the concept of “pyramiding” go hand in hand. Pyramiding refers to tax being added on to a progression of transactions and is prohibited (See Section 212.031(2)(b), F.S.).

Example:
“A” leases 200 square feet of floor space for $400 plus $24 in sales tax on the lease amount.

$400.00 original lease amount times 6% sales tax
$ 24.00 sales tax “A” paid to “A’s” landlord
“A” subleases half of the space (100 square feet) to another person for $300 plus $18 sales tax.

$300.00 sublease amount times 6% sales tax  
$ 18.00 sales tax “A” collects

“A” must remit to the state only the amount of sales tax that exceeds what “A” paid on the subleased portion. To calculate this, look at the tax “A” paid to its landlord for the entire space ($24). Half of that (for half the space) is $12. The tax “A” collected ($18) exceeds the amount “A” paid on the subleased portion ($12) by $6. “A” remits $6 sales tax to the state.

If “A” sublets or assigns its interest in all of the leased premises, or retains only an insignificant portion of the real property, “A” may choose not to pay sales tax to its landlord as long as “A” registers as a dealer and collects and remits sales tax due on the subleased space. “A” would then owe "use tax" on that portion of the property it retains for its own use. In this case, “A” must present a signed copy of its Annual Resale Certificate to its landlord (See Rule 12A-1.070(6), (8) and (9), F.A.C.).

If tax was originally paid to the lessor on consideration paid in exchange for the prime lease, then the lessee may take a line 6 credit on the Sales and Use Tax Return (DR-15) for the tax paid to the lessor on the space being sub leased.

Inverse Pyramiding
Inverse pyramiding is the opposite of pyramiding and is forbidden by Section 212.031(2)(b), F.S. Inverse pyramiding usually results when there is a sublease in loosely held corporations or within families.

Example: A dealer extends a resale certificate to the lessor, and then subleases the property to another at a rate that is less than the dealer paid.

The sublease rental consideration, measured in price per square foot, can be compared to the prime lease rental consideration, measured in price per square foot, to determine if inverse pyramiding exists. If inverse pyramiding is determined, the difference between the prime lease and the sublease payments is subject to tax to the prime lessee.

Subleasing
When a business leases a building or office space in excess of its needs, the subletting of the excess space is one method of reducing rent expense. Some firms lease more space than required, with the intent of generating additional income by subletting the extra space at a higher rental rate than they pay to the property owner. In addition, many hotels sublease a portion of the premises so that the guests may have a restaurant, lounge, gift shop, barber and beauty salon, or travel agency on the premises.
Subleases of real property are common and the correct tax application can be complex. Sometimes dealers lease real property and sublease some or all of it to one or more other persons. Department stores use subleasing as a means of attracting vendors that will provide goods or services that the department store is not in the business of providing. The law provides that only one tax shall apply to each property and the tax shall neither be pyramided nor decreased (inverse pyramided) by a progression of transactions.

If a tenant sublets all of the leased premises or retains only an incidental portion, then such tenant 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 and pay the tax due to the department on the portion of the rental charges pertaining to any taxable space which he retains. If the tenant elects not to pay the tax to his landlord, he should extend to his landlord a resale certificate.

When a tenant (lessee or licensee) sublets some portion of the leased or licensed property, he may take credit on a pro-rata basis for the tax that he paid to his landlord on the space he subleases. The proration of the taxable and exempt portions of the total rental charge or license fee should be based on a reasonable allocation as determined from the lease or license and such other information as may be available.

SPECIAL CONSIDERATIONS

Ad Valorem Taxes
A lease will often require the tenant to make the Ad Valorem tax payments to the county on behalf of the landlord. These payments are subject to Florida sales tax whether made to the landlord or directly to the county (See Rule 12A-1.070(4)(c), F.A.C.). Regardless whether there is a written lease, payments will be subject to Florida sales tax if the tenant pays the Ad Valorem taxes for the right to occupy the property (See Regal Kitchens v. Department of Revenue, 641 So.2d 158 (Fla. 1st DCA 1994).

