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IN THE SUPREME COURT OF FLORIDA

Case No. SC13-838
DCA Case No. 1D12-2421
L.T. Case No. 2009-CA-4319

LEON COUNTY, *et al.*

Petitioners,

v.

EXPEDIA, INC., *et al.*,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioners, ALACHUA COUNTY, CHARLOTTE COUNTY, ESCAMBIA COUNTY, FLAGLER COUNTY, HILLSBOROUGH COUNTY, DOUG BELDON, as Hillsborough County Tax Collector, LEE COUNTY, LEON COUNTY, DORIS MALOY, as Leon County Tax Collector, MANATEE COUNTY, NASSAU COUNTY, OKALOOSA COUNTY, PASCO COUNTY, PINELLAS COUNTY, DIANE NELSON, as Pinellas County Tax Collector, POLK COUNTY, JOE G. TEDDER, as Polk County Tax Collector, SEMINOLE COUNTY, ST. JOHNS COUNTY, WAKULLA COUNTY, and WALTON COUNTY, will be collectively referred to as the "Florida Counties."

Respondents, EXPEDIA, INC., HOTELS.COM, L.P., HOTWIRE, INC., ORBITZ, LLC, ORBITZ FOR BUSINESS, INC., TRIP NETWORK, INC., PRICELINE.COM, INC., TRAVELWEB, LLC, AND TRAVELOCITY.COM, LP., will be collectively referred to as the "Travel Companies."

The decision of the First District Court of Appeal, Alachua County v. Expedia, Inc., No. 1D12-2421, slip op. (1st DCA Feb. 28, 2013), is included in the Appendix, attached hereto.

STATEMENT OF THE CASE AND FACTS

A. Statement of Facts and Issues

This is a tax dispute between Petitioners, seventeen Florida counties and four county tax collectors, and Respondents, nine companies that provide tourists with the ability to book and pay for hotel rooms by telephone and through the Internet. At issue is whether the Tourist Development Tax ("TDT") authorized in § 125.0104, Fla. Stat., is a tax due on the total amount paid by the tourist to rent a hotel room, or a tax due on money received by the hotel from the Travel Companies. The Court's precedent and the plain language of § 125.0104 direct that the TDT is a tax due on the total amount paid by the tourist to rent a hotel room.

The Travel Companies utilize two business models in their hotel room reservation business. Under both models the tourist contacts the Travel Companies directly to make a room reservation, and the Travel Companies then make the hotel room reservation for the tourist. However, the amount of TDT charged by the Travel Companies differs depending on the model used. Under the "agency model" the tourist pays directly to the hotel the total consideration to rent the hotel room. The hotel charges the TDT on that total amount. The hotel subsequently remits a fee to the Travel Companies for facilitating the reservation. Under the "merchant model," the tourist pays directly to the Travel Companies the total consideration to rent the hotel room. The Travel Companies subsequently pay to

the hotel a portion of that amount and retain the remainder as a fee for facilitating the reservation. The Travel Companies charge the TDT only on the portion they pay to the hotel, but do not charge the TDT on the portion they keep.

Thus, the total amount of TDT charged for the same hotel room rental differs depending on whether the Travel Companies are utilizing the agency or the merchant model, even when the total consideration paid by the tourist to rent the hotel room is the same. This is true despite the fact that the plain statutory language ties the TDT to the "total consideration" paid by the tourist to rent the hotel room.

B. Procedural History

On May 7, 2012, the trial court entered summary judgment in favor of the Travel Companies and against the Florida Counties as a matter of law. The judge found § 125.0104 to be ambiguous and stated he believed the resolution of the issue should be left to the Legislature. The Florida Counties appealed.

On February 28, 2013, the First District Court of Appeal, in a 2-1 decision, held that the TDT is a tax imposed on the business engaged in the privilege of renting the hotel room, rather than on the tourist for the privilege of renting a hotel room in Florida. The majority further held that the TDT is due only on the amount the Travel Companies pay to hotels as the "wholesale" rate, and not on the total consideration the Travel Companies charge and receive from a tourist for the rental

of a hotel room. The majority's decision is contrary to this Court's decision in Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981).

The Florida Counties filed a motion for rehearing en banc, or in the alternative, a motion for certification to the Florida Supreme Court of a question of great public importance. On April 16, 2013, the First District Court of Appeal denied the motion for rehearing en banc and granted the motion for certification, certifying the following question to this Court as one of great public importance:

> Does the 'Local Option Tourist Development Act,' codified at section 125.0104, Florida Statutes, impose a tax on the total amount of consideration received by an on-line travel company from tourists who reserve accommodations using the on-line travel company's website, or only on the amount the property owner receives for the rental of the accommodations?

Pursuant to Rules 9.030(a)(2)(A) and 9.120 of the Florida Rules of Appellate Procedure, the Florida Counties filed a notice to invoke the discretionary jurisdiction of this Court on the grounds that the First District Court of Appeal's decision: (i) expressly and directly conflicts with a decision of the Florida Supreme Court on the same question of law, and (ii) passes on a question certified to be of great public importance. Pursuant to Rule 9.120(d), the Florida Counties submit this brief on jurisdiction only as to the first ground.

