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IN THE SUPREME COURT OF FLORIDA

ALACHUA COUNTY, *et al.*,

Petitioners,

v.

EXPEDIA, INC., *et al.*,

Respondents.

CASE NO. SC13-838
DCA CASE NO. 1D12-2421
L.T. NO. 2009-CA-4319

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

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Respondents – Expedia, Inc., Hotels.com, L.P., Hotwire, Inc., Orbitz, LLC, Orbitz For Business, Inc., Trip Network, Inc., Priceline.com, Inc., Travelweb, LLC, and Travelocity.com, LP – are referred to herein as online travel companies or "OTCs."

Petitioners, Leon County, Doris Maloy, Leon County Tax Collector, Flagler County, Lee County, Manatee County, Pinellas County, Diane Nelson, Pinellas County Tax Collector, Polk County, Joe G. Tedder, Polk County Tax Collector, St. Johns County, Escambia County, Charlotte County, Walton County, Hillsborough County, Doug Belden, Hillsborough County Tax Collector, Pasco County, Alachua County, Nassau County, Okaloosa County, Seminole County, and Wakulla County, are referred to herein as the "Counties."

References to the Record on Appeal are indicated herein as (R. ____), with citation to the appropriate page in the record.

STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

Respondent OTCs are technology companies that operate Internet websites where they publish comparative information about hotels, car rental companies and airlines, and help customers book reservations with such travel providers. OTCs do not own or operate any airlines, hotels or car rental companies.

Petitioner Counties seek to hold the OTCs liable for Tourist Development Tax ("TDT"), a tax on businesses that exercise the privilege of renting, leasing, or letting hotel rooms to transients.[1] Each hotel remits TDT to the Counties on the amount it receives for renting a room to a transient who requested a reservation through an OTC; but now, the Counties seek to also tax the OTCs and the additional amount an OTC charges the transient for its online services.

The Counties filed a complaint against the OTCs alleging each owes TDT on that additional amount. The Complaint asserts the TDT is a "transient rental tax" imposed on businesses that exercise the taxable privilege of "renting, leasing or letting" hotel rooms to transients, and alleges the OTCs are liable for TDT because they exercise that privilege. On cross-motions for summary judgment, the Counties proffered a different statutory construction, asserting the TDT is a tax on the transient for exercising the privilege of renting or leasing a room, and that the

[1] "Hotel" is used throughout to refer to hotels, motels, and other transient lodging establishment businesses.

OTCs are liable for TDT even if they do not "rent, lease or let" rooms to transients.

The circuit court entered Summary Final Judgment for the OTCs, concluding they are not liable for TDT. (R. 16271-73) The First District Court of Appeal affirmed, holding that under its express terms, the TDT Statute imposes (i) tax liability only on hotels for the privilege of "renting, leasing or letting" rooms; (ii) collection and remittance obligations only on "dealers," persons that exercise the taxable privilege; and (iii) tax only on the rent the hotel charges for providing a transient use and possession of a room. *Alachua County, et al. v. Expedia, Inc., et al.*, 110 So. 3d 941, 945-46 (Fla. 1st DCA 2013).[2]

B. RELEVANT STATUTES

The Florida Legislature authorizes two taxes on the rental of rooms by hotels to transients, the state Transient Rental Tax ("TRT") and the parallel, county-level TDT.

1. Florida's Transient Rental Tax Statute

The TRT Statute, enacted in 1949, imposes a state-wide tax on the privilege of engaging in the business of renting hotel rooms to transients: "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*

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[2] This Court did not state the basis on which it accepted jurisdiction to review that decision. For the reasons discussed below, Respondents submit jurisdiction was improvidently granted, and the petition should be dismissed.

license to use any . . . accommodations in . . . any hotel . . . ." § 212.03(1)(a), Fla. Stat.[3] The business exercising the taxable privilege is the one liable for the tax, and the Department of Revenue ("DOR") may enforce that liability against that business. *Id.* §§ 212.11(1)(a), 212.14(1), 212.151(1).[4]

The TRT Statute imposes tax collection and remittance obligations only on persons who exercise the taxable privilege – businesses that possess rooms and rent them to transients in return for consideration:

> The tax . . . shall be . . . charged *by the lessor* or person receiving the rent in and by said *rental arrangement* . . . . The owner, lessor or person receiving the rent *shall remit the tax to the department* . . . . The same *duties imposed* by [the State sales tax statute] *upon dealers . . . shall apply* to and be binding upon all persons who *manage or operate hotels* . . ., and to all persons who collect or receive such rents on behalf of such owner or lessor taxable under this chapter.

Id. § 212.03(2).

TRT is imposed on: "the *total rental charged for such . . . accommodations* by the person charging or collecting the rental." *Id.* § 212.03(1)(a). Though the person exercising the taxable privilege is the one liable for the tax, the economic incidence of the tax is passed through to the transient: "The tax . . . shall be . . .

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[3] Each "person desiring to . . . lease, rent, or let or grant licenses in . . . sleeping . . . accommodations in hotels" must register with the DOR as a "dealer." § 212.18(3)(a), Fla. Stat. Unless otherwise indicated, all emphasis in quotations herein is added, and all internal citations omitted.

[4] These provisions explain how such person can "calculate his or her estimated tax liability;" and permit the DOR to audit and assess the "person required to pay a tax imposed," and sue that person to "effect[] collection of any tax due."

charged . . . to the lessee or person paying the rental." *Id.* § 212.03(2).[5] However, the person engaging in the taxable business remains liable whether or not the tax is charged to or collected from the customer.[6]

2. The Enabling Act For The Local Tourist Development Tax

The TDT Enabling Act, enacted in 1977, authorizes Florida counties to enact a parallel local tax on the privilege of renting hotel rooms to transients: "[E]very person who *rents, leases, or lets* for consideration . . . *accommodations* in any hotel . . . is *exercising a privilege* which is *subject to taxation* under this section." § 125.0104(3)(a), Fla. Stat. The persons "subject to the tax" are "*owners or operators of motels, hotels*" and the like, and those persons "taxable hereunder,"

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[5] This pass through of the economic incidence is typical of sales taxes. *E.g.*, §§ 212.05 ("every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state"), 212.07(1)(a)("[t]he privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer"). As this Court has explained, "[i]n providing that the tax be passed on to the consumer, the law does nothing more than adopt the procedure which, historically and traditionally, been followed voluntarily, if not necessarily, in the commercial world from the inception of excise taxes." *Gaulden v. Kirk*, 47 So. 2d 567, 578 (Fla. 1950).

[6] The TRT Statute is part of Chapter 212, Fla. Stat., the state sales tax law that taxes sales of tangible personal property, rentals, storage for use or consumption, and a handful of enumerated services. In 1986, the Legislature enacted an omnibus tax on services, greatly expanding the types of services subject to sales tax. It repealed the enactment six months later (*see* Chs. 87-6, 87-548, Laws of Fla.), returning the law to taxing only certain enumerated services, which do not include the OTCs' online travel services. *See, e.g.*, § 212.05(1)(i)1.a, b (detective, burglary protection, and other protection services; nonresidential cleaning; and nonresidential pest control).

i.e., businesses exercising the taxable privilege, are "personally liable for payment of the tax." *Id.* §§ 125.0104(4)(e), (8)(a).

The TDT Enabling Act authorizes counties to impose tax collection and remittance obligations on persons that receive the consideration for transferring possession of hotel rooms, *i.e.*, "dealers," and mandates that the DOR Rules for administering the TRT also govern administration of the TDT:

> The person *receiving the consideration for such rental or lease* shall *receive, account for, and remit the tax to the [DOR]* . . . in the manner provided . . . *under s. 212.03*. The *same duties and privileges imposed by chapter 212* [which includes the TRT Statute] *upon dealers* . . . and . . . *rules of the [DOR] in the administration of that chapter* shall apply to and be *binding* upon all [such] persons . . . . [T]he [DOR] may authorize a quarterly return and payment [of] the *tax remitted by the dealer* . . . .

Id. § 125.0104(3)(g); *see also* § 125.0104(10)(c).

The Enabling Act authorizes counties to enact a tax on "the total consideration charged *for such lease or rental*." *Id.* § 125.0104(3)(c). TDT is to be "collected from the lessee, tenant, or customer." *Id.* §§ 125.0104(3)(f), (8)(a).

3. County TDT Ordinances

Each County enacted a TDT ordinance, adhering to the TDT Enabling Act's limited grant of authority, imposing a local tax identical to the state TRT. The local ordinances tax the privilege of transferring possession of hotel rooms, by imposing tax on "every person who *rents, leases or lets* . . . accommodations in

any hotel . . . ." LEON COUNTY CODE § 11-46(a)(1) ("Ordinance").[7] The persons "subject to the tax" are "*owners or operators of motels, hotels*" and the like, who are "personally liable for payment of the tax," and must "register a facility" at which it rents, leases or lets rooms. *Id.* §§ 11-48, 11-51(a),(b).

The Ordinance imposes collection and remittance obligations only on persons who receive consideration for the exercise of the taxable privilege:

> The [TDT] 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 . . . . **** Any person receiving the consideration *for such rental or lease* shall *receive, account for, and remit* the [TDT] in full to the county tax collector.

Id. § 11-46(a)(3), (5). "[T]he *total rental* and/or *consideration charged*" for the rental is taxed. *Id.* § 11-46(a)(1).

