IN THE CIRCUIT COURT IN THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ORANGE COUNTY AND MARTHA O. HAYNIE, ORANGE COUNTY COMPTROLLER,

Plaintiff(s),

vs.

EXPEDIA, INC., ORBITZ, LLC and ORBITZ, INC.

Defendant(s).

CASE NO.: 48-2006-CA-2104-O

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ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND.

Defendants Expedia and Orbitz are internet-based travel companies that operate extensive websites where customers can research and evaluate various travel products, including (among other products) car rentals, lodging rentals and airline tickets. Both Defendants also provide toll-free customer service centers for travelers who prefer to make their travel arrangements by telephone instead of through the internet.

The issue presently before the Court may be found in Plaintiffs' separate Motions for Summary Judgment against the Expedia and Orbitz Defendants,

which raise essentially identical legal questions. The facts set forth within this Order are the version of events most favorable to the Defendants who oppose summary judgment. All doubts regarding the existence of an issue in a motion for summary judgment are resolved against the moving party and all evidence before the court plus favorable inferences reasonably justified thereby are to be liberally construed in favor of the opponent. *Aagaard-Juergensen, Inc. v. Lettelier,* 540 So.2d 224 (Fla. 5th DCA 1989). *See also*, Padovano, West's Florida Civil Practice, Sec. 13-2 ("trial judge must draw every possible inference against the moving party and in favor of the party opposing the motion").

The Defendants' business plan is to generate a profit by connecting those who actually provide travel products or services with the traveling public, who are the ultimate consumers. In their promotional or other literature, the Defendants often describe the transactions they consummate as "sales" of rooms or airline seats. *See generally* information collected in Plaintiffs' Summary Judgment Brief against Expedia, pages 10-15, and similar information re Orbitz. In affidavits filed with the Court, the Defendants describe the use of these "sales" terms as loose vernacular common to the travel industry but not of strict legal significance under a tax scheme.

When their transactions involve hotel or motel rooms (hereinafter occasionally referred to simply as "hotels"), Defendants have two different

business models. One model is indistinguishable from the classical travel agency, where the Defendants assist travelers in making reservations at hotels and receive for their services a commission directly from the hotel operator. That business model is not implicated in this case, and appears to be disfavored by the Defendants as they make a better profit on the second model.

This other business model is sometimes referred to by the Defendants as the "merchant" model. When operating under this business model, Defendants enter into written contracts with hotels to obtain access to a certain number of rooms that they can "reserve" or "book" for their customers. Although the details of these contracts vary somewhat (and only a limited number of such contracts were filed with the Court for review), in general they work in this fashion:

1. The hotels agree in advance to make a limited number of rooms available to the Defendants at a "wholesale" price lower than what the general public could obtain by contacting the lodging operator directly, absent special membership, affiliation or group contract rates (*e.g.,* AAA or AARP discounts, conventions or government contract rates).

2. Defendants often decide on the "retail" price they want to charge to their customers, with the lodging contracts sometimes limiting the prices the Defendants may charge, and sometimes not. In practice, the marketplace presumably places a practical limit on the top price the Defendants may charge,

as customers can always go directly to the hotel's website, or telephone the hotel, to determine whether a direct relationship with the hotel is better than the rate the Defendants quote. The lowest price the Defendants may charge is sometimes contractually limited by the hotels, presumably so the Defendants do not offer rooms at cheaper rates than the hotels themselves offer to the public.

3. Although the lodging establishments agree to make available a certain number of rooms, they may change those numbers on a minute-by-minute basis, which the Defendants track by sophisticated computer programs at the precise moment that a reservation inquiry occurs. The hotels' decision to increase or decrease the number of available rooms the Defendants may offer for reservation depends on its vacancy rate and on the number of sales generated by the hotel itself.

4. There is never any obligation for the Defendants to buy or take down a certain number of rooms from the hotels. The Defendants never purchase blocks or numbers of hotel rooms in advance. There is no penalty if the Defendants are unable to conduct any transactions relating to a particular hotel. In substance, Defendants have the option but not the obligation to do a lodging transaction with any particular hotel. Some of the contracts explicitly state that the hotels need not accept the reservations made by the online agencies, and others implicitly

reach the same result (as the hotels reserve the right to limit the number of available rooms).

