IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-2421

ALACHUA COUNTY, CHARLOTTE COUNTY, ESCAMBIA COUNTY, FLAGLER COUNTY, HILLSBOROUGH COUNTY, DOUG BELDON as Hillsborough County Tax Collector, LEE COUNTY, LEON COUNTY, DORIS MALOY as Leon County Tax Collector, MANATEE COUNTY, NASSAU COUNTY, OKALOOSA COUNTY, PASCO COUNTY, PINELLAS COUNTY, DIANE NELSON as Pinellas County Tax Collector, POLK COUNTY, JOE G. TEDDER as Polk County Tax Collector, SEMINOLE COUNTY, ST. JOHNS COUNTY, WAKULLA COUNTY, and WALTON COUNTY,

Appellants,

v.

EXPEDIA, INC., et al.,

Appellees.
_____/

Opinion filed February 28, 2013.

An appeal from the Circuit Court for Leon County.
James O. Shelfer, Judge.

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

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

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

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

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

THOMAS, J.

In this case before us, we address the Tourist Development Tax, codifed in section 125.0104, Florida Statutes, and levied pursuant to Florida's Local Option Tourist Development Act of 1977. The question presented on appeal is whether the Tourist Development Tax ("Tax") applies to the entire amount that Appellees ("Online Travel Companies" or "Companies") collect from hotel customers who reserve their hotel room through Online Travel Companies. We find that the additional sums of money earned by the Companies are not taxable. And as required by Florida Supreme Court precedent, we must read the statute "strongly in

favor of the taxpayer and against the government." Maas Bros., Inc. v. Dickinson, 195 So. 2d 193, 198 (Fla. 1967). Thus, we affirm the trial court's ruling that the Tax applies only to the amount of money the Companies send to the hotels for the reserved rooms, and not to the additional compensation retained by the Companies. As the trial court here correctly determined, it is for the Legislature, and not the judiciary, to decide whether to apply the Tax to the full amount that the Companies charge their customers who utilize their website to obtain a hotel reservation.[1]

Factual & Procedural Background

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

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

hotel for the room. Upon arrival, the hotel provides the hotel room to the customer.[2]

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

Thus, the trial court found that it first had to determine "who and what the Legislature intends to tax" -- tourists who utilize hotels and motels in Florida, or "the hotels and motels themselves for the privilege of doing business here?" If the Tax was intended to apply to the consumer, then the full amount paid by the consumer to the Companies would be subject to the Tax, and the Companies would be obligated to collect and remit the Tax on the amount involved in the transaction which exceeded the amount the Companies pay to the hotel. But "[i]f the privilege the Legislature seeks to tax is the opportunity of operating a hotel in Florida, which was the Legislature's clear intention in 1949 when it passed the Transits Rental Tax

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

(TRT) under Florida Statute 212.03, then the hotel in which the tourist stays must collect the tax on the lesser amount that the hotel receives for the room and submit that lesser amount of tax to the counties."

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

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

have yet acted to declare as much. Thus, the court granted the Companies' motion and denied Appellants' motion.[3]

Analysis

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

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

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

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

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

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

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

§ 212.03(1)(a), Fla. Stat.

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

Both the Tourist Development Tax and the Transient Rentals Tax impose a duty to charge, collect, and remit the bed tax. See § 125.0104(3)(f), Fla. Stat. ("The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental."); § 125.0104(8)(a), Fla. Stat. ("Any person who is taxable hereunder who fails or refuses to charge and collect from the person paying any rental or lease the

taxes herein provided . . . is, in addition to being personally liable for the payment of the tax . . .” criminally liable.);[4] § 212.03(2), Fla. Stat. (“The tax provided for herein shall be in addition to the total amount of the rental, shall be charged by the lessor or person receiving the rent in and by said rental arrangement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person, as defined in this chapter, who receives said rental or payment.”). Logically, therefore, that duty is imposed on the hotels, not the tourist. Thus, although the tourist is obligated to pay the tax when it is charged, the tourist is not obligated to charge himself the tax, collect it from himself, or remit it to the proper taxing authority. That duty is imposed on hotels, motels, and others for exercising the privilege of engaging in the business of renting rooms to consumers.

