

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Budget Subcommittee on Finance and Tax

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BILL: CS/SB 376

INTRODUCER: Budget Subcommittee on Finance and Tax and Senator Gaetz

SUBJECT: Tax on Sales, Use and Other Transactions

DATE: April 6, 2011

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	<b>Fav/2 amendments</b>
2.	Fournier	Diez-Arguelles	BFT	<b>Fav/CS</b>
3.			BC	
4.			RC	
5.				
6.				

**Please see Section VIII. for Additional Information:**

- A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes  
B. AMENDMENTS.....  Technical amendments were recommended  
 Amendments were recommended  
 Significant amendments were recommended

**I. Summary:**

CS for SB 376 (the bill) provides that the state transient rentals tax, local tourist impact tax, local tourist development taxes, local convention development taxes, and municipal resort tax are imposed on the amount received by a person operating transient rental accommodations – not on the payments received by unrelated persons facilitating the booking of reservations of such accommodations. The bill requires the owner or person operating transient rental accommodations to separately state the tax from the rental charged on receipts, invoices, or other documents for transient accommodations, however, unrelated persons who facilitate the booking of reservations are not required to separately state the tax, except that such persons must disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the booking of the reservation.

The bill also allows compensation for county governments that provide information to the Department of Revenue (DOR) that leads to the collection of taxes, or registration of a noncompliant taxpayer.

This bill substantially amends the following sections of the Florida Statutes: 125.0104, 125.0108, 212.03, 212.0305, and 213.30.

This bill substantially amends ss. 1 and 3, of chapter 67-930, of the Laws of Florida, as amended.

This bill may require a two-thirds vote of the membership of each house of the Legislature for passage.

## II. Present Situation:

### Taxation of Transient Rentals

Transient rentals are rentals or leases of accommodations for a period of 6 months or less. The term “accommodation” includes stays in hotels, apartment houses, roominghouses, tourist or trailer camps, mobile home parks, recreational vehicle parks, or real property.<sup>1</sup>

Under current law, 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)(c), F.S., provides that the local option tourist development tax is levied on the “total consideration charged for such lease or rental.”
  - 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> Revenue from this tax may be bonded to finance certain facilities and projects.
  - An additional tourist development tax of 1 percent may be levied.<sup>4</sup> Currently 43 counties levy this tax and only 56 counties are currently eligible to levy this tax.<sup>5</sup> Revenue from this tax may be bonded to finance certain facilities and projects.
  - 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 and all 67 counties are eligible to levy this tax.<sup>7</sup> Revenue from this tax may be bonded to finance a professional sports facility or convention center.
  - A high tourism impact county may levy an additional 1 percent on transient rental transactions.<sup>8</sup> Five counties are eligible to levy this tax (Broward, Monroe, Orange, Osceola, and Walton). Of these five counties, Monroe, Orange, and Osceola levy this additional tax.<sup>9</sup> Revenue from this tax may be bonded to finance certain facilities and projects.
  - 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

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<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> Office of Economic and Demographic Research, 2011 Local Option Tourist/Food and Beverage/Tax Rates in Florida's Counties, available at <http://edr.state.fl.us/Content/local-government/data/data-a-to-z/2011LOTTRates.pdf> (last visited on Jan. 13, 2011).

<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*.

franchise facility tax.<sup>10</sup> Out of 35 counties that levy a professional sports facility tax, 20 levy an additional professional sports franchise facility tax.<sup>11</sup> Revenue from this tax may be bonded to finance a professional sports facility.

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.<sup>12</sup>
3. Local Convention Development Tax: The convention development tax under s. 212.0305, F.S., is charged 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 percent (Volusia County).<sup>13</sup> No county authorized to levy this tax may levy more than 2 percent of the tourist development tax, excluding the professional sports franchise facility tax.<sup>14</sup> Convention development taxes levied by Miami-Dade County or Duval County may be bonded to finance construction of certain facilities.
4. Municipal Resort Tax: As authorized by ch. 67-930, Laws of Florida, and amended by ch. 93-286 and 94-344, Laws of Florida, certain municipalities may levy and collect a municipal resort tax at a rate of up to 4 percent on the sale of food and beverages, including alcoholic beverages sold at a hotel or restaurant, and on transient rental transactions.<sup>15</sup> The tourist development tax may not be levied in any municipality imposing the municipal resort tax. Currently only three municipalities in Miami-Dade County are eligible to impose the tax (Bal Harbour, Miami Beach, and Surfside).
5. State Transient Rentals Tax: The transient rentals tax 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.
6. Local Option Discretionary Sales Surtaxes: The local option discretionary sales surtaxes under ss. 212.054 and 212.055, F.S., are levied on transactions subject to tax under sh. 212, F.S. therefore, those taxes apply to transient rentals.

In general, the local taxes are adopted by ordinance and some must be approved by a voter referendum in the county or area where the tax is to be levied. Local taxes on transient rentals are required to be remitted to DOR by the person receiving the consideration, unless a county has

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

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

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Section 125.0104(3)(b), (3)(1)4., and (3)(n)2., F.S.