5. If Defendants' potential customer desires to obtain a room through the Defendants' services, Defendants obtain a hotel reservation for the customer in exchange for pre-payment of the agreed charge. Commonly, but not always, the hotel will give a hotel confirmation number or reservation number to the Defendants, who then transmit that information to their customer. Invariably, the Defendants also give their customers a different and unique Orbitz or Expedia number to assist in tracking this transaction.

6. The deposited or prepaid rent is paid by the customer through a credit card transaction with the Defendants as the disclosed "merchant" at the time the reservation is made, and the Defendants retain this money or credit until after the customer appears at the hotel and uses the room. The customer is not charged by the hotel at check-in for any room costs, because he or she already paid the Defendants in full. Normally the hotels require a credit card or other contingent deposit from the customer at check-in for incidentals and other charges not covered by the room rate.

7. At the end of the customer's stay the hotel directly bills the Defendant, which then remits to the hotel the pre-arranged "wholesale" price of the room, plus an amount to cover the hotel's estimate of any projected state or local taxes.

The hotels contractually agree with the Defendants that the former will pay to the appropriate authorities the taxes charged to the customers. Anything remaining from the prepaid sums collected by the Defendants when the reservation is made, which are not remitted to the hotels, are retained by the Defendants as "service fees" or (in practical economic terms) their gross profit on the transaction.

8. In calculating the amount of taxes owed, the contracts between the Defendants and the hotels call for calculation and payment of taxes on the "wholesale" price of the room, not the "retail" price paid by the ultimate consumer. Some of the Defendants' contracts with their hotels require the Defendants to indemnify the hotels if any taxing authority claims its tax is due on the full retail price of the room, and not on the wholesale price. Other contracts are silent as to indemnity.

9. The Defendants' websites contain disclosures to their customers that the charges for the rooms include an amount remitted to the hotel; an amount reserved for estimated local and state taxes; and two fees for Defendants' services. By agreement with the hotels so that the customers cannot simply subtract the amount withheld for taxes and thereby determine the precise amount of the "wholesale" price the hotel was willing to accept for the room, and correspondingly the amount of profit or fee the Defendants charge, the

Defendants conflate a portion of the fee and tax amount to preclude a ready calculation by the consumer of these two sums.

Plaintiffs, Orange County and Martha O. Haynie, Orange County Comptroller, filed this Declaratory Judgment action against the Defendants, asserting that the Tourist Development Tax ("TDT"), authorized by F.S. 125.0104, and Orange County Code, Section 25-136 et seq., is owed on what the tax statutes refer to as the "total rental charged" (*see* F.S. 212.03(1)(a)), or the "consideration paid for occupancy" (*see* F.S. 125.0104(3)(a)(2)), or what the Ordinance describes as the "total consideration charged every person" (*see* Ordinance 25-136(a)). In the Plaintiffs' view, they are entitled to receive a TDT on the full "retail" value of the rooms charged by the Defendants when a reservation is made for a hotel customer, and not on the "wholesale" value accepted by the hotels from the Defendants at the end of the rental process.

Very considerable sums of money are at stake, as Orange County, Florida is one of the largest hotel markets in the world, and Orbitz and Expedia have become two of the largest travel companies engaging in transactions of this sort.

Many other local taxing authorities in the State of Florida and elsewhere have filed suits against the Defendants and other internet travel companies making similar arguments under various sorts of transient or occupancy taxes. (Scores of similar pending litigation are listed, for example, in Orbitz's April 13,

2010 Interrogatory responses.) As of this moment, there are no controlling appellate cases on this precise issue. Cases from other jurisdictions are interesting for their analyses, but are not dispositive due to the differences in the applicable tax statutes or ordinances. Most of the cases cited to the Court on Florida's TDT arose from Orders on motions to dismiss and are therefore of limited value as the allegations of the Complaints (rather than sworn proof) were accepted as the basis for the "facts" of those cases.

