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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

ALACHUA 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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

OTHER AUTHORITY

ARGUMENT IN REPLY

The Travel Companies struggle throughout their Answer Brief to deflect focus on the key, undisputed material facts in this case and provide a tortured reading of § 125.0104 and the County Ordinances. When the key, undisputed facts are applied to the plain statutory language, however, it is clear that the Travel Companies owe the Florida Counties for unpaid taxes.

I. The Rental Transaction is between the Tourist and the Travel Company.

The Travel Companies ignore the key, undisputed facts about their merchant business model, which are dispositive of the legal issues presented here:

- First, **under the merchant model, all rental charges are prepaid to the Travel Company**. The customer reserves and *pays the Travel Company directly* for a hotel room using the Travel Company's website. The Travel Company collects the total payment from the customer when the reservation is made. That total payment by the customer to the Travel Company is a condition of occupancy. The customer *pays nothing to the hotel* to rent the hotel room. (R. 3855–61, 5141, 5802–05, 6840–44, 13720–21.)

- Second, **there is only one rental transaction involving the tourist, and that is the rental transaction between the tourist and the Travel Company**. The customer enters into an agreement with the Travel Companies before she can book a room through the Travel Company's website. Once the Travel Company charges the customer's credit card, the customer has paid for the hotel room. Upon arrival, the hotel provides the room to the customer. (R. 11720, 11725, 11727, 13720–24, 13765–66.)

- Third, **payment by the customer to Travel Company confers to the customer the right to occupy the hotel room**. The hotel is obligated to honor the customer's reservation made through the Travel Companies. If a customer is wrongly refused a room at the hotel, the Travel Companies

refund the customer. (R. 13762–65.)

- Fourth, **the portion the Travel Companies retain are mandatory charges that are "required to be paid" by the tourist to rent the hotel room**. The customer cannot pay the "net rate" to rent a room from the Travel Company. In fact, the customer never sees nor is informed of the "net rate" on the Travel Companies' websites. The customer sees only a "total" price, which includes the net rate plus the Travel Companies' markup and/or "service fees."[1] (R. 13727–50.)

- Fifth, **the "net rate" paid by the Travel Company to the hotel does not confer to the Travel Company the right to occupy the hotel room**. (R. 13751.)

- Sixth, **the transaction between the Travel Companies and the hotels is an exchange of money that occurs post-rental and post-occupancy**. After receiving the rental payment, the Travel Companies inform the selected hotel of the transaction. After a customer checks out of the hotel, the hotel invoices the Travel Company. (R. 13754–61.)

Throughout their brief, the Travel Companies recite facts that they contend are uncontroverted and established in this case. (Answer Br. 6–11, 24–27, 30–31, 33–34.) They are neither. To the extent the First District Court of Appeal made findings of fact that the Travel Companies do not grant possessory or use rights, such findings 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); *Farneth v. State*, 945

[1] The Travel Companies state that the total amount they charge a customer is displayed in two components: (1) the "Net Rate," i.e., the wholesale rate of the room, plus the Travel Companies' "margin," "markup," or "facilitation fee," which is not taxed; and (2) taxes and fees, which includes the TDT that is calculated based only on the Net Rate. (Answer Br. 10–12.) The customer does not see the breakdown of the so-called "first component" of the total amount; the customer sees only a "total price." (R. 13727–50.)

So. 2d 614, 617 (Fla. 2d DCA 2006). And in fact, the evidence shows the Travel Companies do grant possessory or use rights in a hotel room. (Initial Br. 39–42.)

II. The Travel Companies Owe TDT on the "Total Consideration" the Tourist Must Pay the Travel Companies to Rent a Hotel Room, Not Merely on a Portion of that Amount.

The Travel Companies concede—as they must—that the TDT Enabling Statute (§ 125.0104), the relevant county ordinances,[2] and the relevant DOR Rules all expressly state that the TDT is owed on the "total consideration" charged to the customer to rent a hotel room. (Answer Br. 32.) Nonetheless, the Travel Companies employ a tortured reading of each of these authorities to come to the untenable conclusion that "total consideration" does not mean "total consideration," but means "net rent" and excludes the rental markup and fees the Travel Companies retain. There is nothing, however, in the law that authorizes this apportionment of the taxable consideration.