Appellants contend that their position that the taxable privilege is exercised by tourists is supported by our supreme court’s opinion in Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981). We disagree. In that case, the appellant argued that the Tourist Development Tax violated the equal protection clause in the United States Constitution, because the “county is attempting to impose a tax on nonresidents alone on the privilege of renting living space for less than six months.” Id. at 988. We note, however, that this was the

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

appellant's characterization of the issue. The supreme court rejected the equal protection argument, observing that the Tourist Development Tax is "imposed . . . on anyone who rents certain kinds of living space for a term of six months or less," and "is imposed on all renters of the covered types of premises" regardless of whether they are residents or non-residents. Id. at 989. The court did not hold, nor was it asked to address, whether the taxable privilege addressed in the Tourist Development Tax is exercised by those renting rooms from hotels or by those renting rooms to tourists. It simply recognized the obvious – the tax is imposed on tourists and residents and collected by the hotels.

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

Thus, we hold that the privilege being exercised for purposes of the Tourist Development Tax is renting rooms **to** tourists, not the other way around.[5] This

[5] The privilege involved here of renting rooms to tourists is also supported by the plain wording in other provisions in the statute. The statute explicitly provides that the privilege exercised is renting, leasing, or letting a room "for consideration," and that the tax at issue is due "on the consideration paid for occupancy" of such a room in the applicable county. § 125.0104(3)(a)1., 2.a., Fla. Stat. In a contract,

leaves us with Appellants' alternative argument that the Companies have an obligation to charge the Tourist Development Tax on the entire amount they collect from customers, not just the portion of that amount they forward to the hotels.

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

It is well-established law in Florida that courts must "construe tax statutes in favor of taxpayers where an ambiguity may exist." Harbor Ventures, 366 So. 2d at 1174. Here, because the legislature has not provided a statutory definitional scheme to create special meanings for the terms "rents, leases, or lets for

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one party sells a product or service **for** consideration, and the other party pays for the product or service **with** that consideration. The statute itself recognizes this principle: "The tourist development tax shall be charged **by the person receiving the consideration for** the lease or rental, and it shall be collected from the . . . customer at the time of payment **of the consideration for** such lease or rental." § 125.0104(3)(f), Fla. Stat. (emphasis added). "The person **receiving the consideration for** such rental or lease shall receive, account for, and remit the tax" to the Department of Revenue. § 125.0104(3)(g), Fla. Stat. (emphasis added).

consideration," the court must give those words their ordinary and common usage. See Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 961 (Fla. 2005).

To "rent, lease or let" in ordinary meaning denotes the granting of possessory or use rights in property. Inherent in that idea is the notion that one actually has sufficient control of the property to be entitled to grant possessory or use rights. Thus, the consideration received for the "lease or rental" is that amount received by the hotels for the use of their room, and not the mark-up profit retained by the Companies for facilitating the room reservation. See also Fla. Admin. Code R. 12A-1.061(3)(a) ("Rental charges or room rates for the use or possession, or the right to the use or possession, of transient accommodations are subject to tax . . . ."). Notably, section 125.0104(3)(e), Florida Statutes, recognizes the difference between taxes and fees on the one hand, and financial consideration on the other: "The tourist development tax shall be in addition to any other tax imposed pursuant to chapter 212 and in addition to all other taxes and fees and the consideration for the rental or lease." See also Fla. Admin. Code R. 12A-1.061(3)(b) ("Rental charges or room rates include any charge or surcharge to guests or tenants for the use of items or services that is required to be paid by the guest or tenant as a condition of the use or possession, or the right to the use or possession, of any transient accommodation."). Thus, the tax at issue is on the

actual rate paid for **occupancy** of the room, that is, the consideration for the room itself (the "rental or lease"), not any taxes or other fees.

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

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

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

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

Conclusion

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

AFFIRMED.

DAVIS, J., CONCURS; PADOVANO, J., DISSENTS WITH OPINION.

PADOVANO, J., dissenting.