II. THE STATUTE AND THE ORDINANCE.

F. S. 125.0104 is the Local Option Tourist Development Act which enables Counties to enact such taxes. In part, it 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...for a term of 6 months or less is exercising a privilege which is subject to taxation under this section [unless otherwise exempt].

Further, the TDT "shall be due on the consideration paid for occupancy in the county...and shall be collected on the last day of occupancy...." F.S. 125.0104(2)(a).

Finally, the TDT "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." F.S. 125.0104(f). "The person receiving the consideration for such

rental or lease shall receive, account for, and remit the tax to the Department of Revenue ...." F.S. 125.0104(g).

Orange County's TDT may be found in Ordinances 25-136 et seq. Following the State law language, the TDT is charged on "the total consideration charged every person who rents, leases or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, [or] motel...for a term of six (6) months or less...." Orange County Ordinance 25-136(a).

Tracking the enabling State law exactly, the TDT "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." Ordinance 25-137(a).

Similar in concept to the State law but differing in minor wording, the Ordinance further provides that "the person receiving the consideration for such rental or lease (hereinafter referred to as the "dealer") for any period subsequent to December 31, 1991 shall receive, account for and remit the tax to the county comptroller." Ordinance 25-137(b).

III. THE PARTIES' RESPECTIVE CONTENTIONS.

Plaintiffs' argument may be summarized thusly: Defendants rent, lease, let, or grant/license the right to use hotel rooms in Orange County when they enter into the transactions described in Part I of this Order. As summarized by

the Plaintiffs, the Defendants "sell hotel rooms" or "grant licenses to use hotel accommodations" or "rent rooms". *See, e.g.,* Plaintiffs' Expedia Brief, p. 16-17; 19. In the Plaintiffs' view, the TDT by its terms is due on the total consideration received by the renting party, which may be measured by the pre-tax "room rates" quoted by the Defendants to their customers for the rooms, and not the "wholesale" rates for the rooms that the Defendants remit to the hotels at the end of the customers' stays.

Plaintiffs rely heavily on language used by the Defendants in their sales materials, their websites, their government SEC filings, and elsewhere, describing their conduct as the "sale" of hotel rooms, and which sometimes refer to the amounts charged the customers as "the total reservation price", the "total room cost" or the "lodging cost", all terms reflective of the concept of "total consideration charged" under the statutes. Plaintiffs also contend the evidence on summary judgment shows the Defendants have "purchased" these hotel rooms, which they then let out to their own customers.

Alternatively, Plaintiffs urge that the Defendants are "agents, representatives, or management companies" that collect and receive rent and are therefore obligated to collect and remit TDT pursuant to Fla. Admin. Code R. 12A-1.061(7)(a).

Because the Defendants collect all of the hotel charges in advance by charging their customers' credit cards at the time the reservation is made, and because the hotels never charge the Defendants' customers directly for the room rates, Plaintiffs insist the Defendants must be considered the "dealers" liable for the TDT under the Ordinance. According to this theory, the Defendants (not the hotels) owe the TDT, and it must be paid on the full sum they collect from their customers for the right to use the rooms when the reservations are made.

Implicit in the Plaintiffs' argument is the notion that if the Defendants were acting as classical travel agents the hotel would collect the TDT on the full room charges, and then pay the Defendants their travel agent commission separately. By structuring their "fees" to come "off the top" before the TDT is calculated, the Defendants have shorted the County a portion of the revenue the local government would have received under a classical travel agent scenario. That argument, of course, is accurate as a practical and partisan view of the matter. It does not, however, answer the separate legal question of whether the nature of the online travel companies' activities subjects them to the TDT.

The Defendants counter that their business model does not come within the taxing scheme and that they properly account for the TDT owed by having the hotels pay the County the tax on the charges the hotels actually agreed to accept for the consumers' right to use the hotels' accommodations. Defendants urge

that it is the hotels, not the online travel companies, that actually have the legal right and power to rent their hotel rooms, and that the Defendants are not in the business of "renting" rooms themselves, merely facilitating the making of reservations with the hotels. Because they do not operate any hotels, Defendants argue they are not engaged in the "taxable privilege" which gives rise to a taxable event.

