STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BAYFRONT HMA MEDICAL CENTER, LLC,

Petitioner,

vs. Case Nos. 19-1880
19-1881
DEPARTMENT OF REVENUE, 19-1882

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge Mary Li Creasy by video teleconference with locations in Tampa and Tallahassee, Florida on August 13, 2019, and September 30, 2019.

APPEARANCES

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STATEMENT OF THE ISSUES

These consolidated cases involve three issues: (1) whether the Department of Revenue's ("the Department") assessment against Bayfront HMA Medical Center, LLC ("Bayfront"), for sales tax on commercial rent payments is erroneous; (2) whether Bayfront is entitled to a refund for overpayment of sales tax on commercial rent payments from August 1, 2014, to July 31, 2017; and (3) whether Bayfront is entitled to a refund for overpayment of sales tax on commercial rent payments from August 1, 2017, to May 31, 2018.

PRELIMINARY STATEMENT

In August 2017, the Department initiated a sales and use tax audit of Bayfront. While the audit was underway, Bayfront filed a refund application with the Department seeking a refund of $546,068. In June 2018, the Department issued to Bayfront a sales and use tax assessment in the sum of $148,452 and denied the refund application. In July 2018, Bayfront filed a second refund application, which was denied by the Department in September 2018. Bayfront timely filed informal protests to the assessment and the two refund application denials. On October 4, 2018, the Department issued decisions denying each of Bayfront's protests.

On November 30, 2018, Bayfront filed three petitions challenging each of the Department's October 4, 2018, decisions. On April 11, 2019, the Department referred all three petitions to the Division of Administrative Hearings ("DOAH") for assignment to an administrative law judge. On April 26, 2019, an Order was entered consolidating the cases and setting a final hearing for June 10, 2019. On May 22, 2019, the hearing was continued to August 8, 2019. Thereafter, on June 24, 2019, the Department filed an unopposed motion to transfer venue. The motion was granted and on June 27, 2019, the final hearing was set for August 13, 2019.

The final hearing was conducted as scheduled on August 13, 2019, and September 30, 2019. Bayfront presented the testimony of five witnesses: Charles Tyson, Bayfront's Chief Financial Officer; Jane DeMauro, Director of Bayfront Baby Place; James Malone, a tax consultant from FM Cost Containment; David Stevens, preparer of the Capstan report; and Chuck Wallace, senior attorney for the Department's Technical Assistance and Dispute Resolution ("TADR") office in Tallahassee. Bayfront's Exhibits 1 through 24 were admitted.

The Department presented three witnesses: Chris Anderson, tax auditor from the Department's refund office in Tallahassee; Tom Koah, senior tax specialist at the Department's Largo Service Center; and Chuck Wallace, senior attorney for the Department's TADR office. The Department's Exhibits 1 through 32 and 34 through 37 were admitted.

The two-volume final hearing Transcript was filed on November 1, 2019. The parties agreed to 30 days in which to file proposed recommended orders. The parties timely filed proposed recommended orders. The Department then requested, and was granted the opportunity to file a supplemental proposed recommended order on the issue of an unadopted rule challenge raised by Bayfront for the first time in its Proposed Recommended Order. The parties' proposed recommended orders were taken into consideration in the preparation of this Recommended Order. All references to the Florida Statutes are to the 2019 version unless otherwise stated.

FINDINGS OF FACT

1. The Department is the state agency responsible for administering Florida's sales and use tax laws pursuant to chapter 212, Florida Statutes.

2. Bayfront, a for-profit LLC, is a 480-bed facility that is housed in a large six-floor building with adjacent smaller buildings comprising the hospital

campus in downtown St. Petersburg. The Department issued Bayfront's sales tax registration in August 2013.

3. The petitions in DOAH Case Nos. 19-1881 and 19-1882 contest the Department's tax assessment and refund application denial for the period of August 1, 2014, to July 31, 2017. The petition in DOAH Case No. 19-1880 contests the Department's refund application denial for the period of August 1, 2017, to May 31, 2018.

