

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1393 Taxation Of Transient Rentals

**SPONSOR(S):** Brodeur

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1888

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Tax Committee		Flieger	Langston
2) Business & Consumer Affairs Subcommittee			
3) Economic Affairs Committee			

### SUMMARY ANALYSIS

The bill clarifies the meaning of several terms used in the taxation of transient rental accommodations by the state and local governments. The bill amends s. 212.03, F.S., to clarify that the terms "total rental charged" as used in s. 212.03, F.S., "total consideration" as used in ss. 125.0104 and 125.0108, F.S., "consideration" as used in s. 212.0305, F.S., and "rent" as used in ch. 67-930, L.O.F., as amended, have the same meaning and that meaning includes the total amount a person licensed pursuant to ss. 509.241 and 509.242, F.S., or regulated by the Department of Business and Professional Regulation receives from a customer for the right to occupy that person's transient accommodations. Licensing pursuant to ss. 509.241 and 509.242, F.S., relates to public lodging establishments.

The bill has no fiscal impact.

The bill has an effective date of July 1, 2012.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Taxation of Transient Rentals

Transient rentals are rentals or leases of accommodations for 6 months or less and include stays in hotels, apartment houses, roominghouses, tourist or trailer camps, mobile home parks or recreational vehicle parks.<sup>1</sup>

Currently, transient rentals are potentially subject to the following taxes:

1. Local Option Tourist Development Taxes: Current law authorizes five separate tourist development taxes on transient rental transactions. Section 125.0104(3)(a), F.S., provides that the local option tourist development tax is levied on the “total consideration charged for such lease or rental.”
  - a. The tourist development tax may be levied at the rate of 1 or 2 percent.<sup>2</sup> Currently, 60 counties levy this tax at 2 percent; all 67 counties are eligible to levy this tax.<sup>3</sup>
  - b. An additional tourist development tax of 1 percent may be levied.<sup>4</sup> Currently 43 counties levy this tax; only 56 counties are currently eligible to levy this tax.<sup>5</sup>
  - c. A professional sports franchise facility tax may be levied up to an additional 1 percent on transient rental transactions.<sup>6</sup> Currently 35 counties levy this additional tax; all 67 counties are eligible to levy this tax.<sup>7</sup>
  - d. A high tourism impact county may levy an additional 1 percent on transient rental transactions.<sup>8</sup> Only Broward, Monroe, Orange, Osceola and Walton counties have been designated as high tourism impact counties eligible to impose this tax, but only Orange, Osceola and Monroe counties impose the tax.<sup>9</sup>
  - e. An additional professional sports franchise facility tax no greater than 1 percent may be imposed by a county that has already levied the professional sports franchise facility tax.<sup>10</sup> Out of 65 eligible counties, 20 levy this tax.<sup>11</sup>
2. Local Option Tourist Impact Tax: The local option tourist impact tax under s. 125.0108, F.S., is levied at the rate of 1 percent of the total consideration charged. Only Monroe County is eligible and does levy this tax in areas designated as areas of critical state concern because they created a land authority pursuant to s. 380.0663(1), F.S.<sup>12</sup>
3. Local Convention Development Tax: The convention development tax under s. 212.0305, F.S., is imposed on the total consideration charged for the transient rental. Each county operating under a home rule charter, as defined in s. 125.011(1), F.S., may levy the tax at 3 percent (Miami-Dade County); each county operating under a consolidated government may levy the tax at 2 percent (Duval County); and each county chartered under Article VIII of the State Constitution that had a tourist advertising district on January 1, 1984, may levy the tax at up to 3

<sup>1</sup> These accommodations are defined in s. 212.02(10), F.S. See also Rule 12A-1.061(2)(f), F.A.C.

<sup>2</sup> Section 125.0104(3)(c), F.S.

<sup>3</sup> Florida Legislative Committee on Intergovernmental Relations.

<sup>4</sup> Section 125.0104(3)(d), F.S.

<sup>5</sup> See fn. 3, supra.

<sup>6</sup> Section 125.0104(3)(l), F.S.

<sup>7</sup> See fn. 3, supra.

<sup>8</sup> Section 125.0104(3)(m), F.S.

<sup>9</sup> See fn. 3, supra.

<sup>10</sup> Section 125.0104(3)(n), F.S.

<sup>11</sup> See fn. 3, supra.