Real property or Ad Valorem taxes are assessed by the county against the owner of the property. If the lease requires the lessee to pay the tax directly to the county tax collector, the lessee is making a payment to the account of the landlord. The payment is part of the total consideration being paid for the right of occupancy and is subject to the commercial rental tax. The landlord may pay the real property tax and bill the lessee for reimbursement. This billing is also rent and subject to the tax. Any portion of the Ad Valorem taxes attributable to leasehold improvements made by the tenant is exempt.

Real Property Improvements
Cost reimbursements made by a tenant to a landlord for real property improvements are taxable if they are paid pursuant to a lease agreement and are a condition of occupancy, or continued occupancy. Failure to pay these amounts would result in a default under the lease with the result that the right of occupancy would be at risk. In addition, direct payments to third party contractors by a tenant may be taxable if such payments are made as a condition of occupancy and the underlying improvements are not optional to the lessee. If the improvements are optional on the part of the tenant, only those
reimbursements paid directly to the landlord will be deemed taxable (only if payment is necessary for continued occupancy). A payment for optional improvements paid to a third party contractor is not taxable as rental consideration.

Other Components of Rent

Any component of the lease that is not a condition of occupancy in the lease and offers the lessee the option of either using or refusing specific services is not taxable as rental consideration. However, the charge for the optional components must be separately stated in the contract and the billing.

Examples of lessor provided services that, if separately stated and optional, are not subject to tax are:

- Building Security;
- Janitorial Service;
- Liability and Casualty Insurance - Taxable when it benefits the landlord such as landlord receiving the insurance settlement for damages; When a tenant or other person pays insurance for his own protection, the premium is not regarded as rental or license fee consideration, even though the landlord or other person granting the right to occupy or use such real property is also protected by the coverage. However, any portion of the premium which secures the protection of the landlord or person granting the right to occupy or use such real property and which is separately stated or itemized is regarded as rental or license fee consideration and is taxable (See Rule 12A-1.070(12), F.A.C); and
- Utilities - Utility charges that are “passed through” to a tenant are not part of the taxable “rent” for purposes of Section 212.031, F.S., if the utility charges are not “marked up” by the landlord and taxes on the utilities are paid to the utility (See Section 212.031(7), F.S. and Rule 12A-1.070(4)(e), F.A.C);

Further, the utility charges must be separately stated to the tenant. As a practical matter, most large commercial buildings will have only one meter. Landlords in that situation will prorate the utility charges on such things as the square footage of the area being leased by a tenant. The Department has recognized these situations by allowing the “separately stated” requirement of the statute to be met via such things as an end-of-the-year reconciliation of utility estimates and actual charges. An auditor should review the leases, utility bills and end-of-the-year reconciliations in such instances to verify that tax was paid to the utility and no “mark-up” was made by the landlord.

Utility charges paid by a tenant to the lessor for the privilege or right to use or occupy real property are taxable. These charges are not taxable if the lessor has paid sales tax to the utility company on the utilities consumed by the tenant, and the utilities billed by the lessor to the tenant are separately stated on the lessor’s invoice to the tenant at the same or lower price that was billed by the utility company to the lessor.
Larger buildings and office complexes usually do not have an electric meter for each tenant. Instead, one meter will be used. The landlord will pay the electric company (along with applicable taxes on the electric bill) and charge the individual tenants based on such things as the square feet of space being rented.

Ordinarily, if the payment of the electricity charge to the tenant is a condition of occupancy, Florida sales tax is due. However, Florida sales tax will not be due if the following conditions are met: (1) the landlord pays the electric company and pays all the applicable taxes related to the purchase of the electricity; (2) the landlord does not “mark up” the charges being passed along to the tenant; and (3) the landlord separately states the charge to the tenant (See Rule 12A-1.070(4)(e), F.A.C.).

**Note:** If the lessor marks-up the cost of utilities in addition to the sales tax being due, gross receipts tax, at the rate of 2.5 percent, would also be due on the marked-up portion (See Section 203.01, F.S.).

**Additional Rent**
A lease may contain a provision for “additional rent,” which may be a “catchall” or may include other forms of rent discussed in this Guide.

**Base Rent**
Section 212.031(1)(c), F.S. refers to the fixed dollar amount due on a periodic basis from the person occupying or using the property of another. This is subject to Florida sales tax.

