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

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

Plaintiff(s), Case NO.: 2006-CA-2104

v.

EXPEDIA, INC. and
ORBITZ, LLC,

Defendant(s),

_____/

ORDER GRANTING ORBITZ'S MOTION FOR SUMMARY JUDGMENT

I. Nature of the Case.

This tax case involves Florida's Local Option Tourist Development Act, F.S.A., Section 125.0104, which authorizes Counties to adopt local Tourist Development Taxes ("TDT") on short-term rentals of hotel and motel rooms, apartments, and similar accommodations. Exercising its statutory right, Orange County, FL adopted such a TDT, which may be found at Orange County Ordinance, Section 25-136 *et seq.*

The issue in this case is whether Florida's TDT applies to what are essentially the gross profits of online travel companies such as Defendant Orbitz, when it helps consumers make reservations for hotel or motel rooms owned or operated by third-parties hoteliers, either by using Orbitz's website or by calling its live operators who staff toll-free telephone centers.

This legal issue is a case of first impression in the State of Florida, as neither the parties nor the Court have located any appellate decisions directly answering the exact question presented. That is not to say the issue is unique; to the contrary this precise issue is being actively litigated all over the United States under varying local "bed tax" or "room tax" or "occupancy tax" statutes or ordinances, and is likewise the point of contention between government tax authorities and online travel companies in multiple currently pending federal and state trial courts throughout Florida. The topic has attracted enough attention to have generated an A.L.R. article, James A. Amdur, Annotation, *Obligation of Online Travel Companies to Collect and Remit Hotel Occupancy Taxes* 61 A.L.R.6th 387 (2011). The cases reach disparate results, as would be expected given the variable statutory formulations and the different procedural stages at which the issue has been addressed.

The record in this case establishes that Orbitz generates a profit by connecting those who actually provide travel products or services with the traveling public, who are the ultimate consumers of those services. The travel services or products Orbitz trades in include airline seats, rental cars and hotel rooms. In its promotional or other literature, Orbitz often describes the transactions it consummates with consumers as "sales" of rooms or airline seats or car rentals. In affidavits filed with the Court, Orbitz describes 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 the transactions involve hotel or motel rooms Orbitz has three different business models pursuant to which it conducts business. Two models are virtually indistinguishable from the classical travel agency, where Orbitz assists travelers in making reservations at hotels and receives for its services a commission directly from the hotel operator at the end of the transaction. Those business models (called the "Agency/Retail Model", or the "Modified Merchant Model") are not implicated in this case, and appear to be disfavored by Orbitz as it makes a better profit on the third model. As pertinent here, however, the Court observes that under the Agency or Modified Merchant models TDT is charged and remitted on the entire amount paid by the consumer for the hotel room so the tax authorities have no disputes with respect thereto.

The third business model used by online travel companies such as Orbitz is usually referred to as the Merchant Model, and unlike the first two models directly gives rise to the present tax fight. When operating under this business model, Orbitz enters into written contracts with hotels to obtain the right to access the hotel's electronic database of available rooms so that it can exchange sufficient information with the hotel to "reserve" or "book" those rooms for its customers. Although the details of these numerous contracts vary somewhat (thereby creating non-uniform facts in this Declaratory Judgment action), in general they work in this fashion:

1. The hotels agree in advance of a proposed consumer transaction to make a limited number of rooms available to Orbitz (and to other online travel companies that are simultaneously competing against Orbitz on the Web) at a "wholesale" price lower than what a member of the general public could obtain by contacting the lodging operator directly, absent special membership, affiliation or group contract rates available to the consumer, *e.g.,* AAA or AARP discounts, conventions or government contract rates. (Disparate room rates seem to be the practice in the lodging industry. The parties all acknowledged that otherwise apparently fungible hotel rooms are seldom rented to consumers at identical rates, which vary depending on such factors as perceptions of seasonal or daily supply and demand.)