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

adopted an ordinance providing for local collection and self-administration of the tax.<sup>16</sup> 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 transient rental taxes. These include rentals to active-duty military personnel, full-time students residing in transient-rental facilities, 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 Florida as a dealer, or to lease, rent, let, or grant licenses to use accommodations that are subject to tax under s. 212.03, F.S., must file an application to collect and/or report taxes with DOR prior to engaging in such business. A separate application is required for each county where property is located. After the application is approved by DOR, the applicant receives a Certificate of Registration for each place of business.<sup>18</sup> An agent, representative, or management company that collects and receives rent as the accommodation owner's representative is 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 a Resale Certificate for Sales Tax from DOR. The resale certificate is renewed annually for dealers that have 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. Examples include the re-rental of transient rental property and the resale of tangible personal property. An 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>

### **Online Rental Accommodation Intermediaries<sup>22</sup>**

There are a number of internet websites that specialize in offering reservations for transient rental accommodations. These websites may be operated by independent third party intermediaries who act either as an "agent" or "merchant" for the transient rental facility<sup>23</sup> or may be operated by the owner or franchisor of a particular brand of facility.

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<sup>16</sup> This is 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> Florida Department of Revenue, Annual Resale Certificate for Sales Tax (Guidelines), available online at <http://dor.myflorida.com/dor/taxes/resale.html> (last visited Jan. 13, 2011).

<sup>22</sup> The information for this section was obtained from the following interim reports: Comm. on Government Efficiency Appropriations, The Florida Senate, *Application of the Tourist Development Tax to the Sale of Discounted Hotel Rooms Over the Internet and to Hotel Reward Points Programs* (Interim Project 2005-131) (Nov. 2004); and Comm. on Finance and Tax, The Florida Senate, *Application of the State Sales Tax and the Tourist Development Tax to the Sale of Discounted Hotel Rooms Over the Internet* (Issue Brief 2009-320) (Oct. 2008).

<sup>23</sup> Travel agents have been granted computerized access to search hotel room inventories and book discounted hotel rooms in the name of, and for the account of, other people (i.e., as intermediaries) since the 1970s.

### **A. Agent Business Model**

The agent business model is the general practice used by most traditional travel agencies and in limited cases by internet intermediaries. When an internet intermediary acts as an “agent”, the intermediary is solely acting as a middle-man between the customer and the accommodation owner to reserve a room. In this scenario, the customer reserves a room on the intermediary’s website with a credit card to hold the room, but pays the hotel directly during check-out, at which point taxes are charged on the entire amount of the bill. At the time of the online reservation, the customer is typically advised of the taxes that will be collected upon check-out as a separate line item in the total cost listed on the website. After the transaction, the agent receives a commission from the hotel owner, based on the retail rate charged to the customer by the hotel. Under the agency business model, the full retail room rate is subject to tax without any reduction for the commission paid to the agent. An agent does not purchase room inventory for its own account at the hotel in advance of the customer’s transaction.

### **B. Merchant Business Model**

An internet intermediary acting as a “merchant” enters into a contract with a hotel owner to offer rooms to the public. In some cases, the merchant will package the room with other travel services, such as airfare or car rental. Under the merchant method, the accommodation owner agrees to make a certain type of its rooms (e.g., standard rooms and/or upgraded rooms) available to the intermediary at a wholesale rate<sup>24</sup> for reservation on its website either alone or as part of a travel package. This wholesale rate is not disclosed to the public.<sup>25</sup> In return, the merchant agrees to pay the hotel the wholesale rate plus an additional amount to cover the projected state or local taxes that will apply to the discounted rate it pays to the hotel. The merchant’s website advertises its retail price for the room or the travel package with disclosures for separate charges labeled as “taxes and service fees”. Since the merchant’s “taxes and service fees” charges are lumped together, consumers do not know how much they are paying in taxes and how much they are paying in fees retained by the merchant.<sup>26</sup> Once a customer decides to rent an accommodation through the merchant’s internet intermediary service, the merchant initiates a charge to the customer’s credit card for the full retail rate established by the merchant plus the amount the merchant sets as “taxes and service fees”. In return the customer receives confirmation of the pre-paid reservation from the merchant. In some cases, a unique credit card number is supplied by the merchant to the accommodation owner for the wholesale room rate and applicable taxes due on the wholesale amount. In other cases, after the customer’s stay, the accommodation owner sends the merchant an invoice for the room and the merchant pays the owner the wholesale room rate and applicable taxes due on the wholesale amount. If no invoice is sent, the merchant may keep all of the money it collected from the customer.<sup>27</sup> If the customer cancels the reservation, the merchant keeps any monies forfeited by the customer per the merchant’s cancellation policy.<sup>28</sup>

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<sup>24</sup> The merchant generally does not pre-purchase a block of rooms from the hotel. It has the contractual right to sell the rooms on its site at a rate that typically includes a minimum mark-up so it does not undercut the hotel’s own website.

<sup>25</sup> The negotiated rate is also referred to as the “discounted” or “negotiated” rate/price.