**Billboards (Outdoor Advertising Signs)**
Questions may arise when considering whether a person is exercising a taxable privilege under Section 212.031, F.S., when they sell “advertising” or “advertising space” on a billboard. A main consideration is the level of control and access given by the owner of the billboard to its customer, if any. If the contract does not provide the customer any level of control or access to the billboard, a lease or license of real property may not exist and the transaction may be more akin to a service.

Outdoor advertising companies usually lease real property, normally land and buildings, along well-traveled streets and highways. The company then constructs the billboard, obtains a client who wants to advertise on the billboard, produces the advertisement, and either pastes or paints the advertisement on the surface of the billboard.

The real property lease/license is taxable unless exempted by Section 212.031(1) (a), F.S.; the charge made to the client for displaying the advertisement on the billboard is exempt as an advertising service.

**Cancellation Fees**
Rule 12A-1.070(4)(g)1., F.A.C. provides that the amount charged by a lessor to a lessee to cancel or terminate a lease agreement is subject to tax if the lessor records such charge
as rental income in its books and records. If such charge is not recorded as rental income by the lessor, then such charge is not considered a payment for the lease of the real property but as a payment to cancel or terminate the lease agreement.

**Capital Improvements**

A developer or landlord will often construct a “shell” that consists of the bare basics (e.g., an unfinished concrete floor, walls, roof, and exterior windows) and then seek a suitable tenant. Upon entering into a lease, the developer/landlord and the tenant will agree to make certain improvements in order to make the building ready for occupancy.

The costs of the improvements are a form of rent consideration subject to Florida sales tax if the improvements made by the tenant are:

- Required under the lease; and
- Real property improvements that will remain with the developer/landlord after the term of the lease

(See Department of Revenue, State of Fla. v. Seminole Clubs, Inc., 745 So.2d 473 (Fla. 5th DCA 1999)).

**Common Areas**

Common areas are those areas provided for use by all, such as the public promenade of a shopping mall, open parking facilities, and public restrooms. Common areas, which are not a component of a lease or for which no separate charge is made for the use thereof, are not subject to the sales tax.

In a ground lease of unimproved real property where a developer (the prime lessee) builds and sublets store space, tax is due from the developer on all of the space not sublet on the ground level. Common areas on any level above ground would not be taxable to the prime lessee, as this property is owned by the prime lessee (developer) and not leased.

In a lease of improved real property, such as an office building, where all of the space, except for the common area, is sublet, the prime lessee is responsible for the sales tax on the common area located on any of the floors of a multi-story building.

**Section 212.031(1) (a) 2, F.S.,** provides that dwelling units are exempt from tax on lease of commercial property because the taxed amount paid for the guestroom also grants to the guest a nonexclusive license to use, for example:

- The lobby area;
- The pool area;
- Parking area allocated to one space per room regardless of the number of floors in the complex;
- Hall space; and
- Elevator space
This exemption does not extend to areas of a transient rental facility that are not considered common areas or property occupied by guests. These areas include, among others:

- Any office space;
- The laundry room; and
- Excess parking space

**Common Area Maintenance Charges**

Also known as “CAM charges,” these are imposed on tenants who share common areas such as lobbies, food courts, walkways, parking lots, etc. If payment of these charges is a requirement for the continued right to use the rented property, these charges are subject to Florida sales tax (See Rule 12A-1.070(4)(d), F.A.C.).

**Debt service payments**

Frequently, tenants pay the mortgage payments and other debt obligations of the landlord either directly to the landlord or on behalf of the landlord. This is a form of rent consideration and is subject to Florida sales tax (See Rule 12A-1.070(19)(c), F.A.C.).

**Deposits**

Any portion of the security deposit which is used to compensate the landlord for rent which was not paid by the tenant during the term of the lease is part of the rent subject to sales tax in accordance with Section 212.031(1)(c), F.S.; However, any unused portion which is returned to the tenant is not part of the taxable rent.

Any portion of the security deposit which is used to compensate the landlord for other than a rent default is not subject to tax because such an amount if retained by the landlord is not given in exchange for the right to occupy or use real property. For a discussion on the subject, see TAA 97A-035.

