

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 335

Tax on Transient Rentals

SPONSOR(S): Long

TIED BILLS:

IDEN./SIM. BILLS: SB 156

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Finance & Tax Council		Aldridge	Langston
2) Military & Local Affairs Policy Committee			
3) Full Appropriations Council on Education & Economic Development			
4)			
5)			

SUMMARY ANALYSIS

The bill addresses state and local taxes related to the business of renting, leasing, letting, or granting a license to use transient rental accommodations.

The bill provides that for purposes of the state sales and use tax, the local option tourist development tax, the tourist impact tax, the transient rentals tax, the convention development tax, and the municipal resort tax the taxable privilege to rent, lease, let, or grant a license to use accommodations includes activity in which a person offers the availability of transient stays at accommodations, arranges for their use, establishes the total rent amount, or collects the rental payments. Persons required to collect and remit applicable taxes may be persons other than the owner or operator of the accommodation.

The state sales and use tax and the local option tourist development tax, the tourist impact tax, the transient rentals tax, the convention development tax, and the municipal resort tax are applicable to the total amount paid to use the accommodation. The bill defines the terms related to the rent or consideration for purposes of these state and local taxes.

Persons who engage in this business are required to register with the Florida Department of Revenue (DOR) or appropriate political subdivision, and collect and remit the proper taxes, unless the registered owners or operators of the accommodations agree in writing to report and remit the taxes on their behalf. DOR may adopt rules to allow for a single application for registration with the department that identifies each county in which transient accommodations are located.

The bill provides for amnesty for unpaid taxes, penalties, and interest under certain conditions; DOR may administer the amnesty through the adoption of emergency rules.

The Revenue Estimating Conference (REC) has not reviewed this bill. However, in 2009, the REC reviewed the provisions of a substantially similar bill (CS/SB 1970). That bill, like HB 335, had provisions dealing with both taxation and an amnesty. The REC estimated revenue impacts for these issues separately. With respect to the tax, the REC estimated that CS/SB 1970 (2009) would increase state revenues by \$28.2 million in FY 2010-11, \$29.8 million in FY 2011-12, and 31.0 million in FY 2012-13. With respect to local revenues, the REC estimated a positive impact of \$5.6 million in FY 2010-11, \$5.9 million in FY 2011-2012 and \$6.1 million in FY 2012-13.

The REC also estimated that the amnesty portion of the bill would have no state revenue impact and a nonrecurring negative indeterminate impact on local revenues.

The bill has an effective date of July 1, 2010.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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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

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 42 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 31 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

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://www.floridalcir.gov/UserContent/docs/File/data/2010LOTTates.pdf> (last visited 3/15/10)

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.

- 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 counties eligible to levy this tax, only 18 do.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 (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 DOR 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

¹⁰ Section 125.0104(3)(n), F.S.

¹¹ See fn. 3, supra.

¹² Id.

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.

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

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.²⁴ 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.²⁵

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.

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 3/15/2010).

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 One criticism of this practice is that the customer does not know the exact composition of the “taxes and fees” and therefore does not know how much tax is being collected and paid.

²⁵ 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).

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 fee²⁶ is not subject to tax because it is not an amount paid to the owner (generally the difference between the retail rate paid by the customer and the negotiated rate paid by the internet intermediary). They argue that the taxable incident is not the isolated receipt of the rental payment, but the exercise of the privilege – the assemblage of activities consistent with ownership. Under this line of reasoning, money received to facilitate a booking, process a reservation application, or provide a similar service, is not subject to tax when a company lacks an ownership interest in the accommodation. This position extends to the tax treatment of customer charges variously labeled as “tax reimbursements,” “tax recovery charges,” or “taxes and fees.”

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

When Taxes Should Be Remitted

Internet intermediaries argue that the tax is not due at the time money is paid by the consumer. Instead, it should be remitted by the hotel or facility, as owner of the accommodation, once the 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 Florida²⁷

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 County, Florida v. Expedia, Inc., et. al. (2006-CA-0021 04) Ninth Judicial Circuit, Orange County, Florida

Orange County, Florida, self-administers the local tourist development tax. In 2006, it brought a lawsuit against internet intermediaries Expedia and Orbitz to determine whether tax is due “on the difference between the wholesale price and the retail price they receive for the rooms when they re-sell them.”²⁸ The trial court dismissed the case, ruling that the county must complete audits first to estimate taxes

²⁶ 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.

²⁷ 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).

²⁸ Orange County, at 2.

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.

Leon County, et. al. v. Expedia, Inc., et. al. (2009-CA-4319) Second Judicial Circuit, Leon County, Florida

Leon, Flagler, Lee, Manatee, Pinellas and Polk counties filed suit in November, 2009 against fourteen internet intermediaries, including Expedia, Inc., Orbitz Worldwide, Inc., Priceline.com, Inc., and Travelocity.com, Inc. Similar to the Orange County action, these counties are seeking declaratory relief. This case is still in its early stages.

Orbitz, LLC, et. al. v. Broward County, Florida, et. al. (37 2009 CA 000126) Second Judicial Circuit, Leon County, Florida

Orbitz, LLC and seven other internet intermediaries were audited by Broward County, resulting in assessments against the companies. All have filed suit in Leon County contesting those assessments. This case is still in its early stages.