4. While the Department audited all of Bayfront's Florida sales and use tax liabilities, in this proceeding, Bayfront only challenges the Department's determination that Bayfront owes sales and use tax on its base rent and additional rent payments for space it leases at Johns Hopkins All Children's Hospital ("All Children's Hospital").

Bayfront Baby Place

5. On November 30, 2007, All Children's Hospital (as the landlord), and Bayfront (as the tenant) entered into a lease agreement for a term of 23 years wherein Bayfront leases 91,195 square feet, or 12.57 percent, of All Children's Hospital to provide obstetric services. Bayfront refers to this space as Bayfront Baby Place (although for purposes of this Recommended Order, it may also be referred to as "Bayfront").

6. Together with All Children's Hospital, Bayfront Baby Place is a regional perinatal intensive care center licensed under sections 383.15 through 383.19, Florida Statutes. A regional perinatal intensive care center is a specialized unit within a hospital specifically designed to provide a full range of health services to women with high-risk pregnancies and intensive care services for newborns. Bayfront Baby Place provides these services to low and high-risk mothers and normal newborns. Both outpatients and inpatients are treated at this facility. Approximately 50 to 60 percent of Bayfront Baby Place's monthly patient visits are for outpatient treatment.

7. Bayfront Baby Place is a secure facility, requiring identification for patients and others entering the facility. The 94,195 square feet of leased space is allocated as follows:

(a) The first floor has 3,532 square feet of leased space and consists of the entrance with a security station, gift shop, lobby area, and conference room. Patients and family members enter at the first-floor entrance. The conference room is used by Bayfront Baby Place's staff and to hold classes for the public. Other than the entrance, inpatients do not usually use the first floor.

(b) The second floor has 264 square feet and is not accessible to Bayfront's inpatients or outpatients.

(c) The third floor has 86,824 square feet and is used to provide obstetric medical services to inpatients and outpatients. On this floor there are eight triage rooms used solely for outpatient care; 14 antepartum rooms for both outpatient and inpatient treatment; four operating rooms; eight post-anesthesia recovery bays; 13 labor and delivery rooms; a nursery for newborns; and 40 mother-baby inpatient rooms.

(d) The fourth floor has 575 square feet and is not accessible to Bayfront's inpatients or outpatients.

8. Under its lease, Bayfront is responsible for paying sales tax on base rent and additional rent payments. The lease specifies that utility services (electricity, water, sewer, heating, air conditioning, plumbing, medical gas, etc.) are charged to the tenant as additional rent. All Children's Hospital provides Bayfront with an itemized invoice each month detailing base rent, Florida sales tax, environmental services, routine maintenance, dietary services, utilities, medical gases, and central energy plant.

9. Bayfront Baby Place's inpatient room charge exceeds $2,000 per day.[1] The room fee includes nursing care, medical supplies, dietary services, and general overhead charges.

[1] Bayfront characterizes the room charge as "rent." However, Bayfront's invoices label the charge as "Private Room OB."

10. Patients receiving outpatient treatment are not considered inpatients and are not charged an inpatient room charge.

11. Bayfront's witnesses, Charles Tyson, Jane DeMauro, and David Stephens, all acknowledge the leased space is used exclusively to provide medical services. It is not a hotel, a nursing home, a psychiatric facility, or a substance abuse facility.

The Audit

12. On August 30, 2017, the Department initiated a sales and use tax audit of Bayfront for the period of August 1, 2014, to July 31, 2017. The audit was conducted by Glenn Morrison, an auditor at the Department's Largo Service Center, and the scope of the audit was all of Bayfront's sales and use tax liabilities imposed under Florida law. Bayfront's representative for the audit was Camille Henry, Director of Finance.

13. The Department's initial assessment was issued on April 16, 2018, and assessed an amount due of $1,002,761.97 of tax and accrued interest. The assessment contained seven audit exhibits. Bayfront is only contesting audit assessment exhibit B03-Commercial Rent for All Children's Hospital, in which the Department determined Bayfront failed to pay sales and use tax owed on utilities, maintenance, and other services that are components of its rent payments.