**Easements**

Leases, licenses, or rentals of real property, as defined by statute, convey real property for a specified period and amount or authorize the use of certain real property. An easement is an interest that one person has in the land of another. This interest in the land is a right to use real property for a particular purpose that is usually conveyed by writing. Consideration paid in exchange for an easement is beyond the scope of sales and use tax.

The Department views true easements as not falling under the provisions of Section 212.031, F.S. Easements differ from licenses and leases:

- An “easement” is created by a grant as evidenced by a written agreement and/or other recorded documents;
- An “easement” is “perpetual” (i.e., permanent), unlike a lease or license;
- Unlike a lease, which grants exclusive possession, an “easement” is nonexclusive in nature;
• The “easement” defines and limits the permitted uses of a taxpayer;
• Under all the facts, circumstances, and documents, it must be clear that the intent of the parties was to grant an easement over, through or across the grantor’s property; and
• An easement, in the traditional sense of the term, is used for egress and ingress. It is akin to a road, driveway, or rail line

For an example of the treatment of a nontaxable easement, see TAA 05A01.

CERTAIN BUSINESSES

Airports
Privilege, franchise, or concession fees, or fees for a license to do business, paid to an airport are not payments for leasing, letting, renting, or granting a license for the use of real property (See Section 212.02(10)(i), F.S.).

Various real property leases, rentals, or licenses to use arrangements occur in airport facilities. Airports are generally owned by counties or municipalities, which lease space to airlines for the purpose of loading or unloading passengers, luggage, and crew, or for the purpose of selling tickets, temporary seating of passengers, or temporary storage of aircraft. Space may also be leased to business owners who operate restaurants, gift shops, and rental car companies.

All spaces rented or leased to businesses at an airport for the purpose of operating a gift shop or restaurant are taxable.

Real property used at an airport exclusively for the purpose of aircraft landing or taxiing, or property used by an airline for the purpose of loading or unloading passengers onto or from an aircraft or for fueling aircraft, is exempt from sales tax imposed on the lease, rental, or license to use the property.

If real property is rented or leased to a third party who, in turn, uses the property for taxable and exempt rentals, documentation must be maintained that identifies the square footage attributed to the exempt and taxable portions of the property being leased or rented.

Fair Associations
The lease or rental of land or a hall or other facilities by a fair association subject to the provisions of Chapter 616, F.S., to a show promoter or prime operator of a carnival or midway attraction is exempt. However, the sublease of land or a hall or other facilities by the show promoter or prime operator of a carnival or midway attraction is taxable (See Section 212.031(6), F.S.).
Federal Government; Leasing real property from the

The State of Florida cannot force the Federal Government to register as a “dealer” with the Department. The Department would look to the tenant for payment of Florida sales tax.

Hotels

Hotel sleeping accommodations are in effect transient dwelling units. Other areas of a hotel facility whose use is appurtenant to and included in the price of the room itself are treated as an extension of the room and therefore as part of a dwelling unit. This would include, for example, hallways and stairways in guest room areas, a parking space if provided with the room at no charge, the registration desk area, or a swimming pool provided for guest use. It would not include those areas used by the hotel to carry on its business such as management or administrative offices, storage areas, employee lounges, or loading docks. It also would not include areas in which the hotel carries on commercial activity that is not provided at any additional charge to those renting sleeping accommodations, such as restaurants, bars, banquet and meeting rooms, or gift or other shops. See WHI Limited Partnership, d/b/a Wyndham Harbour Island Hotel vs. Department of Revenue, DOAH Case No. 98-1194 (Final Order October 17, 2005).

Local and state government entities; Leasing real property from

Unless the tenant itself is an exempt organization, or the property or its use qualifies for an exemption, the renting of real property by a local or state government entity is subject to Florida sales tax under Section 212.031, F.S.

Mining Royalties

The consideration paid to the property owner in return for these rights is a royalty payment based on the amount of subsurface material extracted from the property. This is a transaction whereby the taxpayer enters into a royalty and subsurface lease agreement with the owner of undeveloped land. The agreement entitles the taxpayer to the subsurface rights to extract rock, sand, or other subsurface material from the property.