State of Florida, Office of the Attorney General, Department of Legal Affairs v. Expedia, Inc., Orbitz, LLC, and Orbitz, Inc. (37 2009 CA 004303) Second Judicial Circuit, Leon County, Florida

The Attorney General's Office has filed suit against Expedia, Inc., Orbitz, Inc. and Orbitz, LLC, pursuant to Chapter 501, Part II, the Florida Deceptive and Unfair Trade Practices Act (the "Act"). Section 501.204(1) of the Act provides that "unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." This case is still in its early stages.

PROPOSED CHANGES

Taxation

The bill adds three new subsections to s. 212.03, F.S., to address all state and local taxes related to the business of renting, leasing, letting, or granting a license to use transient rental accommodations. For purposes of ss. 212.03, 125.0104, 125.0108, and 212.0305, F.S., and ch. 67-930, L.O.F., as amended, the business includes:

- Any activity in which a person offers information about the availability of accommodations to a customer,
- Arranges for the customer's occupancy of the accommodations,
- Establishes the total rent the customer pays for the accommodations, or
- Collects the rental payments from the customer.

The bill defines the terms "total rent," "total consideration," "consideration," or "rent," as used in the above mentioned statutes or laws, to include:

- The total amount a customer pays for the right to occupy a transient accommodation;
- Any charges paid as a condition of the right of occupancy, including:
 - Any charges paid to the person collecting the rent or consideration, even if these charges are separately stated;
 - Any charges for the use of tangible personal property or services, even if these charges are separately stated;
 - But excluding mandatory fees imposed for the availability of communications services.

The bill authorizes DOR to adopt rules that exclude separately stated charges for tangible personal property and services from the definition of total rent or consideration.

The bill requires persons who engage in this business to register with DOR or the appropriate political subdivision, and collect and remit the proper taxes, unless the registered owners or operators of the accommodations agree in writing to report and remit the taxes on their behalf. The owner or operator is not liable for any tax, penalty, or interest due as a result of the failure of the person engaged in the business to accurately report or remit the taxes.

The bill authorizes persons who engage in this business to file a single application for registration with the department that identifies each county in which transient accommodations are located. Such person may file consolidated returns as provided in s. 212.11(1)(e), F.S. However, persons engaged in this business must register with each political subdivision that self administers its local transient rental taxes.

Amnesty

The bill creates an undesignated section of law providing an amnesty program for unpaid taxes, penalties, and interest on transient rental transactions, if:

- Rentals were made prior to July 1, 2010;
- Rental payments were collected by persons who were not owners, operators, or managers of the transient rental facilities or their agents;
- The person who collected the rental payments registers with DOR and any applicable local jurisdictions to pay taxes on or before October 1, 2010; and
- That same person applies for amnesty by October 1, 2010, pursuant to rules adopted by DOR.

Amnesty is not available:

- When the tax assessment is final and has not been timely challenged;
- For assessments that have already been paid, unless the payment is for an assessment that is not final or has been timely challenged; or
- For taxes billed or collected from consumers, unless the person engaged in the business can document that those amounts were remitted to the owner or operator of the transient rental facility.

The bill authorizes DOR to adopt emergency rules to implement the amnesty, including rules for forms and procedures related to application for amnesty, reporting amnesty rentals, and ensuring the applicant's ongoing commitment to registration, collection, and remittance of the taxes. These emergency rules will remain effective until the later of 6 months after adoption or the date of final resolution of all amnesty applications; the emergency rules may be renewed during the pendency of procedures to adopt formal rules.

B. SECTION DIRECTORY:

Section 1: Adds subsections (8), (9), and (10) to s. 212.03, F.S., specifying taxation of certain transient rental transactions, providing definitions, and providing registration requirements.

Section 2: Creates an undesignated section of law that provides for a tax amnesty program related to specific transient rental transactions.

Section 3: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The REC has not reviewed this bill. However, in 2009, the REC reviewed the provisions of a substantially similar bill (CS/SB 1970). That bill, like HB 335, had provisions dealing with both taxation and an amnesty. The REC estimated revenue impacts for these issues separately. With respect to the tax, the REC estimated a positive revenue impact of \$28.2 million in FY 2010-11, \$29.8 million in FY 2011-12, and \$31.0 million in FY 2012-13. The REC also estimated that the amnesty portion of the bill would have no state revenue impact.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The REC has not reviewed this bill. However, in 2009, the REC reviewed the provisions of a substantially similar bill (CS/SB 1970). That bill, like HB 335, had provisions dealing with both taxation and an amnesty. The REC estimated revenue impacts for these issues separately. With respect to the tax, the REC estimated a positive revenue impact of \$5.6 million in FY 2010-11, \$5.9 million in FY 2011-2012 and \$6.1 million in FY 2012-13. For the amnesty issue, the REC estimated a recurring negative indeterminate impact on local revenues.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill would require certain companies that are not currently registered to register with DOR or the appropriate political subdivision, and collect and remit the proper taxes, unless the registered owners or operators of the accommodations agree in writing to report and remit the taxes on their behalf.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes DOR to adopt rules that exclude separately stated charges for tangible personal property and services from the definition of total rent or consideration. The bill also authorizes DOR to adopt emergency rules to implement the amnesty, including rules for forms and procedures related to application for amnesty, reporting amnesty rentals, and ensuring the applicant's ongoing commitment to registration, collection, and remittance of the taxes. These emergency rules will remain effective until the later of 6 months after adoption or the date of final resolution of all amnesty applications; the emergency rules may be renewed during the pendency of procedures to adopt formal rules

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES