

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1241 Tax on Sales, Use, and Other Transactions
SPONSOR(S): Economic Development Policy Committee, Patronis and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2436

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Economic Development Policy Committee	8 Y, 3 N, As CS	Kruse	Kruse
2)	Finance & Tax Council			
3)	Economic Development & Community Affairs Policy Council			
4)				
5)				

SUMMARY ANALYSIS

Florida’s court system has not resolved the issue of whether third parties who assist consumers with making internet accommodation bookings are responsible for taxes associated with transient accommodations. Additionally, the Florida Attorney General has requested a declaratory judgment from the court to resolve the issue.

The bill clarifies that third parties who assist consumers with making internet accommodation bookings are not responsible for paying several taxes associated with transient accommodations. Those taxes are the tourist development tax, municipal resort tax, tourist impact tax, sales and use tax on the taxable privilege of renting, leasing, or letting for consideration any accommodations in hotels, motels, roominghouses, mobile home parks, recreational vehicle parks, condominiums, or timeshare resorts, and the convention development tax. Under the provisions of the bill, only the party who operates a transient accommodation is responsible for paying those taxes. A “person operating transient accommodations” is defined as the person who conducts the daily affairs of the physical facilities furnishing transient accommodations who is responsible for providing the services commonly associated with operating the facilities furnishing transient accommodations, regardless of whether such commonly associated services are provided by unrelated persons. The bill delineates responsibility of third parties by defining “unrelated person” as persons who are not related to the person operating transient accommodations within the meaning of s. 1504, s. 267(b), or s. 707(b) of the Internal Revenue Code of 1986, as amended.

In 2008, the Revenue Estimating Conference reviewed a similar bill and found that for the tourist development tax the annualized fiscal impact was negative \$22 million, and the cash fiscal impact was negative indeterminate. However, the Revenue Estimating Conference has not yet determined the fiscal impact of this bill.

This bill may be a Mandate requiring a 2/3ds vote of the membership.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Rental of Accommodations Online¹

Some websites specialize in offering reservations of transient rental accommodations. These are generally independent third parties who act either as an agent or a merchant. Travel agents 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.

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 that cannot be disclosed to the public.² 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."³ Because internet intermediaries lump together what they charge in "taxes and service fees," consumers do not know how much they are paying for each. The website 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

¹ Much 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).

² The negotiated rate is also referred to as a discounted or wholesale price or rate.

³ Because the tax paid by the internet intermediary is based on the wholesale rate, not the retail rate, the fee portion is much larger than it might seem. The rationale given by internet intermediaries for not breaking out taxes and fees is that other on-line merchants would know what type of deals they made with accommodation owners. The standard facilitation fee on such internet room rates is 25 percent.

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. If no invoice is sent, the merchant may keep the money.⁴

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.

"Taxes and Fees" Charged by Websites

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 fee⁵ is not subject to tax because it is not an amount paid to the owner (generally the difference between the retail rate and the negotiated rate). 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 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 does not take an official position on whether tax is due on the amount collected and retained by Internet room providers. The department does not take 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 does not take a position on whether tax should be remitted at the time the customer pays for the reservation.

Litigation in Florida⁶

Numerous lawsuits have been filed in Florida on this issue. In one case, Orange County, Florida, which self-administers the local tourist development tax, brought a lawsuit against internet intermediaries Expedia and Orbitz to determine whether tax is due "on the difference between the wholesale price and

⁴ 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).

⁵ A facilitation fee generally involves money received to facilitate a booking, process a reservation application, or provide a similar service.

⁶ 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).

the retail price they receive for the rooms when they re-sell them.”⁷ The trial court dismissed the case, ruling that the county must complete audits first to estimate taxes due. The appellate court reversed the trial court. The opinion did not suggest who might eventually win, only that the county is entitled to know whether it can lawfully assess the tourist development tax before attempting to audit the companies. Jurisdiction is now with the trial court to hear and evaluate the case.