Based on the definition of “real property” in Section 212.02(10)(h), F.S., royalty payments for a subsurface lease agreement are not subject to Florida sales tax.

Military bases; Leasing real property on

The State of Florida cannot force the Federal Government to register as a “dealer.” In the past, the military has resisted the Department’s efforts to enter onto military bases for purposes of auditing civilian taxpayers.

When auditing civilian taxpayers who are renting real property on military bases, auditors are likely to see two different situations:

- The civilian taxpayer is renting directly from the military; and
- The civilian taxpayer is subleasing from another civilian taxpayer who has been given the prime lease from the military.
As a matter of policy and practicality, auditors should only be concerned with those instances that involve civilian taxpayers who sublease from other civilian taxpayers, and not be concerned with taxpayers who rent directly from the military.

**Native Americans; Real Property Rentals involving**

The lease of real property by a tribe to a non-tribal member is subject to Florida sales tax. Should the tribe fail to collect and remit the tax on the lease of the real property, the non-tribal taxpayer will be directly liable to the State of Florida for such tax.

Indians and Indian tribes are generally immune from state taxation. In order for immunity from Florida sales tax to apply:

- The property rented must be on an Indian tribe’s reservation;
- The tenant must be an enrolled member of the Indian tribe or the Indian tribe whose members reside on the reservation are the tenants;
- The tenant must be a permanent resident of the reservation at the time of the lease;
- The tenant must display a tribal identification card or letter issued by the tribe or appropriate federal agency at the time of the lease; and
- The landlord must maintain a record of the lease including the name of the customer and the tribal enrollment number.

**Residential Facility for the Aged**

While these facilities present similar situations as hotels (for example, restaurants, beauty shops and newsstands subleased to third parties), auditors should be aware that Section 212.031(1)(b), F.S., treats residential facilities for the aged slightly differently.

The statute provides that “… areas used for residential units by the aged and for the care of such residents…” are exempt. The key to the sentence being: “for the care of” such residents.

Illustration:

At a hotel, a beauty shop occupies space on the ground floor and is subleased to a third party by the hotel. The space is taxable, as it does not fall under the meaning of “dwelling unit.” However, under certain circumstances at a residential facility for the aged, space rented to a beauty shop may be part of “the care of” the residents because the residents are unable to leave the facility. Likewise, an employee break room at a hotel would be part of the space subject to Florida sales tax. However, at a residential facility for the aged, such space is for “the care of” the residents because the facility’s employees must be available to the residents at all times.

Auditors should consider the needs and abilities of the residents of such a facility. There will be some facilities whose residents live independent lives and who need little “care” compared to other persons in other facilities.
Auditors should be aware that current Rule 12A-1.070, F.A.C.’s discussion of this may be impacted by a 1996 Circuit Court decision (See Beverly Enterprises-Florida, Inc. v. The State of Florida Department of Revenue, Case No. 94-221073 (Fla. 18th Cir Ct. 1996)). The holding of that case focused on the statutory phrase “for the care of.” This discussion attempts to capture the holding of that court decision.

Trade Shows
When space is subleased to a convention or industry trade show in a convention hall, exhibition hall, or auditorium, whether publicly or privately owned, the sponsor who holds the prime lease is subject to tax on the prime lease, and the sublease is exempt (See Rule 12A-1.070(7)(b), F.A.C.).

Vending and amusement machines – licenses to use real property
In addition to sales tax being due on the proceeds of vending and amusement machines, Florida sales tax may also be due on the consideration paid for the granting of a license to use real property.

Example: A storeowner agrees to allow a vending machine company to place one of its machines in her store. In exchange for the right to use the storeowner’s property, the vending machine company will give the storeowner a percentage of the proceeds from the machine. These proceeds are subject to Florida sales tax under the theory that the store owner has granted the vending machine company a license to use the store’s property to conduct business (See Rule 12A-1.070(1)(f), F.A.C., and Rule 12A-1.044, F.A.C.).