<sup>26</sup> The rationale given by internet intermediaries for not breaking out taxes and fees is to prohibit other on-line merchants from knowing what type of deals they received from the accommodation owners; which could be obtained simply by subtracting the amount withheld for taxes. The standard facilitation fee on such internet room rates is 25 percent.

<sup>27</sup> For a detailed description of the merchant model, see, *Columbus, Georgia v. Expedia*, (Civil Action No. SU-06-CV-1974-7) (Superior Court, Muscogee County, Ga., Sept. 22, 2008).

<sup>28</sup> For a detailed description of the merchant model, see, *Columbus, Georgia v. Expedia*, (Civil Action No. SU-06-CV-1974-7) (Superior Court, Muscogee County, Ga., Sept. 22, 2008).

### ***C. Franchise Business Model***

A hotel may utilize multiple business models to sell its rooms via the internet, including intermediaries acting under both the agency and merchant models described above. A hotel that is operated as a franchise also has available to it the online systems operated by its franchisor. A franchise is essentially a marketing agreement between an owner, in this case, of a transient lodging facility, and the owner of a particular brand or trademark. The owner of the facility (the franchisee) pays the owner of the trademark (the franchisor) for the use of the trademark and related systems and services, and agrees to abide by the applicable brand standards set by the franchisor for appearance, services, facilities, amenities, etc. The franchisor agrees to provide certain support for the franchisee, including a reservation system. Customers can go to the franchisor's website or call centers to make reservations at franchisee facilities in a particular location but do not generally pay for the lodging until the time of stay at the hotel, at which time the full amount for the room is collected from the customer together with applicable taxes. The franchisee pays a per-transaction fee and in some cases additional system charges to the franchisor for its use of the reservation system. In this scenario, the service fees charged by franchisors to facilitate online reservations are not included in the overall franchise fee.<sup>29</sup>

### **Transient Rentals Taxes and Online Rental Accommodations**

The proper amount against which current law levies state and local transient rentals taxes, specifically whether they are only levied against the “wholesale” price (the negotiated/discounted rate paid by the intermediary to the hotel owner) or the full “retail” price (the total rate charged to the customer by the intermediary), has been subject to dispute in Florida since at least 2004. During the 2004 Legislative Session, an informal workgroup representing the Florida Hotel and Motel Association, one Internet intermediary company, a major Florida theme park, the Florida Association of Counties, and legislative staff discussed this issue. In addition, the Department of Revenue participated as a source of information and support staff. As a result of these discussions, proposed legislation to ameliorate the problem was developed. The proposed legislation attempted to clarify the appropriate tax treatment of transactions in which an Internet intermediary of hotel rooms pays a hotel a discounted rate for a room that the intermediary then sells to a customer at a higher price. The proposed legislation was not considered during the 2004 Legislative Session,<sup>30</sup> and no legislation was enacted on the issue in subsequent legislative sessions, although bills dealing with the issue have been filed in 2008,<sup>31</sup> 2009,<sup>32</sup> and 2010.<sup>33</sup>

### ***A. Internet Intermediaries' Interpretation of Current Law***

Internet intermediaries assert that the tourist development tax is based upon the amount paid to the accommodation owner/operator for the right to use the transient accommodation (wholesale

<sup>29</sup> This description of the franchise business model is based on information provided on March 8, 2011 by Kerry J. Houghton, Senior Vice President – Law, Starwood Hotels & Resorts Worldwide, Inc.

<sup>30</sup> Comm. on Government Efficiency Appropriations, The Florida Senate, *Application of the Tourist Development Tax to the Sale of Discounted Hotel Rooms Over the Internet and to Hotel Reward Points Programs* (Interim Project 2005-131) (Nov. 2004)

<sup>31</sup> HB 7147, SB 2788

<sup>32</sup> HB 579, SB 1790

<sup>33</sup> HS 335, 1241, SB 156, 2436

rate); and not by the full retail rate. The intermediaries state that the facilitation fee, which is generally the difference between the retail rate and the wholesale rate, is not subject to the tourist development tax because it is not an amount that is paid to the hotel owner.<sup>34</sup> They further 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, the fees that are received for facilitating booking, processing reservation applications, or providing similar services, are not subject to tax when the receiving company lacks an ownership interest in the accommodation. This argument extends to the tax treatment provided for other customer charges, variously labeled as “tax reimbursements,” “tax recovery charges,” or “taxes and fees.”

### ***B. Local Governments’ Interpretation of Current Law***

Local governments maintain that the tourist development tax should be levied against the full retail rate that is charged by the internet intermediaries to the customer, not just the wholesale price that is paid to the hotel owner. Local governments contend that intermediaries acting as merchants are considered sales tax dealers. They argue that 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 assert that dividing the sale of an accommodation reservation into discrete transactions ignores the sale’s singular nature. They are concerned that allowing intermediaries to separate the customary accommodation services from the taxable transaction will erode the tax base.