C. STATEMENT OF FACTS

1. Hotels Rent Hotel Rooms To Transients

The essential characteristic and function of a hotel is to maintain a physical structure containing lodging accommodations, and to convey to transient guests the legal right to occupy them temporarily for consideration. (R. 2137) Operation of a hotel requires myriad on-site functions, such as providing housekeeping, room service, laundry, security, front desk operation, and maintaining the hotel grounds

[7] Each County enacted a substantively identical ordinance. (R. 1995-97.) The OTCs cite to Leon County's ordinance *infra* as representative of, and referring to, corresponding provisions in each County's ordinance.

and rooms. (R. 2141-42, 2255-56, 2262-63, 2274-75, 2537, 2669)

Hotel operators use "revenue management" strategies to set, monitor, and adjust reservation rates, and to decide which distribution channels (including third-party intermediaries) to use (if any) to help secure reservations and increase occupancy. (R. 2138-39, 2645-46, 2736, 2759, 2778-80) The hotel alone determines which distribution channels to use, when to extend availability of reservations, if at all, and at what rental rates. (R. 2138-39, 2645-46, 2257-59, 2275, 2538, 2648-50, 2734, 2757, 2778-79)

2. OTCs Facilitate Reservations; They Do Not Rent Hotel Rooms

The OTCs are one of many competing third-party intermediaries hotels use as distribution channels. (R. 2138-39, 2256-58, 2259-60, 2269-70, 2276, 2538, 2646-47) The OTCs are technologies companies that operate websites, allowing customers to explore destinations, plan trips, and request reservations from competing hotels, car rental companies, airlines, and other travel providers. (R. 2127, 2650-52, 2658, 2667) The OTCs do not: (i) own, possess, operate, or manage hotels or hotel rooms (R. 2137-38, 2140-42, 2262-64, 2536-37, 2539-40, 2669-70, 2671, 2274-75, 2276); (ii) rent, lease or let hotel rooms to transients (R. 2137-39, 2669-70); or (iii) manage or perform the myriad functions necessary to carry out the daily business of any hotel (R. 2140-41, 2262-64, 2272-73, 2539, 2646-47, 2669-70, 6882). Rather, pursuant to their respective contracts with

hotels, OTCs only have the ability to facilitate a customer's reservation request, and to process payment, if the hotel accepts the request. (R. 2135-36, 2261-63, 2267-70, 2273, 2536, 2646-48, 5139-40) A transient does not have to use an OTC's services to reserve a room with a hotel; a transient can book a reservation directly with the hotel or through another distribution channel. (Pet. Br. at 41.)

Each OTC is independent from, and has an arm's-length relationship with, hotels under contracts and operating procedures that govern their relationship. (R. 2135, 2261-63, 2273-74, 2535-36, 2646-48) An OTC does not buy, resell, or lease rooms; does not maintain an inventory or block of hotel rooms; has no right or ability to purchase or rent an inventory of rooms from the hotel; has no right or ability to take and transfer possession of any rooms; has no risk of loss or other obligations for rooms not reserved through its website; and has no obligation to facilitate any reservations at all. (R. 2135-36, 2173, 2261-64, 2275-77, 2535-37, 2539-41, 2646-47, 2662, 2669-70, 2685-86, 2734-36, 2757-59, 2778-79)

OTCs never possess or control any room before or during the reservation process; a hotel maintains possession and control of its rooms at all times. (R. 2135-36, 2263, 2274-77, 2646-47, 2648-49, 2650-52, 2669-70) Under the OTCs' hotel contracts and operating procedures, a hotel: (1) controls its own room inventory; (2) can cease making reservations available through the OTC at any time prior to issuing the reservation; (3) determines, at the time of booking, the

rental rate it will charge for a transient's occupancy of a room; and (4) can decrease, increase, or shut off rates and availability at its sole discretion. (R. 2135-36, 2150, 2236, 2261-63, 2273-77, 2535-36, 2586-87, 2620-23, 2645-47, 2648-52, 2669-70, 2676, 2685-86, 2710-11, 2734-35, 2757-59, 2778-80, 5148)

The OTC submits a reservation *request* to the hotel on a transient's behalf. (R. 2134, 2263-64, 2275, 2649-54, 2658-59) The hotel decides whether to accept the request based on the rate and availability it determines. (R. 2134, 2263-64, 2648-49, 2650-54, 2658-59) If the hotel chooses to accept a transient's reservation request, it makes the reservation in the transient's name. (R. 2134, 2263-64, 2534-35, 2662) Typically, the hotel sends a reservation confirmation number to the OTC, which then forwards it to the transient. (R. 2134, 2263-64, 2270, 2534-35, 2650-52, 2654, 2659, 2803-85)

The hotel does not transfer to the OTC its legal right to grant occupancy of (or right to occupy) any of its rooms. (R. 2136, 2262-64, 2274-76, 2646-47, 2652-54, 2658-59, 2669-70) The hotel, not the OTC, controls the reservation after the hotel issues it. (R. 2135, 2646-47, 2652-54, 2658-59, 2669-70)

When making the reservation request, the transient agrees to abide by the terms, conditions and rules the hotel imposes on the reservation and hotel stay. (R. 2134-35, 2273, 2533-34, 2539, 2662, 2808-31, 2852-74, 4628) Upon arrival at the hotel, only the hotel can check the transient in and register the transient as a guest.

(R. 2137-38, 2258, 2272, 2274-77, 2535, 2537-38, 2662-63, 5154) At that point, the hotel assigns and grants the transient use and possession of a specific room, and provides a room key, based on availability and at its discretion. (R. 2133-34, 2263-64, 2272, 2274-76, 2540, 2663)

If a transient has a reservation but the hotel is overbooked, the hotel is typically obligated to either locate, or make reasonable efforts to locate, alternative accommodations. (R. 2135, 2590, 2637, 2664, 2896, 2902) OTC terms and conditions (which transients must accept before finalizing a reservation) provide that the OTC is not responsible for claims by transients arising from the hotel's performance or non-performance. (R. 2135, 2158, 2575-79, 2662)

3. OTCs Are Compensated For Their Online Services

The total amount the OTC charges a customer when a hotel accepts a reservation request is typically displayed in two components.[8] The first, referred to as the "Offer Price," "Nightly Reservation Rate," "Room Cost" or "Room Rate," is the total amount the hotel charges for the transient's occupancy of the room ("Net Rate") – which is later paid to the hotel, plus an amount the OTC retains as compensation for its online services (referred to as the "Margin," "Markup" or "Facilitation Fee"). (R. 2130-31, 2271-72, 2654-55, 2659-60, 5143)

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[8] Hotel reservations are also often made as part of a travel package, in which travelers purchase other components, including flight or rental car reservations, at the same time. In such package transactions, OTCs typically quote a single price for the entire travel package. (*See, e.g.*, R. 2268, 2271-73, 2280-2331)

The second component is the "tax recovery charge and service fees" or "taxes and fees" charge. (R. 2130-31, 2271-72, 2654-55, 2659-60) As the label indicates, this charge combines two items: the anticipated taxes hotels will collect and remit on the Net Rate (including TRT and TDT), and a service fee intended, in part, to further compensate the OTC for the services it provides, including processing reservations and paying credit card fees (the "Service Fee"). (R. 2130-31, 2133, 2271-72, 2532-33, 2535, 2653, 2654-55, 2659-60) The tax recovery charge is later paid to the hotel along with the Net Rate. (R. 2133, 2271-72, 2532-33, 2535, 2653, 2654-55, 2659-60, 2665, 3901) Hotels remit TDT to the Counties on the Net Rate they receive. (R. 1527)

SUMMARY OF ARGUMENT

Because taxes deprive people and businesses of their property, it is the long-standing policy and law of this state that taxes may be imposed only by *clear and unequivocal* language in a duly enacted statute; taxation by implication is forbidden. Moreover, tax statutes must be construed strictly against the taxing authority, and any ambiguity must be resolved in favor of the alleged taxpayer.

Florida law does not clearly and unequivocally impose tax on the OTCs, the online services they provide, or the amounts they retain as compensation for those services. Under the plain meaning of the TRT and TDT Statutes and the Counties' Ordinance (collectively, the "Statutes"), tax is imposed only on businesses

exercising the privilege of renting, leasing or letting rooms to transients, and only on the amount such businesses receive as consideration for exercising that privilege. Those businesses are Florida hotels, which possess rooms and rent them to transients, not OTCs – out-of-state technology companies that, through their websites, help customers obtain reservations from hotels.

For this reason, the Court of Appeal correctly affirmed summary judgment for the OTCs, ruling (i) OTCs are not liable for TDT; (ii) OTCs have no tax collection and remittance obligations; and (iii) the amounts OTCs retain as compensation for their online facilitation services are not subject to tax. As shown in Sections I-III below, that decision should be affirmed for at least three reasons.

First, the OTCs do not exercise the taxable privilege, and thus are not liable for TDT. The Statutes and governing DOR Rules impose TDT liability only on persons that exercise the taxable privilege of engaging in the business of renting, leasing or letting rooms to transients. In their Complaint, the Counties base their TDT claims on this very construction and *allegations* that the OTCs "engaged in the business of renting, leasing or letting rooms" to transients. But uncontroverted *evidence* established the OTCs do not possess any rooms, and thus do not rent, lease or let them to transients. As the Court of Appeal recognized, the OTCs are merely "conduits" that transfer a reservation request to a hotel, which issues the reservation and later rents the room to the transient upon arrival at the hotel.