Amusement Machine is defined at Section 212.02(24), F.S. and Vending Machine is defined at Section 212.0515(1), F.S.
GLOSSARY OF TERMS

Accrued Revenue:  Money that has been earned but not received as of the end of the reporting period. For example, a landlord has not received January rent of $500 from a tenant. The adjusting entry at the end of January is to debit rent receivable and credit rental revenue $500. This income would not be taxable until actually received.

Ad Valorem Tax:  Levy imposed on the value of real property by counties, municipalities, or taxing districts.

Amusement Device: Any mechanical device or combination of devices which carries or conveys passengers on, along, around, over, or through a fixed or restricted course or within a defined area for the purpose of giving its passengers amusement, pleasure, or excitement.

Amusement Attraction: Any building or structure around, over, or through which persons may move or walk, without the aid of any moving device integral to the building or structure, which building or structure provides amusement, pleasure, thrills, or excitement. The term does not include enterprises principally devoted to the exhibition of products of agriculture, industry, education, science, religion, or the arts.

Base Rent: The fixed dollar amount due on a periodic basis from the person occupying or using the property of another. This is subject to Florida sales tax (See Section 212.031(1) (c), F.S.).

Business: any activity engaged in by any person, or caused to be engaged in by him or her, with the object of private or public gain, benefit, or advantage, either direct or indirect” (See Section 212.02(2), F.S.).

Capital Lease: One in which the lessee obtains significant property rights. Although not legally a purchase, theoretical substance governs over legal form and requires that the leased property be recorded as an asset on the lessee’s books. The asset equals the present value of minimum lease payments. A capital lease exists if any one of the following criteria is met:
1) The lease transfers ownership of the property to the lessee at the end of the lease term;
2) A bargain purchase option exists;
3) The lease begins before the last 25% of the asset’s estimated life;
4) The lease term is 75% or more of the life of the property;
5) The present value of minimum lease payments equals or exceeds 90% of the fair value of the property; or
6) If the property in question is real property, the sales tax is due on the on the monthly lease payments as in an operating lease.

Common Area Maintenance Charges:  Also known as “CAM charges,” these are imposed on tenants who share common areas such as lobbies, food courts, walkways, parking lots, etc. If payment of these charges is a requirement for the continued right to use the rented property, these charges are subject to Florida sales tax.

Contingent Rental: Payment based on factors other than the passage of time. For example, a rental is contingent when the lessee must pay an extra amount based on sales or profitability.
Debt service payments: Frequently, tenants pay the mortgage payments and other debt obligations of the landlord either directly to the landlord or on behalf of the landlord. This is a form of rent consideration and is subject to Florida sales tax (See Rule 12A-1.070 (19) (c), F.A.C.).

Deeds: Are documents conveying title to realty from one person to another person. The “Grantor” is the person who owns the realty and is now conveying it to the “Grantee” (or person buying the realty) (See Black’s Law Dictionary 630 (5th ed. 1979). In Florida, the conveyance of realty must be made in writing (See Section 689.01, F.S.). There are a number of different types of Deeds (e.g., Quitclaim, Warranty, etc.); however, the differences between them are immaterial for purposes of Section 212.031, F.S. A deed can be made effective retroactively (See 19 Fla. Jur. 2d Deeds Section 144); however, these situations should be viewed skeptically.

Disregarded entities: The statutory definition of “person” includes “disregarded entities” (See Section 212.02(12), F.S.); In addition, Section 608.471(3), F.S., specifically provides that: “Single-member limited liability companies and other entities that are disregarded for federal income tax purposes must be treated as separate legal entities for all non-income-tax purposes….” Therefore, even though a tenant or landlord may be “disregarded” for Federal Income Tax purposes, the disregarded entity may be liable for Florida sales tax as a “person.”

Ground leases: Usually found in situations where someone owns a piece of undeveloped land and rents it to a developer who will construct buildings on it. The developer will own the buildings themselves, but will pay rent to the landowner. These types of leases are usually long-term (99 years or so).

Landlord/tenant relationship: Is not defined by statute. Black’s Law Dictionary describes it as a relationship wherein one person occupies the premises of another in subordination to the other person’s title or rights and with his permission or consent. (See Black’s Law Dictionary 790 (5th ed. 1979)).