<sup>12</sup> Id.

percent (Volusia County).<sup>13</sup> No county authorized to levy this tax can levy more than 2 percent of the tourist development tax, excluding the professional sports franchise facility tax.<sup>14</sup>

4. **Municipal Resort Tax:** Certain municipalities may levy the municipal resort tax at a rate of up to 4 percent on transient rental transactions.<sup>15</sup> The tourist development tax may not be levied in any municipality imposing the municipal resort tax. The tax is collected by the municipality. Currently only three municipalities in Miami-Dade County are eligible to impose the tax.
5. **State Sales Tax:** The state sales tax on transient rentals under s. 212.03, F.S., is levied in the amount of 6 percent of the “total rental charged” for the living quarters or sleeping or housekeeping accommodations in, from, or part of, or in connection with any hotel, apartment house, roominghouse, or tourist or trailer camp.

In general, the local taxes are adopted by ordinance, some of which must be approved by a referendum election of the voters of the county or area where the tax is to be levied. The local taxes on transient rentals are required to be remitted to the Department of Revenue by the person receiving the consideration, unless a county has adopted an ordinance providing for local collection and administration of the tax.<sup>16</sup> Further, the use of the proceeds from each tax may only be used as set forth in the authorizing statute.

Certain rentals or leases are exempt from the taxes; these include rentals to active-duty military personnel, full-time students, bona fide written leases for continuous residence longer than 6 months, and accommodations in migrant labor camps.<sup>17</sup>

Every person desiring to engage in or conduct business in this state as a dealer or to lease, rent, or let or grant licenses to use accommodations that are subject to tax under s. 212.03, F.S., must file with DOR an application for a certificate of registration for each place of business prior to engaging in such business.<sup>18</sup> A separate application is required for each county where property is located. Agents, representatives, or management companies that collect and receive rent as the accommodation owner’s representative are required to register as a dealer and collect and remit the applicable tax due on such rentals to the proper taxing authority.<sup>19</sup>

In addition to the certificate of registration, each newly registered dealer also receives an initial resale certificate from DOR. The resale certificate is renewed annually for dealers with an active sales tax account, and expires on December 31 each year.<sup>20</sup> An annual resale certificate allows registered dealers to make tax-exempt purchases or rentals of property or services for resale, including re-rental of transient rental property and resale of tangible personal property. The annual resale certificate may not be used to make tax-exempt purchases or rentals of property or services that:

- Will be used rather than resold or rented.
- Will be used before selling or renting the goods.
- Will be used by the business or for personal purposes.<sup>21</sup>

#### *Rental of Accommodations Online*<sup>22</sup>

Some companies have websites that specialize in offering reservations of transient rental accommodations. These are generally independent third parties who act either as an agent or a merchant and are often referred to as “internet intermediaries” or some similar term. Travel agents

<sup>13</sup> Id.

<sup>14</sup> Section 125.0104(3)(b), (3)(l)4., and (3)(n)2., F.S.

<sup>15</sup> Chapter 67-930, L.O.F., amended by chs. 82-142, 83-363, 93-286, and 94-344, L.O.F.

<sup>16</sup> See e.g., ss. 125.0104(10) and 212.0305(5), F.S. Also known as “self-administering.”

<sup>17</sup> Section 212.03(7), F.S. See also ss. 125.0104(3)(a), 125.0108(1)(b), 212.0305(3)(a), F.S.

<sup>18</sup> Section 212.18(3)(a), F.S.

<sup>19</sup> Rule 12A-1.061(7), F.A.C.

<sup>20</sup> Section 212.18(3)(c), F.S.

<sup>21</sup> Annual Resale Certificate for Sales Tax (Guidelines), at <http://dor.myflorida.com/dor/taxes/resale.html> (last visited 03/02/2011).

<sup>22</sup> Information for this section was obtained from Interim Project 2005-131, Senate Committee on Government Efficiency Appropriations (Nov. 2004); and Issue Brief 2009-320, Senate Committee on Finance and Tax (Oct. 2008).

have been allowed computerized access to search hotel room inventories and to book discounted hotel rooms in the name of, and for the account of, other people (i.e., as intermediaries) since the 1970s.