The only relevant question to determine what amount is subject to the tax is: what is the total amount charged to the tourist? The answer is straightforward: it is the amount the Travel Companies charge to the tourist to rent a hotel room, which includes the net rental plus the Travel Company's markup plus any additional fees.

As one federal court addressing a similar tax put it, the tax is imposed on the

[2] For ease of reference, the Counties will follow the Travel Companies' convention of citing to Leon County's Ordinance throughout this brief. (Answer Br. 6 n.7.)

"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).

Certainly, the language of the Ordinance, the DOR Rules, and § 125.0104 do not support the Travel Companies' contention.

The Ordinance. Leon County Ordinance 11-46(a)(1) levies the TDT on a percentage of the "total rental *and/or* consideration charged every person who rents, leases, or lets . . . accommodations in any hotel . . . ."

To determine the "total rental and/or consideration charged" one must identify the rental transaction. The rental transaction is between the tourist and the Travel Company. (*See* Section I, *supra*.) This is the only transaction that (i) constitutes a rental agreement; (ii) involves the charging of rent and/or consideration to a person who rents, leases, or lets a hotel room, *see* Ordinance § 11-46(a)(1); (iii) confers a right of occupancy; and (iv) includes a "lessee," "tenant," or "customer," who pays rent and/or consideration, *see* Ordinance § 11-46(a)(3). The payment transaction made by the Travel Company to the hotel after the customer has checked out of the hotel—and to which the customer is not a party—is not the rental transaction.

Even assuming that "total rental" somehow means only "net rental" as the Travel Companies contend (it does not), the Travel Companies cannot explain why

the Ordinance also includes the phrase "and/or consideration" after "total rental." *See Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) (a court must "give effect to each word in the statute"). Tellingly, the Travel Companies misquote this portion of the ordinance by omitting the "and/or" without so much as ellipses to indicate the omission. (Answer Br. 32.) The use of the phrase "total rental and/or consideration" clearly indicates the intent to tax more than simply the net rental amount.

And although the Travel Companies make much of the phrase "for the lease or rental," which they contend is an "express limitation on the tax base" (Answer Br. 35), this so-called limiting language is simply not present in the Ordinance.

The DOR Rules. The DOR Rules confirm that the "rental charge or room rate" includes "any charge" that "is required to be paid" by the tourist as a condition of occupancy. Fla. Admin. Code R. 12A-1.061(3)(b). The Travel Companies' response to this issue is based on a gross mischaracterization of the law and the facts.

First, the Travel Companies incorrectly contend that the DOR Rules provide that only charges for services which meet two elements are taxed: (i) provided to "all" guests, and (ii) required to be paid as a condition of possessing a room. (Answer Br. 33.) The Travel Companies also suggest that only services charged by the hotel after check-in are subject to tax. (*Id*. 33, 37 & n.18.) These limitations, however, are simply not in the Rule.

Rule 12A-1.061(3)(e) defines "rental charges and room rates" as "the total consideration received solely for the use or possession, or right to the use or possession," of an accommodation. Although the Travel Companies make much of the use of the word "solely," they disregard that the definition then refers the reader to the next subsection, titled "rental charges or room rates," which sets forth what is and is not included within that definition. Rule 12A-1.061(4)(b)1, which the Travel Companies misquoted in their brief by omitting key provisions and joining two separate provisions with ellipses, actually states, in its entirety:

> Rental charges or room rates include <u>any charge or surcharge</u> to guests or tenants for the use of items or services that <u>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</u>, of any transient accommodation. Such charges or surcharges are included even when the charges to the transient guest are:
>
> a. Separately itemized on a guest's or tenant's bill, invoice, or other tangible evidence of sale; or
>
> b. Made by the owner or the owner's representative to the guest or tenant for items or services <u>provided by a third party</u>.

Contrary to the Travel Companies' contention, the Rule makes plain that "rental charges and room rates" include "any charge or surcharge" that is "required to be paid" by the tourist as a condition of occupancy. This includes charges for services provided "<u>by a third party</u>" (i.e., not the hotel), such as the Travel Companies. Finally, the DOR Rules do not distinguish between pre- and post-check-in charges, but apply to "<u>any</u> charges."