Lease: A contract that may be either reduced to writing or can be made orally. The owner of the land (the terms “landlord” and “lessor” are synonymous) contracts with another person (the terms “tenant” and “lessee” are synonymous) conveying the right to occupy the real property. A lease will have a “term” (the length of the contract) and will usually provide the “consideration” paid by the tenant in exchange for the right to use real property (See Black’s Law Dictionary 800 (5th ed. 1979)). Florida courts have held that a lease need not be in writing for purposes of Section 212.031, F.S.

Leasehold Agreement: Agreement between the lessee and lessor specifying the lessee’s rights to use the leased property for a given time at a specified rental payment.

Lessee: Individual paying a rental fee to the lessor for the right to use real or personal property. The two methods used to account for leases by the lessee are the capital lease and the operating lease.

Lessor: Owner of real or personal property who gives another the right to use it in return for rental payments. The three types of leases for the lessor are the direct financing lease, the sales-type lease, and the operating lease.

Liability for Florida sales tax: Like any Florida sales tax, sales tax under Section 212.031, F.S., is imposed on the end consumer; here, the tenant/licensee (See Section 212.031(2)(a), F.S.). The State of Florida, however, can turn to either the
landlord or the tenant in the event that payment of Florida Sales Tax cannot be proven to have been paid (See Section 212.031(3), F.S.).

License: The granting of a privilege to use or occupy a building or a parcel of real property for any purpose” (See Section 212.02(10)(i), F.S.). A license to use real property is different from a lease of real property, in that a license does not convey any property rights to the licensee. The license to use real property usually comes with restrictions. For example, a photographer is given a “license” to roam an amusement park to take photos of patrons. The license may restrict the photographer to the time, place and manner in which he can conduct his business. Compare that to a “lease” wherein a lessee is allowed full access to a piece of property and is generally left alone by the lessor.

License Fees: A license fee is imposed on a person who has been granted the right to go on the property of another. The term is synonymous with “rent.” These fees are subject to Florida sales tax (See Section 212.031(1)(c), F.S.).

Other things of value: This phrase is used in Section 212.031(1) (d), F.S., but is not defined by statute. “When the rental or license fee of any such real property is paid by way of property, goods, wares, merchandise, services, or other thing of value, the tax shall be at the rate of 6 percent of the value of the property, goods, wares, merchandise, services, or other thing of value” (See Section 212.031(1)(d), F.S.). We can see that the phrase is used to expand the list that preceded it.

Percentage Rent: Refers to a form of rent that is a percentage of gross or net sales to determine the rent. There is usually a minimum or “base” rental, in the event of poor sales (See Black’s Law Dictionary 1022 (5th ed. 1979)). This is subject to Florida sales tax (See Section 212.031(1)(c), F.S.).

Person: Is defined broadly as it: “…includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit and also includes any political subdivision, municipality, state agency, bureau, or department and includes the plural as well as the singular number” (See Section 212.02(12), F.S.).

Port Authority: Any port authority created by or pursuant to the provisions of any general or special law or any district or board of county commissioners acting as a port authority under or pursuant to the provisions of any general or special law.

Qualified Production Services: Any activity or service performed directly in connection with the production of a qualified motion picture.

Real Property: The surface land, improvements thereon, and fixtures, and is synonymous with “realty” and “real estate.”

Recording: In Florida, it is unnecessary to record a deed in order for it to be “good.” However, an unrecorded deed does not protect the grantee from subsequent creditors and others (See 19 Fla Jour Deeds Section 20).

Related Party Transaction: Interaction between two parties, one of whom can exercise control or significant influence over the operating policies of the other.

Rental Consideration: Anything of value that is paid by a licensee or tenant for the right to use or occupy real property. This includes base rent, percentage rent, charges required
under the license or lease, payment of property expenses on behalf of the land owner, etc. (See Section 212.031(1)(c), (d), F.S. and Rule 12A-1.070, F.A.C.).

**Rent Expense:** Cost of lease of, or the license to use real property. The rental charge incurred by the lessee may be based on time and/or some other factor (e.g., sales).

**Retail Concessionaire:** Any person in the business that is a lessee or licensee of premises owned by another who makes sales of food or drink directly to the general public within such premises.