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

INITIAL BRIEF OF PETITIONERS

Roberto Martínez, Esquire
Florida Bar No. 305596
Maureen E. Lefebvre, Esquire
Florida Bar No. 475874
Stephanie A. Casey, Esquire
Florida Bar No. 97483
COLSON HICKS EIDSON
255 Alhambra Circle, Penthouse
Coral Gables, Florida 33134

Robert L. Nabors, Esquire
Florida Bar No. 97421
Harry F. Chiles, Esquire
Florida Bar No. 306940
NABORS GIBLIN & NICKERSON, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308

Edward A. Dion, Esquire
Florida Bar No. 267732
NABORS GIBLIN & NICKERSON, P.A.
208 S.E. Sixth Street
Fort Lauderdale, Florida 33301

Attorneys for Petitioners

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PRELIMINARY STATEMENT

Petitioners (Plaintiffs/Appellants below) ALACHUA COUNTY, CHARLOTTE COUNTY, ESCAMBIA COUNTY, FLAGLER COUNTY, HILLSBOROUGH COUNTY, DOUG BELDEN, 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 (Defendants/Appellees below) 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."

Citations to the record on appeal appear as R.__. The decision of the First District Court of Appeal, *Alachua County v. Expedia, Inc.*, 110 So. 3d 941 (Fla. 1st DCA 2013), is included in the Appendix, attached hereto. Emphasis is added by counsel unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on discretionary review of a 2-1 decision of the First District Court of Appeal, which certified a question of great public importance. The decision of the First District Court of Appeal conflicts with this Court's decision in *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981).

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 make reservations 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., imposes a tax on the total amount of consideration received by the Travel Companies from tourists who reserve accommodations through the Travel Companies, or only on the amount the hotel receives from the Travel Companies. The Florida Counties maintain that this Court's precedent and the plain language of § 125.0104 requires the Travel Companies to collect and remit the TDT on the total amount of consideration received by the Travel Companies from the tourists, and not on the net amount the Travel Companies ultimately pay to hotels.

Finding § 125.0104 to be ambiguous and expressing a belief that the resolution of the issue should be left to the Legislature, the trial court entered

summary judgment against the Florida Counties and in favor of the Travel Companies. (R. 16271–73.) The First District Court of Appeal, in a 2-1 decision, affirmed the trial court's decision, but certified the question of the proper construction of § 125.0104 to this Court as one of great public importance. The decision of the First District Court of Appeal is contrary to the plain statutory language of § 125.0104 and conflicts with this Court's interpretation of § 125.0104 in *Miami Dolphins*.

A. Statement of Facts Relevant to the Appeal

1. The Relevant Statute.

Florida Statute § 125.0104 authorizes counties in Florida to levy the TDT on the total consideration charged to the tourist for exercising "the taxable privilege" of renting or leasing transient accommodations as follows:

> (2) APPLICATION; DEFINITIONS—
>
> * * *
>
> (b) . . . 2. "Tourist" means a person . . . who rents or leases transient accommodations as described in paragraph (3)(a).
>
> * * *
>
> (3) TAXABLE PRIVILEGES; EXEMPTIONS; LEVY; RATE—
>
> (a)1. It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel . . . is exercising a privilege which is subject to taxation under this section . . . .
>
> * * *
>
> (b) Subject to the provisions of this section, any county in this state may levy and impose a tourist development tax on the exercise within its boundaries of the taxable privilege described in paragraph (a) . . . .

> (c) The tourist development tax shall be levied, imposed, and set by the governing board of the county at a rate of 1 percent or 2 percent of each dollar and major fraction of each dollar of the total consideration charged for such lease or rental. . . .
>
> * * *
>
> (f) The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental.
>
> (g) The person receiving the consideration for such rental or lease shall receive, account for, and remit the tax to the Department of Revenue at the time and in the manner provided for persons who collect and remit taxes under s. 212.03. . . .

§ 125.0104, Fla. Stat. Each of the Florida Counties has enacted an ordinance levying a TDT pursuant to § 125.0104. (R. 1995–97.)

2. The Travel Companies' Business Models.

The Travel Companies profit by providing customers with the ability to make reservations for hotel rooms located in the Florida Counties by telephone or over the Internet using either of two business models: the agency model or the merchant model. (R. 3849, 5139–40, 5801–02 & 6838–40.)

Agency Model. Under the agency model, the Travel Companies act as traditional travel agents. Customers reserve hotel rooms using the Travel Companies' websites. The Travel Companies pass the customers' reservations on to the hotels. Upon arrival, the customers pay the hotels directly. The hotel collects and remits the TDT owed on the total amount the customer pays in order to rent a hotel room. The hotel provides the customer with a break-down of the total

amount charged for the room and the amount of taxes collected. The Travel Companies later receive a commission from the hotels. (R. 3851–53, 5140–41, 5801–02, 6838–40 & 15511.)

Merchant Model. Under the merchant model, the Travel Companies do not act as a traditional travel agent. Instead, the Travel Companies enter into contracts with hotels allowing the Travel Companies to rent hotel rooms directly to customers. Customers reserve and pay the Travel Companies directly for hotel rooms using the Travel Companies' websites. The Travel Companies collect the total amount the customers pay when the reservation is made and send a portion of the payments to the hotels. The customer pays nothing to the hotel for the hotel room. Upon arrival, the hotels provide the hotel rooms to the customers. (R. 3855–61, 5141, 5802–805 & 6840–44.)

Customers must pay the total amount charged by the Travel Companies in order to make a hotel room reservation under the merchant model. (R. 3872, 5142, 5816–17 & 6841.) The Travel Companies, however, do not remit the TDT on the total amount the customer has paid to rent a hotel room. (R. 2131, 2272–73, 2532–33 & 2654–56.) Instead, the Travel Companies rely on the hotels to remit the TDT owed only on the portion the Travel Companies forward to the hotel. (R. 2131, 2272–73, 2532–33 & 2654–56.) No TDT is paid on the difference. (R. 2131, 2272–73, 2532–33 & 2654–56.)

Once the customer has paid the amount charged by the Travel Companies and obtained the hotel room reservation, the customer has obtained the right to occupy the hotel room. (R. 11720, 11725 & 11727.) The hotel is contractually bound to honor the Travel Companies' customer reservations and treat them equal to its own. (R. 4125, 5156, 5260–94, 6002–03 & 7032.)

3. The Differing Tax Consequences that Flow from the Two Business Models.

Although the customer may pay the same total amount to rent a hotel room under both models, the Travel Companies claim that less TDT is owed under the merchant model simply because they receive the payment directly from the customer rather than the hotel. 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.

Thus, for agency-model transactions, where the hotel receives the consideration directly from the customer, the TDT is calculated based on the total amount the customer pays to rent a hotel room. (R. 3852–53, 5140–41, 5801–02 & 6839.) In contrast, for merchant-model transactions, where the Travel Companies receive the consideration directly from the customer, the TDT is calculated based only on the "net" or "wholesale rate" which the Travel Companies pay to the hotel—not the total amount the Travel Companies charge and receive from their customers. (R. 2031.) The difference, the Travel Companies contend, is not

subject to the TDT, notwithstanding the fact that it is a part of the total amount the consumer must pay and pays to the Travel Companies in order to rent the hotel room. (*See* R. 2031, 3872, 5142, 5816–17 & 6841.)

By way of example, assume a tourist must pay $100 to rent a hotel room in Florida and that $90 is kept by the hotel and $10 by the Travel Companies. Under the agency model, the tourist would pay $100 to the hotel to rent the hotel room and the hotel would remit $10 to one of the Travel Companies for facilitating the reservation. The hotel would collect and remit the TDT on the entire $100 regardless of the fact that $10 was paid to one of the Travel Companies as commission. Under the merchant model, the tourist would pay $100 to one of the Travel Companies to rent a hotel room, and the Travel Company would pay $90 to the hotel, retaining the remainder ($10) as a fee for facilitating the reservation. The Travel Company would then rely on the hotel to remit the TDT on the $90 it received and no TDT would be remitted on the $10 the Travel Company kept.

B. Proceedings in the Circuit Court

The Florida Counties filed a motion for partial summary judgment seeking a declaration that the Travel Companies are liable as a matter of law for any unpaid TDT on the total amount they charge their customers under a plain reading of § 125.0104. (R. 1956.)

In response, the Travel Companies filed a cross-motion for summary

judgment arguing: (i) that they are not liable for any amount of unpaid tax under § 125.0104; (ii) that applying the TDT to the Travel Companies would violate the United States Constitution; (iii) that applying the TDT to them would violate the federal Internet Tax Freedom Act; and, (iv) that three of the Florida Counties lacked standing to bring a declaratory claim. (R. 2015–52.)

The trial court heard argument on the motions over three days of hearing.[1] On the third day, the trial judge announced his decision from the bench. The judge explained that it "seems" like the Florida Counties' interpretation of § 125.0104 is correct and that Travel Companies have the "obligation to transmit the tax." (R. 16262–64.) But the trial court went on to state that the Travel Companies had made a "strong case about whether or not a tax can be imposed if it is not clearly stated that they are subject to the tax." (R. 16265.)

> [T]he tax statutes have to be strictly construed somewhat in the nature of a criminal statute I would assume. . . . Thinking about on the defense standpoint is that if you got a question, you have to—if the glove don't fit, you have to acquit it, I guess.

(R. 16265–66). In the end, the court held that "since I am having so much problem in finding whether or not it is covered, I think maybe the defendants' position

[1] The Florida Counties' partial motion for summary judgment was heard on February 28, 2012. (R. 1975–77 & 15809–982.) On April 3, 2012, the hearing continued, and argument was also heard on the Travel Companies' cross-motion and the Florida Counties' motion to strike the expert testimony. (R. 3646–50, 13883–86 & 16296–507.) Argument on all three motions concluded at the hearing on April 19, 2012. (R. 16057–270.)

should hold that it is not something that I should from this bench rule that it's a taxable event simply because there are questions as to whether or not that was the intent of the legislature." (R. 16267.)

On May 7, 2012, the trial judge entered his written Summary Final Judgment, finding the following:

> To decide this case the court must first determine who and what the Legislature intends to tax. Is the Tourist Development Tax (TDT) a tax on the tourist who utilizes our hotels and motels, or is it a tax on the hotels and motels themselves for the privilege of doing business here? If the taxable privilege is exercised by the tourist who spends the night in a hotel room, then the full amount paid by that tourist to the Online Travel Company (OTC) is subject to the tax and the OTC must collect and remit the tax. If the privilege the legislature seeks to tax is the opportunity of operating a hotel in Florida, which was the Legislature's clear intention in 1949 when it passed the Transits [*sic*] Rental Tax under Florida Statute 212.03,[2] then the hotel in which the tourist stays must collect the tax on the lesser amount that the hotel receives for the room and submit that lesser amount of the tax to the counties.
>
> * * *
>
> Florida Statute 125.0104, as currently written does not clearly impose the TDT on the amount that the OTC's charge to their customers. Whether the method of doing business utilized by the OTC's is within the net cast by the statute is unclear. The ambiguity that is found in Florida Statute 125.0104 must be resolved in favor of the OTC's….
>
> [T]he Court should not expand the scope of the taxing authority by assuming that the Legislature intends to include this completely new method of doing business under the currently existing taxing scheme.

[2] Section 212.03 of the Florida Statutes is discussed below in the argument section of the brief.

(R. 16271–73.)

C. Disposition in the First District Court of Appeal.

The First District Court of Appeal, in a 2-1 decision, affirmed the trial court's decision. *Alachua Cnty. v. Expedia, Inc.*, 110 So. 3d 941 (Fla.1st DCA 2013). The majority began by stating that the TDT imposes a duty on hotels to charge, collect, and remit the tax. *Id*. at 945. The majority then noted that this Court in *Miami Dolphins* "recognized the obvious—the [tourist development] tax is imposed on tourists and residents and collected by the hotels." *Id*. It nonetheless held that the tax was not imposed on the tourists for exercising the privilege of renting a hotel room in Florida, but on "hotels, motels, and others for exercising the privilege of engaging in the business of renting rooms to consumers." *Id*. at 944. 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.

Judge Philip J. Padovano dissented. In his dissent, Judge Padovano 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*.

Id. at 947 (Padovano, J., dissenting) (internal citations omitted).

Judge Padovano also recognized the differing tax consequences of the Travel Companies' two business models:

> When the travel company employs the agency model, the tax is computed and paid on the full amount of the bill for the room, and the fee that is remitted to the travel company is treated as an expense. In contrast, the tax is not computed on the full amount of the bill if the transaction is arranged under the merchant model. In that case, the tax is paid only on the portion of the funds paid by the tourist that are actually remitted to the hotel. The tax is not paid on that portion of the funds retained by the travel company.
>
> Because the merchant model is merely a different method of completing the same transaction, it cannot have the effect of changing the tax liability on the transaction. . . .
>
> 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 for 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.

Id. at 950–51 (Padovano, J., dissenting). The majority's decision thus allows hotels throughout Florida to avoid paying the full amount of the TDT that is otherwise owed by merely using the scheme of creating an intermediary to collect the rental from the tourist for the same transaction—the renting of a hotel room.

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?

The Florida Counties invoked this Court's discretionary jurisdiction. On September 10, 2013, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Court should answer the certified question by holding that the TDT codified at § 125.0104, Fla. Stat., imposes a tax on the total amount of consideration received by a travel company from tourists who reserve accommodations using the travel company's website. Accordingly, this Court should reverse the decision of the First District Court of Appeal and remand with instructions to reverse the judgment of the trial court and remand to the trial court for entry of summary judgment in favor of the Florida Counties and against the Travel Companies. This conclusion is required by the plain language of § 125.0104 and this Court's precedent.

First, the plain language of § 125.0104 makes clear that the tax is levied on the total consideration (not on merely a portion of the consideration) that the tourist pays for a room. This construction is supported by this Court's decision in *Miami Dolphins, Ltd. v. Metro. Dade County*, 394 So. 2d 981 (Fla. 1981), which concluded that the tax is imposed on the renter. There is simply no textual support for the conclusion that a portion of the consideration paid by the tourist for a hotel room is exempt from taxation.

Second, § 125.0104 cannot be read identically with § 212.03. The language of the two statutes is obviously different. A comparison of their respective legislative histories demonstrates that the Legislature intentionally omitted

language in § 125.0104, which is conspicuous in § 212.03. Moreover, this Court in *Miami Dolphins* made clear that the § 125.0104 and § 212.03 are not identical, and where the two statutes conflict, § 125.0104 prevails.

Third, even if the district court was correct in concluding that § 125.0104 must be interpreted identically with § 212.03—despite its different statutory language—the Travel Companies are still liable for unpaid tourist development taxes on the total amount they charge their customers to rent hotel rooms because they are exercising the taxable privilege of engaging in the business of renting as described in § 212.03. And they are liable for remitting tourist development taxes on the total amount of consideration they collect from their customers just the same. Either way, the Travel Companies are liable.

ARGUMENT

This case presents a question of statutory interpretation and construction, which is a question of law subject to this Court's *de novo* review. *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012). In addition, *de novo* review is the appropriate standard because the question presented for this Court's review was resolved on summary judgment. *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005).

I. The Plain, Unambiguous Language of § 125.0104 Establishes that the TDT is Levied on the Total Amount of Consideration Received by the Travel Companies from the Tourist to Rent a Hotel Room.

The majority's holding in *Alachua County* that a portion of the total amount of consideration paid by the tourist to rent a hotel room is exempt from the TDT when the Travel Companies use the merchant business model is contrary to the plain language of § 125.0104 and this Court's decision in *Miami Dolphins*.

Three provisions of § 125.0104 make it perfectly clear that the Travel Companies are liable for any unpaid tourist development taxes on the total amount they charge their customers to rent hotel rooms under the merchant model:

> 1. Under the plain language of § 125.0104(3)(a), the tax is imposed on Travel Companies' customers for the privilege of renting hotel rooms in Florida. This conclusion is supported by this Court's decision in *Miami Dolphins*.
>
> 2. Under the plain language of § 125.0104(3)(c), the tax is due on the total amount the Travel Companies charge their customers, not just the portion of that amount they forward to the hotels.

> 3. Under the plain language of § 125.0104(3)(f) and (g) the Travel Companies are liable for remitting the tax because they receive the payment directly from their customers.

Each point is discussed below.

A. Principles of Statutory Construction.

"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). "[S]tatutory interpretation begins with the plain meaning of the statute." *Fla. Birth-Related Neurological Injury Comp. Assoc. v. Dept. of Admin. Hearings*, 29 So. 3d 992, 997 (Fla. 2010). "When a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears." *Nicholson v. State*, 600 So. 2d 1101, 1103 (Fla. 1992). In the absence of an express statutory definition, "courts may resort to a dictionary definition to determine the 'plain and ordinary meaning' of the statutory language." *Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 292 (Fla. 2000)

It is only when a statute is ambiguous that the court may resort to the rules of statutory interpretation and construction. *Neurological*, 29 So. 3d at 997. "[E]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the [statute], it will not deem itself authorized to depart from the plain meaning of the language which is free from

ambiguity." *Neurological*, 29 So. 3d at 997 (citation omitted).

Importantly, an ambiguity does not exist unless reasonable persons can find different meanings in the same statute. *Forsythe v. Longboat Key Beach Erosion Control Dist*., 604 So. 2d 452, 455 (Fla. 1992). "[T]he fact that the legislature may not have anticipated a particular situation does not make the statute ambiguous." *Id*. at 456. Likewise, a statute is not rendered ambiguous merely because it is complex and requires some analysis. *Cf. Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003); *First Prof'ls Ins. Co., Inc. v. McKinney*, 973 So. 2d 510, 514 (Fla. 1st DCA 2007); *State Farm Fire & Cas. Co. v. Oliveras*, 441 So. 2d 175, 178 (Fla. 4th DCA 1983).

B. The Tourist Exercises the Taxable Privilege in § 125.0104.

The TDT is imposed on tourists who rent hotel rooms in Florida. This interpretation is supported by the plain language of § 125.0104 and the Florida Supreme Court's precedent.

i. The Plain Language of § 125.0104

The plain language of § 125.0104 imposes the TDT on tourists who rent hotel rooms in Florida.

Paragraph (3)(b) of § 125.0104 authorizes counties to impose a TDT "on the exercise within its boundaries of the taxable privilege described in paragraph (a)." Paragraph (3)(a), in turn, describes the taxable privilege as that exercised by "every

person who rents, leases, or lets for consideration" any hotel room for a term of six months or less. The question is: who is the person that "rents, leases, or lets" as described in paragraph (3)(a)? The answer is contained in Section 125.0104 (2)(b).

Section 125.0104(2)(b) provides the definitions that apply "for purposes of this section," and it defines "Tourist" as "a person … who rents or leases transient accommodations as described in paragraph (3)(a)." It follows that the defined term "tourist" is the "person" referenced in the paragraph (3)(a) as exercising the taxable privilege.

The Travel Companies argued below—and the *Alachua County* majority agreed—that the terms "rent," "lease," and "let" denote actions taken by the owner of the property, in this case the hotel. The *Alachua County* majority therefore concluded that the "total consideration" is the net amount the hotels receive from the Travel Companies, not the total amount the Travel Companies receive from the customer. 110 So. 3d at 946.

But, as Judge Padovano noted, the verbs "rent," "lease," and "let" are also used to describe an action taken by the person who pays for the right to occupy the property. *Id*. at 948–49 (Padovano, J. dissenting). Black's Law Dictionary defines the verb "rent" only as "to pay for the use of another's property." *Black's Law Dictionary* 1411 (9th ed.). The Oxford Dictionaries Online also defines the verb "rent," followed by an object (as it appears in § 125.0104), only as the payment of

money for the use of a property or other tangible thing. *Oxford Dictionaries Online*, OxfordDictionies.com ("pay someone for the use of (something, typically property, land, or a car): they rented a house together in Spain."). Black's Law Dictionary provides dual definitions of the verb "lease": "to grant the possession and use of []land . . . to another" and "to take lease of; to hold by lease <Carol leased the townhouse from her uncle>." *Black's Law Dictionary* at 972. The verb "lets" is statutorily defined to mean "leasing or renting of . . . hotels." § 212.02(10). "Let" is statutorily synonymous with "leasing or renting."