SUMMARY OF ARGUMENT

Pursuant to Article V, section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv), this Court has jurisdiction to review the decision of the

First District Court of Appeal because it expressly and directly conflicts with this Court's opinion in Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981), on the same question of law, i.e., the interpretation of the taxable privilege in § 125.0104 as the renting by the tourist of a hotel room. First, the decision is in direct conflict with Miami Dolphins' definition of the TDT as a tax imposed on funds paid by the tourist. Second, the decision misapplies Miami Dolphins' instruction that, when the language of the TDT and the separate and different state sales tax on transient rentals authorized in § 212.03, Fla. Stat. (the "Transient Rentals Tax") conflict, the provisions of the TDT prevail. Moreover, this Court should exercise its discretionary jurisdiction over this matter because it has statewide impact.

ARGUMENT

I. The Decision of the First District Court of Appeal Expressly and Directly Conflicts with this Court's Decision in Miami Dolphins.

This Court recognized in Miami Dolphins that in statutory construction, words matter and that the court's function is to interpret statutes as they are written. In Miami Dolphins, this Court decided whether § 125.0104 violated the privileges and immunities clause and the equal protection clause of the United States Constitution. 394 So. 2d at 988. The appellant argued that § 125.0104 was unconstitutional because it attempted to "impose a tax on nonresidents alone on the privilege of renting living space for less than six months." Id. Construing the

language of § 125.0104, this Court held that the TDT "does not distinguish between residents and nonresidents, rather it is imposed . . . on anyone who rents certain kinds of living space for a term of six months or less." Id.

To reach that decision, this Court relied on § 125.0104(3)(a), which provides that "every person who rents, leases, or lets . . . for a term of 6 months or less is exercising a privilege which is subject to taxation under this section." According to the Court, this language meant that "the tax is to be imposed on all renters of the covered types of premises," regardless of whether that person (i.e., the tourist) was a resident or non-resident of Florida, and therefore did not violate the privileges and immunities clause. Id. (emphasis added). In other words, the Court expressly concluded that the statutory language, "every person who rents, leases, or lets," refers to the person renting the accommodation (i.e., the tourist), not the hotel.

Judge Philip J. Padovano, in dissent, recognized that the majority's holding is contrary to Miami Dolphins and to the plain statutory language of § 125.0104:

> It is clear from the language of the Miami Dolphins opinion that the Florida Supreme Court considered the local option tourist development tax as a tax due on funds paid by the tourist, not a tax due on money received by the hotel. It is also clear from the language of the opinion that the tax is due on the gross amount of the hotel bill, not on the net amount the hotel may receive after payment of expenses or commissions to an online booking agent. Yet the majority of this court has concluded that the tax at issue is actually a tax on the business of renting a hotel room and the amount due is limited to the hotel's portion of the total funds paid by the tourist to rent the room. On this point, I believe that the majority has misapplied the holding in Miami Dolphins.

Alachua Cnty., slip op. at 15 (Padovano, J., dissenting) (internal citations omitted). As Judge Padovano emphasized, Miami Dolphins dictates that the TDT is due on the total, gross amount the tourist or customer pays to the Travel Companies, not on the net amount the Travel Companies pay to the hotels.

In contrast, the majority held that the taxable privilege being taxed for the purposes of the TDT is that of the hotel engaged in the business of renting a room to the tourist not that of the tourist renting the hotel room. The First District Court of Appeal's holding that the TDT is due only on the amount the Travel Companies pay to the hotel is incorrect and inconsistent with Miami Dolphins.

Moreover, to reach its decision, the First District Court of Appeal misapplied Miami Dolphins' instruction that, when the TDT conflicts with the Transient Rentals Tax, codified in § 212.03, Fla. Stat., the provisions in the TDT prevail. Instead, the court melded § 125.0104 and § 212.03 into a single statute, giving precedence to the language of § 212.03 where the two statutes are inconsistent.

In Miami Dolphins, this Court clarified how to construe the TDT with the Transient Rentals Tax as follows:

> When read in pari materia with chapter 212, Florida Statutes, the [TDT] act contains all of the elements and establishes the policy necessary to implement the legislature's goals. Any omissions therein are to be filled by the applicable provisions of the transient rentals tax. In the event of conflict between any provisions of the two, the provisions of the act will govern. While its provisions are used to fill any gaps in the act, the transient rentals tax is simply the base upon

> which the act rests; the act may modify and conflict with the transient rentals tax.

394 So. 2d at 988 (emphasis added).

It is clear that the language of § 125.0104 and § 212.03 are different. The TDT, §125.0104(3)(a)1, provides that "every person who rents, leases, or lets for consideration any . . . accommodations in any hotel . . . is exercising a privilege which is subject to taxation under this section[.]" (emphasis added). Section 125.0104(2)(b)2 defines "tourist" as the "person . . . who rents or leases transient accommodations." In contrast, the Transient Rentals Tax, § 212.03(1)(a), provides that "every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use . . . accommodations in, . . . connection with any hotel[.]" (emphasis added).

