

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 493 Tax on Sales, Use & Other Transactions

SPONSOR(S): Brodeur and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 376

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Economic Development & Tourism Subcommittee	11 Y, 3 N	Tecler	Kruse
2) Finance & Tax Committee			
3) Economic Affairs Committee			

SUMMARY ANALYSIS

Legal disputes between online booking services and local governments have risen regarding the application of the tourist development tax. The bill clarifies that service fees for facilitating the booking of reservations for customers at transient accommodations is not taxable. Further, the bill states that amounts specifically collected as tax are county or state funds and must be remitted as tax. The bill also provides that the changes made by the bill do not affect lawsuits existing on the date the act becomes effective regarding the taxes amended by the act.

The Revenue Estimating Conference (REC) estimates that the revenue impacts of the bill are negative indeterminate for General Revenue and state trust fund revenue. The REC also estimates that the bill will reduce recurring local government revenues by \$28.7 million in FY 2011-2012, \$31.3 million in FY 2012-13, \$34.9 million in FY 2013-14, and \$36.6 million in FY 2014-15.

The bill may be a mandate requiring a 2/3 vote of the membership of each house.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Issue Background

Legal disputes between online booking services and local governments have risen regarding the application of the tourist development tax. The bill clarifies that service fees for facilitating the booking of reservations for customers at transient accommodations is not taxable.

Taxation of Transient Rentals

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

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

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

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

² Section 125.0104(3)(c), F.S.

³ Florida Legislative Committee on Intergovernmental Relations. See <http://edr.state.fl.us/Content/local-government/data/data-a-to-z/2011LOTTRates.pdf> (last visited 03/02/2011)

⁴ Section 125.0104(3)(d), F.S.

⁵ See fn. 3, supra.

⁶ Section 125.0104(3)(l), F.S.

⁷ See fn. 3, supra.

⁸ Section 125.0104(3)(m), F.S.

⁹ See fn. 3, supra.

¹⁰ Section 125.0104(3)(n), F.S.

¹¹ See fn. 3, supra.

¹² Id.

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

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

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

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

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

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

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

¹³ Id.

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

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

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

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

¹⁸ Section 212.18(3)(a), F.S.

¹⁹ Rule 12A-1.061(7), F.A.C.

²⁰ Section 212.18(3)(c), F.S.

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

Rental of Accommodations Online²²

Some companies have websites that specialize in offering reservations of transient rental accommodations. These are generally independent third parties who act either as an agent or a merchant and are often referred to as “internet intermediaries” or some similar term. Travel agents have been allowed computerized access to search hotel room inventories and to book discounted hotel rooms in the name of, and for the account of, other people (i.e., as intermediaries) since the 1970s.

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

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

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

The Markup/Facilitation Fee/Service Fee

Internet intermediaries argue that the tourist development tax is measured by the amount paid to the accommodation owner or operator for the right to use the transient accommodation (negotiated rate) and that the facilitation fee²⁴ is not subject to tax because it is not an amount paid to the owner (generally the difference between the retail rate paid by the customer and the negotiated rate paid by the internet intermediary). They argue that the taxable incident is not the isolated receipt of the rental payment, but the exercise of the privilege – the assemblage of activities consistent with ownership. Under this line of reasoning, money received to facilitate a booking, process a reservation application, or provide a similar service, is not subject to tax when a company lacks an ownership interest in the accommodation. This position extends to the tax treatment of customer charges variously labeled as “tax reimbursements,” “tax recovery charges,” or “taxes and fees.”

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

²² 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).

²³ The negotiated rate is also referred to as a discounted or wholesale price or rate.

²⁴ Also known as the “markup” or a “service fee.” A facilitation fee generally involves money received to facilitate a booking, process a reservation application, or provide a similar service.

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

Litigation in Florida²⁵

Litigation over these matters has ensued, both across the country and across the state of Florida. The following are examples of cases in Florida being actively litigated:

Orange County²⁶

A Florida state court recently denied a summary judgment motion by Orange County and found that the fees charged by online travel companies to facilitate reservations "are not taxable matters" under the Orange County Tourist Development Tax ordinance. See *Orange County v. Expedia, Inc.*, 48-2006-CA-2104-O, Slip Op. at 23 (Fl. 9th Jud. Cir. Ct. Jan. 20, 2011).

Monroe County²⁷

A federal court class action lawsuit brought by Monroe County alleging that certain online travel companies are subject to taxation under Tourist Development Tax ordinances was recently dismissed after the parties entered into a class-wide settlement agreement. The Tourist Development Tax claims brought by the City of Jacksonville (on behalf of Duval County) and Miami-Dade County have been dismissed because of the Monroe County class settlement. The parties have also agreed to settle and dismiss another federal court lawsuit brought by Brevard County.