Second, the OTCs do not have statutory TDT collection and remittance obligations. The Statutes and DOR Rules impose such obligations only on persons who exercise the taxable privilege and "receiv[e] the consideration for [the] lease or rental," *i.e.*, "dealers." The Counties' Complaint seeks a judicial declaration that the OTCs are "dealers" with such obligations because they "rent, lease or let" rooms to transients. But again, the uncontroverted evidence established the OTCs are not such persons. As the Court of Appeal held, the duty to collect and remit the tax is imposed on the hotel that received the "consideration [] for the lease or rental" for exercising that privilege.

Third, the Statutes and DOR Rules do not impose tax on the amount each OTC retains as compensation for its online travel services. TDT is imposed only on the amount a person receives for exercising the taxable privilege, *i.e.*, the "consideration for the lease or rental." The Counties' Complaint alleges the OTCs' compensation is subject to TDT because it is for the "use of the hotel rooms." But uncontroverted evidence established the OTCs' compensation is not for the use and possession of hotel rooms, which the OTCs do not have and cannot provide to transients. As the Court of Appeal held, the amount subject to tax is the amount the hotel receives for use and possession of a room, not the additional amount an OTC charges for its online travel services.

Confronted with this uncontroverted evidence, the Counties, on cross-

motions for summary judgment, proffered for the first time a completely different statutory construction that contradicts their allegations in the Complaint; they now assert TDT is not imposed on *hotels* for the privilege of renting, leasing or letting rooms *to transients*, but rather on *transients* for the privilege of renting or leasing rooms *from hotels*. The Counties argue this new construction of the taxable privilege somehow transforms the tax base into the entire amount paid by the transient to anyone relating to a room reservation, and renders the OTCs liable for TDT, even though they do not rent, lease or let rooms to transients.

As shown in Section IV below, the Court of Appeal correctly rejected the Counties' new constructions. The express terms of the Statutes and DOR Rules, and Florida appellate decisions, including *Miami Dolphins, Ltd. v. Metro. Dade County*, 394 So. 2d 981 (Fla. 1981), make clear the Statutes impose tax on the same businesses, hotels, motels and the like, for exercising the same privilege – renting, leasing or letting rooms to transients.

Even if the Counties' new construction of the taxable privilege were correct, the OTCs would still be entitled to judgment. Even if the privilege were exercised by the *transient*, the only *businesses* on which the Statutes and DOR Rules impose any TDT liability and obligations are those that rent, lease or let rooms to transients, and the only amount taxed is the amount those businesses receive for doing so. Those businesses are the hotels, not the OTCs.

By their plain meaning, the Statutes do not tax OTCs or the amounts they retain as compensation for their online services. The Statutes certainly do not "clearly and unequivocally" do so. As shown in Section V below, at a minimum, the OTCs' constructions are *reasonable*. Indeed, every Florida court to reach final judgment on the application of the TDT has ruled in favor of the OTCs. Thus, even if the Counties' new, contrary constructions were also reasonable (they are not), they must be rejected. Any ambiguity in a tax statute, resulting from competing reasonable constructions, must be construed strictly against the government and in favor of the asserted taxpayer. Thus, either way, plain meaning or ambiguity rule, judgment for the OTCs should be affirmed.

If the Counties wish to tax the OTCs and other travel service intermediaries, and the amounts they retain as compensation for helping customers obtain reservations from hotels, the proper forum is the Legislature, not the courts. For this reason, the DOR has declined to pursue tax claims against the OTCs unless and until the Legislature amends the TRT and TDT Statutes to clearly and unequivocally impose liability on them. To date, the Legislature has steadfastly chosen not to enact proposals that would do so. This Court should reject the Counties' invitation to impermissibly usurp the Legislature's exclusive province.

STANDARD OF REVIEW

Summary judgment is reviewed *de novo*. (Pet. Br. at 14.)

RULES GOVERNING THE CONSTRUCTION OF TAX STATUTES

General rules of statutory interpretation provide:

> [W]hen the language of the statute is clear and unambiguous . . . the statute must be given its plain and obvious meaning. Further, [a court is] *without power* to construe an unambiguous statute in a way which would *extend, modify, or limit, its express terms* or its reasonable and obvious implications. To do so would be an abrogation of legislative power. A related principle is that when a court interprets a statute, it *must give full effect to all statutory provisions*.

Gomez v. Vill. of Pinecrest, 41 So. 3d 180, 185 (Fla. 2010).

"[T]he power to tax is the power to destroy. . . . [Thus,] [a] tax sought to be imposed without legislative authority is a nullity." *Dep't of Revenue v. Young Am. Builders*, 358 So. 2d 1096, 1099-1100 (Fla. 1st DCA 1978). Accordingly, additional rules govern construction of tax statutes. "Taxes cannot be imposed except in *clear and unequivocal language. Taxation by implication is not permitted*." *Fla. S & L Servs., Inc. v. Dep't of Revenue*, 443 So. 2d 120, 122 (Fla. 1st DCA 1983). As this Court held: "[T]he duty to pay taxes, while necessary to the business of the sovereign, is still a duty of pure statutory creation and taxes may be collected *only within the clear definite boundaries recited by statute*." *Maas Bros, Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967); *accord Broward Cnty. v. Fairfield Resorts, Inc.*, 946 So. 2d 1144, 1147 (Fla. 4th DCA 2006) (a court cannot "look beyond the *clear wording of the statute*" to impose TDT).

Further, "*tax laws* are to be *construed* strongly *in favor of the taxpayer* and

against the government, and [] *all ambiguities* or doubts are to be *resolved in favor of the taxpayer*." *Maas Bros.*, 195 So. 2d at 198; *accord Alachua*, 110 So. 3d at 942, 945. Simply, "[t]axing statutes . . . are to be strictly construed. . . . This is *particularly true* in instances wherein one meaning results in imposing the tax and the other *relieves imposition of the tax*." *Dep't of Revenue v. Brookwood Assocs.*, 324 So. 2d 184, 187 (Fla. 1st DCA 1976).

ARGUMENT

I. NONE OF THE OTCS IS LIABLE FOR TAX UNDER EXPRESS TERMS OF THE TDT STATUTE

A. The TRT And TDT Statutes Are "Upon The Same Subject" And Are To Be Read Together.

The TDT Enabling Act mandates "the *provisions* contained in *chapter 212* [which includes the TRT Statute] *apply to the administration* of any tax levied pursuant to this section." § 125.0104(2). Further, in enforcing its Ordinance, each County is "bound by all rules *promulgated by the [DOR]* . . ., as well as . . . *rules pertaining to* the sales and use *tax on transient rentals imposed* by s 212.03 [the TRT Statute]." *Id.* § 125.0104(10)(c).

This Court relied on this incorporation to hold the TDT Enabling Act and a county ordinance are not unconstitutionally vague:

> [T]he [TDT Statute] **is to be read *in pari materia with chapter 212*** . . .. First, because *section 125.0104(2) . . . provides* that the provisions of *chapter 212* are *to apply* to the administration of taxes levied under the former. Second, because section *125.0104(3)(f) provides* that the receipt, accounting for, and remitting of taxes collected pursuant to the act is to

> be *in the time and manner* provided by *section 212.03*. *** When read ***in pari materia*** *with [the TRT Statute]*, the [TDT] contains all of the elements and establishes the policy necessary to implement the legislature's goals. Any ***omissions [in the TDT]*** are to be ***filled by the applicable provisions of the [TRT]***. In the event of conflict between the two, the provisions of the [TDT] will govern . . .. [T]he ***[TRT]*** is simply ***the base on which the [TDT] rests***. *** If *read in conjunction with [the TRT]*, [the *TDT] passes muster* for completeness [and] . . .. It is not unconstitutionally vague; this Court's ***in pari materia construction makes it complete*** and remedies any vagueness.

Miami Dolphins, Ltd., 394 So. 2d at 987-88. Thus, the TRT and TDT Statutes are "upon the same subject," must be read together, construed the same, and subject to the same DOR Rules, except if and where there is a clear conflict in their terms.

The Fifth District Court of Appeal recently reaffirmed these requirements: "[T]he provisions of *Chapter 212, . . . including the legal principles governing the transient tax under section 212.03 . . . are applicable and binding . . .* in the *administration and enforcement of the County's TDT*." *Orange County v. Expedia, Inc.*, 985 So. 2d 622, 624-25 (Fla. 5th DCA 2008); *accord Alachua*, 110 So. 3d at 944-45. The Counties concede, absent an express conflict, the two Statutes must be construed the same. (Pet. Br. at 36-37.)[9]

B. The TRT And TDT Statutes Both Tax The Same Privilege Of Renting, Leasing, Or Letting Rooms To Transients.

The TRT Statute imposes tax on the privilege of "engaging in the business

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[9] Amici curiae agree. *See* American Hotel and Lodging Association ("Hotel Ass'n") Br. at 8; Volusia County Br. at 8, 10, 13 (the TDT Statute incorporates chapter 212's provisions, and "[a]ny divergence in interpreting both . . . ignores a compelling unifying principle that underlies the[ir] purpose").

of *renting, leasing, letting, or granting a license to use*" hotel rooms. (*Supra* at 3.) The TDT Enabling Act authorizes counties to impose tax on exercising the same privilege "for consideration." (*Supra* at 4-5.) The Ordinance, as it must, does the same. (*Supra* at 5-6.) The plain meaning of these terms confirms the taxable privilege is exercised by the lodging establishment business.