In footnote 5, the *Alachua County* majority also makes much of the fact that the statute provides that the privilege exercised is "renting, leasing, or letting a room 'for consideration.'" 110 So. 3d at 945 n.5. The majority explains that the use of the preposition "for" indicates that the taxable privilege is exercised by the person who rents accommodations to the tourist, not the other way around, because "[i]in a contract, one party sells a product or service for consideration, and the other party pays for the product or service with that consideration." *Id*. (emphasis in original). The *Alachua County* majority goes on to cite to other statutory subsections that purportedly recognize this principle. *Id*. This analysis, however, is unsound. As an initial matter, the statutory subsections the court cites to do not involve the phrase "for consideration." Rather, they concern the phrase "for the lease or rental." But most importantly, the phrase "for consideration" is used in

reference to the lessee or rentee in other, relevant statutory definitions. For example, "lease," "let," or "rental" are statutorily defined as "the leasing or rental of tangible personal property and the possession or use thereof by the lessee or rentee for a consideration." § 212.02(10)(g).

It is clear from the review of dictionary and statutory definitions that the use of the verbs "rent," "lease," and "let" and the use of the prepositional phrase "for consideration" do not naturally nor necessarily denote the granting of possessory or use rights in property, as the *Alachua County* majority concluded. And the fact that words in a statute, standing alone, may have multiple meanings does not signify that the statute is ambiguous. "[A]mbiguity does not result automatically just because a word in the English language has more than one possible meaning." *Davis v. Nationwide Life Ins. Co.*, 450 So. 2d 549, 552 (Fla. 5th DCA 1984). Rather, courts must consider the context in which the word is used to determine whether only one meaning is reasonable. *Id*. Where the context shows only one meaning in reasonable, there is no ambiguity. *Id*.

The *Alachua County* majority simply disregarded the plain language of § 125.0104, including statutory definitions, and failed to read the statute as a whole. *See Nicholson*, 600 So. 2d at 1103 ("When a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent clearly appears.");

Forsythe, 604 So. 2d at 455 ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole." (emphasis in original)). Reading together each subsection of § 125.0104—as this Court must—the plain language makes clear that it is the person who pays consideration to occupy the hotel room, *i.e.*, the tourist, who exercises the taxable privilege described in § 125.0104 and, therefore, that the tax is imposed on the tourist.

ii. This Court's Analysis in *Miami Dolphins* is Controlling.

That the plain language of § 125.0104 imposes the TDT on tourists who rent hotel rooms is not an issue of first impression. This Court addressed this issue in *Miami Dolphins*, 394 So. 2d 981. There, the Court concluded that the TDT is a tax "imposed on all renters of the covered types of premises." *Id.* at 989.

At issue in *Miami Dolphins* was whether § 125.0104 violated the privileges and immunities clause and the equal protection clause of the United States Constitution. *Id.* 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.* Obviously, the words "anyone who rents" refer to a tourist and not a hotel, since a hotel cannot be

a nonresident.

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.* In other words, the Court expressly concluded that the statutory language—"every person who rents, leases, or lets"—refers to the person renting the hotel room (i.e., the tourist), not the hotel.

Although both the trial court and the majority in *Alachua County* acknowledged this Court's decision in *Miami Dolphins*, both courts have declined to apply it. In its ruling from the bench the trial court stated that *Miami Dolphins* was further support for the plain reading of § 125.0104, but then stated that "I'm not sure whether it's *dicta* or not" without deciding. (R. 16266.) The First District Court of Appeal stated that *Miami Dolphins* "recognized the obvious—the tax is imposed on tourists and residents," but then went on to hold that the TDT is a tax imposed on the business (i.e., the "hotels, motels, and others") for the privilege of renting the hotel room to the tourist, rather than on the tourist for the privilege of renting a room from the Travel Companies.

In his dissent, Judge Padovano highlighted the conflict between the *Miami Dolphins*' definition of the TDT and the majority's opinion. Judge Padovano agreed with the majority that it is "obvious" that the TDT is imposed on tourists, but noted that the *Alachua County* majority's holding runs contrary to this Court's definition of the tax. As Judge Padovano explained, "the supreme court defined the nature of the tax by stating that it was a tax on money paid by the tourist, not as a tax on the money received by the hotel after payment of expenses." In short, *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 hotels receive from the Travel Companies.

C. "Total Consideration" Refers to the Total Amount the Tourist Pays to the Travel Companies to Rent a Hotel Room.

Under the plain language of §125.0104, the TDT is owed on the total amount the customer pays to the Travel Company, regardless of whether the hotel ultimately receives all, some, or none of that amount. There is simply no textual support in § 125.0104 for the conclusion that a portion of the consideration paid by the tourist to the Travel Companies for a hotel room is exempt from taxation.

Pursuant to § 125.0104, the TDT is levied as a percentage of "each dollar and major fraction of each dollar of the <u>total consideration charged</u> for such lease or rental." § 125.0104(3)(c). The critical question is what constitutes "the total consideration charged" for the lease or rental, which is subject to the TDT.

A plain reading of the statutory language makes clear that the "total consideration" that is subject to the TDT is the total amount of money paid by the tourist, not the net amount retained by the hotel. *See Alachua Cnty.*, 110 So. 3d at 949 (Padovano, J. dissenting) (stating that the use of the language in § 125.0104(c)(3) "undercuts the argument that a portion of the consideration can be exempted from taxation"). The reason is simple: the "total consideration charged for such lease or rental" refers to the total consideration charged by the Travel Companies to the customer, not the amount the Travel Companies later forward to the hotels. A careful analysis of the statutory language and the merchant business model makes that clear.

The language in § 125.0104(3)(f) is helpful to understanding what is meant by "total consideration charged." That subsection mandates that the TDT "shall be charged by the person receiving the consideration for the lease or rental" and "shall be collected from the . . . customer at the time of payment of the consideration for such lease or rental." § 125.0104(3)(f). Under the plain reading of the statute, the "person receiving the consideration" can only refer to the person receiving the consideration from the customer because § 125.0104 requires this same person to charge and collect the tax "from the . . . customer at the time of payment of the consideration." *See* § 125.0104(3)(f).

In merchant-model transactions, the Travel Companies are the "person[s]

receiving the consideration" from the customer. Under that business model, the Travel Companies—not the hotels—charge the customer for the hotel room rental and receive from the customer the total amount of consideration for the hotel room rental. The moment in which the customer pays the Travel Companies for the hotel room is the "time of payment of the consideration for such lease and rental." Notably, section 125.0104(3)(f) says nothing about subtracting any portion from the total consideration paid by the customer before charging and collecting the TDT.

Put simply, § 125.0104 is clear that "total consideration" means the total amount that the customer pays to the Travel Companies.

Nonetheless, the Travel Companies have maintained that, under § 125.0104, it is not the total amount they charge to the customer which is subject to the tax, but only the portion that the Travel Companies ultimately pay to the hotel. Any difference—they argue—is not subject to the tax. The *Alachua County* majority agreed. But this theory is completely untethered from the plain language of the statute.

There is no language anywhere in § 125.0104 that supports the apportionment of the total amount charged to tourists into taxable and nontaxable amounts. Nor is there any language which would base such an apportionment upon whether an amount was ultimately paid by the Travel Company to a hotel.

To the contrary, "total" is a word of broad import. It means "whole; not divided; full; complete." *Black's Law Dictionary* 1627. To support its holding, the *Alachua County* majority simply ignored the Legislature's deliberate inclusion of the adjective "total" to modify the noun "consideration." *See Fla. Mun. Power Agency*, 789 So. 2d at 324 (when interpreting statutory language, a court must "give effect to each word in the statute"). The Legislature's use of "total consideration charged" does not allow the restrictive interpretation advanced by the Travel Companies, and accepted by the *Alachua County* majority.

To support its holding, the *Alachua County* majority focused on the statute's use of the word "rental," which the court equated to "net rent," i.e., only the price of the occupancy without the addition of expenses such as taxes. 110 So. 3d at 946. The court's analysis on this issue, however, is flawed. As the court noted, Black's Law Dictionary defines "rental" as the "income received from rent." *Black's Law Dictionary* 1411. But that is the second definition that appears in the entry for the noun "rental." The first definition is the "amount received as rent." *Id*. This definition is distinguished in Black's Law Dictionary from the more narrow definition of "net rental," which the *Alachua County* majority also cites to support its reasoning. The use of the modifier "net," however, changes and narrows the definition of the word "rental" to mean only "the amount remaining after deducting all expenses from the gross rental income." *Id*. The *Alachua*

County majority's conclusion that "rental" means "net rent" is simply incorrect and unsupported by the plain language of the statute. If the legislature meant "net rent" as opposed to "total consideration" it would have drafted § 125.0104 accordingly. *See Alachua Cnty. v. Dept. of Revenue*, 466 So. 2d 1186, 1187 (Fla. 1st DCA 1985) ("[c]onstruction must not be so strained that it forces a conclusion that is unreasonable and results in an interpretation that conflicts with legislative intent expressed in plain language.").

The Florida Department of Revenue reached an analogous conclusion in its administrative rule regarding the transient rentals tax: "[r]ental charges . . . include any charge . . . for the use of items or services that is required to be paid . . . as a condition of the use or possession or the right to use or possession of any transient accommodation . . . even when the charges . . . are [s]eparately itemized." *See* Fla. Admin. Code. R. 12A-1.061(3)(b)1. Likewise, a federal court addressing a similar tax noted that the tax is imposed on the "bargain struck" between the Travel Company and the customer, i.e., the payment of money for access to a hotel room regardless of whether that total amount includes fees for the Travel Companies' services. *Vill. of Rosemont, Ill. v. Priceline.com Inc.*, No. 09 C 4438, 2011 WL 4913262, at *3 (N.D. Ill. Oct. 14, 2011).

The Travel Companies have contended that this conclusion cannot apply to their transactions because they provide a service to customers and taxing the

amount of the charge they retain for providing that service would be tantamount to imposing a service tax. This is yet another argument which has been flatly rejected by the Florida Supreme Court sixty years ago. "Although the tax is determined upon the price charged for the merchandise or services, it is not a tax upon personal property or services, but upon the privilege of selling the same, and it is measured by the extent to which the privilege is enjoyed." *See Gaulden*, 47 So. 2d at 574. Moreover, the Travel Companies fail to explain why this same "service" is taxable under the agency model, but should not be under the merchant model simply because the customer pays them directly instead of the hotel.[3]

Accordingly, the Florida Counties are entitled to a declaration that, under the plain language of § 125.0104, the Travel Companies are liable for unpaid TDT on the total amount they charge their merchant-model customers.