2. The online travel companies decide on the "retail" price they want to charge to their customers for booking the room with the hotel, with the hotel/travel company contracts often limiting the prices the companies may charge, and sometimes not. In practice, the marketplace presumably places a practical limit on the *top price* an online travel company 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 offers a better deal than the rate obtained by internet quote from the online travel company. The *lowest price* the online travel companies may charge is often contractually limited by the hotels, presumably so the companies do not offer rooms at cheaper rates than the hotels themselves offer to the public. (The parties disagree in their present summary judgment filings on the extent to which the online travel companies rather than the hotel operator fixes the minimum price that must be charged. Plaintiffs vigorously contend their discovery proves the companies must hew to a minimum price schedule or pricing "parity" that the hotels formulate. Orbitz disputes that fact. For reasons that will become obvious in the legal analysis portion of this Order, in construing the tax ordinance at issue the Court does not deem this disputed fact to be a material one precluding summary judgment because setting a minimum price for use of the hotel room is not a determinative factor under the TDT law.)

3. Although the lodging establishments agree to make available a certain number of rooms to the online travel companies, they may change those numbers on a minute-by-minute basis, which the companies track by sophisticated computer programs at the precise moment that a reservation inquiry is sent by the company to the hotelier. The hotel's decision to increase or decrease the number of available rooms the online travel companies may offer for reservation depends on the specific hotel's vacancy rate, the number of rooms taken down by other competing travel companies, and on the number of room reservations generated by the hotel itself without third-party assistance.

According to the Plaintiffs, some of the contracts require the hotels to offer a minimum number of rooms to the online travel companies to market. However, and critically so, Plaintiffs do not have evidence demonstrating that any such rooms are in fact pre-purchased by online travel companies and then resold or let to consumers. (Plaintiffs alleged in their Declaratory Judgment Complaint that Orbitz bought rooms from hotels and then turned around and resold those same rooms, allegations the Court notices have also been made in some of the other pending cases involving TDT disputes. Apparently Plaintiffs' allegations were wrong. The summary judgment papers submitted to the Court by Plaintiffs no longer claim the online travel companies are selling to consumers any hotels rooms they have pre-purchased for resale from lodging establishments. Rather,

Plaintiffs now contend the online travel companies receive from the hotels "the ability to sell the right to occupy hotel rooms." *See, e.g.,* Plaintiff's Summary Judgment Response Brief, p. 16, para. 2.)

4. There is never any obligation for the online travel companies to buy or take down a certain number of rooms from the hotels. The online travel companies never purchase blocks or for that matter any specific number of hotel rooms in advance. There is no penalty or financial loss if the travel companies are unable to conduct any transactions relating to a particular hotel on a given day. There is no financial detriment to the online travel company if a room goes empty, as companies like Orbitz do not share in the hotels' overhead costs. In substance, the travel companies have the option but not the obligation to assist the consumer in consummating a lodging transaction with any particular hotel. Concomitantly, some of the contracts explicitly state that the hotels need not accept the reservations requested by an online company, and others implicitly reach the same result (as the hotels reserve the right to limit the number of available rooms marketed through online travel companies).

5. If an Orbitz customer desires to obtain a room through the Orbitz website or through its telephone operator services, Orbitz electronically informs the hotel and then obtains a hotel reservation for the customer in exchange for pre-payment by the consumer of the charges Orbitz sets for the transaction.

Commonly, but not always, the hotel will give a hotel confirmation number or reservation number to Orbitz, which then transmits that information to its customer. Invariably, Orbitz also gives its customers a different and unique Orbitz transaction number for the consumer to use as an identifying reference for problems or questions with the reservation.

6. The customer then deposits with Orbitz the full charges for the room and Orbitz's services through a credit card transaction, with the online travel company listed as the disclosed "merchant" at the time the reservation is made. The companies do not forward to the hotel its portion of this deposit until after the customer checks-in at the hotel and completes his or her use of the room. The customer is not charged by the hotel at check-in for any room costs, because he or she already paid to the online travel company by credit card more than enough to satisfy the hotel's agreed room rate. Normally the hotels do require a credit card or other contingent deposit from the customer at check-in for incidentals and other charges not covered by the monies or credits previously deposited with Orbitz.