Florida’s Attorney General has also filed suit in the circuit court for the Second Judicial Circuit in Leon County under the Deceptive and Unfair Trade Practices Act requesting a declaratory judgment. The Attorney General alleges that the defendants are under the Merchant Model and are not remitting the applicable taxes.⁸

Effect of Proposed Changes

Section 1. Tourist development tax; procedure for levying; authorized uses; referendum; enforcement.:

PRESENT SITUATION AFFECTED BY THE BILL

Section 125.0104, F.S., provides for the imposition of tourist development tax on the taxable privilege of renting, leasing, or letting for consideration any living accommodations in hotels, motels, roominghouses, mobile home parks, recreational vehicle parks, condominiums, or timeshare resorts. The tax is due on the total consideration charged for the rental or lease of a transient accommodation and must be collected from the lessee at the time the rental consideration is paid.

CHANGES PROPOSED BY THE BILL

Amends subsection (3) of Section 125.0104, F.S. “Consideration,” “rental,” and “rents” are defined as the amount received by a person operating transient accommodations for the use of any living quarters or sleeping or housekeeping accommodations in, from, or part of, or in connection with any transient accommodation. A “person operating transient accommodations” is defined as the person who conducts the daily affairs of the physical facilities furnishing transient accommodations who is responsible for providing the services commonly associated with operating the facilities furnishing transient accommodations, regardless of whether such commonly associated services are provided by unrelated persons. The terms do not include payments received by unrelated persons for facilitating the booking of reservations for or on behalf of the lessees or licensees at transient accommodations. The bill defines “unrelated person” as persons who are not related to the person operating transient accommodations within the meaning of s. 1504, s. 267(b), or s. 707(b) of the Internal Revenue Code of 1986, as amended.

The bill also provides that a person who operates transient accommodations must separately state the tax from the consideration charged on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons who facilitate the booking of reservations who are unrelated person are not required to separately state amounts charged on the receipt, invoice, or other documentation. Any amounts specifically collected as tax are county funds and must be remitted as tax.

Section 2. Areas of Critical State Concern; tourist impact tax

PRESENT SITUATION AFFECTED BY THE BILL

Section 125.0108, F.S., provides for the imposition of a tourist impact tax in the area or areas within a county designated as an area of critical state concern under ch. 380, F.S.. Any county creating a land authority is authorized to levy the tax by ordinance. If the area of critical state concern is greater than 50 percent of the land area of the county, the tax may be levied throughout the county.

⁷ Orange County, at 2.

⁸ Deputy Attorney General Bob Hannah appeared before the March 17, 2010, Economic Development Policy Committee meeting and stated for the record that the Attorney General has not taken an official position on this issue, but is seeking clarification from the court.

CHANGES PROPOSED BY THE BILL

Amends s. 125.0108(1), F.S. "Consideration," "rental," and "rents" are defined as the amount received by a person operating transient accommodations for the use of any living quarters or sleeping or housekeeping accommodations in, from, or part of, or in connection with any transient accommodation. A "person operating transient accommodations" is defined as the person who conducts the daily affairs of the physical facilities furnishing transient accommodations who is responsible for providing the services commonly associated with operating the facilities furnishing transient accommodations, regardless of whether such commonly associated services are provided by unrelated persons. The terms do not include payments received by unrelated persons for facilitating the booking of reservations for or on behalf of the lessees or licensees at transient accommodations. The bill defines "unrelated person" as persons who are not related to the person operating transient accommodations within the meaning of s. 1504, s. 267(b), or s. 707(b) of the Internal Revenue Code of 1986, as amended.

The bill also provides that a person who operates transient accommodations must separately state the tax from the consideration charged on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons who facilitate the booking of reservations who are unrelated person are not required to separately state amounts charged on the receipt, invoice, or other documentation. Any amounts specifically collected as tax are county funds and must be remitted as tax.

Section 3. Transient rentals tax; rate, procedure, enforcement, exemptions.:

PRESENT SITUATION AFFECTED BY THE BILL

Section 212.03, F.S., provides for the imposition of sales and use tax on the taxable privilege of renting, leasing, or letting for consideration any living accommodations in hotels, motels, roominghouses, mobile home parks, recreational vehicle parks, condominiums, or timeshare resorts. The tax imposed is in addition to the total amount of the rental and must be charged by the lessor or person receiving the rent. The tax is due and payable at the time of receipt of the rental payment by the lessor or person who receives the rental or payment.

CHANGES PROPOSED BY THE BILL

Amends subsections (1) and (2) of Section 212.03, F.S. "Rent," "rental," "rentals" and "rental payments" are defined as the amount received by a person operating transient accommodations for the use of any transient accommodation. The terms do not include payments received by unrelated persons for facilitating the booking of reservations for or on behalf of the lessees or licensees.

"Person who operates transient accommodations" is defined as the person conducting the daily affairs of the physical facilities furnishing transient accommodations who is responsible for providing the services commonly associated with operating the facilities furnishing transient accommodations regardless of whether such commonly associated services are provided by unrelated persons.

The bill defines "unrelated person" as persons who are not related to the person operating transient accommodations within the meaning of s. 1504, s. 267(b), or s. 707(b) of the Internal Revenue Code of 1986, as amended.

Provides that a person operating transient accommodations shall collect the tax from the lessee or person paying the rental. The tax is due and payable at the time of receipt of the rental payment by a person who operates transient accommodations and the person who operates transient accommodations shall remit the tax.

Provides that a person who operates transient accommodations shall separately state the tax from the rental charged on the receipt. Persons who facilitate the booking of reservations who are unrelated to the person operating the transient accommodations are not required to separately state amounts

charged on the receipt. Provides that any amounts specifically collected as tax are state funds and must be remitted as tax.

Section 4. Convention development taxes; intent; administration; authorization; use of proceeds.:

PRESENT SITUATION AFFECTED BY THE BILL

Section 212.0305, F.S., provides for the imposition of convention development tax on the taxable privilege of renting, leasing, or letting for consideration any living accommodations in hotels, motels, roominghouses, mobile home parks, recreational vehicle parks, condominiums, or timeshare resorts. The tax applies to the amount of payment made any person to rent the accommodation. The tax must be charged by the person who receives the lease or rental consideration and must be collected from the tenant when the rental payment is received.

CHANGES PROPOSED BY THE BILL

Amends subsection (3) of Section 212.0305, F.S. "Consideration," "rental," and "rents" are defined as the amount received by a person operating transient accommodations for the use of any living quarters or sleeping or housekeeping accommodations in, from, or part of, or in connection with any transient accommodation. A "person operating transient accommodations" is defined as the person who conducts the daily affairs of the physical facilities furnishing transient accommodations who is responsible for providing the services commonly associated with operating the facilities furnishing transient accommodations, regardless of whether such commonly associated services are provided by unrelated persons. The terms do not include payments received by unrelated persons for facilitating the booking of reservations for or on behalf of the lessees or licensees at transient accommodations. The bill defines "unrelated person" as persons who are not related to the person operating transient accommodations within the meaning of s. 1504, s. 267(b), or s. 707(b) of the Internal Revenue Code of 1986, as amended.

The bill also provides that a person who operates transient accommodations must separately state the tax from the consideration charged on the receipt, invoice, or other documentation issued with respect to charges for transient accommodations. Persons who facilitate the booking of reservations who are unrelated person are not required to separately state amounts charged on the receipt, invoice, or other documentation. Any amounts specifically collected as tax are county funds and must be remitted as tax.

Section 5. Compensation for information relating to a violation of the tax laws.:

PRESENT SITUATION AFFECTED BY THE BILL

Section 213.30, F.S., permits the Executive Director of the Department of Revenue to compensate persons who provide information to the Department that leads to the punishment of or collection of taxes from any person or to the identification and registration of a noncompliant taxpayer. The statute provides the conditions under which compensation may be paid. Employees of the Department or any other state or federal agency may not be compensated.

CHANGES PROPOSED BY THE BILL

Amends Section 213.30, F.S., to also permit compensation to a county government for information leading to the punishment of or collection of transient rental sales tax from any person or the identification and registration of any person liable for transient rental sales tax. Provides the conditions under which compensation may be paid.

Section 6.

PRESENT SITUATION AFFECTED BY THE BILL

Sections 1 and 3 of ch. 67-930, L.O.F., provides that all cities and towns in counties of the state with populations between 330,000 and 340,000 and in a specified county may impose a municipal resort tax.