D. Section 125.0104 Requires the Travel Companies to Remit the Tourist Development Tax.

To reach its decision, the *Alachua County* majority conflates two separate parts of the statutory structure: (i) the exercise of the taxable privilege; and (ii) the duty to collect and remit the tax that is paid. The *Alachua County* majority

[3] The mere difference in the form of a transaction cannot have the effect of changing its tax liability, where the substance of the transaction is the same. *See Alachua Cnty*., 110 So. 3d at 950 (Padovano, J., dissenting). When resolving tax issues, the court must look to the substance of the transaction, rather than its form or label. *See Leon Cnty. Educ. Facilities Auth. v. Hartsfield*, 698 So. 2d 526, 529 (Fla. 1997); *Reinish v. Clark*, 765 So. 2d 197, 208 (Fla. 1st DCA 2000); *TEDC/Shell City, Inc. v. Robbins*, 690 So. 2d 1323, 1325 (Fla. 3d DCA 1997).

incorrectly reasoned that a person who has a duty to collect and remit the tax must be the same person who is exercising the taxable privilege. *See* 110 So. 3d at 944. Based on that premise, the majority concluded that the taxable privilege in § 125.0104 is being exercised by "hotels, motels, and others" "for the privilege of engaging in the business of renting rooms to consumers." *Id*. This conclusion is simply wrong and runs counter to the plain statutory language in § 125.0104.

Imposing a tax on a consumer and then imposing the obligation to collect the tax on the person (usually a business) collecting payment from the consumer is a standard and long-standing statutory device. *See, e.g., Gen. Trading Co. v. State Tax Comm'r*, 322 U.S. 335, 338–39 (1944). And it is the statutory device used here. Although the tax is imposed on their customers, under the plain language of § 125.0104, the Travel Companies are obligated to collect and remit the TDT for merchant-model transactions because they receive the consideration directly from their customers.

Paragraph 3(f) of § 125.0104 mandates that the TDT "shall be charged by the person receiving the consideration for the lease or rental" and "shall be collected from the . . . customer at the time of payment of the consideration for such lease or rental." § 125.0104(3)(f). As discussed above, under the plain reading of the statute, the "person receiving the consideration" can only refer to the person receiving the consideration <u>from the customer</u> because § 125.0104 requires

this person to charge and collect the tax "from the . . . customer at the time of payment of the consideration." *See* § 125.0104(3)(f). Thus, whoever receives the payment for the rental directly from the customer must also charge and collect the TDT from the customer at the time the consideration is paid. Further, under paragraph (3)(g) of § 125.0104, the same person obligated to collect the tax is also obligated to remit the tax to the tax collecting authority. *See* § 125.0104(3)(g).

The plain language of § 125.0104 contains no requirement that the person collecting the consideration be engaged in any particular type of business, be located in Florida, or that the receipt of the consideration occur in Florida in order for that person be subject to the obligation to collect and remit. The only requirement is that they receive the consideration from the tourist who rents a hotel room located in Florida.

Thus, to the extent the Travel Companies are collecting payment from tourists who are renting hotel rooms located within the Florida Counties, the Travel Companies are obligated to collect the TDT from the consumer at the time of payment and remit the tax to the tax collecting authority. While the hotel may ultimately receive some payment for the rental, under the merchant model it never receives payment from the customer and, therefore, is not the person obligated to collect and remit the tax under § 125.0104. In the merchant-model transactions, the Travel Companies are always the "person[s] receiving the consideration" and

they are responsible for collecting and remitting the tax under § 125.0104.

The Travel Companies argued below that, notwithstanding the plain language of § 125.0104(3)(f) and (g), they are not obligated to collect and remit the TDT because they do not satisfy statutory definition of "dealer" in Fla. Stat. § 212.06(2)(j).[4] Both the trial court and the First District Court of Appeal correctly declined to rely on this theory; it is simply wrong.

Section 125.0104 clearly states that the person receiving the consideration from the tourist is required to collect and remit the TDT. § 125.0104(3)(f) & (g). There is *no* requirement that such person also satisfy the definition of "dealer" under the separate sales, storage, and use tax. Indeed, §125.0104(3)(g) explicitly states that the person who receives the consideration has the same obligations as such dealers, but does not require that they satisfy the definition of dealer:

> The same duties and privileges imposed by chapter 212 upon dealers in tangible property, respecting the collection and remission of tax; the making of returns; the keeping of books, records, and accounts … shall apply to and be binding upon all persons who are subject to the provisions of this section.

Thus, to the extent the Online Travel Companies receive consideration for the rental of hotel rooms within the Florida Counties, they are obligated to collect

[4] Section 212.06 establishes the concept of a "dealer" as the person who is responsible for collecting the separate sales, storage, and use taxes on tangible property.

and remit the TDT and they are subject to the same obligations as dealers in tangible property regardless of whether they satisfy the definitions of dealer contained in the sales, storage, and use tax statute. The Legislature burdened them with the same obligations as dealers even though they are not dealers.

II. Section 125.0104 Cannot be Interpreted Identically with Section 212.03.

The Travel Companies argued below that § 125.0104 must be interpreted identically with the separate transient rentals tax levied under Fla. Stat. § 212.03 to impose a tax on persons engaged in the business of renting hotel rooms to tourists. The trial court adopted this argument when it held that § 125.0104 was ambiguous because it could also be read to tax the same privilege as § 212.03. (R. 16271–72.) The *Alachua County* majority also read § 125.0104 together with § 212.03, concluding that the business of operating a hotel and renting out rooms to tourists is the privilege being taxed in § 125.0104. The courts below are wrong.

First, the language at issue in § 125.0104 is not ambiguous. As Judge Padovano succinctly put it: "[Section 125.0104] is not confusing or unclear. It imposes a tax on the funds paid by a tourist to rent a room in a hotel. The matter is no more complicated than that." *Alachua Cnty.*, 110 So. 3d at 949–50 (Padovano, J., dissenting). Nor did *Miami Dolphins* find the statutory language confusing when it assigned the statute precisely this meaning.

Here, there is no reason to depart from the plain meaning of the statutory

language in § 125.0104. *See supra* Section I.A–C.

Second, to the extent legislative history can be considered to support the plain meaning of a statute, *Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 293 (Fla. 2000); *Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999), the historical contrast between the language of § 125.0104 and § 212.03 actually lends further support to the Florida Counties' position.

Almost thirty years before enacting § 125.0104, the Florida Legislature enacted § 212.03 as part of the Florida Revenue Act of 1949 (the "1949 Act"), ch. 212, Fla. Stat. The 1949 Act established Florida's current sales and use tax scheme and levied many new taxes.[5] Section 212.03 levied a state-wide transient rentals tax:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use any living quarters … in, from, or a part of, or in connection with any hotel. . . . For the exercise of such taxable privilege, a tax is hereby levied in an amount equal to 6 percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental.

§ 212.03(1)(a).

Section 212.03 expressly contains the words "engages in the business of

[5] For instance, § 212.05 levies a sales, storage, and use tax on tangible personal property, and the subsequent sections of Chapter 212 go on to establish the administrative procedures for the collection and remittance of the tangible-property sales, storage, and use tax, the penalties, for non-compliance, *etc*. *See* §§ 212.06, .07, .11 & .12.

renting or leasing" hotel rooms. *Id.* In contrast, § 125.0104 does not contain that language. This is a critical difference. The Florida 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.[6]

By 1959, the Florida Supreme Court had made clear in several decisions interpreting § 212.03 that the phrase "engages in the business of" signified that the taxable privilege was not that exercised by the tourist (or renter), but that exercised by the person on the other side of the transaction who "engages in the business" of renting to the renter, e.g., landlords and not tenants. *See Green v. Panama City Housing Auth.*, 115 So. 2d 560 (Fla. 1959), *aff'g* 110 So. 2d 490, 491 (Fla. 1st DCA 1959) ("It follows, since it is the landlord and not the tenant who 'engages in the business,' that the tax was intended to be imposed on the landlord."); *Gaulden*

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[6] Florida's Fourth District Court of Appeal has recognized this important distinction:

> 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 . . . ."

Broward Cnty. v. Fairfield Resorts, Inc., 946 So. 2d 1144, 1146 n.2 (Fla. 4th DCA 2006).

v. Kirk, 47 So. 2d 567 (Fla. 1950). In 1964, the Florida Supreme Court, yet again, reaffirmed the significance of the phrase "engages in the business of" when used by the Legislature to describe a taxable privilege:

> It is well settled that the sales or use tax [as levied by Fla. Stat. § 212.05] is a tax on the privilege of engaging in a particular business . . . . The tax is not levied against the consumer, but upon the businessman who is engaged in the business . . . .

Ryder Truck Rental, Inc. v. Bryant, 170 So. 2d 822, 825 (Fla. 1964).

It was against this backdrop that the Legislature chose not to include the phrase "engages in the business of" to describe the taxable privilege when it enacted § 125.0104 in 1977. Each increase in the rate of taxation of the TDT since 1977 has reemphasized the privilege taxed by the TDT by explicit statutory reference. *See* § 125.0104(3)(1), Fla. Stat. (increasing the TDT in 1988 by "an additional 1-percent tax on the exercise of the privilege described in paragraph (a) . . . ."). See identical statutory references to the taxable privilege enacted by the Legislature in TDT rate increases in Chapter 89-356, Laws of Florida (renumbered as section 125.0104(3)(m) in Chapter 96-397, section 46, Laws of Florida) and in Chapter 94-275, section 1, Laws of Florida [7] (renumbered as section 125.0104(3)(n), Florida Statutes, due to amendments in Chapter 96-397, section 46, Laws of Florida) .

[7] Identical language was also included in Chapter 94-338, section 37, Laws of Florida, approved in the same legislative session.

Knowing the judicial interpretation given to the phrase "engages in the business of," it must be presumed the Legislature omitted the phrase for a reason. Very simply, it omitted the phrase because it intended to impose the tax on tourists who rent hotel rooms in Florida and not on persons engaged in the business of renting to tourists. *See Crescent Miami Ctr., LLC v. Fla. Dept. of Revenue*, 903 So. 2d 913, 918 (Fla. 2005) ("[T]he legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute."); *c.f. Capella v. City of Gainesville*, 377 So. 2d 658, 660 (Fla. 1979) ("When the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment."). If the Legislature had wanted to impose a tax on the business of renting out the accommodation, as the Travel Companies argued below, it knew precisely how to do so by using the phrase "engages in the business of." Its failure to include that language demonstrates that different result was intended. As Judge Padovano correctly concluded in his dissent, "[i]f we are to draw any conclusion from this omission at all, it would be that the taxable event for the purpose of section 125.0104 is not the privilege of operating a hotel." 110 So. 3d at 950 (Padovano, J., dissenting) (emphasis in original).