"[B]ecause 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." *Alachua*, 110 So. 3d at 945, citing *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005) ("the plain and ordinary meaning can be ascertained by reference to a dictionary"). The verb "rent" means "to *grant the possession* and enjoyment of (property, machinery, etc.) *in return for the payment* of rent from the tenant or lessee." *Dictionary.com* (based on *Random House Dictionary*) (2013). The verb "lease" means "to *grant the temporary possession* or use of (lands, tenements, etc.) to another, usually *for compensation* at a fixed rate; let." *Id.* The verb "let" means "to *grant the occupancy* or use of (land, buildings, rooms, space, etc., or movable property) *for rent*." *Id.* Thus, the common meaning of all three terms comprising the taxable privilege under the Statutes is to transfer possession or occupancy of a hotel room *to* another in return for payment.[10]

[10] While "rent" and "lease" can also mean the act of taking possession *from* another

The Court of Appeal here recognized this plain meaning: "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*." *Alachua*, 110 So. 3d at 946. Thus, TDT is imposed on "*hotels, motels, and others* for exercising the privilege of engaging in the *business of renting rooms* to consumers." *Id.* at 944.

The Court of Appeal explained the privilege of "renting or leasing" property when construing Florida's commercial rentals tax statute in *Florida Revenue Comm'n v. Maas Bros., Inc.*, 226 So. 2d 849 (Fla. 1st DCA 1969). Exercising that privilege requires "a number of *interdependent and interrelated activities*," including "the preparation and *execution of leases*, the supervision, *maintenance and upkeep of* the leased *premises*, the payment of taxes and assessments levied against the premises, [and] maintenance of adequate insurance to protect the interest of those entitled to protection under . . . the leases." *Id.* at 851. Transfer of possession of property is integral to the act of renting or leasing; thus, the mere "*incident of payment and receipt of the rental* charged [*does not*] constitute[] the taxable transaction [or] *create[] the tax liability*." *Id.* at 852-53.

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for consideration, "let" – "to grant the occupancy of" – cannot. The same is true of "granting a license to use" included in the TRT Statute. A "license" is "the granting of a privilege to use or occupy a building or a parcel of real property for any purpose." § 212.02(10)(i), Fla. Stat. Thus, to "let" or "grant a license to use" a room can *only* mean to transfer possession of it *to* another.

The Court of Appeal also held "the tax imposed upon the rental of guest rooms is imposed upon the *privilege of operating a hotel or motel*," and discussed the scope of that privilege: "*Hotels and motels . . .* are *in the business of providing overnight accommodations, together with attendant services*. In return for payment by the patron, the *hotel or motel undertakes to provide* a package consisting of *real property, tangible personal property and services*." *Fla. Hotel & Motel Ass'n v. Fla. Dep't of Revenue*, 635 So. 2d 1044, 1046-47 (Fla. 1st DCA 1994).

In sum, these decisions confirm the taxable privilege is exercised by hotels and other lodging businesses that possess, and can transfer possession of, hotel rooms. Adhering to that plain meaning, the Court of Appeal here held "[i]n both [statutes], the Legislature determined that operating a hotel in a county is a privilege subject to taxation." *Id.* at 945, citing *Miami Dolphins*, which "held the [TRT] statute is to be read together with the [TDT] statute."

As the Court of Appeal here explained, the TDT Statute's repeated use of the word "for" further confirms that the hotel is the person exercising the taxable privilege. "For" means "in order to obtain, gain, or acquire." *Dictionary.com*. This plain meaning dictates that the person who "rents, leases, or lets for consideration" is the business, not the customer, because "[i]n a contract, one party sells a product or service **for** consideration," while the other pays "**with** that

consideration." *Alachua*, 110 So. 3d at 945 n.5. (emphasis in original)

Finally, the DOR Rules governing construction and administration of the Statutes provide "every person" "engaging in the business of *renting, leasing, letting,* or granting licenses *to others* to use transient accommodations" is exercising the taxable privilege. Fla. Admin. Code R. 12A-1.061(1), (2).[11]

The Counties, in their Complaint and until briefing summary judgment, recognized that the TRT and TDT are commensurate, alleging the "same ***privileges***, duties and obligations imposed by Chapter 212" are "applicable and binding for purposes of the" TDT. (R. 58, 1525)

C. The TRT And TDT Statutes Both Impose Tax Liability Only On Persons That Exercise The Privilege Of Renting, Leasing Or Letting Rooms To Transients.

The Statutes impose tax liability only on those persons that exercise the privilege being taxed -- renting, leasing or letting rooms to transients. Each such person is "personally liable" for tax owed on that business activity. (*Supra* at 3-6.) The TDT Statute and Ordinance make clear the persons "subject to the tax" are the "owners or operators of motels, hotels" (*supra* at 4-6), *i.e.*, persons renting, leasing or letting rooms. Those persons remain liable for the tax, whether or not it is

[11] The Rules require each such person "to register as a dealer and obtain a separate dealer's certificate of registration for each place of business where transient accommodations are provided." Fla. Admin. Code R. 12A-1.060(1)(a)9, (3)(b)1.

charged to or collected from customers. (*Supra* at 4.)[12]

The DOR Rules reaffirm only the hotel, the person in possession of, and transferring possession of, the rooms, is liable for any TRT or TDT owed. The Rules provide that "every person" "engaging in the business of *renting, leasing, letting,* or granting licenses *to others* to use transient accommodations" is exercising the taxable privilege and liable for tax. (*Supra* at 22.) "The *property owner* is ultimately *liable for* any sales *tax* due . . . *on rentals, leases, lets, or licenses to use the owner's property*." Fla. Admin. Code R. 12A-1.060(3)(d)3.a.

This Court confirmed hotels are the persons subject to the TDT in *Miami Dolphins*, where it held a county's TDT ordinance was properly enacted because the ballot measure met all requirements, as it "contained a brief description of the tax plan, *i.e.*, the rate, ***the group on whom it would be imposed***, the expected revenues, and the planned expenditure of those revenues." 394 So. 2d at 987. The ballot referred to that group as "***hotel, motel***, and similar accommodations." *Metro. Dade County v. Shiver*, 365 So. 2d 210, 212 (Fla. 3d DCA 1978). The court of appeal had ruled "***hotel, motel***, and similar accommodations" sufficiently identified the group subject to the tax. *Id.* at 213. Thus, in affirming that the ballot sufficiently identified the group subject to the tax, this Court necessarily was

[12] Because the economic incidence of the tax is passed on to the transient, the Enabling Act grants the hotel a lien on the guest's property to secure the *hotel's* liability for the tax. § 125.0104(8)(c), Fla. Stat. The TRT Statute does the same. § 212.03(5), Fla. Stat. These provisions reinforce that hotels are liable for the tax.

referring to that group as ***hotels, motels,*** and similar accommodation businesses. *Miami Dolphins*, 394 So. 2d at 987.

This Court next examined whether the TDT Statute is unconstitutionally vague "as to ***who*** is subject to the tourist tax." *Id.* The Court held the Statute sufficiently sets forth who is subject to the tax – but only when read *in pari materia* with the TRT Statute. *Id.* By looking to the TRT Statute to answer "who is subject" to the TDT, this Court again made clear the answer is the same under both statutes – ***hotels, motels*** and the like.

The Counties, in their Complaint and until briefing summary judgment, asserted this very construction. They based their TDT claims on the Statutes imposing tax liability only on persons that engage in the taxable privilege of "renting, leasing or letting" rooms to transients, and *allegations* that the OTCs do so. (R. 61, 1528) The Complaint sought a declaration that OTCs are liable for TDT because they are "exercising the taxable privilege by renting, leasing or letting transient accommodations." (R. 62, 1529)

D. Uncontroverted Evidence Established The OTCs Do Not "Rent, Lease Or Let" Rooms, And Thus Are Not Liable For Tax.

Under the OTCs' contracts and operating procedures with hotels, only the hotel can rent accommodations, *i.e.*, transfer occupancy of a room to a transient, by registering the transient as a guest and assigning, and granting access to, a particular room, because only the hotel possesses rooms to rent. (*Supra* at 8-10.)

An OTC acts as an intermediary, relaying a transient's reservation request to the hotel, and the hotel's acceptance or rejection of that request back to the transient, and processing payment, all through the OTC's website. (*Supra* at 8-9.)

In light of these uncontroverted facts, the Court of Appeal correctly affirmed summary judgment for the OTCs:

> 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 [TDT] enabling statute or the counties' ordinances. *** 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*.

Alachua, 110 So. 3d at 946.[13] Thus, the OTCs are not liable for TDT.[14]

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[13] The Court noted (110 So. 3d at 943 n.3) its use of Judge Lauten's analysis in *Orange County v. Expedia, Inc.*, No: 48-2006-CA-2104, at 28 (Fla. Orange Cty. Ct. June 22, 2012) (App. 1) ("Under the Merchant Model, a customer rents a room from the hotel company not from the [OTC] that assists in the transaction."). Judge Lewis held the same in *Broward County v. Orbitz, LLC*, Case No. 2009-CA-126, at 4, *on appeal*, Case No. 1D 13-543: "[T]he tax is on the privilege of renting out rooms. It is, in essence, *a tax on the hotelier* for the *privilege of engaging in that business*. The *OTCs are not hoteliers* and *do not engage in that business*." (App. 2)

[14] For the same reasons, an overwhelming majority of courts nationwide have rejected similar attempts to impose hotel tax liability on OTCs, including appellate courts in eight other jurisdictions. *See, e.g.*, *Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 313 (4th Cir. 2009) ("OTCs are not hotel "operators" because they "*[do] not physically provide the rooms*" and "have *no role* in the day-to-day operation or management of the hotels."); *City of Birmingham v. Orbitz, LLC*, 93 So. 3d 932, 936 (Ala. 2012); *Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P.*, 590

The Counties now proffer two conclusory arguments that the OTCs rent rooms to transients. (Pet. Br. at 37.) Both are refuted by uncontroverted evidence.