### ***C. When Taxes Should Be Remitted***

There is also dispute as to when the transient rentals tax is due. Internet intermediaries assert that the transient rentals tax should be remitted by the hotel or facility, as owner of the accommodation, and shall therefore be due once the wholesale/negotiated room charge is forwarded to the owner after the consumer’s hotel stay. On the other hand, local governments maintain that the transient rentals tax is due at the time the money is paid by the consumer to the intermediary, not when the accommodation owner is later paid the wholesale/negotiated rate.

## **Litigation in Florida<sup>35</sup>**

### ***A. Orange County v. Expedia, Inc. et al***

Orange County is one of the counties in Florida that self-administers their local tourist development tax.<sup>36</sup> In 2008, Orange County brought a lawsuit against internet intermediaries Expedia and Orbitz to determine whether the local tourist development tax is due “on the difference between the wholesale price and the retail price they receive for the rooms when they re-sell them.”<sup>37</sup> The trial court dismissed the case, ruling that the county must first exhaust administrative remedies, by completing audits to estimate taxes due. Thereafter, the appellate court reversed the trial court’s ruling and remanded the case for further proceedings stating that

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<sup>34</sup> A facilitation fee generally involves money received by the intermediary to facilitate booking, process reservation applications, or provide similar services.

<sup>35</sup> Lawsuits in other states “are based on the specific language of each jurisdiction’s taxing scheme and on the variety of causes of action pled. . . .” *Orange County v. Expedia, Inc. et al.*, 985 So.2d 622, 630 (5th DCA, 2008), rehearing denied, *Expedia, Inc. v. Orange County*, 999 So.2d 644 (Fla. 2008) (unpublished disposition).

<sup>36</sup> Self-administering means that the county has adopted an ordinance providing for local collection and administration of the tax.

<sup>37</sup> *Orange County*, at 2.

the county is entitled to know whether it can lawfully assess the tourist development tax before attempting to audit the companies.

On January 20, 2011, the Ninth Judicial Circuit Court denied a motion for summary judgment filed by Orange County,<sup>38</sup> and held that the “facts on summary judgment . . . do not unequivocally demonstrate that the entirety of the transactions here are within the intentment of the TDT” (tourist development tax).<sup>39</sup> The Ninth Circuit further ordered that no additional motions be filed until the parties conduct a status conference hearing to discuss future contemplated filings and other necessary activities necessary to the case.

### ***B. Additional Florida Cases***

There are currently several cases pending in Florida between counties and various internet intermediaries addressing the levy of transient rentals taxes on online hotel accommodations provided through internet intermediary services.<sup>40</sup> The following are a few cases that are pending in the 2<sup>nd</sup> Judicial Circuit in Leon County:

- *Orbitz LLC vs. Broward County* (Case No. 37 2009 CA 000126) is a consolidated case led by Orbitz LLC that involves various internet intermediaries who are suing Broward County Florida for the assessment of Broward’s tourist development tax.<sup>41</sup>
- *Orbitz LLC vs. Miami-Dade County* (Case No. 2009 CA 005006) is part of another set of cases involving a dispute between various internet intermediaries and Miami-Dade County for the assessment of both the tourist development tax and the convention development tax.<sup>42</sup>
- *Leon County vs. Expedia Inc.* (Case No. 37 2009 CA 004319) & (Case No. 37 2009 CA 004882): In this case, a number of counties and tax collectors filed an action for declaratory and equitable relief for a mandatory injunction against various internet intermediaries for the payment of transient rentals tax and any local option sales taxes levied on the total rental charged for hotel accommodations. A notice for trial was filed on May 26, 2010.<sup>43</sup>

<sup>38</sup> A “motion for summary judgment” is “a [p]rocedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either a material fact or inferences to be drawn from undisputed facts, or if only question of law is involved. BLACK’S LAW DICTIONARY 1435 (6<sup>th</sup> ed. 1990). The moving party must prove that there is “no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” *Volusia County v. Aberdeen at Ormond Beach, L.P.*, (Fla. 2000). In deciding a motion for summary judgment, “the trial judge must draw every possible inference against the moving party and in favor of the party opposing the motion.” *Orange County v. Expedia* (Case No. 48-2006-CA-2104-O) (Fla. 9th Cir. Ct. 2011) (citing Padovano, West Florida Civil Practice, Sec. 13-2).

<sup>39</sup> *Orange County v. Expedia* (Case No. 48-2006-CA-2104-O) (Fla. 9th Cir. Ct. 2011) (emphasis added).

<sup>40</sup> See *Anne Gannon v. Hotels.com, L.P.* (Case No. 50 2009 CA 025919 XXXXMB)(Fla. 15th Cir. Ct. 2009). See also *Brevard County v. Priceline.org et al* (Case No. 6-09-cv-1695-GAP-GJK)(M.D. Fla. filed Oct. 2, 2009).

<sup>41</sup> Leon County Clerk of Courts Website, *Orbitz LLC vs. Broward County* (Case No. 37 2009 CA 000126), available at [http://cvweb.clerk.leon.fl.us/process.asp?template=summary&addQuery=real\\_case.case\\_id=61797026](http://cvweb.clerk.leon.fl.us/process.asp?template=summary&addQuery=real_case.case_id=61797026) (last visited on Jan. 14, 2011).