14. On May 8, 2018, tax consultant James Malone informed the Department of FM Cost Containment's representation of Bayfront for the audit. From May 17, 2018, to about May 31, 2018, FM Cost Containment supplied additional taxpayer records to the Department. After review of the newly-supplied records, the auditor, Mr. Morrison, determined the additional records supported substantial reductions to most of the audit assessment exhibits. However, the Department rejected Bayfront's challenge to audit exhibit B03 and made no change to B03 in the assessment revisions.

15. The Department's Largo Service Center held a telephone conference with James Malone on June 7, 2018, and reviewed all issues. On June 8,

2018, the Largo Service Center issued its revised Notice of Intent to Make Audit Changes. Mr. Malone did not request a second audit conference, and instead asked the Largo Service Center to close his file and forward it to Tallahassee for further processing.

16. On June 21, 2018, the Department's Compliance Standards Process office in Tallahassee issued to Bayfront a Notice of Proposed Assessment having a balance due of $124,395.34 tax and $24,412.02 accrued interest.

17. On June 29, 2018, Bayfront, through FM Cost Containment, filed a timely informal protest with the Department, challenging audit exhibit B03. In its protest, Mr. Malone cites sections 212.08(7) and 212.031(1)(a)2., Florida Statutes; Florida Administrative Code Rule 12A-1.001; and *Beverly Enterprises-Florida, Inc. v. Department of Revenue*, No. 94-2259-CA-16-L (Fla. 18th Cir. Ct. Apr. 30, 1996) to support the claim that "the lease, rental, and license to use rooms exclusively as dwelling units by patients in hospitals and other qualifying healthcare facilities are … exempt from tax."

18. On October 4, 2018, the Department issued a Notice of Decision sustaining the assessment and, due to accruing interest, Bayfront's tax liability increased to $151,588.36. This decision was prepared by TADR tax conferee Clay Brower, who retired from the Department in the fall of 2018. In its Notice of Decision, the Department rejected Bayfront's argument that its leased space is used exclusively as dwelling units and explained that only patients and inmates are exempt from paying sales tax under section 212.08(7)(i), a sales tax exemption that is not available to Bayfront, which is a Florida for-profit business entity and not a patient or inmate.

19. On November 30, 2018, Bayfront filed a petition challenging the Department's Notice of Decision.

Refund I (Case No. 19-1881)

20. On May 29, 2018, Bayfront filed an application with the Department seeking a refund of $546,068.49 for the period of November 1, 2014, to July 31, 2017 ("Refund I"). Because the Department's service center was still involved with the audit, this refund application was sent to auditor Glenn Morrison in Largo for processing.

21. As Bayfront's landlord, All Children's Hospital is the taxpayer responsible for remitting commercial rent tax to the state. § 212.031(3), Fla. Stat. In order to have standing for a refund claim, Bayfront needed to obtain an assignment of rights from its landlord. § 215.26(1), Fla. Stat. Along with its refund application, Bayfront provided the Department with All Children's Hospital's executed assignment dated May 24, 2018, for the refund period.

22. Bayfront's reason set forth in its refund application was: "NT Rental Tax-Patients Rooms- Sec. 212.08(7), F.S.; Sec. 212.031(1)(a)2., F.S.; Rule 12A-1.001 indicate that the lease, rental and license to use rooms exclusively as dwelling units by patients in hospitals and other qualifying healthcare facilities are also exempt from tax."

23. On June 25, 2018, the Department issued its Notice of Intent to Make Tax Refund Claim Changes, denying Bayfront's application.

24. On June 29, 2018, Bayfront timely filed an informal protest with the Department challenging the denial of its refund application. In its protest, Bayfront repeated the same argument from its protest of the assessment. *See* ¶17.

25. On October 4, 2018, the Department issued a Notice of Decision of Refund Denial sustaining the denial of the refund application on the same basis as its Notice of Decision.

26. On November 30, 2018, Bayfront filed a petition challenging the Department's Notice of Decision of Refund Denial.

Refund II (Case No. 19-1880)

27. On July 10, 2018, Bayfront filed a second refund application with the Department. This refund claim sought $117,586.85 for the period of August 1, 2017, to May 31, 2018 ("Refund II"). Bayfront's reason in this application was: "Tax paid on NT Rental Tax - Patients Rooms pursuant to Sec. 212.08(7), F.S.; Sec 212.031(1)(a)2."

28. Refund II was sent to Tallahassee for processing and was assigned to refund tax auditor Chris Anderson.

29. By Notice of Proposed Refund Denial issued on September 4, 2018, the Department denied Bayfront's application determining that the lease was taxable and the leased space was not transient rental accommodations under rule 12A-1.061. When Mr. Anderson issued the denial of the refund claim he did not know of the earlier audit or the first refund application denial. His analysis and conclusion were based solely on issues raised by Bayfront in Refund II.

30. On September 7, 2018, Bayfront timely filed an informal protest with the Department challenging the denial of Refund II. In this protest, Bayfront repeated the same argument it made in its protest of the initial assessment and Refund I. *See* ¶17.

31. On October 4, 2018, the Department issued a Notice of Decision of Refund Denial sustaining the denial of Refund II on the same basis as its Notice of Decision sustaining the assessment and the Notice of Decision of Refund Denial in Refund I.

32. On November 30, 2018, Bayfront filed a petition challenging the Department's Notice of Decision of Refund Denial of Refund II.

Bayfront's Position

33. Bayfront's three petitions are essentially the same, with the only difference being the specific facts relevant to the audit assessment and each refund application.

34. In the Joint Pre-hearing Stipulation, Bayfront claims it is exempt and excluded from sales and use tax on its commercial rent payments because: (1) patient rooms and space used principally by patients are dwelling units excluded from tax under section 212.031(1)(a)2.; and (2) Bayfront's re-lease of space to its patients is excluded from tax as a sale for resale pursuant to rule 12A-1.039(1)(b). In its Proposed Recommended Order, Bayfront also argues that the Department's criteria for distinguishing a space used exclusively as a dwelling unit from a space used for medical care constitutes an unadopted rule.

The Capstan Report

35. In support of its arguments that patient-accessible areas of Bayfront are used exclusively as dwelling units, or should be considered a lease for re-lease, and thus excluded from tax, Bayfront retained the services of Capstan, a separate consulting firm, to prepare a space-use report.

36. The report, prepared by David Stephens, provides a facility use analysis of Bayfront Baby Place based on the square footage of the public space and private space. To prepare the report, Mr. Stephens, conducted an on-site inspection on September 21, 2018, and subsequently prepared the September 24, 2018, Capstan report after viewing each floor of the leased space with Bayfront staff. Mr. Stephens, who is not an engineer, testified as a lay witness, rather than an expert.

37. For purposes of the Capstan report, spaces determined to be accessible to patients and, therefore, "public," included patient rooms, patient suites, operating rooms, the nursery, hallways, bathrooms, lobbies, conference rooms, and the front portion of nurses' stations. Spaces determined to be administrative and, therefore, "private," included employee rooms, employee break rooms, areas behind the nursing stations, offices, labs, laundry rooms, storage spaces, hazardous waste rooms, and janitorial closets.

38. Based on the floor plans and information from the visit, Mr. Stephens used satellite imagery to determine the square footage accessible to patients and the square footage accessible to only Bayfront staff.

39. The parties dispute what portion of the third floor is public versus private. At final hearing, Mr. Stephens testified that the public (patient-accessible) portion of the entire leased space is 85 percent (77,483 divided by 91,195), if the first and third floors are considered. If only the public square feet from the third floor are considered, the total public square feet for the entire leased space equals 81 percent (73,951 divided by 91,195). Mr. Stephens also did a separate calculation for only the patient rooms, patient suites, and hallways, and determined the total public square feet for those areas to be 52 percent of the leased space.

40. The Capstan report is of limited value. Other than visiting Bayfront Baby Place on one occasion, Mr. Stephens testified that he was unfamiliar with the taxpayer, he engaged in no independent research, and the classification of leased space as "public" versus "private" was supplied by FM Cost Containment, the entity hired by Bayfront to respond to the audit. The report fails to distinguish between the portions of the facility used exclusively by inpatients, from that used for outpatient medical treatment.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.569, 120.57(1) and 120.80(14).

Applicable Burdens

42. The Department bears the initial burden to demonstrate that the assessment has been made against the taxpayer and the factual and legal grounds upon which the Department made the assessment. § 120.80(14)(b)2., Fla. Stat. The Department met its burden of proof. It established that it made an assessment against Bayfront for sales and use tax for the audit period,

and the Department also demonstrated the factual and legal grounds upon which it based the assessment.

43. Once the Department meets this burden, the burden shifts to the taxpayer who must prove by a preponderance of the evidence that the tax assessment is incorrect to prevail. § 120.57(1)(j), Fla. Stat. This evidentiary burden is described as "the greater weight of the evidence" and "evidence that more likely than not tends to prove a certain proposition." §120.57(1)(j), Fla. Stat.; *IPC Sports, Inc. v. Dep't of Rev.*, 829 So. 2d 330, 333 (Fla. 3d DCA 2002); *S. Fla. Water Mgmt. v RLI Live Oak*, 139 So. 3d 869, 872 (Fla. 2014).

44. In addition to the assessment, Bayfront protests the Department's denial of two refund applications. In an administrative proceeding regarding a refund claim, a party's burden of proof is not provided by statute. Hence, Bayfront has the initial burden of proof provided by general law. *See* § 120.80(14)(b)2., Fla. Stat. "The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." *Balino v. Dep't. of HRS.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977); *see also Green v. Pederson*, 99 So. 2d 292, 296 (Fla. 1957)("It is well settled that he who would shelter himself under an exemption clause in a tax statute must show clearly that he is entitled under the law to exemption."). Bayfront has the burden of proving by a preponderance of the evidence that it is entitled to a refund.

"Used Exclusively As Dwelling Units"

45. Both the contested assessment and the refund applications stem from Bayfront's commercial lease of 12.57 percent of All Children's Hospital. Section 212.031 provides in pertinent part:

> Tax on rental or license fee for use of real property.
>
> (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, letting, or granting a license for the use of any real property unless such property is:

* * *

2. Used exclusively as dwelling units.

* * *

(b) When a lease involves multiple use of real property wherein a part of the real property is subject to the tax herein, and a part of the property would be excluded from the tax under … subparagraph (a)2 … the department shall determine, from the lease … and such other information as may be available, that portion of the total rental charge which is exempt from the tax imposed by this section. The portion of the premises leased or rented by a for-profit entity providing a residential facility for the aged will be exempt on the basis of a pro rata portion calculated by combining the square footage of the areas used for residential units by the aged and for the care of such residents and dividing the resultant sum by the total square footage of the rented premises. For purposes of this section, the term "residential facility for the aged" means a facility that is licensed or certified in whole or in part under chapter 400, chapter 429, or chapter 651 … or that provides residences to the elderly.

46. Bayfront entered into a written landlord-tenant lease agreement requiring it to pay monthly base rent and additional rent, in exchange for the exclusive right to use a portion of its landlord's real property. The Department determined Bayfront failed to pay sales and use tax owed on utilities, maintenance, and other services that are components of its rent payments.

47. Bayfront argues it is exempt and excluded from sales and use tax on its commercial rent payments because patient rooms and space used principally by patients are dwelling units excluded from tax under section 212.031(1)(a)2. Bayfront relies on *Beverly Enterprises-Florida, Inc. v. Department of Revenue*, No. 94-2259-CA-16-L (Fla. 18th Cir. Ct. Apr. 30,

1996) for the proposition that nursing homes, which provide medical related services, are considered "exclusively used as a dwelling unit."[2]

48. The terms "dwelling unit" and "used exclusively" are not defined in chapter 212 or by administrative rule. When construing a statute, the court must first look to the plain language used by the Legislature. *Verizon Bus. Purchasing, LLC v. Dep't of Rev.*, 164 So. 3d 806, 809 (Fla. 1st DCA 2015). If a statute is clear, "the statute must be given its plain and obvious meaning." *Id.* "When considering the meaning of terms used in a statute, this court looks first to the term's ordinary definitions [which] … may be derived from dictionaries." *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 439 (Fla. 2013), *citing Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 214 (Fla. 2009).