First, the Counties contend OTCs "grant possessory or use right in a hotel room" because "what the [OTCs] sell – what they charge customers for – is a confirmed reservation for a hotel room." (Pet. Br. at 41.) Amicus Broward County similarly asserts "hotels contractually grant the OTCs the ability to convey a leasehold interest in a hotel room to the hotel guest." (Broward Br. at 14.) But uncontroverted evidence, including the OTCs' contracts with hotels and testimony (*see supra* at 8-10), established the OTCs never obtain, and therefore "*do not grant possessory or use rights* in hotel properties owned or operated by third-party hoteliers." *Alachua*, 110 So. 3d at 946.[15] The OTCs "merely transfer a reservation request from the tourist to a hotel," which issues the reservation at its discretion. *Id.* OTCs cannot "sell" what they do not have.

F.3d 381, 388 (6th Cir. 2009); *City of Columbus, Ohio v. Hotels.com, LP*, 693 F.3d 642 (6th Cir. 2012); *City of Bowling Green v. Hotels.com, L.P.*, 357 S.W.3d 531, 532-33 (Ky. Ct. App. 2011) (pet. for rev. denied, 2012 Ky. LEXIS 228 (Ky., Feb. 15, 2012)); *City of Philadelphia v. City of Philadelphia Tax Review Bd.*, 37 A.3d 15 (Pa. Commw. Ct. 2012), *alloc. denied*, 50 A. 3d 1253 (Pa. 2012); *City of Houston v. Hotels.com, L.P.*, 357 S.W.3d 706 (Tex. Ct. App. 2011); *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708 (Mo. 2011); *City of Branson v. Hotels.com, LP*, 396 S.W.3d 378 (Mo. Ct. App. 2013).

[15] As Broward concedes, the OTCs do not "own or possess a leasehold interest in a hotel room," it is the hotel that assigns a room and "physically hands a key" to the transient (Broward Br. at 14), thereby making her a hotel "guest" and conveying the right to occupy a room. (*Supra* at 10.)

Even the reservation issued by a hotel is not itself a right to occupy a room. "[B]ooking a reservation through [an OTC] does not provide a customer with the use or possession of a room or the right to do the same. Rather, this booking merely establishes the *expectation* that a room will be available to a customer at a set point in time in the future." *City of Phila.*, No. 216 C.D. 2011, 2012 WL 310874, at *9. A reservation booked through an OTC does not "guarantee" a customer a room, no room is assigned and held by the hotel, and if the hotel is overbooked, the customer may be provided a room at another hotel. (*Supra* at 10.) The DOR agrees that a non-guaranteed reservation is not itself a right of occupancy, and thus, not subject to tax. Fla. Admin. Code R. 12A-1.061(6)(a)1.a.

Second, the Counties assert that, even if the OTCs do not "rent, lease or let" rooms, they are subject to TDT because the TRT Statute defines "business" to include "any activity . . . caused to be engaged in by him or her." (Pet. Br. at 40-41.) They assert the OTCs cause hotels to rent rooms by helping customers obtain reservations from the hotel. (*Id.* at 40.) However, the evidence is uncontroverted that the hotels are separate business entities with whom each OTC has an arms-length contractual relationship. (*Supra* at 8.) Florida hotels were not coerced by OTCs to enter the hotel business; and an OTC cannot cause any hotel to use it as a distribution channel, or to issue a single reservation. (*Supra* at 7, 9.)

II. NONE OF THE OTCS ARE LEGALLY OBLIGATED TO COLLECT AND REMIT THE TDT.

A. The Statutes And DOR Rules Impose Tax Collection And Remittance Obligations Only On "Dealers" – The Persons That "Rent, Lease, Or Let" Rooms To Transients.

Because hotel operators are the persons who exercise the taxable privilege of "renting, leasing, or letting rooms," the Statutes require "the *owner*, *lessor* or person *receiving the rent* in and by said rental arrangement to the lessee" to charge the tax to the transient and remit the tax to the government. §§ 212.03(2), Fla. Stat., 125.0104(3)(g) ("The *person receiving the consideration for such rental or lease* shall receive . . . and remit the tax . . . *in the manner . . . under s. 212.03*."). The person obligated to collect and remit the tax is the "dealer." *Id.* Chapter 212 defines "dealer" in pertinent part as "any person who *leases*, or *grants a license to use, occupy, or enter* upon, living quarters, sleeping or housekeeping *accommodations* in hotels . . .." *Id.* § 212.06(2)(j). The DOR Rules provide the same. Fla. Admin. Code R. 12A-1.061(9)(a).

The Ordinance likewise provides a "dealer" is one "*leasing, renting, or letting any facilities*," and requires registration "before the *dealer* may *lease, rent or let* any facilities." Ordinance § 11-46(b)(1). The Ordinance refers to *"tax remitted by the dealer*," and requires each "dealer" "*to keep a record of each and every lease, license, or rental transaction.*" *Id.* §§ 11-46(c)(4) & 11-46(d)(1)(A).

The plain meaning of "person receiving the consideration for such rental or lease" confirms only the "dealer" – the person renting, leasing or letting rooms –

has collection and remittance obligations. "Consideration" means "recompense or payment, as for work done; compensation." *Dictionary.com*. "Rental" means "the act of renting;" and "an apartment, house, car, etc., offered or given for rent." *Id.* "Lease" means "the property leased." *Id.* Thus, the "consideration for the lease or rental" is the compensation for transferring the use and possession of a room.

Adhering to this plain meaning, the Court of Appeal recognized "[b]oth the [TDT] and [TRT Statutes] impose a duty to charge, collect, and remit the bed tax" on hotels – the persons who rent, lease or let rooms:

> Logically, therefore, that *duty is imposed on 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*.

Alachua, 110 So. 3d at 944.

Until briefing summary judgment, the Counties asserted "dealers" were the persons with statutorily imposed TDT collection and remittance obligations. Their Complaint alleged a "dealer" is a "person who leases . . . accommodations in hotels," and "dealers" "must register with and obtain a certificate of registration from the [DOR]." (R. 58, 59, 1525) They sought a declaration that the OTCs are "dealers for purposes of the TDT," required to collect and remit tax because they rent, lease or let rooms. (R. 62, 1529)

B. Uncontroverted Evidence Established The OTCs Are Not "Dealers" With Statutorily Imposed Tax Collection And Remittance Obligations.

As shown, the OTCs do not "rent, lease or let" rooms to transients. Thus, they are not "dealers." Based on these uncontroverted facts, the Court of Appeal properly held: "the *consideration received for the lease or rental* is the *amount received by the hotels* for the use of their room, and not the mark-up profit retained by the [OTCs] for facilitating the room reservation." *Alachua*, 110 So. 3d at 946.

The Counties argue an OTC nevertheless should be deemed "the person receiving the consideration for the lease or rental" because the OTC, not the hotel, is directly involved in the transaction with their customers. (Pet. Br. 28-30.) But, as shown, under the plain meaning of those terms, only the hotel, *i.e.*, the "dealer," actually rents, leases or lets – *i.e.*, transfers use and possession of – hotel rooms, and is the person "receiving the consideration *for the lease or rental*." OTCs receive only consideration for their online facilitation services. (*Supra* at 10-11.)

This reality does not change because the customer deals directly with the OTC in prepaying the rental the hotel charges for occupancy of a room. As the Court of Appeal explained, OTCs serve as intermediaries between the customer, the party seeking to rent a room, and the hotel, the party with rooms to rent. (*Supra* at 25.) The reservation request and the subsequent payment for the rental are conveyed by the OTC to the hotel on behalf of the customer, and the hotel's

reservation confirmation is conveyed to the customer on behalf of the hotel. While the two may not interact directly until the customer arrives at the hotel and the rental occurs, they are dealing with each other indirectly *through the OTC* throughout the entire process.[16]

"Dealer" does not mean all persons through whom consideration for the rental charged by the hotel passes. As the Court of Appeal held construing the commercial rentals tax, "the incident of payment and the *receipt* of the rental charged [does not] . . . create the tax liability." *Maas Bros.*, 226 So. 2d at 852-53. Rather, renting or leasing to another requires transfer of property. *Id.* The OTCs are one further giant step removed; as shown, they "collect" but do not "receive" the consideration for the rental, hotels do. Contractually agreeing to *collect* rent, and tax thereon, on behalf of "dealers," *i.e.*, hotels, does not impose collection and remittance obligations on the OTCs under the Statutes and *Maas*.[17]

III. AMOUNTS AN OTC CHARGES AND RETAINS AS COMPENSATION FOR ITS ONLINE SERVICES ARE NOT CONSIDERATION "FOR [THE] LEASE OR RENTAL"

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[16] Amicus Hotel Association describes the OTCs' service as "the processing of room reservations," but asserts that service is subject to tax under *American Telephone and Telegraph v. Florida Dept of Revenue*, 764 So. 2d 665 (Fla. 1st DCA 2000). (AHLA Br. at 8.) That decision contemplates taxing only services charged by a "dealer" of tangible property, not extending tax liability to non-dealers. The Counties and amici cite nothing in the Statutes, DOR Rules, or otherwise under Florida law, for doing so.

[17] Under the Counties' construction, a credit card company through which a rental payment passes, "receives" consideration for a rental and would be liable for TDT.

A. Under The Statutes And DOR Rules, Tax Is Imposed Only On The Amount A "Dealer" Charges And Receives For Transferring Possession Of A Room.