<sup>42</sup> Leon County Clerk of Courts Website, *Orbitz LLC vs. Miami-Dade County* (Case No. 2009 CA 005006), available at [http://cvweb.clerk.leon.fl.us/process.asp?template=summary&addQuery=real\\_case.case\\_id=81922577](http://cvweb.clerk.leon.fl.us/process.asp?template=summary&addQuery=real_case.case_id=81922577) (last visited on Jan. 14, 2011).

<sup>43</sup> Leon County Clerk of Courts Website, *Leon County v. Expedia Inc.*, (Case No. 2009 CA 004319), docket available at [http://www.clerk.leon.fl.us/index.php?section=2&server=image&page=high\\_profile/index.asp?year=2009](http://www.clerk.leon.fl.us/index.php?section=2&server=image&page=high_profile/index.asp?year=2009) (last visited on Jan. 14, 2011) (The plaintiffs in this case include: Leon County, Leon County Tax Collector Doris Maloy, Flagler County,



The Florida Attorney General has also filed an action for declaratory judgment against Expedia and Orbitz asking whether the internet companies' failure to remit the appropriate amount of transient rentals taxes on hotel room rentals is in violation of Florida law.<sup>44</sup>

In August 2010, Monroe County entered into a settlement agreement on behalf of 32 counties<sup>45</sup> in a federal class-action suit against certain online travel companies. As a result of the settlement order, the online travel companies were required to pay \$6.5 million to the counties, and in return were released from any obligation to pay or remit tourist development taxes on the full retail price for hotel accommodations.<sup>46</sup> The participating counties agreed to dismiss all current claims against the online travel companies with prejudice, and are further precluded from suing Expedia, Travelocity and Orbitz for two years, and Priceline for three years.

### **Information Relating to Violation of Tax Laws**

Section 213.30, F.S., authorizes the executive director of the Department of Revenue to compensate persons who provide information leading to the collection of taxes, penalties, or interest. The compensation may not exceed 10 percent of the amount collected. Compensation is also authorized for information leading to the identification and registration of a taxpayer who is not in compliance with statutory registration requirements.

Section 213.0535, F.S., establishes the Registration Information Sharing and Exchange Program (RISE), which is coordinated by the Department of Revenue and by which participating state agencies and local governments responsible for administering one or more specified taxes share tax administration data. The information that is subject to sharing includes the registrant's, licensee's, or taxpayer's name, mailing address, business location, and federal employer identification number or social security number; any applicable business type code; any applicable county code; and other tax registration information prescribed by the Department of Revenue. The Department of Revenue and local officials responsible for collecting the tourist development tax, the tourist impact tax, a convention development tax, or a municipal resort tax also exchange data relating to tax payment history, audit assessments, and registration cancellations of dealers engaging in transient rentals.

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Lee County, Manatee County, Pinellas County, Pinellas County Tax Collector Diane Nelson, Polk County, Polk County Tax Collector Joe Tedder, St. Johns County, Escambia County, Charlotte County, Walton County, Hillsborough County, Hillsborough Tax Collector Doug Belden, Pasco County, Alachua County, Nassau County, Okaloosa County, Seminole County, and Wakulla County).

<sup>44</sup>Leon County Clerk of Courts Website, *Dep't. of Legal Affairs vs. Expedia Inc.* (Case No. 37 2009 CA 004304), available at [http://cvweb.clerk.leon.fl.us/process.asp?template=summary&addQuery=real\\_case.case\\_id=84428357](http://cvweb.clerk.leon.fl.us/process.asp?template=summary&addQuery=real_case.case_id=84428357) (last visited on Jan. 14, 2011).

<sup>45</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>46</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 Senate Committee on Community Affairs).

### III. Effect of Proposed Changes:

This bill provides that the state transient rentals tax, local tourist development taxes, local tourist impact taxes, local convention development taxes, and municipal resort taxes are imposed on the amount received by the owner of or the person operating transient rental accommodations – not the payments received by unrelated persons facilitating the booking of reservations of such accommodations.

The following terms are defined in sections 1, 2, 3, 4 and 6 of the bill:

- The terms “*consideration*,” “*rental*,” and “*rents*” means “the amount received by the owner of or the person operating a transient accommodation for the use of any living quarters or sleeping or housekeeping accommodations in, from, or part of, or in connection with, a hotel, apartment house, roominghouse, timeshare resort, tourist or trailer camp, mobile home park, recreational vehicle park, or condominium.” Section 3 of the bill, amending s. 212.03, F.S., also provides this definition for the term “rental payments” and does not define the term “consideration”. Section 6 of the bill, amending ch. 67-930, Laws of Florida, only uses this definition for the term “rent”.
- The terms “*consideration*,” “*rental*” and “*rents*” (and “*rental payments*” for section 3 of the bill) do not include payments received by “unrelated persons” from a lessee, tenant, or customer for facilitating the booking of reservations for or on behalf of the lessee, tenant, or customers at a hotel, apartment house, roominghouse, timeshare resort, tourist or trailer camp, mobile home park, recreational vehicle park, or condominium in this state.”
- A “*person operating transient accommodations*” means “the person who conducts the daily affairs of the physical facilities that furnish transient accommodations and who is responsible for providing any of the services commonly associated with operating those facilities, including providing physical access, regardless of whether the commonly associated services are provided by an unrelated person.”
- The term “*unrelated person*” is defined as “a person who is not related to the owner or the person operating transient accommodations within the meaning of s. 267(b) or s. 707(b) of the Internal Revenue Code of 1986, as amended.”<sup>47</sup>