Third, the *Alachua County* majority's holding misapplies *Miami Dolphins*' explicit instruction that § 125.0104 cannot be read identically with the Transient

Rentals Tax, codified in § 212.03, when the two statutes conflict.

Indeed, this Court in *Miami Dolphins* made clear that § 125.0104 and § 212.03 are not identical. 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.

It is clear that the language of § 125.0104 and § 212.03 is 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[.]" 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[.]"

The words "engages in the business of renting," conspicuous in the Transient

Rentals Tax, are clearly omitted from the TDT. The phrase "granting the license to use" is also omitted from the TDT. In fact, § 125.0104(3)(e) expressly recognizes the distinction between the two taxes by providing that the TDT is "in addition to any other tax imposed pursuant to chapter 212," which would necessarily include § 212.03.

Where the language of the two taxes differ—as they obviously do with respect to the definition of the taxable privilege in § 125.0104 and § 212.03—*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 *Alachua County* majority, 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.*, 110 So. 3d at 944.

III. Even if the Taxable Privilege in § 125.0104 is Construed to be the Same as in § 212.03, the Travel Companies are not Entitled to Summary Judgment.

The First District Court of Appeal erred in affirming the trial court's grant of summary judgment in favor of the Travel Companies and against the Florida Counties. Summary judgment was inappropriate even if the trial judge correctly

found that the taxable privilege in § 125.0104 was ambiguous as applied to the Travel Companies. The courts below misapplied the law and ignored genuine issues of fact in entering and affirming summary judgment in favor of the Travel Companies and against the Florida Counties.

The Florida Counties argued below that § 125.0104 imposes a tax on tourists who rent hotel rooms in Florida. The Travel Companies argued that § 125.0104 imposes a tax on persons engaged in the business of renting that is identical to the taxable privilege in § 212.03. Rather than resolve the issue, the trial court held that § 125.0104 was ambiguous as to whom the tax was imposed on and that the Travel Companies were therefore entitled to summary judgment. The *Alachua County* majority construed § 125.0104 as identical to § 212.03 and held that the tax was imposed on "hotels, motels, and others for exercising the privilege of engaging in the business of renting rooms to consumers." 110 So. 3d at 945–46.

Although the trial court made no express findings of fact regarding this issue in its Summary Final Judgment, the *Alachua County* majority found that the Travel Companies "do not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers." 111 So. 3d at 946. The majority went on the conclude that "[t]he consideration the Travel Companies ultimately keep is not for the rental or lease, but for their service in facilitating the reservation." *Id*.

As an initial matter, the *Alachua County* majority's findings of fact that the

Travel Companies do not grant possessory or use rights must be disregarded because they were made in the first instance on appeal. *Douglass v. Buford*, 9 So. 3d 636, 637 (Fla. 1st DCA 2009) (appellate court is precluded from making factual findings where the trial court order does not contain sufficient findings of fact); *Farneth v. State*, 945 So. 2d 614, 617 (Fla. 2d DCA 2006) ("A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact."). And in fact, as discussed below, the evidence demonstrates that the Travel Companies do grant possessory or use rights in a hotel room.

Moreover, the principle that "[a]ny ambiguity in the provisions of the tax statute must be resolved in favor of the taxpayer," *Fla. Hi-Lift v. Dept. of Revenue*, 571 So. 2d 1364, 1368 (Fla. 1st DCA 1990), which the *Alachua County* majority recited in its opinion, does not come into play here. That principle is significant when one of the interpretations permits a more favorable result. Not every ambiguity, however, presents a more favorable interpretation for the taxpayer. If a tax statute has two reasonable interpretations, both of which reach the same result, the ambiguity is of no avail to the taxpayer.

Here, even assuming § 125.0104 could be reasonably read to tax the same privilege as § 212.03, the result is the same: the Travel Companies are liable for any unpaid TDT on the total amount they charge their customers. This is true for

at least two reasons.

First, even if the *Alachua County* majority is correct that § 125.0104 must be read to impose the same tax as § 212.03, the evidence demonstrates that the Travel Companies are liable for that tax. The Travel Companies are "engage[d] in the business of renting, leasing, letting, or granting a license to use" hotel rooms as contemplated by § 212.03(1)(a).

Florida Statute § 212.02 defines "business" to mean "any activity engaged in by any person,[8] or caused to be engaged in by him or her, with the object of private . . . gain." Clearly, the Travel Companies exist for the purpose of private gain, *i.e.*, turning a profit. (*E.g.*, R. 3698, 4951, 5622, 6559, 6747.) The issue, therefore, is whether the Travel Companies directly engage in the activity of "renting, leasing, letting, or granting a license to use" hotel rooms or cause the activity of "renting, leasing, letting, or granting a license to use" hotel rooms to be engaged in by others. *See* §§ 212.02(2) & .03(1)(a). The evidence, which the lower courts completely disregarded, demonstrates that the Travel Companies do both. The Florida Counties submitted sixty-four pages of facts, with citations to the evidentiary record, demonstrating that the Travel Companies are "engaged in the business of renting hotel rooms." (R. 13718–76.)

The evidence demonstrates that what the Travel Companies sell—what they

[8] "Person" is defined to include corporate entities and partnerships as well as individuals. § 212.02(12).

charge their customers for—is a confirmed reservation for a hotel room, *i.e.*, the right to use or occupy a hotel room. (R. 11720, 11725 & 11727.) A customer who obtains this right from the Travel Company has the same rights as a customer who obtains this right directly from the hotel. (*Id.*) In fact, the Travel Companies compete with the hotels to rent hotel rooms. (*Id.*) Moreover, the customer believes they are obtaining the right to occupy a hotel room from the Travel Company. The Travel Companies advertise to the public that they sell that right and communicate to their customers that the hotel room is reserved and confirmed. (*E.g.*, R. 2152, 2354, 9881–88, 11504–11, 11524–25, 11689, 12579–81.) And the hotels recognize this right granted by the Travel Companies. (R. 4125, 5156, 5260–94, 6002–03 & 7032.) In sum, the Travel Companies are engaged in the activity of renting, leasing, letting, or granting a license for the use of hotel rooms.

Moreover, the evidence also demonstrates that the Travel Companies cause others—*i.e.*, hotels—to engage in those activities and therefore that they are engaged in the "business" as defined by Florida Statute § 212.02(2). It cannot be disputed that the Travel Companies' activities cause the hotels to rent hotel rooms to the Travel Companies' merchant-model customers. The Travel Companies, in fact, admit that they "facilitate" the rental of hotel rooms; and they explain all the efforts they undertake from the time they contract with a hotel to facilitate the rental of a hotel room to a tourist. (*E.g.*, R. 277–80, 301–04, 325–27, 348–51,

2127, 2269, 2273, 2530–31, 2949–50.) The word "facilitate" in the Merriam-Webster Dictionary Online, is defined as "to help cause (something)." www.merriam-webster.com/dictionary/facilitate.

Second, even if the *Alachua County* majority is correct both that § 125.0104 must be read to impose the same tax as § 212.03 and that only hotels "engage in the business of renting hotel rooms," the Travel Companies remain liable for any amount of unpaid TDT on the total amount they charge their customers. Even if the taxable privilege in § 125.0104 referred only to hotels, under the plain language of the statute, whomever receives the consideration from the customer is still liable for remitting the TDT on the total consideration charged. *See* § 125.0104(3). And, under the plain language of the statute, it is still the Travel Companies who receive the consideration from the customer—not the hotel. *See supra* Section I.C; *see also Vill. of Rosemont*, 2011 WL 4913262, at *3 (holding similar tax was due on total amount customer paid to travel companies, reasoning that, because "the customer cannot access his hotel room unless and until he pays the [travel companies'] entire charge," the travel companies are the ones who receive "consideration for . . . rental[s]" under the statute). Thus, the Travel Companies, as a matter of law, would remain liable for any unpaid TDT on the total amount they charge their customers.

Accordingly, even if the trial court was correct in determining that §125.0104 is ambiguous as to the taxable privilege, it erred in granting summary judgment to the Travel Companies. The purported ambiguity does not provide a more favorable interpretation to the Travel Companies because under the plain language of the statute they are clearly liable for collecting and remitting the TDT on the total amount of consideration received by them from tourists who make hotel reservations through the Travel Companies. Therefore, the purported ambiguity is of no avail to the Travel Companies, and the certified question should be answered accordingly.

CONCLUSION

Petitioners respectfully request that this Court answer the certified question by holding that § 125.0104, Florida Statutes, imposes a tax on the total amount of consideration received by the Travel Companies from tourists who reserve accommodations through the Travel Companies. Having so answered the certified question, this Court should reverse the decision of the First District Court of Appeal and remand with instructions to reverse the judgment of the trial court and remand to the trial court to grant the Florida Counties' motion for partial summary judgment.

Respectfully submitted,

COLSON HICKS EIDSON
255 Alhambra Circle, Penthouse
Coral Gables, FL 33134
Telephone: (305) 476-7400
Facsimile: (305) 476-7444

By: /s/ Roberto Martinez
ROBERTO MARTINEZ
Florida Bar No. 305596
bob@colson.com
STEPHANIE A. CASEY
Florida Bar No. 97483
scasey@colson.com

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 7th day of October, 2013.

MARK E. HOLCOMB, ESQUIRE
Madsen Goldman & Holcomb, LLP
1705 Metropolitan Boulevard, Suite 101
Tallahassee, Florida 32308-3765
mholcomb@mgh-law.com

DARREL J. HIEBER, ESQUIRE
Skadden, Arps, Slate, Meagher & Flom LLP
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071
Darrel.heiber@skadden.com

LARRY SMITH, DEPUTY CO. ATTORNEY
MARY G. JOLLEY, ASST. CO. ATTORNEY
County of Volusia
123 West Indiana Avenue, Suite 301
DeLand, Florida 32720
mjolley@co.volusia.fl.us

By: /s/ Roberto Martinez
ROBERTO MARTINEZ, ESQ.
Florida Bar. No. 305596

CERTIFICATE OF COMPLIANCE

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

By: /s/ Roberto Martinez
ROBERTO MARTINEZ, ESQ.
Florida Bar. No. 305596

APPENDIX

Document

Alachua Cnty., et al. v. Expedia, Inc.,
No. 1D12-2421, 110 So.3d 941 (Fla. 1st DCA 2013)

110 So.3d 941
District Court of Appeal of Florida,
First District.

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, Appellants,
v.
EXPEDIA, INC., et al., Appellees.

