Legislation To Reduce Business Rent Tax Prevails

By Arthur J. Menor, Esq., Shutts & Bowen, LLP, West Palm Beach, Florida

Florida businesses will be granted some tax relief beginning in 2018 by way of a reduction in the sales tax payable on rents under non-residential leases. Currently, all Florida for profit businesses, regardless of their size or financial situation, are required to pay state sales tax on their rental fees at the rate of 6 percent (referred to as Florida Business Rent Tax). In addition, some counties levy local surtaxes on transactions that are subject to state sales tax, including rents under non-residential leases. House Bill 7109, which was signed into law by Governor Rick Scott on May 25, 2017, and has an effective date of January 1, 2018, amends Section 212.031, Florida Statutes, by reducing the sales tax levied on commercial real estate rental fees to 5.8 percent statewide.

Business Rent Tax Background

The concept of a statewide sales tax on commercial real estate rentals, levied since 1969,[3] is unique to the state of Florida.[4] Although a number of states, such as New York, Arizona, Hawaii, and New Mexico, have a commercial real estate leasing tax in some form,[5] only Florida's tax is specifically designed to apply to commercial leases *and* to have a statewide effect. For example, New York's tax is limited to certain types of real estate in Manhattan only and Arizona's tax may be levied in limited circumstances at the municipal level.[6]

Although the Florida Business Rent Tax is a necessary and significant part of Florida's revenue, amounting to approximately $1.7 billion annually,[7] numerous business groups, most prominently including the Florida Association of Realtors, have lobbied for years for a phased elimination of the tax, arguing that it puts Florida businesses at a competitive disadvantage against businesses in the rest of the country and is a significant disadvantage in economic development efforts to recruit new businesses to Florida and to retain and expand existing businesses. According to a report by Florida Tax Watch, high taxes do in fact factor into business relocation and expansion decisions.[8] The statewide average additional rental cost to businesses as a result of the Florida Business Rent Tax is $1 per square foot of space rented.[9] Furthermore, in 61 Florida counties, the already taxable rental payment is subject to further local sales taxes (up to 2 percent in some counties).[10] The county taxes alone could add up to $230 million more to the annual revenue raised by the Business Rent Tax.[11]

The currently Republican-dominated State Legislature, urged on by Florida Governor Rick Scott, has been sympathetic to these arguments, but has wrestled with the budget balancing issues that would result from a decrease in the substantial revenues raised by the Business Rent Tax. Several bills were introduced in Florida's 2016 Legislative Session to reduce the Business Rent Tax. Many of them would have cut the tax much more drastically than House Bill 7109, which ultimately became the compromise by balancing the issues of revenue loss against the "job killing" effect of the tax.

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When and How Does the New Tax Rate Apply?

New subsection (e) of Section 212.031(1), states:

"The tax rate in effect at the time that the tenant or person occupies, uses, or is entitled to occupy or use the real property is the tax rate applicable to the transaction taxable under this section, regardless of when a rent or license fee payment is due or paid. The applicable tax rate may not be avoided by delaying or accelerating rent or license fee payments."

The intent of this language can be somewhat confusing. Does it mean that the new 5.8 percent tax rate only applies to leases under which the tenant takes occupancy after January 1, 2018, the effective date of the bill? According to the Department of Revenue, the answer to this question is "no." Rather, the intent of the language is to address situations where rent for a defined period is paid other than in that period so that the delay or acceleration of payments will not affect the rate that applies to them.

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As an example, for a lease that is executed prior to January 1, 2018, a 6 percent tax rate would be assessed for the rent payments for the period through the month of December 2017, while a 5.8 percent tax rate would be assessed for the rent payments for the period of January 2018 and thereafter. Therefore, if a tenant paid the December 2017 rent in January of 2018, the prior 6 percent tax rate would apply rather than the new 5.8 percent rate.

Conclusion

House Bill 7109 implements a much lower tax rate reduction than any of the other 2017 legislative proposals. Still, the amendment signifies a small step forward in the business industry's war against Florida's Business Rent Tax, and it offers a compromise between maintaining necessary state revenue and further reducing the tax to allay the significant competitive disadvantages to Florida businesses that enter into rental agreements.

A substantial contribution to this article was made by Yugma Desai, a student at Stetson University College of Law and 2016 summer clerk in the West Palm Beach office of Shutts & Bowen LLP.

A. MENOR

__Arthur J. Menor__ is the Managing Partner of the West Palm Beach office of the firm of Shutts & Bowen LLP. He earned his undergraduate and J.D. degrees from the University of Florida. Mr. Menor is a Florida Bar Board Certified Real Estate Lawyer and a fellow in the American College of Real Estate Lawyers. He is the Chair of the Real Property Problems Study Committee of the Section.

Endnotes

1 §212.031, Fla. Stat. (2016).

2 Fla. HB 7109 §21 (2017).

3 Kurt Wenner, *Business Rent Tax: Now is the Time to Begin Eliminating a Clear Competitive Disadvantage for Florida Businesses*, Florida Tax Watch 6 (Apr. 2017), http://www.floridataxwatch.org/resources/pdf/BRT2017-FINAL.pdf.

4 *Id.* at 1.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 3.

9 *Id.*

10 *Discretionary Sales Surtax Information for Calendar Year 2017*, Department of Revenue (Nov. 2016), http://floridarevenue.com/Forms_library/current/dr15dssyear2017.pdf.

11 Wenner, *supra* note 3, at 6.

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