49. Among the definitions for the term "use" is "to put into service or employ for a purpose." The American Heritage Dictionary of the English Language, 5th Edition, *see* "use," *www.ahdictionary.com/word/search.html?q=use* (last visited February 5, 2020). The term "exclusively" is defined as "not allowing something else … ; not divided or shared with others … ; not accompanied by others; single or sole." *Id.* at "exclusively," *www.ahdictionary.com /word/search.html?q=exclusively* (last visited February 5, 2020). "Dwelling" is defined as "a place to live in; an abode." *Id.* at "dwelling," *www.ahdictionary.com/word/search.html?q =dwelling* (last visited February 5, 2020). Hence, a common understanding of the phrase "used exclusively as dwelling units" is a facility intended to be used solely as a place to live.

50. However, the term "used exclusively," in the property context, refers to the "dominant use of property" and does not necessarily mean a use which excludes all others. Exclusive Use, USLEGAL, *www.definitions.uslegal.com/e/exclusive-use-property/* (last visited February 5, 2020). In fact, the Department admits section 212.031(1)(a)2. applies to assisted living facilities

[2] *Beverly* was decided before nursing homes were given the pro rata exclusion under section 212.031(1)(b).

("ALFs"), inpatient substance abuse facilities, and inpatient psychiatric units. Each of these facilities unquestionably provides medical care in addition to sleeping accommodations.

51. Bayfront's provision of sleeping accommodations for inpatient care is distinguishable from ALFs, inpatient substance abuse facilities, and psychiatric units.

52. While the Department acknowledges that certain taxpayers that offer nursing services at their facility receive the section 212.031(1)(a)2. tax exemption, the leased space for the qualifying taxpayers are factually and legally distinguishable from Bayfront. Bayfront's reliance on the Department's advisory letters are misplaced because not only are those taxpayers materially different from Bayfront, by statute and rule, the advisory letters are not legal precedents nor legal authority for other taxpayers. § 213.22(1), Fla. Stat., Fla. Admin. Code R. 12-11.007(1)-(2).

53. Nursing homes and ALFs are specifically designated as residential facilities under chapters 400 and 429, Florida Statutes. Individuals who reside in nursing homes and ALFs are considered "residents" under Florida law. Whereas "residents" reside in nursing homes and ALFs, Bayfront's customers are patients. A patient at a regional perinatal facility is defined as a woman experiencing a high-risk pregnancy or a medically eligible newborn infant. § 383.16(3), Fla. Stat. Bayfront has a patient-medical provider relationship with its customers, not a residential relationship.

54. Bayfront leases the space as a place of business to provide obstetric medical care. No common person refers to a hospital as a dwelling unit, home, or abode solely or even primarily to live and reside. Patients who use the Bayfront space are not leasing a bed or a room with the intention of "dwelling" or staying. Additionally, living and residing is a key to the care offered at ALFs, inpatient substance abuse, and inpatient mental health facilities. In contrast the care provided by Bayfront includes 50-60 percent outpatient services.

55. Unlike residents of an ALF, inpatient substance abuse facility, and inpatient psychiatric unit, who either chose to be, or are placed, at these facilities to reside short or long-term while receiving assistance with personal care and medical needs, obstetric patients are placed in a fully-equipped medical room and their overnight stays are incidental to the child-birth process. Bayfront is not used as a home or a residence. The fact that sleeping may occur at Bayfront does not alter its sole use or dominant purpose. In fact, Bayfront's own witnesses admit that the facility is used exclusively for medical services. Bayfront cannot be used "exclusively" or predominantly both as a labor and delivery medical facility and as a residential facility.