No. 1D12–2421. | Feb. 28, 2013. | Opinion on Rehearing April 16, 2013.

Synopsis

Background: Counties and county tax collectors brought declaratory action against online travel companies, seeking to establish that the Tourist Development Tax applied to the full amount paid to the companies by tourists for hotel rooms, rather than only the portion paid by the companies to hotels. The Circuit Court, Leon County, James O. Shelfer, J., awarded summary judgment to companies. Counties and tax collectors appealed.

Holdings: The District Court of Appeal, Thomas, J., held that:

[1] privileged activity taxed by the Tourist Development Tax was the renting of rooms to tourists, rather than the renting of rooms by tourists, and

[2] Tourist Development Tax did not apply to fees retained by the companies.

Affirmed; question certified; motion for rehearing en banc denied.

Padovano, J., filed dissenting opinion.

West Headnotes (3)

[1] Innkeepers
Licenses and taxes
213 Innkeepers
213k4 Licenses and taxes
Privileged activity taxed by Tourist Development Tax, which declared that every person who "rents, leases, or lets for consideration" accommodation in a hotel is exercising a taxable privilege, was the renting of rooms by hotels to tourists, rather than the renting of rooms from hotels by tourists, for purposes of determining whether tax applied to the full amount paid by tourists to online travel companies for hotel rooms or only the portion paid by the companies to hotels; duty to collect and remit the tax was imposed on the hotels, and tax was to be read together with the Transient Rental Tax, which more

clearly defined the renting of rooms to tourists to be the taxable privilege. West's F.S.A. §§ 125.0104(3)(a), 212.03(1)(a).

[2] **Taxation**

Construction and operation

371 Taxation
371I In General
371k2024 Statutory Provisions
371k2027 Construction and operation

Courts must construe tax statutes in favor of taxpayers where an ambiguity may exist.

[3] **Innkeepers**

Licenses and taxes

213 Innkeepers
213k4 Licenses and taxes

Tourist Development Tax, which applied to the consideration paid "for occupancy" of a hotel room, did not apply to fees retained by online travel companies through which tourists booked hotel rooms, but only to the amounts paid by the companies to the hotels; companies did not themselves grant possessory or use rights in hotel properties, but were simply conduits through which tourists could compare rates and book reservations, and amounts retained by the companies were not for occupancy of hotel rooms, but for their services in facilitating reservations. West's F.S.A. § 125.0104(3)(a); Fla.Admin.Code Ann. r. 12A–1.061(3)(a).

Attorneys and Law Firms

***941** Roberto Martinez, Paul C. Huck, Jr., and Francisco R. Maderal of ***942** Colson Hicks Eidson, Coral Gables; Robert L. Nabors, Harry F. Chiles, and Bethany A. Burgess of Nabors, Giblin & Nickerson, P.A., Tallahassee; Edward A. Dion and Stephanie Casey of Nabors, Giblin & Nickerson, P.A., Fort Lauderdale, for Appellants.

Larry Smith, Deputy County Attorney, Mary G. Jolley, Assistant County Attorney for the County of Volusia, DeLand, Amicus Curiae for the County of Volusia and School Board of Volusia County, Florida.

Mark E. Holcomb of Madsen Goldman & Holcomb, LLP, Tallahassee, for Appellees Expedia, Inc., Hotels.com, LP, Hotwire, Inc., Orbitz, LLC, Orbitz For Business, Inc., and Trip Network.

Darrell J. Hieber of Skadden, Arps, Slate, Meagher & Flom, LLP, Los Angeles, California, for Appellees priceline.com, Incorporated, Travelweb LLC, and Lowestfare.com LLC.

Brian S. Stagner, of Kelly Hart & Hallman, LLP, Fort Worth, Texas, pro hac vice for Appellees Travelocity.com LP, Sabre Holdings Corporation, and Travelocity.com, Inc.

Opinion

THOMAS, J.

In this case before us, we address the Tourist Development Tax, codifed in section 125.0104, Florida Statutes, and levied pursuant to Florida's Local Option Tourist Development Act of 1977. The question presented on appeal is whether the Tourist Development Tax ("Tax") applies to the entire amount that Appellees ("Online Travel Companies" or "Companies") collect from hotel customers who reserve their hotel room through Online Travel Companies. We find that the additional sums of money earned by the Companies are not taxable. And as required by Florida Supreme Court precedent, we must read the statute "strongly in favor of the taxpayer and against the government." *Maas Bros., Inc. v. Dickinson*, 195 So.2d 193, 198 (Fla.1967). Thus, we affirm the trial court's ruling that the Tax applies only to the amount of money the Companies send to the hotels for the reserved rooms, and not to the additional compensation retained by the Companies. As the trial court here correctly determined, it is for the Legislature, and not the judiciary, to decide whether to apply the Tax to the full amount that the Companies charge their customers who utilize their website to obtain a hotel reservation. [1]

Factual & Procedural Background

Online Travel Companies operate websites that allow consumers to view comparative information about competing travel service providers, such as hotels, car rental companies, and airlines. If a customer makes a reservation request from one of the Companies' websites, that Company submits a reservation request to the hotel on behalf of the customer. The hotel decides whether to accept the request, based on rate and availability, and if the hotel chooses to accept the reservation, the hotel makes the reservation in the customer's name. The Company then collects the total payment directly from the customer when the reservation is completed, and sends a portion of the payment to the hotel. The customer pays nothing to the hotel for the room. Upon arrival, the hotel provides the hotel room to the customer. [2]

***943** Appellants asserted below that the Tourist Development Tax applied to the difference between the monetary amount paid to the hotel and the amount collected by the Companies from consumers using their websites. In their declaratory action, Appellants asserted that the Companies were exercising a taxable privilege by renting, leasing or letting hotel rooms; however, in their summary judgment motion, Appellants argued that the taxable privilege at issue was being exercised not by the Companies, but by **tourists** renting hotel rooms.

Thus, the trial court found that it first had to determine "who and what the Legislature intends to tax"—tourists who utilize hotels and motels in Florida, or "the hotels and motels themselves for the privilege of doing business here?" If the Tax was intended to apply to the consumer, then the full amount paid by the consumer to the Companies would be subject to the Tax, and the Companies would be obligated to collect and remit the Tax on the amount involved in the transaction which exceeded the amount the Companies pay to the hotel. But "[i]f the privilege the Legislature seeks to tax is the opportunity of operating a hotel in Florida,

which was the Legislature's clear intention in 1949 when it passed the Transits Rental Tax (TRT) under Florida Statute 212.03, then the hotel in which the tourist stays must collect the tax on the lesser amount that the hotel receives for the room and submit that lesser amount of tax to the counties."

The trial court noted that the Tax is currently paid only on the amount received by hotels, not the "mark-up realized" under the Merchant Model, and determined that if this mark-up "is to be subjected to the [Tax] in the future the Legislature, not the Court, must by statute clearly inform the [Companies] of what is to be taxed and that the [Companies] are responsible for collecting and remitting the tax to the counties." The court also found that the Tax statute, "as currently written does not clearly impose the [Tax] on the amount that the [Companies] charge to their customers," and that this ambiguity must be resolved in the Companies' favor "and against extending the reach of the taxing authority."

The court also addressed Appellants' alternative argument that the Companies' Merchant Model meant that the Companies "have morphed from a pure service provider matching the tourists with a hotel owner into a taxpayer who actually 'rents, leases, or lets' the rooms to the tourist as defined by the statute." The court found that the Companies "may have brought themselves within the reach of the [Tax]," but that neither the Legislature nor the Department of Revenue have yet acted to declare as much. Thus, the court granted the Companies' motion and denied Appellants' motion.[3]

Analysis

The Tourist Development Tax was enacted in 1977. It allows participating counties to assess what is commonly called a "bed tax" for hotel stays within their territorial limits. The statute provides:

> It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel ... for a term of 6 months or less **is exercising a privilege which is subject to taxation under this section,** unless such person rents, leases, or lets for ***944** consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.

§ 125.0104(3)(a) 1., Fla. Stat. (emphasis added).

This tax is "in addition to any other tax imposed pursuant to chapter 212 and in addition to all other taxes and fees and the consideration for the rental or lease." § 125.0104(3)(e), Fla. Stat. The reference to chapter 212 addresses the statewide bed tax, known as the "Transient Rentals Tax" authorized in the "Florida Revenue Act of 1949" codified at section 212.01, *et. seq.*,

Florida Statutes. Section 212.03(1)(a), Florida Statutes, is similar to section 125.0104(3)(a) 1. It provides:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel....

§ 212.03(1)(a), Fla. Stat.

[1] The crux of this dispute involves determining what is the privileged activity which the Tourist Development Tax taxes—renting a room *to* a tourist, or a tourist renting a room *from* a hotel? That is, did the Legislature declare that it is a privilege to rent a hotel room in Florida, or did it declare that it is a privilege to operate a hotel in this state? Appellants argue that the plain language of the statute states that it is tourists who are exercising a privilege, not the hotels. We respectfully disagree.

Both the Tourist Development Tax and the Transient Rentals Tax impose a duty to charge, collect, and remit the bed tax. *See* § 125.0104(3)(f), Fla. Stat. ("The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental."); § 125.0104(8)(a), Fla. Stat. ("Any person who is taxable hereunder who fails or refuses to charge and collect from the person paying any rental or lease the taxes herein provided ... is, in addition to being personally liable for the payment of the tax ..." criminally liable.);[4] § 212.03(2), Fla. Stat. ("The tax provided for herein shall be in addition to the total amount of the rental, shall be charged by the lessor or person receiving the rent in and by said rental arrangement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person, as defined in this chapter, who receives said rental or payment."). Logically, therefore, that duty is imposed on the hotels, not the tourist. Thus, although the tourist is obligated to pay the tax when it is charged, the tourist is not obligated to charge himself the tax, collect it from himself, or remit it to the proper taxing authority. That duty is imposed on hotels, motels, and others for exercising the privilege of engaging in the business of renting rooms to consumers.