This is not a novel reading of the tax. The New York Court of Appeals recently

held that service fees charged by travel companies are a "condition of occupancy" that falls "squarely within the category of payments subject to taxation as a 'rent or charge.'" *Expedia, Inc. v. City of New York Dep't of Finance*, No. 180, 2013 WL 6096133, at *6 (N.Y. Nov. 21, 2013) (addressing similar tax).

Second, the Travel Companies argue that the customer is not required to pay for the Travel Companies' services because "the customer can reserve a room with the hotel directly or through other distribution channels." (Answer Br. 36.) Thus, the Travel Companies incorrectly conclude, the portion they retain untaxed "is not paid as a condition of obtaining occupancy of a room for a hotel, but rather a condition of using [a Travel Company's] services to obtain a reservation from a hotel." (*Id*.) This is a *non-sequitur*.[3] This appeal involves only merchant model transactions. In merchant model transactions, the tourist is required to pay the total amount charged by the Travel Company, including its markup and fees, to rent a hotel room, not to use the website. The Travel Companies only charge for their services when a customer purchases a reservation, i.e., "as a condition of obtaining occupancy." If the tourist refuses to pay the total amount charged, which includes the Travel Companies' markup and fees, the tourist is unable to obtain occupancy.

Section 125.0104. Section 125.0104(3)(c) provides that the TDT is levied as

[3] Extending the Travel Companies' logic further, a person would not have to pay sales tax on the markup of a product in a retail store because the person could purchase the same item through a wholesaler without the markup.

a percentage of "the total consideration charged for such lease or rental." The language of the Enabling Act, particularly when read together with the Ordinance and the DOR Rule, is clear: the TDT is owed on the total amount the Travel Companies charge to the customer, not the amount the Travel Companies later forward to the hotels. (*See supra* Section I; Initial Br. 22–27.)

III. The Travel Companies Already Charge and Collect TDT from the Tourist and are Required to Remit the Taxes to the Counties.

Section 125.0104(3)(f), (3)(g) and Ordinance § 11-46(a)(3), (a)(5) provide that the person responsible for charging, collecting, and remitting the TDT is "the person receiving the consideration for the lease of rental." The TDT is collected by the person receiving the consideration from the customer "at the time of payment of the consideration for such lease or rental." §125.0104(3)(f); Ordinance § 11-46(a)(3). The Travel Companies' arguments that they have no collection or remittance obligations do not hold water.

First, the Travel Companies argue that "the person obligated to collect and remit the tax is the 'dealer,'" and they are not "dealers." (Answer Br. 28.) Section 125.0104 and the Ordinance, however, both explicitly state that it is "the person receiving the consideration"—not the "dealer"—who must collect and remit the TDT. Moreover, § 125.0104(3)(g) makes clear that a person does not need to be classified as a "dealer" to have the duties of a "dealer." Rather, § 125.0104(3)(g) assigns the duties and obligations of a "dealer" to whoever receives the consideration

from the tourist regardless of whether they otherwise satisfy the definition of "dealer." (*See* Initial Br. 30–31.)

The Travel Companies also find no support for their "dealer" argument in the Ordinance. Like §125.0104, the Ordinance provides that the person receiving the consideration must collect and remit the TDT. And, in any case, the Ordinance does not assign the duty of collecting and remitting TDT to the "dealer." Although the Travel Companies recite several obligations the Ordinance assigns to the "dealer," charging, collecting, and remitting TDT are not one of them. (Answer Br. 28.)

There can be no doubt as to the application of the law to the undisputed facts. Under the merchant model, the customer pays the total amount to the Travel Company. The Travel Company charges the customer and receives the consideration in exchange for a hotel room. In this transaction, the only person who receives the total consideration for the rental is the Travel Company.[4] *See Vill. of Rosemont*, 2011 WL 4913262, at *3 (holding tax was due on total amount customer paid to travel companies, reasoning that, because "the customer cannot access his hotel

[4] The Travel Companies suggest that they are merely pass-through entities; they concede they "collect" the consideration, but argue that they do not "receive" it. (Answer Br. 31.) Setting aside the logical absurdity of the argument that a person can collect but not receive the thing they are collecting, the undisputed facts show they are not merely pass-through entities. The Travel Companies maintain the total amount received from the customer as cash on hand to improve their liquidity and working capital until they later forward payment of the net rental to the hotels. (R. 13760–13761.)

room unless and until he pays the [travel companies'] entire charge," the travel companies are the ones who receive consideration for the rental under the statute).