56. The fact that section 212.031(1)(a)2. is applied to exclude certain residential care facilities does not make the provision ambiguous. The space leased by Bayfront is not used "exclusively as dwelling units" and is, therefore, taxable.[3]

Lease for Re-Lease

57. In the prehearing stipulation, Bayfront argues its "re-lease of the space to its patients is excluded from tax as a sale for resale" and cites to rule 12A-1.039(1)(b). In essence, Bayfront claims it subleases Bayfront Baby Place to its patients and is somehow exempt from tax on that basis. However, since Bayfront maintains sole control and full use of its leased space and there is no applicable tax exemption under Florida law, Bayfront's claim has no factual or legal basis.

58. Sections 212.031(1)(a) and (c) impose sales and use tax on the total rent fee charged for the renting or leasing of real property. Section 212.031(3)

[3] Both parties wrote extensively in their proposed recommended orders on the issue of whether section 212.031(1)(a)2., provides a tax exemption or a tax exclusion. If the phrase "used exclusively as dwelling units" is considered a tax exclusion, any ambiguity is resolved in favor of the taxpayer. *Drum Service Co. v. Kirk*, 234 So. 2d 358, 359 (Fla. 1970). Conversely, if the phrase is meant to create an exemption from tax, it is construed against the taxpayer. *Alachua Cty. v. Dep't of Rev.*, 466 So. 2d 1186, 1187 (Fla. 1st DCA 1985). Because the language is not ambiguous, it is unnecessary for the undersigned to address whether this provision is an exclusion or exemption.

holds landlords responsible for charging tenants, collecting, and remitting commercial rent tax to the Department. Rule 12A-1.070(4)(b) requires the tax due to be paid by the tenant to its landlord. Rule 12A-1.070(7)(a) provides that when a tenant sublets a portion of its taxable leased property, the tenant is required to register as a dealer and collect and remit the tax on all sublet rentals. Rule 12A-1.070(9) requires the tenant that assigns its interest, or retains only an incidental portion of the leased premises, to collect sales tax on the subrentals and pay tax to the landlord on the portion retained. The rule also provides that when a tenant sublets all, or substantially all, of its interest in the leased premises, the tenant may register with the Department as a dealer and provide a resale certificate to its landlord in lieu of paying the tax to the landlord, hence relieving the landlord of the duty to remit the tax to the state on its prime lease.

59. However, when a tenant retains its interest in the leased space, an assignment of the leased space (for the avoidance of tax obligations) does not occur, and the tenant continues to be responsible for the tax owed on all consideration paid on the prime lease. Bayfront's control of the leased premises is superior to that of its patients and it does not sublet or assign its interest in the leased premises to its patients. Because Bayfront does not assign its interest in the facility to its patients, Bayfront is responsible for the sales and use tax pursuant to section 212.031(1)(a).[4] *See* Fla. Admin. Code R. 12A-1.070(7),(8), and (9).

Unadopted Rule

60. Agency action that determines the substantial interests of a party cannot be based on an unadopted rule. § 120.57(1)(e)1., Fla. Stat. An unadopted rule is any agency statement of general applicability that is a

[4] In its informal protests Bayfront also relied on section 212.08(7)(i) as support for its claim that the commercial lease is tax exempt. Section 212.08(7)(i) provides that hospital room and meal charges to patients are exempt from tax. This exemption does not apply to Bayfront's commercial lease because the taxpayer, Bayfront, is not a patient.

"rule," as defined in section 120.52(16), without going through the rulemaking process required under section 120.54. § 120.52(20), Fla. Stat.

61. The Department is required to promulgate rules on "those statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." *Coventry First v. Office of Ins. Reg.*, 38 So. 3d 200, 203 (Fla. 1st DCA 2010). If the effect of the Department's statement is to "create certain rights or adversely affect other rights, it is a rule." *Id.* at 203.