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

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

It is clear from the language of the Miami Dolphins opinion that the Florida Supreme Court considers the local option tourist development tax as a tax due on funds paid by the tourist, not a tax due on money received by the hotel. It is also clear from the language of the opinion that the tax is due on the gross amount of the hotel bill, not on the net amount the hotel may receive after payment of expenses or commissions to an online booking agent. Yet the majority of this court has concluded that the tax at issue is actually a tax on the business of renting a hotel room and the amount due is limited to the hotel's portion of the total funds paid by the tourist to rent the room. On this point, I believe that the majority has misapplied the holding in Miami Dolphins.

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

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

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

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

The travel companies argue that the statute must be construed to impose a tax on the business income received by the hotels, because the terms "rent" and "lease" are used to describe actions taken by the owner of the property, in this case the hotel. They point out in the answer brief that "rent" means "to grant the possession and enjoyment of property . . . in return for payment," that "lease" means "to grant the temporary possession or use of (lands, tenements, etc.) to

another, usually for compensation at a fixed rate; let," and that "let" means "to grant occupancy or use of (land, buildings, rooms, space, etc., or movable property)" in return for payment. Dictionary.com (based on Random House Dictionary) (2012); see also Collins English Dictionary (10th ed. 2009). The problem with this argument is that the terms "rent" and "lease" are also used to describe an action taken by the person who pays for the right to occupy the property.

The first definition of the transitive verb "rent" in the American Heritage Dictionary of the English Language online is "[t]o obtain occupancy or use of (another's property) in return for regular payments." AHDictionary.com. Indeed, the hard copy of the American Heritage Dictionary does not even include the meaning in which one grants the use of property to another. It lists only the meaning consonant with the primary online definition — "[t]o use (another's property) in return for regular payments" — and "[t]o be for rent." American Heritage Dictionary 708 (4th ed. 2001). Likewise, the MacMillan Dictionary online lists as the first definition of "rent" as "to pay money regularly to use a house, room, office, etc. that belongs to someone else." MacMillanDictionary.com; see also Cambridge Dictionary Online, Dictionary.Cambridge.org/dictionary/american-english/. The Oxford Dictionaries US English Usage site lists only the connotation, "pay someone for the use of

(something, typically property, land, or a car): they rented a house together in Spain." Oxford Dictionaries Online, OxfordDictionaries.com (emphasis in original). As Bryan Garner explains, the transitive verb "rent"

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

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

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

Because these terms can be used interchangeably to describe the action by

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

For these reasons, I do not think that the statement of legislative intent in section 125.0104 supports the argument by the travel companies that the tax is imposed for the privilege of operating a hotel in Florida. And even if that were the case, the statement of legislative intent would not override the plain and unambiguous language of the operative parts of the statute - that is, the parts of the statute that describe how the tax is to be assessed and collected. See S.R.G. Corp. v. Dep't of Revenue, 365 So. 2d 687, 689 (Fla. 1978) (stating that legislative intent is determined primarily from the language of the statute). Several key parts of the statute reveal that the tax is to be based on the total amount of money paid by the tourist, not on the net amount retained by the hotel.

For example, section 125.0104(3)(a)2.a states the "[t]ax shall be due on the

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

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

2011).

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

It is significant in my view that the tourist development tax is paid on some transactions arranged by the online companies but not on others. The travel companies employ two different business models. Under the practice described as the "agency model," the travel company books the room, the tourist pays the full amount of the bill to the hotel, and the hotel remits a fee to the travel company. By the practice described as the "merchant model," the travel company books the

room, collects the full amount of the hotel bill from the tourist, pays a portion of the bill to the hotel, and retains a portion of the bill for booking the room.

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

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

If the travel companies could escape the tax merely by changing the form of the transaction, the hotels could do the same thing on their own. There would be nothing to prevent a large hotel chain from setting up a wholly owned subsidiary

and then using that company for the exclusive purpose of advertising and promotion and for booking hotel rooms. The subsidiary could then charge the hotel for a portion for the room rate for every booking it makes and retain its portion of the bill tax-free. In my view, a scheme like this is no worse than the one the travel companies have devised here; nor is it any better. Both schemes seek to avoid taxation by making the transaction appear to be something other than what it is.

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

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

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

For these reasons, I would hold that the portion of the hotel bill that is retained by the online travel companies is part of the total consideration paid for

the accommodation and that it is therefore subject to the local option tourist development tax.