TRT is imposed on "the *total rental charged*" for accommodations. § 212.03(1)(a), Fla. Stat. Likewise, the Enabling Act authorizes TDT on "the *total consideration charged for such lease or rental*." *Id.* § 125.0104(3)(c). Thus, Ordinance § 11-46(a)(1) imposes TDT on the "total rental/consideration charged."

As shown, the plain meaning of "consideration for [the] lease or rental" is the amount the hotel receives for furnishing use and possession of a room to a transient. (*Supra* at 28-29.) The Court of Appeal reaffirmed this plain meaning:

> [T]he consideration received 'for the lease or rental' is that amount received by the hotels for use of their room. . . . 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 other taxes or fees.

110 So. 3d at 946. (emphasis in original); *accord Orange County*, 985 So. 2d at 625 ("The TDT is levied . . . on the total amount of the *consideration received by a "dealer"* (as that term is defined in Florida law including section 212.06(2)(j). . .) for the *letting of the . . . accommodations*.").

The DOR Rules governing the TDT reaffirm this plain meaning: "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***." Fla. Admin. Code R. 12A-1.061(4)(a). Thus, "rental charges or room rates" is defined as "the total

consideration received ***solely for*** the *use or possession*, or the right to the use or possession, of any *transient accommodation*." *Id.* R. 12A-1.061(3)(e).

The DOR Rules further provide:

> 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 *** [and] include[s] charges or surcharges for the use of items or services when *all guests or tenants* receive the use of such items or services.

Id. R. 12A-1.061(4)(b)1, 3. Therefore, the *only* charges for services taxed are those services (i) provided to *all* "guests or tenants" – *i.e.*, persons who have actually obtained possession of a room by checking-in and registering at the hotel; and (ii) required to be paid as a condition of possessing a room.[18] Contrary to the Counties' suggestion, these express limitations cannot be ignored.

B. Uncontroverted Evidence Established The Amount An OTC Charges A Customer And Retains Is Not "Consideration For [A] Lease Or Rental" Subject To TDT.

As shown, the OTCs are not "dealers," as they do not "rent, lease, or let" accommodations to transients. (*Supra* at 30.) Thus, as the Court of Appeal held, "the consideration received for the 'lease or rental' is . . . *not the mark-up profit retained by the [OTCs]* for facilitating the room reservation." *Alachua*, 110 So. 3d

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[18] Thus, the Rules list services *charged by the hotel* to only *some* guests that are therefore *not* subject to tax, including "food and beverage services; safety deposit boxes; admissions for golf, tennis, or cultural events; transportation services; laundry services; valet services; and delivery services." R. 12A-1.061(4)(h).

at 946. "The consideration [they] ultimately keep is *not for the rental or lease*, but for their service in facilitating the reservation." *Id.* The Court properly concluded:

> [T]he difference between the fees [OTCs] 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*. . . .The [TDT] *does not plainly evince an intention to include the additional fees* that [OTCs] 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 for allowing customers to occupy their rooms – *is what has been taxed.*

Id. at 946-47.[19]

C. The Counties' Efforts To Impose Tax On Amounts Not Received As Consideration For Renting, Leasing Or Letting Rooms To Transients Is Contrary To The Plain Meaning Of The Statutes And DOR Rules.

The Counties assert "the total consideration charged for such lease or rental" should be read as "the total amount the customer pays to the [OTC], regardless of whether the hotel ultimately receives all, some, or none of that amount." (Pet. Br. at 22.) This "tax everything" approach ignores the Statutes' terms, which do not impose tax on the "total consideration" paid by the transient, but rather on only the "total consideration" the hotel charged "for the lease or rental."

The Counties proffer a definition of "total" (*id.* at 25), but not

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[19] Judge Lauten reached the same conclusion: "It is the hotels themselves, though, not [the OTCs], who are subject to the TDT on the amount they *insist on being paid before a customer may use their property*." *Orange County*, No: 48-2006-CA-2104-O, at 22. Tax is imposed "*upon the sum accepted by the person who actually rents, leases or lets its room*. That person is the hotelier." *Id.* at 28.

"consideration," which, as shown, is payment "for" something – the "lease or rental." The Counties omit "for such lease or rental," and assert "total consideration means the total amount the customer pays to the [OTCs]." (*Id.* at 24.) But they cannot erase the express limitations on the tax base. *See Gomez*, 41 So. 3d at 185 (courts "must give effect to all statutory provisions").

Thus, the Court of Appeal did not ignore the "deliberate inclusion of the adjective total" (Pet. Br. at 25); rather, it adhered to the plain meaning of "total consideration charged *for [the] lease or rental*." It is the Counties that ignore words – the "for [the] lease or rental" limitation."[20]

In support of their tax everything approach, the Counties cite TDT Enabling Act § 125.0104(3)(f). (Pet. Br. at 23). But that subsection merely provides when the tax must be collected: "The [*TDT*] 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.*" The timing of the tax collection does not transform amounts not charged as "consideration . . . for such lease or rental" into such charges.

The Counties contend the entire amount an OTC charges must be deemed

[20] Nor did the Court of Appeal rule the OTCs' compensation is "exempt" from tax. (Pet. Br. at 14.) It held that amount is not within the Statute's express tax base. The Counties quibble with the court's definition of "rental" as the "income received from rent," and assert "rental" can also mean the "amount received as rent." (*Id.* at 25.) But, under either definition, the result is the same – the consideration "for [the] rental" is only the amount a hotel receives for possession of a room.

"for such lease or rental" because it is collected from the customer at the same time as the tax. (*Id.* at 23-24.) But, as the Court of Appeal held, the "consideration for [the] lease or rental" is, by its plain meaning, only the amount a hotel charges for the use and possession of a room. (*Supra* at 34.)[21]

The Counties then turn to the DOR Rule that provides services "required to be paid as a condition of the . . . possession . . . of any transient accommodation" are part of the taxable "rental charge." (Pet. Br. at 26.) Broward County does the same. (Broward Br. at 9.) But a customer is not required to use an OTC's online service to obtain a reservation from a hotel; the customer can reserve a room with the hotel directly or through other distributions channels. (*Supra* at 8.)

Thus, the amount retained by an OTC for its online services is not paid as a condition of obtaining occupancy of a room from a hotel, but rather a condition of using an OTC's services to obtain a reservation from a hotel. As the Counties recognize, "[c]ustomers must pay the total amount charged by the [OTCs] *in order to* make a hotel room reservation *under the merchant model*." (Pet. Br. at 4.) No person, much less every person, must use, and pay for, the OTCs' online services to

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[21] Volusia County (Volusia Br. at 4 n.4) cites *Brevard County v. Priceline.com, Inc.*, No. 6:09-cv-1695, 2010 WL 680771 (M.D. Fla. Feb. 24, 2010) . But *Brevard* did not state TDT is imposed on the "total consideration charged," regardless of for what and to whom. It held tax is imposed on amounts charged as compensation for "the lease or rental," *i.e.*, transfer of possession of a room, and denied the OTCs' motion to dismiss because the county *alleged* OTCs do so. *Brevard* at *4.

obtain from a hotel the use and possession of a room.[22]

Moreover, the Rule does not apply to every charge. Only the "the total consideration received ***solely*** *for* the *use or possession* . . . of any *transient accommodation*" is taxed, and includes only a "charge or surcharge for a service provided to "all" "***guests or tenants***" as a condition of obtaining occupancy. (*Supra* at 32-33.) The Counties ignore the "solely" and "all" requirements, and use ellipsis to remove "to guests or tenants." (Pet. Br. at 27.) Those words limit the taxable charges to only those services provided *by the hotel* to *all* "guests or tenants" – persons who have obtained possession of a room by checking-in and registering at the hotel, which are charges "*solely* for use or possession" of a room. The OTC's consideration is not for use or possession of a room, but for online services it (not the hotel) provides to customers before they become guests, and not all of a hotel's guests use and are charged for those services. (*Supra* at 34.)[23]

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[22] The Counties assert the OTCs oppose their construction because it would impose a "service tax." (Pet. Br. at 26-27.) It is true that, absent enabling legislation, the Counties cannot tax services the Legislature has not chosen to tax. As the OTCs have shown, the Counties cannot tax the OTCs' services because the Counties' construction is contrary to the Statutes' express limiting language, and taxing them is not within the clear and definite boundaries of the Statutes.

[23] The Counties complain of "differing" tax results under the "merchant" model at issue here and the "agency" model that is not. (Pet. Br. at 3-6.) The tax owed under the former differs from the latter because, as the Counties admit, the amount the hotel charges and receives for a transient's possession of a room differs. (*Id.* at 6.) Under the Statutes' terms, the hotel's decision to charge less for occupancy logically affects the tax base.

The Counties are left asserting an OTC's compensation for its online services is subject to TDT even if it is not "for such lease or rental." (Pet. Br. at 42.) This assertion demonstrates the Counties' true position – that no matter what the Statutes and DOR Rules say, any amount charged related to a room reservation must be taxed. But the express limitations in the Statutes and Rules do matter, and cannot be ignored, erased or ellipsized away to achieve the Counties' desired result.[24] Even if TDT were owed on the OTCs' compensation, under the Statutes' express terms, the *hotels*, *i.e.*, the "dealers," would be liable for it, not the OTCs.

IV. THE COUNTIES' LATEST CONSTRUCTION OF THE TAXABLE PRIVILEGE IS CONTRARY TO THE PLAIN MEANING OF THE STATUTES, THE DOR RULES, FLORIDA CASE LAW, AND THE COUNTIES' OWN COMPLAINT.