<sup>47</sup> “Unrelated persons” do not include the following:

**1. Individuals**

- a. Individuals and any Spouse, Sibling, and Lineal Ascendant or Descendant;
- b. Individuals and any partnership that they own >50% of the capital/profit interest;
- c. Individuals and any corporation they own >50% value of stock;

**2. Partnerships**

- a. Two partnerships if same person owns more than 50% of the capital or profit interest;
- b. A partnership and a corporation if the same person owns more than 50% of the stock in the corporation and more than 50% of the capital or profits interest in the partnership;

**3. Corporations**

- a. Corporations when one owns the other or when they are connected through common ownership;
- b. A corporation and a partnership if the same person owns more than 50% of the stock in the corporation and more than 50% of the capital or profits interest in the partnership;
- c. Two S corporations if the same person owns more than 50% of the outstanding stock in each;
- d. An S and a C corp. if the same person owns more than 50% of the outstanding stock.

**4. 501 Entities**

**Section 1** amends s. 125.0104(3), F.S. (Local Option Tourist Development Taxes), to define the terms “consideration,” “rental,” and “rents”, and the terms “person operating transient accommodations” and “unrelated persons” as provided above. This section also provides that the person who owns or is operating transient accommodations must separately state the amount of the tax collected and the consideration charged from the rental on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons facilitating the booking of reservations who are unrelated persons are not required to separately state such taxes, however, unrelated persons who facilitate the booking of reservations are not required to separately state the tax, except that such persons must disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the booking of the reservation. Any amounts specifically collected as tax are county funds and shall be remitted as tax.

**Section 2** amends s. 125.0108, F.S. (Local Tourist Impact Tax), to define the terms “consideration,” “rental,” and “rents”, and the terms “person operating transient accommodations” and “unrelated persons” as provided above. This section also provides that the person who owns or is operating transient accommodations must separately state the amount of the tax collected and the consideration charged from the rental on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons facilitating the booking of reservations who are unrelated persons are not required to separately state such taxes, however, unrelated persons who facilitate the booking of reservations are not required to separately state the tax, except that such persons must disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the booking of the reservation. Any amounts specifically collected as tax are county funds and shall be remitted as tax.

**Section 3** amends s. 212.03(1)(b), F.S. (State Transient Rentals Tax), to define the terms “rent”, “rental,” “rentals,” and “rental payments”, and the terms “person operating transient accommodations” and “unrelated persons” as provided above. The section also amends s. 212.03(2), F.S., to provide that the state transient rentals tax is charged by the owner of, or the person operating transient accommodations subject to the tax imposed under the chapter. The tax is due on the amount of rent received at the time the person operating transient accommodations receives the rental payment.

The owner of or the person operating transient accommodations must separately state the amount of the tax collected and the consideration charged from the rental on the receipt, invoice, or other

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- a. A 501 entity and any person that directly or indirectly controls the organization by himself or herself or through a member of their family (family meaning someone in number 1(a) above);

**5. Trusts**

- a. Grantor and fiduciary of the same trust;
- b. Fiduciaries of two different trusts if the grantor is the same;
- c. Fiduciaries and beneficiaries of the same trust;
- d. Fiduciary and beneficiary of different trusts if grantor is the same;
- e. Fiduciary of a trust and a corporation more than 50% of which is owned directly or indirectly by or for the trust or by or for the grantor of the trust;

**6. Estates** -- An executor and beneficiary of an estate.

documentation issued with respect to charges for transient accommodations the tax from the rental charged on the receipt. Persons facilitating the booking of reservations who are unrelated persons are not required to separately state such taxes, however, unrelated persons who facilitate the booking of reservations are not required to separately state the tax, except that such persons must disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the booking of the reservation. Any amounts specifically collected as tax are county funds and shall be remitted as tax.

**Section 4** amends s. 212.0305(3)(a), F.S. (Local Convention Development Tax), to define “consideration,” “rental,” and “rents”, and the terms “person operating transient accommodations” and “unrelated persons” as provided above. This section also provides that the person who owns or is operating transient accommodations must separately state the amount of the tax collected and the consideration charged from the rental on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons facilitating the booking of reservations who are unrelated persons are not required to separately state such taxes, however, unrelated persons who facilitate the booking of reservations are not required to separately state the tax, except that such persons must disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the booking of the reservation. Any amounts specifically collected as tax are county funds and shall be remitted as tax.

**Section 5** amends s. 213.30(1), F.S., to provide authority for the Department of Revenue (DOR) to compensate a county government that provides information to the department that leads to:

- The punishment of, or the collection of taxes, penalties, or interest from, any person related to the state transient rentals tax in s. 212.03, F.S. The amount of payment to a county may not exceed 10 percent of any tax, penalties, or interest collected as a result of the information.
- The identification and registration of a taxpayer not already in compliance with the state transient rentals tax registration requirements. The amount of payment made to any person providing information that results in the registration of the noncompliant taxpayer shall be \$100. The reward shall be paid only if the noncompliant taxpayer is:
  - Engaged in a bona fide taxable activity; and
  - Found by DOR to have an unpaid tax liability.

Currently, s. 212.30, F.S., permits the Executive Director of DOR to compensate persons who provide information to the department that leads to the punishment or collection of taxes from any person or to the identification and registration of a noncompliant taxpayer.<sup>48</sup> This program is known as the DOR Rewards Program. The statute provides the conditions under which compensation may be paid. Employees of DOR or any other state or federal agency may not be compensated. Although this statute does not specifically deny compensation to county governments, their participation in the RISE Program under s. 213.0535, F.S., would appear to require county governments to provide information about tax law violations under that program, in which rewards are not authorized.

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<sup>48</sup> Between 2007 and 2010, DOR received 3,898 rewards cases and collected \$18.6M as a result of the rewards program. Of these cases, 728 rewards have been paid out, with the total amount paid equaling approximately \$1.1M. This information was obtained via email from Lynne Moeller, Florida Department of Revenue (Feb. 4, 2011) (on file with the Senate Committee on Community Affairs).

**Section 6** amends ss. 1 and 3 of chapter 67-930, Laws of Florida, as amended by chapters 93-286 and 94-344, Laws of Florida, (Municipal Resort Tax), to define the terms “rent”, “person operating transient accommodations” and “unrelated persons” as provided above. This section also provides that the municipal resort tax shall be collected by the owner or the person operating transient accommodations at the time of payment of the rent or the retail sales price.

The bill states that it shall be the duty of every *owner or person operating the transient accommodations*, to collect from the person paying the rent or the retail sales price, for the use of the city or town, the tax imposed and levied pursuant to this section, and to report and pay over to the city or town all such taxes imposed, levied and collected, in accordance with the accounting and other provisions of the enacted ordinance.

This section also provides that the person who owns or is operating transient accommodations must separately state the amount of the tax collected and the consideration charged from the rental on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons facilitating the booking of reservations who are unrelated persons are not required to separately state such taxes, however, unrelated persons who facilitate the booking of reservations are not required to separately state the tax, except that such persons must disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the booking of the reservation. Any amounts specifically collected as tax are county funds and shall be remitted as tax.

**Section 7** states that this act is clarifying and remedial in nature and does not provide a basis for assessments or refunds of tax for periods before July 1, 2011. The bill also states that this act does not affect any lawsuit existing on July 1, 2011, related to the taxes imposed by the provisions of law amended by this act.

**Section 8** provides that this act shall take effect on July 1, 2011.

**Other Potential Implications:**

The new definitions of “consideration,” “rental,” and “rents” provided in sections 1, 2, 3, 4, and 6 create doubt about the taxable status of payments made by “unrelated persons” who facilitate the booking of a reservation for or on behalf of the lessee, tenant, or customer at the transient lodging facility. This is because “consideration,” “rental,” and “rents” are defined as:

The amount received by the owner of or the person operating transient accommodations **for the use of** any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with, a hotel...*(emphasis added)*

However, current law refers to “consideration paid for occupancy” (s. 125.0104(3)(a)2.a., F.S.) and provides that:

The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the

**lessee, tenant, or customer** at the time of payment for consideration for such lease or rental. (*emphasis added*) (s. 125.9195(3)(f), F.S.)

Payments made by unrelated persons may not meet the definition of “consideration” since the unrelated persons do not use the facilities.

Similarly, these definitions cast doubt on the ability of the person operating a transient facility to collect tax on the amount of consideration or rent paid, since the transient rental facility may not receive consideration or rent as defined in the bill.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

Article VII, section 18(b), of the Florida Constitution, provides that “except upon a approval by two-thirds of members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989”.<sup>49</sup> Since this bill would reduce a county or municipality’s authority to raise revenue in the aggregate, it may require a two-thirds vote of the membership of each house of the Legislature for passage.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

This bill would prevent local governments from levying certain taxes on payments received by unrelated persons facilitating the booking of accommodation reservations.

On February 25, 2011, the REC determined that this bill would affect state or local revenue in 3 ways:

- It has a negative but indeterminate cash impact for FY 2011-12 and a recurring impact of (\$28.7) million on the tourist development tax because it does not tax the markup retained by persons facilitating transient rental bookings.
- It has a negative but indeterminate impact on state and local revenue because it will allow persons who currently collect and remit sales and tourist development

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<sup>49</sup> FLA. CONST. art. VII, s. 18(b).

taxes to change their business practices in order to take advantage of the tax preference provided by the bill.

- The section of the bill that provides a cash reward to counties has a negative but indeterminate impact on state revenue and positive indeterminate impact on local revenue

#### B. Private Sector Impact:

This bill provides that transient rentals taxes are levied upon the amount of payment received by the owner or person operating the transient rental facility. It provides a tax preference for unrelated persons facilitating the booking of accommodation reservations under the merchant model, as compared to bookings by related persons or agents, since less than the full amount paid by the final customer is subject to tax.

This bill also requires the owner or person operating the transient accommodation to separately state the amount of tax collected and the consideration charged on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons facilitating the booking of reservations who are unrelated persons are not required to separately state such taxes.

#### C. Government Sector Impact:

The Department of Revenue (DOR) has indicated that this bill will cost the Department \$19,070 in non-recurring expenses for the 2010-2011 FY as a result of printing and mailing Tax Information Publications (TIPs) to transient rental sales and use tax dealers and counties.<sup>50</sup>

Counties that provide information to DOR, that leads to the punishment of, or the collection of taxes, penalties or interest related to state transient rentals tax, or to the identification and registration of a taxpayer who is not in compliance with state transient rentals tax registration requirements, may be entitled to compensation by DOR in an amount not to exceed 10 percent of the taxes, penalties, or interest collected as a result of such information.

*See Tax/Fee Issues.*

#### VI. Technical Deficiencies:

None.

#### VII. Related Issues:

The following table shows the current transient rentals tax rates in all 67 Florida Counties:<sup>51</sup>

<sup>50</sup> Department of Revenue, *Senate Bill 376 Fiscal Analysis* (Jan. 24, 2011) (on file with the Senate Committee on Community Affairs).

<sup>51</sup> Chart provided by the Office of Economic and Demographic Research, [2011 Local Option Tourist/Food and Beverage/Tax Rates in Florida's Counties](http://edr.state.fl.us/Content/local-government/data/data-a-to-z/2011LOTTrates.pdf), available at <http://edr.state.fl.us/Content/local-government/data/data-a-to-z/2011LOTTrates.pdf> (last visited on Jan. 13, 2011) (**Note:** County names that are followed by an asterisk represent those counties that self-

	Maximum		
	Potential	Current	Unutilized
County	Tax Rate	Tax Rate	Tax Rate
Alachua *	5	5	0
Baker *	5	2	3
Bay *	5	5	0
Bradford	5	4	1
Brevard *	5	5	0
Broward *	6	5	1
Calhoun	4	0	4
Charlotte *	5	5	0
Citrus	5	3	2
Clay *	5	3	2
Collier *	5	4	1
Columbia	5	3	2
DeSoto	4	0	4
Dixie	4	0	4
Duval *	6	6	0
Escambia *	5	4	1
Flagler	5	4	1
Franklin	5	2	3
Gadsden	5	2	3
Gilchrist	5	2	3
Glades	4	2	2
Gulf *	5	4	1
Hamilton	5	3	2
Hardee	4	0	4
Hendry	5	3	2
Hernando *	5	3	2
Highlands	5	2	3
Hillsborough *	5	5	0
Holmes	5	2	3
Indian River *	5	4	1
Jackson	5	4	1
Jefferson	5	2	3
Lafayette	4	0	4
Lake *	5	4	1
Lee *	5	5	0
Leon *	5	5	0
Levy	5	2	3
Liberty	4	0	4

	Maximum		
	Potential	Current	Unutilized
County	Tax Rate	Tax Rate	Tax Rate
Madison	5	3	2
Manatee *	5	5	0
Marion *	5	2	3
Martin *	5	4	1
Miami-Dade *	6	6	0
Monroe *	7	5	2
Nassau *	5	4	1
Okaloosa *	5	5	0
Okeechobee	5	3	2
Orange *	6	6	0
Osceola *	6	6	0
Palm Beach *	5	5	0
Pasco	5	2	3
Pinellas *	5	5	0
Polk *	5	5	0
Putnam *	5	4	1
St. Johns *	5	4	1
St. Lucie *	5	5	0
Santa Rosa *	5	4	1
Sarasota *	5	4.5	0.5
Seminole *	5	5	0
Sumter	5	2	3
Suwannee *	5	2	3
Taylor *	5	3	2
Union	4	0	4
Volusia *	6	6	0
Wakulla	5	2	3
Walton *	6	4.5	1.5
Washington	5	3	2
# Eligible to Levy:		67	
# Levying:		60	
* Counties self-administer tourist development taxes			

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Budget Subcommittee on Finance and Tax on April 6, 2011:**

The committee substitute retains the provision that unrelated persons who facilitate the booking of reservations are not required to separately state the tax, but requires them to disclose all amounts charged or expected to be charged as taxes on the final receipt, invoice, or other documentation provided to the customer by the person facilitating the

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administer these taxes and boxed areas indicate those counties that are eligible to impose the particular tax prescribed in the table. As noted in the Present Situation section of this analysis, three municipalities in Miami-Dade County (Bal Harbour, Miami Beach, and Surfside) are eligible to impose the Municipal Resort Tax).



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booking of the reservation. It also includes the provisions of amendments that were traveling with the bill—a change in wording to provide consistent definitions and deletion of language pertaining to a tax on malt beverages that was added to the bill in error.

**B. Amendments:**

None