Others

Lawsuits relating to Tourist Development Tax sought by Leon County, Palm Beach County, Broward County, and Osceola County remain pending.

Compensation for Information Relating to a Violation of the Tax Laws

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 Made By the Bill

Legal disputes between online booking services and local governments have risen regarding the application of the tourist development tax. The bill clarifies that service fees for facilitating the booking of reservations for customers at transient accommodations is not taxable.

²⁵ 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).

²⁶ Order on file with the House Subcommittee on Economic Development & Tourism.

²⁷ Order and settlement agreement on file with the House Subcommittee on Economic Development & Tourism.

Taxation

As described above, transient rentals are potentially subject to the following taxes:

- Local Option Tourist Development Taxes (imposed under s. 125.0104, F.S.)
- Local Option Tourist Impact Tax (imposed under s. 125.0108, F.S.)
- State Sales Tax (imposed under s. 212.03, F.S.)
- Local Convention Development Tax (imposed under s. 212.0305, F.S.)
- Municipal Resort Tax (imposed pursuant to Chapter 67-930, L.O.F.)

Sections 1, 2, 3, 4 and 6 of the bill amend each of these provisions of law in the same manner as follows:

“Consideration,” “rental,” and “rents” are defined as the amount received by a person operating transient accommodations, or the owner of such 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 any of the services commonly associated with operating the facilities furnishing transient accommodations, including providing physical access to such facilities, regardless of whether such commonly associated services are provided by unrelated persons. The terms do not include payments received by unrelated persons from the lessee, tenant or customer for facilitating the booking of reservations for or on behalf of the lessees, tenants or customers at transient accommodations. “Unrelated person” is defined as persons who are not related to the person operating transient accommodations, or the owner of such 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, or the owner of such 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 persons are not required to separately state amounts charged on the receipt, invoice, or other documentation. Any amounts specifically collected as tax are county or state funds and must be remitted as tax.

Compensation for Information Relating to a Violation of the Tax Laws

The bill amends s. 213.30, F.S., to 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. The bill provides the conditions under which compensation may be paid.

The bill states that provisions of the bill are clarifying and remedial in nature and do not provide a basis for assessments or refunds of tax for periods before the effective date. The bill also states that changes made by the bill do not affect lawsuits existing on the date the act becomes effective regarding the taxes amended by the act.

The bill provides an effective date of July 1, 2011.

B. SECTION DIRECTORY:

- Section 1. Amends s. 125.0104(3), F.S., to provide definitions and to specify how taxes are to be stated on receipts, invoices or other documentation.
- Section 2. Amends s. 128.0108(1), F.S., to provide definitions and to specify how taxes are to be stated on receipts, invoices or other documentation.
- Section 3. Amends ss. 212.03(1) and (2), F.S., to provide definitions and to specify how taxes are to be stated on receipts, invoices or other documentation.

- Section 4. Amends s. 212.0305(3), F.S., to provide definitions and to specify how taxes are to be stated on receipts, invoices or other documentation.
- 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 ss. 1 and 3 of ch. 67-930, L.O.F., to provide definitions and to specify how taxes are to be stated on receipts, invoices or other documentation.
- Section 7. States that the bill does not provide a basis for assessments or refunds for periods before the effective date. Provides that the changes made by the bill do not affect certain lawsuits existing on the date this act becomes effective.
- Section 8. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference estimates that the impacts of the bill are negative indeterminate for General Revenue and state trust fund revenue.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The Revenue Estimating Conference estimates that the bill will reduce recurring local government revenues by \$28.7 million in FY 2011-2012, \$31.3 million in FY 2012-13, \$34.9 million in FY 2013-14, and \$36.6 million in FY 2014-15. However, the taxes are not currently collected.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may prevent consumers from paying higher taxes. The bill clarifies that amounts received by unrelated persons from the lessee, tenant or customer for facilitating the booking of reservations for or on behalf of the lessees, tenants or customers at transient accommodations is not taxable, which means the unrelated person does not have to pass on any tax costs to a consumer.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Section 18(b), Article VII of the State Constitution specifies that, "[e]xcept upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or

repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.”

Because of the impacts on local tourist development taxes, this bill reduces the authority that counties have to raise revenue. No exemption applies, therefore the bill may be a mandate requiring a 2/3 vote of the membership of each house.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.