CHANGES PROPOSED BY THE BILL

The bill amends sections 1 and 3 of ch. 67-930, L.O.F. "Rent," is defined as the amount received by a person operating transient accommodations for the use of any transient accommodation. The term does not include payments received by unrelated persons for facilitating the booking of reservations for or on behalf of the lessees or licensees.

"Person operating transient accommodations" is defined as the person conducting the daily affairs of the physical facilities furnishing transient accommodations who is responsible for providing the services commonly associated with operating the facilities furnishing transient accommodations regardless of whether such commonly associated services are provided by unrelated persons.

The bill defines "unrelated person" to mean persons who are not in the same affiliated group of corporations within the meaning of s. 1504, s. 267(b), or s. 707(b) of the Internal Revenue Code of 1986, as amended. This definition is different from how unrelated persons has been defined in all places elsewhere in the bill.

Provides that a person operating transient accommodations shall collect the tax from the lessee or person paying the rental. The tax is due and payable at the time of receipt of the rental payment by a person who operates transient accommodations and the person who operates transient accommodations shall remit the tax.

Provides that a person who operates transient accommodations shall separately state the tax from the rental charged on the receipt. Persons who facilitate the booking of reservations who are unrelated to the person operating the transient accommodations are not required to separately state amounts charged on the receipt. Provides that any amounts specifically collected as tax are state funds and must be remitted as tax.

Section 7. Provides that the changes made by the bill are intended to be clarifying and remedial in nature and shall not provide a basis for assessments or refunds of tax for period prior to July 1, 2010.

Section 8. Provides for an effective date of July 1, 2010.

B. SECTION DIRECTORY:

- Section 1. Amends subsection (3) of section 125.0104, F.S., to provide certain definitions and clarify payment of taxes.
- Section 2. Amends section 128.0108, F.S., to provide certain definitions and clarify payment of taxes.
- Section 3. Amends subsections (1) and (2) of section 212.03, F.S., to provide certain definitions and clarify payment of taxes.
- Section 4. Amends subsection (3) of section 212.0305, F.S., to provide certain definitions and clarify payment of taxes.
- Section 5. Amends section 213.30, F.S., to also permit compensation to a county government for information leading to the punishment of or collection of transient rental sales tax from any person or the identification and registration of any person liable for transient rental sales tax. Provides the conditions under which compensation may be paid.
- Section 6. Amends sections 1 and 3 of ch. 67-930, L.O.F., to provide certain definitions and clarify payment of taxes.

Section 7. Provides that the amendments to the bill are clarifying and remedial in nature, and that those sections may not be the basis for an assessment or refund of tax due or collected prior to July 1, 2010.

Section 8. Provides for an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

In 2008, the Revenue Estimating Conference reviewed a similar bill and found that the annualized and cash fiscal impacts of the bill on sales tax were negative indeterminate. However, the Revenue Estimating Conference has not yet determined the fiscal impact of this bill.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

In 2008, the Revenue Estimating Conference reviewed a similar bill and found that for the tourist development tax the annualized fiscal impact was negative \$22 million and the cash fiscal impact was negative indeterminate. However, the Revenue Estimating Conference has not yet determined the fiscal impact of this bill.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will clarify responsibility for payment of taxes and may prevent consumers from paying higher taxes since only the portion of a consumer's bill attributable to the operator of the accommodation will be taxed.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision may apply because this bill reduces the authority that counties or municipalities have to raise revenues in the aggregate. The bill does not appear to qualify for an exemption or exception. Therefore, the legislature must determine that the bill fulfills an important state interest and the bill must have a 2/3 vote of the membership of each house.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill should be amended to include a statement that the bill fulfills an important state interest.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 17, 2010, the Economic Development Policy Committee adopted a strike-all amendment, which:

- To revise the definition of “unrelated person” to reference sections in the Internal Revenue Code of 1986, as amended.
- To revise the definition of “person operating transient accommodation.”
- To clarify when persons facilitating the booking of reservation must separately state any amounts charged on a receipt.
- To amend other sections of law noted by the Department of Revenue where transient rentals also are subject to a tourist impact tax and a municipal resort tax.

The bill was reported favorably and the analysis has been updated to reflect the committee substitute.