62. Not all agency statements are required to be promulgated as rules. Agency statements that only apply under specific circumstances are not statements of general applicability when the statements are merely guidelines and the application of the statement is subject to the discretion of an agency employee. *Id.* at 204.

63. Bayfront argues:

> The Department testified that hospitals do not qualify under Section 212.031(1)(a)2, because medical treatment is provided. The Department has previously issued a ruling with a similar position that hospitals do not qualify because of medical treatment [PE 16, Letter of Technical Advice ("LTA") 96A-011].

See Petitioner's Proposed Recommended Order ¶¶ 115-116.

64. However, this is a mischaracterization of the testimony. The testimony offered by Charles Wallace on behalf of the Department was that if the sole purpose of a medical facility is to provide medical care, that is a factor taken into consideration in determining whether the structure is a "dwelling unit" under section 212.013.

65. It is clear from Mr. Wallace's testimony that the Department's determination of whether taxpayers qualify for an exemption under section 212.031(1)(a)2. is based upon the application of the plain language of the statute to the facts of each individual case and is not based upon a

general statement by the Department. There is no evidence to establish that the Department instructs its auditors that hospitals do not qualify for the sought-after exemption. In fact, as stated by Bayfront in its Proposed Recommended Order, "the Department determines what real property qualifies for the exclusion on an ad hoc basis." *See* Petitioner's Proposed Recommended Order ¶51; and Tr. Vol. II, p. 218; lines 1-15.

66. Bayfront's reliance on the 1996 Letter of Technical Advice ("LTA") is similarly misplaced.[5] Nowhere in the LTA does the Department suggest that hospitals do not qualify under section 212.031(1)(a)2. because medical treatment is provided. Rather, this LTA states:

> With respect to the applicability of the "dwelling unit" exclusion to hospitals, it must be ascertained whether or not a hospital room can be considered as being used *exclusively* for dwelling. Unlike the case of a hotel, motel, boarding house, or other similar structure, whose sole purpose is to provide sleeping and, perhaps, housekeeping, facilities to its customers, a hospital provides its customers with a place to sleep only as a method of accomplishing its sole purpose of providing treatment, cure, mitigation or amelioration of illness or disease … The hospital does not make *exclusive use* of hospital rooms to simply provide sleeping accommodations to the public. In fact, a primary goal of the hospital is to discharge patients as soon as possible, unlike a motel or hotel, where the objective is to retain the guests for as long as possible.

[5]/ An LTA is a Department advisory position on the taxability of a given transaction. An LTA is informal and non-binding on the Department. *See* Fla. Admin. Code. R. 12-11.003(1)(b). *See also* Chapter 9, § 9.3, Florida Administrative Practice (2019).

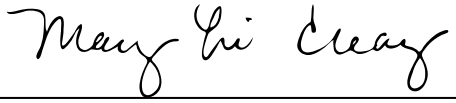
67. An agency statement that merely reiterates a law or declares what is "readily apparent" from the text of a law, is not considered a rule. *Grabba-Leaf v. Dep't of Bus. & Prof'l Reg.*, 257 So. 3d 1205, 1208 (Fla. 1st DCA 2018). It is readily apparent from the statute, that the Legislature intends that every person who rents real property is exercising a taxable privilege, unless the "property" qualifies for an exemption. § 212.031(1)(a), Fla. Stat. Here, the claimed exemption applies to property "used exclusively as dwelling units" under section 212.031(1)(a)2.

68. Because Bayfront is not used exclusively or predominately to provide dwelling units for patients, the Department concluded it did not have the legislative authority to provide Bayfront with the claimed exemption. The effect of the Department's decision is not a rule because it is an application of the statute to the facts of these cases. In making this decision, the Department did not apply a general statement which, in and of itself, creates certain rights or adversely affects other rights.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter final orders in these consolidated cases sustaining the assessment and denying Bayfront HMA Medical Center, LLC's, refund applications.

DONE AND ENTERED this 7th day of February, 2020, in Tallahassee, Leon County, Florida.



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this 7th day of February, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.