Confronted with uncontroverted evidence that OTCs do not "rent, lease or let" rooms to transients, the Counties, on cross-motions for summary judgment proffered a completely new construction of the TDT Statute. Contradicting the construction in their Complaint, they asserted TDT is not imposed on *hotels* for the privilege of renting, leasing or letting rooms *to transients*, but rather on *transients* for the privilege of renting or leasing rooms *from hotels*. The Counties contend this new construction of the taxable privilege somehow transforms the tax base

[24] Amicus Florida Association of Destination Marketing Organizations (ADMO Br. at 9-11) contends tax should be imposed on the OTCs because Florida counties need the revenue. A desire for revenue is no basis for imposing tax beyond that clearly and unequivocally set forth in the Statutes. Increasing taxes for such a purported need is solely the Legislature's prerogative.

into the entire amount paid by the transient to anyone relating to a room reservation, and renders the OTCs liable for TDT, even though they do not rent, lease or let rooms to transients. The Court of Appeal correctly rejected the Counties' newly minted constructions and their three asserted basis for them.[25]

A. The Counties' Misapplication Of "Tourist."

The Counties assert "§ 125.0104 imposes TDT on *tourists* who rent hotel rooms in Florida," and "tourists" exercise the taxable privilege. (Pet. Br. at 16-17.) They base this assertion on a truncated version of the Statute's definition of "tourist," as "a person . . . who rents or leases transient accommodations." (*Id.* at 17, citing § 125.0104(2)(b)2.) (ellipsis in original) This assertion is untenable.

First, the TDT Statute does not define a "tourist" as the person exercising the taxable privilege, and nowhere suggests the "tourist" is that person. The *only* time the Statute uses "tourist" is in provisions requiring TDT revenue be spent, in part, to promote "the attraction of tourists." *E.g.*, § 125.0104(3)(l)4. Thus, the Statute defines, and only uses, "tourist" to make clear who the tax revenue should be spent to attract, not to indicate on whom tax is imposed.

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[25] The Counties' amici do not embrace these new constructions. Volusia Br. at 17 ("The [TDT], along with the [TRT], are costs [businesses] must pay for engaging in the tourist industry. . . . The Legislature has enacted a tax to delineate the cost for engaging in this business, . ."); AHLA Br. at 6 (TDT is imposed on all persons who "receive consideration for room rentals"); Broward Br. at 3, 4 ("assum[ing]" hotel, not tourist, exercises privilege); ADMO Br. at 3 n.1 (adopting constructions, but then conceding "vendors" under the TDT Statute are "hotels," not the OTCs).

Second, the full definition of "tourist" refutes the Counties' assertion: "[A] person who participates in trade or recreation activities outside the county of his or her permanent residence ***or*** who rents or leases transient accommodations as described in paragraph (3)(a)." § 125.0104(2)(b). Thus, one can be a "tourist" *without renting or leasing* a room. The notion that such a "tourist" is exercising the taxable privilege though not renting or leasing a room is nonsensical.[26]

Third, the Counties' new construction is also refuted by the plain meaning of "rent, least, or let" used in the provision that *does* set forth the taxable privilege. As shown, inclusion of "let" in the taxable privilege precludes construing "tourist" as the person who exercises that privilege because "let" can only be read to mean transferring property *to* another for consideration. (*Supra* at 19-20 & n.10.)

The Counties try to explain away the inclusion of "let." (Pet. Br. at 17-18.) Like the dissent below, they assert "rent" and "lease" can describe "action taken by the person who pays for the right to occupy the property." (*Id.* at 17.) But, as the dissent conceded, "let has no other meaning than the one in which the property owner is the actor." *Alachua*, 110 So. 3d at 949.

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[26] The Counties also grammatically misconstrue the definition. The phrase "as described in paragraph (3)(a)" modifies "transient accommodations," and is short-hand for the laundry list of types of accommodations listed in § 125.0104(3)(a); it does not, as the Counties suggest, modify "person." (Pet. Br. at 17). *See Jacques v. Dept. of Business and Prof. Regulation*, 15 So. 3d 793, 796 (Fla. 1st DCA 2009): "Under the 'doctrine of the last antecedent,' 'relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote.'"

The Counties cite a provision in the state sales tax statute, which states "[l]ease, let, or rental means leasing or renting of living quarters or sleeping or housekeeping accommodations in hotels." § 212.02(10)(g), Fla. Stat. They contend this definition allows "let" to be read contrary to its plain meaning to also describe action by the person obtaining accommodations. (Pet. Br. at 18.)[27]

The Counties' assertion is self-refuting. Under the sales tax statute, which includes the TRT Statute, in the context of hotel accommodations, "rental," "lease," and "let," refers only to action taken by the person *providing possession* of the accommodations, because, *as the Counties concede, TRT is imposed on* ***businesses*** *for the privilege of doing so*. (*Id.* at 33.) Thus, under the TRT Statute's definitions, "lease" and "rental" (as well as "let") only refer to an action by the person providing the hotel room.

Fourth, the Counties' new construction of the taxable privilege is precluded by the TDT Enabling Act and Ordinance provisions expressly describing the persons "subject to tax" as "*owner or operators of motels, hotels*" and the like, who are "personally liable" for the TDT. (*Supra* at 4-6.) These provisions confirm the person exercising the privilege is the business "rent[ing], leas[ing], or let[ting]"

[27] Contrary to the Counties' suggestion (Pet. Br. at 17), the dissent below made no such effort to redefine "let." Rather, the dissent said "let" could, in effect, be read out of the TDT Statute because it "is listed in the disjunctive," and thus, "need not be understood as merely another term for rent or lease." 110 So. 3d at 949. The nonsensical result of that construction would be a Statute that imposes tax on two different privileges – renting and leasing *by transients*, and letting *by hotels*.

accommodations to transients, not the "tourist."

Fifth, the Counties' new construction also requires them to try to explain away the phrase "rents, leases, or lets ***for*** consideration." (Pet. Br. at 18-19.) As the Court of Appeal explained, the plain meaning of "for" makes clear the person renting, leasing or letting rooms is the hotel, not the tourist. (*Supra* at 21.)

Ignoring that plain meaning, the Counties contend "for consideration" is "used in reference to the lessee or rentee in other, relevant statutory definitions." (Pet. Br. at 18-19.) They again cite § 212.02(10)(g), which defines "lease," "let," and "rental" as "the leasing or rental of tangible personal property and the possession or use thereof by the lessee or rentee *for a consideration*." But again, this definition is for the sales tax, including the TRT, which the Counties admit is a tax on *businesses*.

Sixth, the Counties' new construction is refuted by the DOR Rules, which govern both Statutes, and make clear the taxable privilege under both is "***engaging in the business of renting, leasing, letting, or granting licenses*** . . . to use transient accommodations" and require each such person "to register as a dealer and obtain a separate dealer's certificate of registration for each place of business where transient accommodations are provided." (*Supra* at 22 & n.11.)

B. The Counties' Misplaced Reliance On "Engages In The Business Of."

The Counties contend the absence of the phrase "engages in the business of"

in the Enabling Act's taxable privilege provision means that, unlike under the TRT Statute, the Legislature "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." (Pet. Br. at 31-34.) But with or without that phrase, the exercise of the taxable privilege requires the act of "renting, leasing, or letting" a room. While it omitted "engages in the business," the Legislature did not omit the term "let," and described those "subject to the tax" as "owners or operators of motels [and] hotels." (*Supra* at 4-5.) Both legislative decisions foreclose any argument that the Legislature intended to flip the taxable privilege.[28] Whatever the reason for omitting "engages in the business of," the remaining express terms, and those of the DOR Rules and Ordinance, refute the assertion that the TDT Statute authorizes taxing a different privilege than the TRT Statute.

C. The Counties' Cannot Manufacture A Conflict With *Miami Dolphins*.

Finally, the Counties assert the Court of Appeal's decision "misapplies" *Miami Dolphins'* holding that any conflict between the TRT and TDT Statutes be resolved by looking to the TDT Statute's express terms. (Pet. Br. at 35-36.) But, as the Court of Appeal explained, there is no conflict, much less one that suggests the tax imposed by each statute is of an entirely different nature. *Alachua*, 110 So.

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[28] As Volusia County concedes, the omission of "engages in the business of" "has been attached unnecessary significance," and its absence does not prevent the TRT and TDT Statutes from being construed together. (Volusia Br. at 13 n.10.)

3d at 944-45. Thus, the court did not "misapply" this Court's instruction; it recognized the instruction was not implicated because no such conflict exists.

Miami Dolphins involved facial constitutional challenges to the TDT Statute and ordinance, and addressed two questions of law: (1) whether "the county's referendum was void, and so the ordinance passed thereby is invalid;" and (2) whether the ordinance "violates both the privileges and immunities clause and the equal protection clause of the United States Constitution." *Miami Dolphins*, 394 So. 2d at 985, 988.

As the Court of Appeal recognized, neither question was presented here, and *Miami Dolphins* did not address the question of law presented here: "The [Supreme C]ourt did not hold, nor was it asked to address, whether the taxable privilege addressed in the [TDT Statute] is exercised by those renting rooms from hotels or by those renting rooms to tourists." *Alachua*, 110 So. 3d at 944-45. Thus, there is also no conflict between the two decisions on a question of law.

As shown, this Court's discussion of the first question of law at issue in *Miami Dolphins* directly refutes the Counties' assertion that the TDT Statute imposes tax on a different privilege than the TRT Statute. This Court upheld the TDT ordinance because the ballot measure sufficiently identified those subject to the tax as "***hotel, motel***, and similar accommodations," and held the TDT Statute was not vague as to "who" is subject to tax, by looking to the TRT Statute, which,

as the Counties concede, imposes tax on those same businesses. (*Supra* at 23-24.)