Further, Defendants swear they are not "agents" or "dealers" for the hotels because they are not in the hotel business, and because they do not have the power to put customers in hotel rooms; that power is held exclusively by the hotels. Instead, the online agencies describe themselves as "reservation facilitators". *See, e.g.,* Orbitz's interrogatory responses served April 13, 2010; Expedia's interrogatory responses served April 13, 2010. Indeed, even screenshots of Expedia's website, an example of which is attached to one of *Plaintiffs'* witnesses' affidavits, is careful about describing the booking process by, for example, stating that "The room rate displayed on the Website is a combination of the pre-negotiated room rate for rooms reserved on your behalf by Expedia and the facilitation fee retained by Expedia to compensate us for our services," *see, e.g.,* David Dougherty Aff., p. 15. In the analogous language used on Orbitz's website, "we are not the provider of the hotel rooms under either

model, and we do not collect taxes or remit taxes to taxing authorities." J. Szudarek Aff., Ex. A-2.

In addition to disagreeing fundamentally with the Plaintiffs on the nature of their business, the Defendants also raise a number of Constitutional doctrines they argue bar the collection of the TDT from them. Given the outcome of this Order, the Court finds it unnecessary to entertain the Constitutional issues.

Defendants further observe that the Director of Florida's Department of Revenue has publicly stated that DOR is uncertain whether TDTs apply to online travel companies. *See* April 16, 2008 Video Archives of the Fla. House of Representatives Government Efficiency and Accountability Council. Plaintiffs challenge the DOR testimony on evidentiary grounds.

The Court finds the DOR transcript might well come within a hearsay exception as "a statement reduced to writing...of public offices or agencies, setting forth the activities of the office or agency...." F.R.E. 90.803(8). Although this hearsay exception is not very well developed in Florida and the parties have cited no cases applying or rejecting it in a circumstance where an agency head reports to a Legislative body on perceived defects in a statute, there is certainly a reasoned argument to be made that public statements of this sort ought to be considered on a matter relating to DOR's performance of its duties. Leaving aside the hearsay issue, however, the transcript does not appear to be

properly authenticated at this stage of the case and will not be further considered. *See generally* F.R.E. 90.901; 90.902. In the future, this evidentiary defect might well be cured.

IV. THE COURT'S ANALYSIS.

Unlike all parties, who urge the Court that the TDT language "clearly" favors their point of view, the Court considers the issues in this case to be quite a bit more nuanced. The difficulty arises not from the language chosen by the Legislature and the local authorities, which are reasonably plain when viewed in isolation, but from application of these laws to a type of internet business transaction which was undoubtedly not contemplated at the time the TDT was initially drafted and enacted, and has apparently never been amended to directly address these circumstances.

In consequence, there are provisions in the TDT that weigh in favor of the Plaintiffs' arguments, and other provisions that favor the Defendants, if the Court restricts its analysis to the bare terms of the TDT. Such uncertainty is to be expected when one considers that the taxing authorities had no way to conceive of the business model used here before invention and widespread use of the internet as a tool of commerce, leading in turn to the business of internet travel companies.

The legislative intent behind the TDT may be found in F.S. 125.0104, where "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, 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...." This statement of legislative intent indicates rather clearly that one would be subject to TDT if he is exercising a taxable privilege by renting, leasing, or letting a right to use any hotel.

The first issue, thus, is whether the online travel company Defendants themselves rent, lease, or let the right to use the accommodations in the hotels to which they send their customers. If the Defendants themselves rent, lease or let hotel rooms, then they clearly owe the tax and it properly would be charged on the "retail" price the travel companies bill to their customers for a room. On the other hand, if the Defendants are not the ones who rent, lease or let the rooms, then they have not engaged in a "taxable privilege" under these laws. Instead, the hotels would be deemed to be the entity taking part in the "taxable privilege", and the TDT would be owed on the "wholesale" price the hotels accept in exchange for use of their rooms as the additional consideration would be properly denominated as reservation or service fees.