The words "engages in the business of renting," conspicuous in the Transient Rentals Tax, are clearly omitted from the TDT. The Legislature enacted § 212.03 in 1949, to impose taxes on any person "who engages in the business of renting." In 1977, the Legislature enacted § 125.0104 and chose not to include the phrase "engages in the business of" to describe the taxable privilege. The Legislature omitted the phrase "engages in the business of" from the description of the taxable privilege in § 125.0104 because it intended to tax a different privilege than in the older Transient Rentals Tax. Section 125.0104(3)(e) recognizes the distinction between the two taxes by providing that the TDT is "in addition to any other tax

imposed pursuant to chapter 212[.]" As Broward Cnty. v. Fairfield Resorts, Inc., 946 So. 2d 1144, 1146 n.2 (Fla. 4th DCA 2006), noted:

> Section 212.03(1), Florida Statutes, regulates the imposition and administration of the state level "transient rentals tax" and is inapplicable to the county "tourist development tax" at issue here. Section 125.0104 does not have the same requirement that the person engage "in the business of renting, leasing, letting or granting a license…."

It is well-established that "[a] court's function is to interpret statutes as they are written and give effect to each word in the statute." Fla. Dept. of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001). Moreover, "[w]hen a statute contains a definition of a word or phrase, that meaning must be ascribed to the word or phrase whenever repeated in the same statute unless a contrary intent clearly appears." Fla. Hi-Lift v. Fla. Dept. of Revenue, 571 So. 2d 1364, 1367 (Fla. 1st DCA 1990).

Consistent with these principles, Miami Dolphins clearly and expressly instructs that each of the words in § 125.0104 must be given effect and will govern whenever § 125.0104 and the provisions in Chapter 212 conflict. The First District Court of Appeal, however, did the opposite: it read the language in § 212.03 to govern. In so doing, the majority concluded that—even though § 125.0104 does not contain the words "engages in the business of" and § 125.0104 was enacted after § 212.03—the TDT is imposed on "hotels, motels, and others for exercising the privilege of engaging in the business of renting rooms to consumers." Alachua

Cnty., slip op. at 8 (emphasis added).

In short, the First District Court of Appeal ignored this Court's interpretation of the language in § 125.0104 and misapplied this Court's instruction regarding how § 125.0104 should be read with the provisions in Chapter 212. As a result, the First District Court of Appeal's decision expressly and directly conflicts with the Supreme Court's decision in Miami Dolphins.

II. This Court Should Exercise Jurisdiction to Review the Decision of the First District Court of Appeal because it has Statewide Impact.

As described above, the Travel Companies utilize two business models: the "agency model," where the hotel charges the TDT on the total amount paid by the tourist for the hotel room, and the "merchant model," at issue in this case, where the Travel Companies charge the TDT on the "net" or "wholesale" rate the Travel Companies pay to the hotel. Although the accounting practices of the Travel Companies distinguish between these two models, the substance of the transaction is the same: the tourist's rental of a hotel room arranged by the Travel Companies.

In reaching its decision, the First District Court of Appeal incorrectly looked to the form of the transaction rather than its substance and realities. See Leon Cnty. Educ. Facilities Auth. v. Hartsfield, 698 So. 2d 526, 529 (Fla. 1997) (considering substance, not form, of transaction to resolve taxation issue); Reinish v. Clark, 765 So. 2d 197, 208 (Fla. 1st DCA 2000) (court "must regard substance over mere form" in taxation issues); TEDC/Shell City, Inc. v. Robbins, 690 So. 2d

1323, 1325 (Fla. 3d DCA 1997) (same). As a result, its interpretation of the TDT provides judicial approval of a scheme whereby a hotel can avoid a tax simply by changing the entity which collects the consideration for the same transaction. This consequence is recognized by the dissent:

> If the travel companies could escape the tax merely by changing the form of the transaction, the hotels could do the same thing on their own. There would be nothing to prevent a large hotel chain from setting up a wholly owned subsidiary and then using that company for the exclusive purpose of advertising and promotion and for booking hotel rooms. The subsidiary could then charge the hotel for a portion of the room rate for every booking it makes and retain its portion of the bill tax-free. In my view, a scheme like this is no worse than the one the travel companies have devised here; nor is it any better. Both schemes seek to avoid taxation by making the transaction appear to be something other than what it is.

Alachua Cnty., slip op. at 22-23 (Padovano, J., dissenting).

The issue raised in this case has far-reaching implications in the State of Florida. As Judge Padovano warns, the majority's decision would allow hotels, as well as Travel Companies, throughout Florida to avoid collecting and remitting the full amount of TDT that is otherwise owed merely by using the scheme of creating an intermediary to collect the rental from the tourist for the same transaction—the renting of a hotel room.

CONCLUSION

Petitioners respectfully request that this Court exercise its discretionary jurisdiction to review the decision of the First District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served by U.S. Regular Mail and electronic mail to the following, on this 21st day of May, 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type size and font used in this brief is Times New Roman 14-point, in compliance with Rule 9.210(a)(2).

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