As for the second question at issue in *Miami Dolphins*, appellant argued TDT was "*to be paid* by nonresidents" alone, and "indistinguishable" from the state income tax in *Austin v. New Hampshire*, 420 U.S. 656 (1975), which the Supreme Court held violated the privilege and immunities and equal protection clauses because it was imposed only on nonresidents *Miami Dolphins*, 394 So. 2d at 988.

This Court rejected the argument that TDT was "to be paid" by only nonresidents because "[t]he tax imposed by Dade County does not distinguish between residents and nonresidents, rather, it is imposed . . . on *anyone* who rents certain kinds of living space . . . ." *Id.* Residents and nonresidents are not treated differently, as the TDT must be paid equally by *anyone* who rents transient accommodations for six months or less: "Neither of the above taxes out-of-state renters alone; instead, both provide that the tax is to be imposed on *all renters* of the covered types of premises. Appellant's assertions notwithstanding, the nonresident is not treated more onerously than the resident." *Id.*

Nowhere in this discussion does the Court address the issue of the taxable privilege. As discussed above, the Court did so earlier when it recognized hotels and motels as the "who" subject to tax under the TDT. *Id.*at 987. Moreover, the Court did so by referencing the TRT, which it found to be in harmony with the TDT and not in conflict (*id.*), further establishing that to the extent this case was

accepted for review on conflict grounds it ought to be dismissed.

Instead, the focus of the Court's analysis in connection with the privileges and immunities argument was the economic incidence of the tax; that is, the person or entity that actually pays the tax. As discussed above (*see supra* at 4 n. 5), the TRT and TDT are pass through taxes. Thus, this Court cited to the TDT Statute and the Dade County ordinance, not to "define[] the nature of the tax" (*Alachua*, 110 So. 3d at 947) (Padovano, J., dissenting) or to "stat[e] that it was a tax on money paid by the tourist" (*id.*), but rather to emphasize – in response to appellant's privileges and immunities and equal protection arguments – that neither impose tax burdens only on nonresidents. To read this Court's reference to "imposing" tax as implying that the "tourist" (a term this Court did not mention in this discussion) exercises the taxable privilege, rather than merely referring to the imposition of the *economic incidence* of the tax, is untenable in light of the lengthy discussion that preceded it, where this Court looked to the TRT Statute to determine "*who*" is subject to the TDT.

D. Even If The Counties' New Construction Of The Taxable Privilege Were Correct, That Construction Does Not Change Who Is Liable For the Tax, Obligated to Collect And Remit It, Or The Amount Subject to Tax.

Even if the Counties' new construction of the TDT taxable privilege were correct, and the privilege were exercised by the transient, that would not alter the result because the only *businesses* on which the *express provisions* of the Statutes

and DOR Rules impose any TDT liability and obligations are the "dealers" that rent, lease or let rooms to transients, and the only amount taxed is the amount those businesses receive for doing so. The OTCs are not such persons, only hotels are. (*Supra* at 30.) Even if the Counties' new construction of the taxable privilege were correct, *and* even if that somehow led to additional tax owed, the only businesses against which the Counties could assert a claim for unpaid TDT are the hotels.

V. EVEN IF THE COUNTIES' NEW CONSTRUCTIONS WERE REASONABLE ALTERNATIVES, THE RESULTING AMBIGUITY MUST BE RESOLVED STRICTLY IN FAVOR OF THE OTCS.

Pursuant to their plain meaning, the Statutes do not tax OTCs or the amounts they charge customers and retain as compensation for their online services. The Statutes certainly do not, within their "clear definite boundaries," do so. In *Fairfield*, the Court of Appeal refused to extend TDT liability for timeshare inspection privilege packages because "[t]he ***plain wording*** of these [Enabling Act] provisions ***do not include*** either timeshares or inspection privilege packages. Indeed, timeshares and inspection privilege packages ***did not exist when the statute and ordinance were enacted***." *Fairfield*, 946 So. 2d at 1147. For the same reasons, tax cannot be imposed on the OTCs and their compensation.

The OTCs' constructions, adopted by the Court of Appeal, and three Circuit Court judges (*supra* at 25 n.13), are supported by the plain meaning of the Statute's express terms, the DOR Rules, and other Florida appellate decisions, including

Miami Dolphins and *Maas Bros.* At a minimum, the OTCs' constructions are certainly reasonable. The Counties' Complaint concedes as much.

Accordingly, even if the Counties' new, contrary constructions were nonetheless reasonable alternatives (they are not), the Court of Appeal's decision still must be affirmed. Where there are competing reasonable constructions, the resulting ambiguity must be strictly construed against the taxing authority and in favor of the asserted taxpayer. (*Supra* at 16, quoting *Maas Bros.*) Either way, plain meaning or ambiguity rule, judgment for the OTCs should be affirmed.[29]

Volusia County asserts that adhering to a plain meaning construction of the Enabling Act and TDT statutes opens "the door" for other businesses, including hotels, to "avoid[] the remission of all the taxes due" by using the merchant model. (Volusia Br. at 18-19.) It is telling Volusia cannot cite to a single instance where this has happened, but instead cites to a hypothetical scenario proffered by the dissent below. But the hypothetical transaction between a hotel and its wholly-

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[29] Broward County asserts the OTCs are not entitled to the ambiguity rule because they are not taxpayers, the transients are. (Broward Br. at 3.) But, as shown, under the Statutes and DOR Rules, TDT is a tax on businesses. As amicus Hotel Ass'n concedes, its "lodging industry" members are "paying" the tax. (AHLA Br. at 1.) That the economic incidence of the tax is passed on to transients – and thus, the additional TDT the Counties seek would in the future be passed on to them, merely highlights why the ambiguity rule must apply. Moreover, Broward ignores the heart of the rule – that any ambiguity be construed "strictly against the *taxing authority*," for which it has no answer. Simply, the rule is in place to prevent taxing authorities from extending their tax laws in novel or discretionary ways. *See, e.g., Gould v. Gould*, 245 U.S. 151, 153 (1917).

owned subsidiary would be a sham because the hotel is, in actuality, on both sides of the transaction, and thus would be ignored for tax purposes. *See Black & Decker Corp. v. U.S.*, 436 F.3d 431, 441 (4th Cir. 2006). In any event, a perceived loophole, real or imagined, is not a basis for imposing tax in a manner contrary to the express terms of the Enabling Act, DOR Rules and Ordinance.[30]

If the Counties wish to expand the TDT to impose tax on the OTCs and other travel service intermediaries, and the amounts they charge and retain for helping customers obtain reservations from hotels, the proper forum is the Legislature, not the courts.[31] The DOR has acknowledged this reality, having determined not to assert TRT and TDT claims against the OTCs unless and until the Legislature amends the Statutes to clearly impose obligations and liability on OTCs. (R. 2018-19, 2962, 2800-01, 2803, 3256-57, 3259-60, 3262, 3268, 3299) The Legislature has chosen generally not to impose tax on the sale of services.

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[30] *See State v. McCoy Motel*, 302 So. 2d 440, 443 (Fla. 1st DCA 1974) ("We make no ruling on the legal effect of the hypothetical transaction posed by appellee as such case is not before us."). A court's responsibility is to enforce the statute as written, not fix potential loopholes. *See Penn Sec. Life Ins. Co. v. United States*, 524 F.2d 1155, 1163 (Ct. Cl. 1975) ("it seems to us preferable to accept the statute as written, leaving to Congress the function of closing loopholes (if they exist). . . ."), *aff'd sub nom. United States v. Consumer Life Ins. Co.*, 430 U.S. 725 (1977); *see also Pitt County*, 553 F.3d at 314 (same).

[31] *Overman v. State Board of Control*, 62 So. 2d 696, 701 (Fla. 1953) (cited in Volusia Br. at 6), makes clear this Court will not substitute its own public policy judgment for the Legislature's: "Whether or not the plan provided in the act under review is the best one or even a good one is a question of policy with which we have no concern."

Dep't of Revenue v. B & L Concepts, 612 So. 2d 720, 721 (Fla. 5th DCA 1993). And the Legislature has steadfastly refused to impose tax on the sale of services by travel intermediaries that do not rent, lease, or let rooms.[32] The Legislature has considered "several proposed legislative bills" that would impose tax liability on OTCs, but has chosen not to enact any of them. *Alachua*, 110 So. 3d at 942 n.1; *see* AHLA Br. at 4, 8-9. The Counties cannot ask this Court to do what the Legislature has chosen not to do, and usurp the Legislature's exclusive province.

CONCLUSION

For the above reasons, the decision below should be affirmed.[33]

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[32] Indeed, when the Legislature chose to, for a short time, impose tax on the sale of services generally (*see supra* at 4 n.6), it exempted the sale of "services provided by travel agents related to arrangements of transportation and accommodations." *See* Ch. 87-6, Laws of Fla. (repealed), p. 20.

[33] If this Court reverses, then judgment should not be entered for the Counties. Instead, the case should be remanded for further proceedings to allow the circuit court to consider the OTCs' affirmative defenses, which it has not yet done, and which therefore are not before this Court.

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 by electronic mail on the persons listed on the Service List below this 26th day of November, 2012.

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

By: 

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APPENDIX

1. *Orange County v. Expedia, Inc.*, No: 48-2006-CA-2104 (Fla. Orange Cty. Ct. June 22, 2012)

2. *Broward County v. Orbitz, LLC*, No. 2009-CA-126 (Fla. Leon Cty. Ct. July 13, 2012)