Plaintiffs cite to two federal district court cases in Florida dealing with the TDT, both arising in the procedural setting of motions to dismiss, and conclude the judges in those cases found the internet travel companies had engaged in the taxable privilege of renting hotel rooms. With respect to talented counsel for the Plaintiffs, the Court does not read those cases to be dispositive of this issue.

In *County of Monroe v. Priceline.com, Inc.,* No 09-100004, 2010 WL 4890664 (S.D. Fla., Dec. 17, 2009), Judge Michael Moore appropriately recognized that "the nub of the instant dispute is whether the Defendants 'rent, lease or let for consideration' hotel space, and whether they are 'the person receiving the consideration for the lease or rental', such that they are covered by the TDT Ordinance. *Id.*, p. 2. In that case, the County alleged the Defendants did just that; for purposes of entering an Order on a motion to dismiss, that was the end of the judicial inquiry. As Judge Moore noted, "*If Defendants do in fact 'rent, lease, or let' rooms for consideration*, they are engaging in a practice that is unquestionably subject to taxation under these provisions." *Id.,* p. 4 (emphasis supplied). He also explicitly observed that Defendants there contested whether they actually did "purchase" or "take title" to hotel rooms, and that such an issue is "more appropriately determined at the summary judgment stage, after discovery is completed." *Id.,* p. 5.

In *Brevard Co. v. Priceline.com, Inc.*, 2010 WL 680771 (M.D.Fla., Feb. 24, 2010), Judge Gregory Presnell denied a similar motion to dismiss. Once again, the Plaintiff there alleged "that Defendants are online travel companies who take title to hotel rooms at negotiated wholesale rates and then lease the rooms to consumers at higher retail rates." *Id.*, p. 2. "*Taking the allegations in the Complaint as true*, Defendants purchase, lease or otherwise have a possessory interest in the hotel rooms that they then lease or re-let to consumers through their web sites." *Id.*, p. 8 (emphasis supplied). Much as Judge Moore concluded, Judge Presnell also limited his ruling by stating that the defense contentions that they were not lessors in fact "are entirely inapposite on a motion to dismiss." *Id.*, p. 8.

It almost goes without saying that the legal standards applied on motion for summary judgment differ markedly from those used in considering motions to dismiss. Unlike Judges Moore and Presnell, the undersigned is not restricted to the four corners of the Complaint in deciding this motion. Instead of *accepting allegations*, this Court must *examine evidence* and the setting is not at all comparable in these two differing procedural devices.

That evidence, taken in a light most favorable to the parties opposing summary judgment, does not indisputably support the Plaintiffs' claim that the Defendants "rent, lease or let" rooms for consideration, *County of Monroe, supra*

at p. 2; or "purchase or lease hotel rooms at a wholesale rate and then sell or re-let the rooms at a higher retail rate", *Brevard Co., supra* at p. 7.

The Defendants' witnesses swear that their business is providing travel information and services to travelers through websites and telephone call centers. T. McDonald Aff., para. 3; J. Szudarek Aff., para. 3-5. They describe themselves as "marketplaces" that bring together travel suppliers and traveling customers. *Id.* They point to the fact that multiple travel options are displayed on their websites, including rooms offered by numerous competing hotels in the same geographic vicinities. McDonald Aff., para. 4; Szudarek Aff., para. 5-7.

Once travelers decide on the accommodation they wish to have, they prepay for the reservation by credit card and authorize the Defendants to obtain a reservation on their behalf from the chosen hotel. McDonald Aff., para. 9; Szudarek Aff., para. 12-27. The Defendants do not assign precise rooms to the customers; that is normally done at check-in by the hotel. McDonald Aff., para. 12; Szudarek Aff., para 18, 24, 28. Nor do the Defendants have the power to put the customer into any room. Instead, the hotels grant access to the customer to their property after determining the customer has a prepaid reservation made through the Defendants. McDonald Aff., para. 12; Szudarek Aff., para. 17-18.