Appellants contend that their position that the taxable privilege is exercised by tourists is supported by our supreme court's opinion in *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981 (Fla.1981). We disagree. In that case, the appellant argued that the Tourist Development Tax violated the equal protection clause in the United States Constitution, because the "county is attempting to impose a tax on nonresidents alone on the privilege of renting living space for less ***945** than six months." *Id.* at 988. We note, however, that this was the appellant's characterization of the issue. The supreme court rejected the equal protection argument, observing that the Tourist Development Tax is "imposed ... on anyone who rents certain kinds of living space for a term of six months or less," and "is imposed

on all renters of the covered types of premises" regardless of whether they are residents or non-residents. *Id.* at 989. The court did not hold, nor was it asked to address, whether the taxable privilege addressed in the Tourist Development Tax is exercised by those renting rooms from hotels or by those renting rooms to tourists. It simply recognized the obvious—the tax is imposed on tourists and residents and collected by the hotels.

Furthermore, the court also held that the Transient Rental Tax statute is to be read together with the Tourist Development Tax statute. *Id.* at 987–88. As with the latter, the ultimate person paying the Transient Rental Tax is the tourist, not the hotel. In both instances, the Legislature determined that operating a hotel in a county is a privilege "subject to taxation," and with that privilege comes the obligation to collect the Tax from the customer.

Thus, we hold that the privilege being exercised for purposes of the Tourist Development Tax is renting rooms **to** tourists, not the other way around.[5] This leaves us with Appellants' alternative argument that the Companies have an obligation to charge the Tourist Development Tax on the entire amount they collect from customers, not just the portion of that amount they forward to the hotels.

Again, the statute states that the local option tax is "due on the consideration paid **for occupancy** in the county ...." § 125.0104(3)(a) 2.a., Fla. Stat. (emphasis added). It also provides that the tax is levied on the "total consideration charged **for such lease or rental.**" § 125.0104(3)(c), Fla. Stat. (emphasis added). This tax is to be charged by the "person receiving the consideration for the lease or rental ...." § 125.0104(3)(f), Fla. Stat. (emphasis added). Once charged and collected, the person "receiving the consideration for such lease or rental" must remit the tax to the Department of Revenue. § 125.0104(3)(g), Fla. Stat. (emphasis added).

[2] It is well-established law in Florida that courts must "construe tax statutes in favor of taxpayers where an ambiguity may exist." *Harbor Ventures*, 366 So.2d at 1174. Here, because the legislature has not provided a statutory definitional scheme to create special meanings for the terms "rents, leases, or lets for consideration," the court must give those words their ordinary and common usage. *See Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954, 961 (Fla.2005).

***946** **[3]** To "rent, lease or let" in ordinary meaning denotes the granting of possessory or use rights in property. Inherent in that idea is the notion that one actually has sufficient control of the property to be entitled to grant possessory or use rights. Thus, the consideration received for the "lease or rental" is that amount received by the hotels for the use of their room, and not the mark-up profit retained by the Companies for facilitating the room reservation. *See also* Fla. Admin. Code R. 12A–1.061(3)(a) ("Rental charges or room rates for the use or possession, or the right to the use or possession, of transient accommodations are subject to tax...."). Notably, section 125.0104(3)(e), Florida Statutes, recognizes the difference between taxes and fees on the one hand, and financial consideration on the other: "The tourist development tax shall be

in addition to any other tax imposed pursuant to chapter 212 and in addition to all other taxes and fees and the consideration for the rental or lease." *See also* Fla. Admin. Code R. 12A–1.061(3)(b) ("Rental charges or room rates include any charge or surcharge to guests or tenants for the use of items or services that is required to be paid by the guest or tenant as a condition of the use or possession, or the right to the use or possession, of any transient accommodation."). Thus, the tax at issue is on the actual rate paid for **occupancy** of the room, that is, the consideration for the room itself (the "rental or lease"), not any taxes or other fees.

Indeed, "rental" is defined as "income received from rent." *Black's Law Dictionary,* 1300 (7th ed. 1999). Additionally, "net rent" is defined as the "rental price for property after payment of expenses, such as ... taxes." *Id.* at 1299. Also, in interpreting section 212.03(2), Florida Statutes, this court in *Florida Revenue Commission v. Maas Bros., Inc.,* explained that it is not "the incident of payment and receipt of the rental charged that constitutes the taxable transaction and creates the tax liability" under the Act, but engaging in the business of renting space. 226 So.2d 849, 852–53 (Fla. 1st DCA 1969).

The Companies are simply conduits through which consumers can compare hotels and rates and book a reservation at the chosen hotel. They do not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers, as contemplated by the Tourist Development Tax enabling statute or the counties' ordinances. In this role, the Companies collect the monies owed for the room, including taxes and fees, and pass on to the hotels the money for the room rental and the taxes on the price of the room. The consideration the Companies ultimately keep is not for the rental or lease, but for their service in facilitating the reservation.

At the risk of belaboring the obvious, the Companies do not own, possess or have a leasehold interest to convey in any hotel room, but merely transfer a reservation request from the tourist to a hotel.

The Companies are not in the business of renting, leasing, letting, or granting licenses to use transient accommodations, as they are online travel companies, not hoteliers. Similarly, the difference between the fees they charge their customers, and what the hotels require be paid to place a customer in a room, is not "solely for the use or possession" of the hotel room. Rather, the Companies operate their businesses, including sophisticated websites, to the benefit of both their customers and the hotels. The Tourist Development Tax does not plainly evince an intention to include the additional fees that Companies charge for advertising hotel facilities, setting up internet websites, and forwarding and assisting in the making of reservations on behalf of hotel customers. The rent itself—the amount charged by the hotels ***947** for allowing customers to occupy their rooms—is what has been taxed.

Conclusion

For the foregoing reason, we AFFIRM the trial court's summary judgment in favor of Appellees, and its denial of Appellants' motion for summary judgment.

AFFIRMED.

DAVIS, J., concurs.

PADOVANO, J., Dissents with Opinion.

PADOVANO, J., dissenting.

I respectfully dissent. The local option tourist development tax authorized by section 125.0104, Florida Statutes, is a tax on the amount of money a tourist pays to stay in a hotel in Florida. The portion of those funds earned by an online travel company, whether remitted by the hotel after payment of the bill or retained initially by the travel company at the time of the reservation, is subject to the tax. This conclusion is required not only by precedent we are bound to follow, but also by the plain language of the statute.

The holding by the majority that a portion of the total bill paid by the tourist is exempt from the local option tourist development tax is contrary to the decision by the Florida Supreme Court in *Miami Dolphins, Ltd., v. Metropolitan Dade County*, 394 So.2d 981 (Fla.1981). One of the questions presented in that case was whether the tax discriminated against tourists from other states. The supreme court answered the question in the negative and, as a part of its decision, the court defined the nature of the tax. As the court stated, the county ordinance implementing the local option tourist development tax imposed the tax on "*the total rental charged every person who rents, leases or lets for consideration any living quarters ...* for a term of six months or less." *Id.* at 989. (emphasis added). The court observed that the tourist development tax is *a tax imposed on all renters* of the covered types of premises. *Id.* (emphasis added).

It is clear from the language of the *Miami Dolphins* opinion that the Florida Supreme Court considers 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.*

I acknowledge that the issue before the court in *Miami Dolphins* is not the same as the issue we have before us here. If the matter were that simple we would have no controversy at all. The point is that the supreme court defined the nature of the tax by stating that it was a tax on money paid by the tourist, not as a tax on the money received by the hotel after payment of expenses. Curiously, the majority seems to concede this point in its statement that the *Miami Dolphins* decision "simply recognized the obvious—the tax is imposed on tourists and residents and collected by the hotels." I think this statement regarding the nature of the tax is obvious, as well, but it is contrary to the rationale of the majority opinion.

The online travel companies rely heavily on the statement of legislative intent in section 125.0104, Florida Statutes, which is as follows:

> (3)(a)1. It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration ***948** any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, roominghouse, mobile home park, recreational vehicle park, condominium, or timeshare resort for a term of 6 months or less is exercising a privilege which is subject to taxation under this section, unless such person rents, leases, or lets for consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.

The travel companies contend that this section authorizes a tax on the exercise of the privilege of "renting, leasing or letting" rooms *to* transients." (emphasis added). But that is not what the statute says. To the contrary, the statute merely identifies the act of renting, leasing and letting as the taxable event. It does not state that the tax is to be assessed on the rental income received by the hotel for the privilege of renting a room "to" a tourist as the travel companies argue. This section of the statute is written passively to define the transaction that is subject to the tax.

The travel companies argue that the statute must be construed to impose a tax on the business income received by the hotels, because the terms "rent" and "lease" are used to describe actions taken by the owner of the property, in this case the hotel. They point out in the answer brief that "rent" means "to grant the possession and enjoyment of property ... in return for payment," that "lease" means "to grant the temporary possession or use of (lands, tenements, etc.) to another, usually for compensation at a fixed rate; let," and that "let" means "to grant occupancy or use of (land, buildings, rooms, space, etc., or movable property)" in return for payment. *Dictionary.com* (based on *Random House Dictionary*) (2012); *see also Collins English Dictionary* (10th ed. 2009). The problem with this argument is that the terms "rent" and "lease" are also used to describe an action taken by the person who pays for the right to occupy the property.

The first definition of the transitive verb "rent" in the American Heritage Dictionary of the English Language online is "[t]o obtain occupancy or use of (another's property) in return for regular payments." *AHDictionary.com.* Indeed, the hard copy of the American Heritage Dictionary does not even include the meaning in which one grants the use of property to another. It lists only the meaning consonant with the primary online definition—"[t]o use (another's property) in return for regular payments"—and "[t]o be for rent." *American Heritage Dictionary* 708 (4th ed. 2001). Likewise, the MacMillan

Dictionary online lists as the first definition of "rent" as "to pay money regularly to use a house, room, office, etc. that belongs to someone else." *MacMillanDictionary.com; see also Cambridge Dictionary Online,* Dictionary.Cambridge.org/dictionary/american-english/. The Oxford Dictionaries U.S. English Usage site lists *only* the connotation, "pay someone for the use of (something, typically property, land, or a car): *they rented a house together in Spain.*" *Oxford Dictionaries Online,* OxfordDictionaries.com (emphasis in original). As Bryan Garner explains, the transitive verb "rent"

> may refer to the action taken by either the lessor or the lessee; the word has had this doubleness of sense from at least the 16th century. Both the lessee and the lessor are *renters,* so to speak, though usually this term is reserved for tenants.

Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed.), p. 756 (emphasis in original).