IV. The TDT is Imposed on the Tourist.

A. The Travel Companies' Interpretation Would Require the Court to Read Language into Section 125.0104 that was Expressly Omitted by the Legislature and to Ignore its Own Precedent.

The Travel Companies struggle to explain how two statutes with plainly different language have the same plain meaning. Tellingly, the Travel Companies quote the language of the Transient Rentals Tax, § 212.03, throughout their brief, in tacit recognition that the language of the TDT, § 125.0104—the tax statute at issue in this appeal—cannot support their position.

The Travel Companies begin with the untenable premise that § 212.03 and § 125.0104 must be read identically despite their different language. (Answer Br. 18–19.) They refuse to apply this Court's instruction in *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981), that "[i]n the event of conflict between any provisions of [§ 212.03 and §125.0104], the provisions of the [§125.0104] will govern," although they concede that it is part of this Court's holding.[5] (Answer Br. 17–18.)

[5] That Rule 12A-1.0601(a)(9), a rule applicable to both statutes, includes a description of the taxable privilege in § 212.03 rather than § 125.0104 is irrelevant. (See Answer Br. 22.) The Rule cannot administratively amend the privilege described in § 125.0104. Moreover, the *Miami Dolphins*' directive for the interpretation of the two statutes governs.

It is clear that the language of § 125.0104 and § 212.03 conflict.[6] (Initial Br. 31–37.) The phrase "engages in the business of renting," conspicuous in the Transient Rentals Tax, is clearly omitted from the TDT. The phrase "granting the license to use" is also omitted from the TDT. And unlike the TRT, § 125.0104(2)(b)2 defines the "person . . . who rents or leases transient accommodations" (i.e., the person who exercises the taxable privilege for purposes of the TDT), as the "tourist."

Instead of addressing these critical distinctions, the Travel Companies maintain that the two statutes are "upon the same subject" and must be construed the same. In support, the Travel Companies misquote a lengthy section of *Miami Dolphins*, strategically employing brackets to omit significant parts of the holding. (Answer Br. 17–18.) In fact, *Miami Dolphins* expressly provides that "the transient rentals tax is simply the base on which the [TDT] rests; the [TDT] may modify and conflict with the transient rentals tax statute as needed." 394 So. 2d at 988.

The Travel Companies also fail to provide any compelling argument for why this Court should disregard § 125.0104's legislative history. (Initial Br. 32–35.) Having no credible response, the Travel Companies simply throw up their hands and insist that "whatever the reason for omitting 'engages in the business of,'"

[6] A comparison of the two statutes striking out the language in § 212.03 which was omitted from § 125.0104 and underlining the new language in § 125.0104 would appear as follows: ~~engaging in the business of~~ rents<u>ing</u>~~ing~~, leases<u>ing</u>~~ing~~, or lets<u>ting</u>~~ting, or granting the license to use~~.

§ 125.0104 taxes the same privilege as § 212.03. (Answer Br. 43.) But it is well established that when the Legislature omits words from a subsequent statute, courts must presume that it intends the statute to have a different meaning. *See Crescent Miami Ctr., LLC v. Fla. Dept. of Revenue*, 903 So. 2d 913, 918 (Fla. 2005); *c.f. Capella v. City of Gainesville*, 377 So. 2d 658, 660 (Fla. 1979). 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. The description of the taxable privilege in the TDT has remained unaltered despite other, subsequent amendments to the TDT statute. (Initial Br. 34–35.) Judge Padovano correctly reached this logical conclusion 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." *Alachua County v. Expedia, Inc.*, 110 So. 3d 941, 950 (Fla. 1st DCA 2013) (Padovano, J., dissenting) (emphasis in original).