The Defendants do not own, lease, operate or manage any hotels. McDonald Aff., para. 16; Szudarek Aff., para. 22; C. Dev. Aff., para. 5. They do

not become involved in any of the myriad activities inherent in running a hotel business, from buying the property, to building or contracting the construction of the facilities, to staffing the various hotel operations or services, or to providing any hotel amenities. *Id.* The individual hotels, not the online travel companies, register guests, establish check-in and check-out times and procedures, and set all the rules and procedures governing stays on that property. C. Dev. Aff., para. 7; Best Western Aff., para. 5.

The written contracts between the hotels and the Defendants commonly state that the Defendants are not in the hotel business, do not "buy", "rent" or "lease" rooms, and instead simply facilitate the making of hotel reservations. *See, e.g.*, McDonald Aff., para. 19, Ex. A-1 at para. 4; A-2 at para. 4; A-3 at para. 1(a). Instead, the contracts describe the powers the Defendants have as the right to facilitate or book reservations, not to rent rooms. *See, e.g.,* McDonald Aff., para. 19, Ex. A-1 at para. 8, A-2 at para. 10. Some of the contracts submitted to the Court appear to differ from the foregoing, and use the term "sale" in describing the transaction between the travel agencies and the hotels.

Perhaps most importantly, the Defendants do not own or control the rooms for which they offer to obtain reservations. McDonald Aff., para. 21; Szudarek Aff., para. 19, 24, 26; C. Dev. Aff., para. 5. They do not rent a block of rooms in advance of booking, and then re-let those rooms to their customers; they are not

obligated to make reservations for any minimum number of rooms; and there is no penalty if they do not assist in making a specific number of reservations. *See* factual citations collected at Defendants' Joint Reply Brief, p. 17, fn. 14-16.

Plaintiffs' allegations to the effect that the Defendants are engaged in the business of renting or licensing rooms to rent in Orange County, FL have been sufficiently disputed by sworn evidence to preclude the grant of summary judgment in favor of the Plaintiffs. Contrary to what the Complaint alleges, the facts on summary judgment --- again, construed most favorably to the opposing party --- do not unequivocally demonstrate that the entirety of the transactions here are within the intendment of the TDT.

Clearly, the net amount of rent accepted by the hotels themselves is properly subject to tax. The remainder of the charges to the hotel customers, however, reasonably can be viewed as separate fees or profits made by the online travel companies in exchange for the services they provide in informing customers about hotel accommodations, or in sending customers to hotels.

In considering the evidence and the reach of the statute and Ordinance, the Court is mindful of the long-standing legal principle that tax laws are construed against the taxing authorities. *Broward County v. Fairfield Resorts, Inc.,* 946 So.2d 1144, 1147 (Fla. 4th DCA 2006). This is properly so, as it is within the power of government (and its concomitant duty) to set forth clearly and

unequivocally precisely what sorts of transactions are intended to be within the scope of its revenue laws. The Court finds that the TDT was not crafted to include within it the income earned by the online travel agencies in the transactions at issue in this case.

The *Fairfield Resorts* case, of all those cited by the parties, provides the closest analogy to the instant matter. Fairfield resorts owned, sold and operated timeshare businesses in Broward County, FL. As part of its marketing, the resort sold prospective timeshare owners a $995 "inspection privilege package" that allowed the potential customers to stay at any Fairfield resort within the next 12 months. If the customer actually bought a timeshare unit, the $995 would be credited to the purchase price. Most purchasers of the "inspection privilege package" did not buy timeshare units. The resort collected sales tax on each transaction; Broward County contended it was entitled to charge its local TDT on the "inspection privilege package".

The trial court found the TDT inapplicable, because the legislative intent was to "tax entities that are in the business of leasing or renting their facilities to transient guests," while Fairfield in distinction was "engaged in the business of selling timeshares, rather than leasing or renting them." 946 So.2d at 1146. On appeal, the 4th DCA disagreed with that aspect of the trial court's ruling, but ultimately concluded the TDT did not include this transaction.

In the appellate court's view, "the plain wording of these tourist development tax provisions do not include either timeshares or inspection privilege packages. Indeed, timeshares and inspection privilege packages did not exist when the statute and ordinance were enacted." 946 So.2d at 1147. Precisely the same observations could be leveled here: the statute and TDT do not explicitly include fees charged by online travel agencies for assistance in making reservations with the hotels that are in the lodging business, and, indeed, this whole business enterprise was not even extant when the tax laws went into effect.

The Court sees that Fla. Admin. Code R. 12A-3.001 sheds some light on the administration of TDTs. One of the Code provisions provides that persons must register with the Department of Revenue "when *engaging in the business* of renting, leasing, letting, or granting licenses to use transient accommodations." (emphasis added). On the summary judgment proof presently before the Court, Plaintiffs have not proven the Defendants have indisputably engaged in the *business of renting accommodations.* The persons doing the renting appear to be the hotels themselves, not the online travel agencies.

In further support of its ruling in the *Fairfield Resorts* case, the 4th DCA noted:

> To the extent it could be argued that the statute is ambiguous in its application to timeshares or inspection privilege packages, we resort to this long-standing principle: 'It is a fundamental rule of construction that

> tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer. [cites omitted] In this case, all that is required is to give the words used their plain meaning. Timeshares and inspection privilege packages are simply not included in the statute or ordinance. They are therefore not subject to the tourist development tax.

946 So.2d at 1147.

Likewise, this Court finds that the TDT does not plainly evince an intention to include the additional fees that online travel companies charge for making reservations on behalf of hotel customers. The rent itself, the amount charged by the hotels for allowing customers to occupy their rooms, has been appropriately taxed. The additional sums of money earned by the online travel companies, while conceivably within the reach of a properly written TDT, are not taxable matters as the Ordinance now reads.

Summary judgment in favor of the Plaintiffs is DENIED.

It occurs to the Court that one case management matter might spare all parties in this case considerable fees and expenses. The Defendants indicated to the Court during argument that they might be filing their own affirmative summary judgment motions depending on the outcome of the present ruling. The Court requests that no such motions be filed until after the status conference described below.

All counsel are hereby instructed to schedule a 30 minute hearing before the Court as soon as reasonably convenient for purposes of discussing future contemplated filings and other activities necessary in this case. Counsel for the parties shall be prepared to discuss whether other motions and briefing will be necessary on any related summary judgment issues; whether there are --- conceptually --- issues of fact from the Plaintiffs' perspective as the parties who might soon be opposing defense motions for summary judgment and, if so, what sorts of issues might be put before a trier of fact if a trial is necessary; and whether it might be more expeditious to put this case into an appropriate posture for a definitive ruling from the District Court of Appeal, if any party intends to pursue appellate remedies. Out of town counsel are hereby given leave to appear at such hearing telephonically.

The Court expresses no inclination as to how it might approach any defense summary judgment motions by stating that it wishes to explore these issues. It is simply interested in hearing from the parties about whether this case presents sufficiently crystallized legal issues that additional factual development might not be necessary or helpful if the parties are inexorably headed to the District Court of Appeals.

All counsel are commended for their high quality presentations in connection with the present summary judgment motion.

DONE AND ORDERED in chambers, in Orlando, Orange County, Florida this 20th day of January, 2011.

FREDERICK J. LAUTEN
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2011 I electronically transmitted to: David Cannella, Esq.; Usher L. Brown, Esq. and Vivian P. Cocotas, Esq.; mailed copies to James P. Karen, Esq.; Deborah S. Sloan, Esq.; Emmanuel Ubinas, Esq., Jones Day, 2727 N. Harwood, Dallas, TX 75201 and Elizabeth B. Herrington, Esq., Mark Altschul, Esq. and Stephanie Poulos, Esq., McDermott, Will & Emery, LLP, 227 West Monroe Street, Chicago, IL 60606.

/s/ Claire Houck
Case Manager