When an internet intermediary facilitates accommodation reservations acting as an agent, the intermediary is acting as a middle-man between the customer and the accommodation owner to reserve a room. Generally, the customer reserves a room with a credit card, and does not pay the hotel bill until check-out, at which point taxes are charged. In these circumstances, at the time of reservation online, the customer is typically advised that taxes may or may not be included in the total cost listed on the website. The accommodation owner compensates the agent with a commission based on the room rate set by the hotel. With this method, the room rate is subject to tax without any reduction for the commission paid. Agents do not arrange in advance of the customer's transaction to purchase room inventory at the hotel.

Generally speaking, when an internet intermediary acts as a merchant, it enters into a contract with an accommodation owner to offer rooms to the public. The accommodation owner agrees to make rooms available for reservation at a negotiated rate.<sup>23</sup> The merchant agrees to pay the owner the negotiated room rate and to also forward money it collects from the customer to pay applicable taxes. The merchant advertises a room rate on the website with disclosures for separate charges for "taxes and service fees" or some similar designation. The internet intermediary is the merchant of record for reservation of the room, and it initiates a charge to the customer's credit card for the full room rate plus the disclosed line items. The consumer receives confirmation of the reservation from the merchant. When the accommodation owner sends the merchant an invoice for the room after the consumer's stay, the merchant pays the negotiated room rate and the tax due on that amount.

The issue of on-line reservations of accommodations by internet intermediaries has surfaced as a result of two main factors: 1) the increase in reservations of accommodations through websites; and 2) tax laws that were adopted before the existence of internet intermediaries. There has been some dispute and question as to the proper amount against which state and local transient rental taxes are levied.

#### *The Markup/Facilitation Fee/Service Fee*

Internet intermediaries argue that the tourist development tax is measured by the amount paid to the accommodation owner or operator for the right to use the transient accommodation (negotiated rate) and that the facilitation fee<sup>24</sup> is not subject to tax because it is not an amount paid to the owner (generally the difference between the retail rate paid by the customer and the negotiated rate paid by the internet intermediary). They argue that the taxable incident is not the isolated receipt of the rental payment, but the exercise of the privilege – the assemblage of activities consistent with ownership. Under this line of reasoning, money received to facilitate a booking, process a reservation application, or provide a similar service, is not subject to tax when a company lacks an ownership interest in the accommodation. This position extends to the tax treatment of customer charges variously labeled as "tax reimbursements," "tax recovery charges," or "taxes and fees."

Local governments interpret the law such that internet intermediaries acting as merchants are sales tax dealers and that the total amount of each transaction is taxable. The internet intermediary acts in place of the accommodation owner in renting, leasing, or letting the real property, tangible personal property, and services as part of the accommodation. Local governments contend that dividing the sale of an accommodation reservation into discrete transactions ignores the sale's singular nature. They are concerned that allowing intermediaries to shoehorn customary accommodation services into the non-taxable category will erode the tax base.

#### *When Taxes Should Be Remitted*

Internet intermediaries argue that the tax is not due at the time money is paid by the consumer. Instead, it should be remitted by the hotel or facility, as owner of the accommodation, once the

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<sup>23</sup> The negotiated rate is also referred to as a discounted or wholesale price or rate.

<sup>24</sup> Also known as the "markup" or a "service fee." A facilitation fee generally involves money received to facilitate a booking, process a reservation application, or provide a similar service.

negotiated room charge is forwarded to the owner after the consumer's stay. Local governments argue that transient rental tax is due at the time of collection, not later when the accommodation owner is paid the negotiated rate.

#### *Florida Department of Revenue*

DOR has not taken an official position on whether tax is due on the amount collected and retained by internet intermediaries. The department has not taken a position on whether tax is due on the additional charges variously labeled as "tax reimbursements," "tax recovery charges," or "taxes and fees." Additionally, DOR has not take a position on whether tax should be remitted at the time the customer pays for the reservation.

#### *Local Litigation*

In August 2010, Monroe County entered into a settlement agreement on behalf of 32 counties<sup>25</sup> in a federal class-action suit against certain online travel companies. As a result of the settlement order, the online travel companies paid \$6.5 million to the counties, and in return the counties released Orbitz, Expedia, and Travelocity from any obligation to pay or remit tourist development taxes on the full retail price for hotel accommodations from July 1, 2010 until July 1, 2012 (Priceline negotiated that they would have no obligation until July 1, 2013).<sup>26</sup> The participating counties agreed to dismiss all current claims against the online travel companies with prejudice, and are further precluded from suing or making attempt to collect such taxes from Expedia, Travelocity, and Orbitz until after July 1, 2012, and from Priceline until July 1, 2013.