Garner makes a similar observation as to the term "lease": "To say that one *leases* property nowadays does not tell the reader or listener whether one is lessor or ***949** lessee." *Id.* at 514. Accordingly, dictionaries, including *Black's,* generally list dual definitions of "lease." *See Black's Law Dictionary,* 909 (8th ed.); *The American Heritage Dictionary of the English Language* Online, AHDictionary.com; *Merriam–Webster Dictionary Online,* Merriam–Webster.com/; *Oxford Dictionaries Online,* OxfordDictionaries.com. The definition in the Cambridge Dictionary Online lists the sense in which the lessee is the acting party as the first of the two alternate meanings. *See Cambridge Dictionary Online,* http://dictionary.cambridge.org/ ("to use or allow someone else to use land, property, etc. for an agreed period of time in exchange for money: *I leased my new car instead of buying it.*") (emphasis in original).

Because these terms can be used interchangeably to describe the action by either party in the making of a lease or rental agreement, we cannot say for certain that they are used in the statute to describe the act of providing a hotel room for a price. We could just as well read the phrase "any person who rents ..." to mean any person who pays money to a hotel for the privilege of staying there. And while "let" has no other meaning than the one in which the property owner is the actor, this term is listed in the disjunctive in the statute. Therefore, it need not be understood as merely another term for "rent" or "lease." Again, the statute merely defines the kind of transaction that is subject to the tax. It does not seek to assess the tax based on the activity of one of the parties to the transaction.

For these reasons, I do not think that the statement of legislative intent in section 125.0104 supports the argument by the travel companies that the tax is imposed for the privilege of operating a hotel in Florida. And even if that were the case, the statement of legislative intent would not override the plain and unambiguous language of the operative parts of the statute—that is, the parts of the statute that describe how the tax is to

be assessed and collected. *See* S.R.G. Corp. v. Dep't of Revenue, 365 So.2d 687, 689 (Fla.1978) (stating that legislative intent is determined primarily from the language of the statute). Several key parts of the statute reveal that the tax is to be based on the total amount of money paid by the tourist, not on the net amount retained by the hotel.

For example, section 125.0104(3)(a) 2.a states the "[t]ax shall be due on the consideration paid for occupancy." Here, the legislature is plainly referring to the amount of money paid by the tourist, not the amount of money retained by the hotel. And if there could be any doubt that the tax is based on the gross amount paid by the tourist, it would be completely removed by section 125.0104(3)(c), which specifies that the tax shall be assessed "at a rate of 1 percent or 2 percent of each dollar and major fraction of each dollar of the *total consideration* charged for such lease or rental." (Emphasis added.) This provision undercuts the argument that a portion of the consideration can be exempted from taxation. As the statute provides, the tax is to be levied on the full amount paid for the room.

I acknowledge that an ambiguity in a tax statute must be resolved in favor of the taxpayer, *see* Department of Revenue v. Brookwood Associates, Ltd., 324 So.2d 184, 186 (Fla. 1st DCA 1975); *Maas Brothers, Inc. v. Dickinson*, 195 So.2d 193, 198 (Fla.1967), but the statute at issue here does not strike me as ambiguous at all. It is broad in the sense that it covers many different kinds of tourist accommodations, and it is general in the sense that it refers without specification to both lessors and lessees. But it is not confusing or unclear. It imposes a tax on the funds paid by a ***950** tourist to rent a room in a hotel. The matter is no more complicated than that. As a federal judge observed in ruling on the identical issue, the tax is imposed on the "bargain struck" and that is the money the tourist pays for access to the hotel room. *See* Village of Rosemont, Ill. v. Priceline.com, Inc., 2011 WL 4913262 (N.D. Ill., 2011).

The majority is correct to say that section 125.0104, Florida Statutes must be read in conjunction with Chapter 212, the Florida Revenue Act of 1949. And the majority is also correct in pointing out that section 212.03(1)(a) specifies that the taxable privilege for the purpose of Chapter 212 is the business of operating a hotel. However, it does not follow from these two propositions that the taxable privilege for the purpose of section 125.0104 is the privilege of operating a hotel, as the majority concludes. Statutes are read in pari materia only to resolve ambiguities and, as I have explained, there is no ambiguity in section 125.0104. Moreover, section 125.0104 was enacted *after* section 212.03(1)(a)(1), and the specific language in section 212.03(1)(a)(1) about the privilege of operating a hotel was not carried forward in section 125.0104. If we are to draw any conclusion from this omission at all, it would be that the taxable event for the purpose of section 125.0104 is *not* the privilege of operating a hotel.

It is significant in my view that the tourist development tax is paid on some transactions arranged by the online companies but not on others. The travel companies employ two different business models. Under the practice described as the "agency model," the travel company books the room, the tourist pays the

full amount of the bill to the hotel, and the hotel remits a fee to the travel company. By the practice described as the "merchant model," the travel company books the room, collects the full amount of the hotel bill from the tourist, pays a portion of the bill to the hotel, and retains a portion of the bill for booking the room.

When the travel company employs the agency model, the tax is computed and paid on the full amount of the bill for the room, and the fee that is remitted to the travel company is treated as an expense. In contrast, the tax is not computed on the full amount of the bill if the transaction is arranged under the merchant model. In that case, the tax is paid only on the portion of the funds paid by the tourist that are actually remitted to the hotel. The tax is not paid on that portion of the funds retained by the travel company.

Because the merchant model is merely a different method of completing the same transaction, it cannot have the effect of changing the tax liability on the transaction. When resolving a tax issue, the courts must look to the substance of the transaction, not its form or label. *See* Leon Co. Educ. Facilities Auth. v. Hartsfield, 698 So.2d 526, 529 (Fla.1997); Reinish v. Clark, 765 So.2d 197, 208 (Fla. 1st DCA 2000); TEDC/Shell City, Inc. v. Robbins, 690 So.2d 1323, 1325 (Fla. 3d DCA 1997). By this basic principle, a taxpayer cannot avoid a tax merely by characterizing a transaction as something other than what it truly is.

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 for 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 ***951** 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.

The issue presented in this case is just emerging in Florida, but it has been decided in other jurisdictions in a way that is contrary to the majority opinion. For example, in Expedia, Inc. v. City of Columbus, 285 Ga. 684, 681 S.E.2d 122 (2009), the Supreme Court of Georgia held that an online travel company using the merchant model must pay a local accommodation tax on the portion of the hotel bill it retains when booking the room. Because the statute at issue in that case imposed a tax on the "lodging charges actually collected" from the tourist, the court concluded that the "wholesale rate" the hotel charged the travel company could not be the rate upon which the tax was computed. Likewise in City of Charleston, S.C. v. Hotels.com, LP, 586 F.Supp.2d 538 (D.S.C.2008), a federal court held than an online travel company was required to pay the local accommodation tax on the portion of the hotel bill it retained for booking rooms in the City of Charleston. The statute in that case imposed a tax on the "gross proceeds" derived from the rental. The Florida statute is substantially the same in that it imposes a tax on "total consideration"

for the lease or rental. And in *Village of Rosemont, Ill. v. Priceline.com Inc.*, 2011 WL 4913262 (N.D.Ill., 2011), the court held that Priceline.com was obligated to pay a local accommodation tax on the amount it retained when it booked hotel rooms under the merchant model we have before the court in this case. Numerous other courts have concluded that requiring the online travel companies to pay a local accommodation tax on a hotel bill does not violate the dormant commerce clause. *See Mayor & City Council of Baltimore v. Priceline.com Inc.*, 2012 WL 3043062 (D.Md., 2012); *City of San Antonio v. Hotels.com*, 2008 WL 2486043 (W.D.Tex.2008); *Travelscape, LLC v. S. Carolina Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011).

There are certainly differences in the wording of the statutes in these cases, but the fundamental principle is the same in all of them. The tax at issue is a tax on the total amount of money a tourist pays to stay in a hotel room. That amount cannot be artificially reduced by setting a wholesale rate for the room and then treating the difference on the funds retained by an online travel company as if it is not part of the money the tourist has paid to stay in the room. With respect for my colleagues in the majority, I think that the result should be no different here.

For these reasons, I would hold that the portion of the hotel bill that is retained by the online travel companies is part of the total consideration paid for the accommodation and that it is therefore subject to the local option tourist development tax.

ON MOTION FOR REHEARING EN BANC OR CERTIFICATION

PER CURIAM.

Appellants' Motion for Rehearing En Banc Or, In the Alternative, Requesting a Certification to the Florida Supreme Court of a Question of Great Public Interest, was filed March 15, 2013. We deny the motion for rehearing en banc, but grant the motion for certification.

We certify the following question to the Florida Supreme 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 *952 TRAVEL COMPANY'S WEBSITE, OR ONLY ON THE AMOUNT THE PROPERTY OWNER RECEIVES FOR THE

RENTAL OF THE ACCOMMODATIONS?

Parallel Citations

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BENTON, C.J., PADOVANO and THOMAS, JJ., concur.

Footnotes

1 There have been several proposed legislative bills to expressly include or exclude the Companies from the Tourist Development Tax. *See* Fla. HB 1241 (2010); Fla. HB 335 (2010); and Fla. HB 493 (2011).

2 This process is known as the "merchant model" which differs from the "agency model" in that, with the latter, the consumer pays the hotel for the room and the hotel then remits a commission to the Online Travel Company.

3 This issue was the subject of litigation in the Ninth Judicial Circuit, in addition to the order on appeal here. We acknowledge our use of some of the analysis of the summary judgment order by Judge Lauten in *Orange County and Martha O. Haynie, Orange County Comptroller v. Expedia, Inc. and Orbitz, LLC* (Fla. Cir. Ct., 9th Cir. Case No. 2006–CA–2104).

4 Note that this provision clearly applies to hotels and motels, etc., and provides that they, too, are taxable under the Tourist Development Tax.

5 The privilege involved here of renting rooms to tourists is also supported by the plain wording in other provisions in the statute. The statute explicitly provides that the privilege exercised is renting, leasing, or letting a room "for consideration," and that the tax at issue is due "on the consideration paid for occupancy" of such a room in the applicable county. § 125.0104(3)(a) 1., 2.a., Fla. Stat. In a contract, one party sells a product or service **for** consideration, and the other party pays for the product or service **with** that consideration. The statute itself recognizes this principle: "The tourist development tax shall be charged **by the person receiving the consideration for** the lease or rental, and it shall be collected from the ... customer at the time of payment **of the consideration for** such lease or rental." § 125.0104(3)(f), Fla. Stat. (emphasis added). "The person **receiving the consideration for** such rental or lease shall receive, account for, and remit the tax" to the Department of Revenue. § 125.0104(3)(g), Fla. Stat. (emphasis added).

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