Any doubt remaining as to who exercises the taxable privilege is resolved by *Miami Dolphins*. (Initial Br. 20–22.) *Miami Dolphins* "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." *Id.* at 947. The Travel Companies' argument that *Miami Dolphins* held that the TDT is imposed on "hotel, motel, and similar accommodations" flies in the face of the Court's explicit conclusion that "the

tax is to be imposed on all renters of the covered types of premises." 394 So. 2d at 989 (describing "renters" as in-state and out-of-state persons who rent living space).[7]

For their part, the Travel Companies cite the wrong case law to support their position. They cite two cases which, they contend, "confirm the taxable privilege is exercised by hotels." (Answer Br. 20–21.) Neither case, however, concerns or even refers to § 125.0104; in fact, one of the cases was decided a decade before § 125.0104 was enacted. *See Fla. Revenue Comm'n v. Maas Bros., Inc.*, 226 So. 2d 849, 851 (Fla. 1st DCA 1969); *Fla. Hotel & Motel Ass'n, Inc. v. Fla. Dept. of Revenue*, 635 So. 2d 1044, 1048 (Fla. 1st DCA 1994).

In a final attempt to rebut the Florida Counties' plain language reading of § 125.0104, the Travel Companies embark on a conflicting analysis of dictionary definitions of the words "rent", "lease," and "let." First the Travel Companies conclude that these words mean "to transfer possession or occupancy . . . *to* another in return for payment." (Answer Br. 19.) They then recede from this position—as they must—conceding that "rent" and "lease" "can also mean the act of taking possession *from* another for consideration." (Answer Br. 20). The Travel Companies disregard that the verb "let" is statutorily defined as "leasing or renting

[7] The Travel Companies also misrepresent the holding in *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 212 (Fla. 3d DCA 1978). *Shriver* did not rule that hotels were "the group subject to the tax." Rather, it held that the ballot question contained the essential, though non-exhaustive, description of the TDT.

of . . . hotels" in § 212.02(10), and is statutorily synonymous with "leasing or renting." (Initial Br. 17–18, 41.)

But, most importantly, Ordinance § 11-46(a)(1) itself spells out exactly who is exercising the tax in plain English. The TDT is levied on a percentage "of the total rental and/or consideration charged every person who rents, leases, or lets any living quarters or accommodations in any hotel . . . ." "Every person" cannot mean the hotel, as the Travel Companies contend, because the "total rental and/or consideration" is not charged to the hotel, it is charged to the tourist.

B. The Travel Companies are Personally Liable for the TDT.

The Travel Companies incorrectly contend that they are not personally liable for unpaid TDT because they are not exercising the privilege being taxed. This argument rests on a mischaracterization and misreading of § 125.0104(4)(e), (8)(a) and Ordinance §§ 11-48 and 11-51.

Section 125.0104(4)(e) and Ordinance § 11-48 establish a "tourist development council" and mandate that certain members of the council "shall be owners or operators of motels, hotels . . . or other tourist accommodation in the county and subject to the tax." (emphasis added.) This last phrase, they argue, proves that only "owners or operators" of hotels are subject to the tax.

In fact, this requirement simply mandates representation by the segment of the travel industry affected by the tax. Owners and operators of the hotels who are

"subject to the tax" are so because they have hotels and receive consideration from tourists within the county and are subject to the same requirements as dealers, not because they exercise the taxable privilege. *See* § 125.0104(3)(g).

Section 125.0104(8)(a) and Ordinance § 11-51 likewise fail to lend any support to the Travel Companies' argument. The Ordinance states that "any person subject to the provisions of this article who . . . fails or refuses to charge, collect, and remit in full the taxes herein provided," shall be personally liable for the unpaid tax. These provisions simply reiterate that the person who is responsible for charging, collecting, and remitting the TDT, i.e., the person who receives the consideration, is personally liable for the unpaid tax. Because the Travel Companies receive the consideration, they are personally liable for the unpaid tax. (*See* Section III, *supra*.)

C. Even Assuming the Hotel is Exercising Taxable Privilege, The Travel Companies Remain Liable for Unpaid Taxes.

Even assuming that the taxable privilege is exercised by those engaged in the business of renting hotel rooms, the Travel Companies remain liable for any amount of unpaid TDT. Even if the taxable privilege in § 125.0104 referred only to hotels, whoever receives the consideration from the customer is still liable for remitting the TDT on the total consideration charged. *See* § 125.0104(3). And it is still the Travel Companies who receive the consideration from the customer—not the hotel. Thus, the Travel Companies, as a matter of law, remain liable for any unpaid TDT on the total amount they charge their customers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served by electronic mail on the following, on this 16th day of December, 2013.

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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).

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