In October 2011, Orange County approved a confidential settlement they reached with Expedia. Based on review of the county's finances, media estimates place the settlement at roughly \$9 million. While the terms are confidential, reports indicate that the settlement was similar to that of the Monroe County, in that without admitting liability Expedia received an agreement that the county not assess tax for an agreed upon grace period.<sup>27</sup>

Several other local jurisdictions have open litigation pending against online travel companies.<sup>28</sup>

### **Department of Business and Professional Regulation**

Section 509.241, F.S., provides that each public lodging establishment is required to obtain a license from the Department of Business and Professional Regulation. License classifications for public lodging establishment are set out in s. 509.242, F.S., and include hotels, motels, nontransient apartments, transient apartments, roominghouses, bed and breakfast inns, and vacation rentals. The Department of Business and Professional Regulation regulates additional locations and professions related to transient rental accommodations such as condominiums, timeshares, mobile homes, and real estate agents.

### **Proposed Changes**

The bill clarifies the meaning of several terms used in the taxation of transient rental accommodations by the state and local governments. The bill amends s. 212.03, F.S., to clarify that the terms "total rental charged" as used in s. 212.03, F.S., "total consideration" as used in ss. 125.0104 and 125.0108,

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<sup>25</sup> The class action suit represented the following counties: Baker, Bradford, Citrus, Clay, Collier, Columbia, Duval, Franklin, Gadsden, Gilchrist, Glades, Hamilton, Hendry, Hernando, Highlands, Holmes, Indian River, Jackson, Jefferson, Lake, Levy, Madison, Martin, Miami-Dade, Monroe, Okeechobee, Putnam, St. Lucie, Santa Rosa, Sarasota, Sumter, Suwannee, and Taylor. The 15 defendants included: Expedia, Inc., Hotels.com, L.P., Hotwire, Inc., Hotels.com, and TravelNow.com, Inc. (the "Expedia parties"); priceline.com incorporated and Travelweb LLC (the "Priceline parties"); Travelocity.com LP and Site59.com (the "Travelocity parties"); and Orbitz, LLC and Trip Network Inc. d/b/a Cheaptickets.com (the "Orbitz parties").

<sup>26</sup> *Monroe County v. Priceline, Inc. et al. Master Settlement Agreement* (Case No. 09-10004-CIV-MOORE/SIMONTON)(S.D. Fla. 2010) (on file with the Finance and Tax Committee, Florida House of Representatives).

<sup>27</sup> "Expedia details might stay secret from Orange taxpayers", Orlando Sentinel, December 6, 2011,

[http://articles.orlandosentinel.com/2011-12-06/business/os-mystery-settlement-expedia-20111206\\_1\\_expedia-settlement-talks-tax-information](http://articles.orlandosentinel.com/2011-12-06/business/os-mystery-settlement-expedia-20111206_1_expedia-settlement-talks-tax-information) (accessed January 24, 2012)

<sup>28</sup> See, e.g., *Leon County vs. Expedia Inc.* (Case No. 37 2009 CA 004319); *Priceline.com Inc. vs. Osceola County*, (Case No: 37 2011 CA 000192); *Hotwire Inc. vs. Miami Dade County*, (Case No. 37 2009 CA 004977)

F.S., "consideration" as used in s. 212.0305, F.S., and "rent" as used in ch. 67-930, L.O.F., as amended, have the same meaning and that meaning includes the total amount a person licensed pursuant to ss. 509.241 and 509.242, F.S., or regulated by the Department of Business and Professional Regulation receives from a customer for the right to occupy that person's transient accommodations.

**B. SECTION DIRECTORY:**

Section 1 amends s. 212.03, F.S. to consolidate the definition of several terms.

Section 2 provides for an effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Department of Revenue does not believe the bill provides sufficient clarification on this issue to enable the Department to determine what amounts are subject to tax as the use of the word "include" in the bill does not act to exclude consideration received by parties not licensed or regulated by the Department of Business and Professional Regulation from the definitions of the relevant terms.<sup>29</sup>

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>29</sup> Department of Revenue 2012 Bill Analysis *HB 1393*, January 13, 2012.