7. At the end of the customer's stay the hotel directly bills Orbitz, which then remits to the hotel the pre-arranged "wholesale" price of the room, plus an amount to cover the hotel's previously calculated estimate of any projected state or local taxes, including TDT. The hotels typically contractually agree with the

online travel companies that the hotels will forward to the appropriate authorities the taxes charged to the customers. Anything remaining from the prepaid sums collected by Orbitz when the transaction was begun through it, which are not remitted to the hotels, are retained by it as "service fees" or (in practical economic terms) its gross profit on the transaction.

8. In calculating the amount of taxes owed, the contracts between the online companies such as Orbitz and the hotels call for calculation and payment of TDT on the "wholesale" price of the room charged to the travel company, not the "retail" price paid by the ultimate consumer. Some of Orbitz's contracts with its hotels require Orbitz to indemnify the hotels if any taxing authority successfully claims its tax is due on the full retail price of the room, instead of the wholesale price. Other contracts are silent as to indemnity.

9. The Orbitz website contains disclosures to its customers that the charges for the rooms include an undisclosed amount remitted to the hotel; an amount reserved for estimated local and state taxes; and two fees for Orbitz's 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 concomitantly the amount of profit or fee the online companies charge,

companies such as Orbitz commonly conflate a portion of the fees and tax amounts to preclude a ready calculation by the consumer of these two sums.

A short example will give flesh to the skeletal outline of this business. However, in focusing on a single mid-price example it is easy to overlook the considerable monetary sums involved in this tax dispute as Orange County, Florida is one of the preeminent tourist destinations and largest hotel markets in the world.

Assume the online travel company has agreed with a hotel to pay the latter $80/night for any room reservations it obtains for its customers, and that the company has in turn obtained the customer's agreement to pay the travel company $100/night for the room and its services. All parties in this case agree TDT is owed on the $80/night room charge, which the hotels have historically promptly remitted directly to the taxing authorities after the customer checks out.

The precise legal issue in this case is whether the online travel company is further required to charge the consumer additional TDT on the $20/night difference between what the hotel charges the travel company and what the travel company in turn convinces the customer to pay. Based on the statutory language, and well-settled legal principles, this Court now holds that TDT is not owed on the differential.

The Court is not saying that a properly drafted TDT statute and ordinance could not impose a tax on online travel companies and their services under the Merchant Model; indeed, while it is unnecessary for this Court to render an advisory opinion on the propriety of imposing such a tax should the legislature choose to do so, it can conceive of no good reason for a TDT not to include online travel company services in "facilitating" or "assisting" consumers in internet or telephone transactions involving the booking of short-term hotel, motel or apartment reservations.

However, this Court does not sit as a legislature making tax policy; its duty is simply to determine whether the presently written laws clearly include these commercial activities. It concludes they do not. Orange County's remedy, if it wishes to tax these activities, more properly may be found in the State legislature rather than the Circuit Court.

II. Procedural Background.

The Complaint in this case was initially filed in March, 2006, unsuccessfully removed to the United States District Court for the Middle District of Florida, and then remanded to Circuit Court. Defendants filed Motions to Dismiss, which were granted, and Plaintiffs thereupon filed Amended Complaints. Second Motions to Dismiss were granted with prejudice by a former judge assigned to this case for failure of Plaintiffs to exhaust administrative remedies, thereafter

appealed by the Plaintiffs, and reversed by the 5th District Court of Appeal. *Orange County v. Expedia, Inc.*, 985 So.2d 622 (Fla. 5th DCA 2008).

The facts set forth in that appellate decision were premised upon averments in Plaintiffs' Amended Complaint, not from undisputed sworn evidence. In many material respects the allegations of the Amended Complaint have not been supported by summary judgment proof at the current stage of the proceedings. As a prime example of how the case has evolved, the appellate court on its last review of this matter (necessarily and properly) accepted Plaintiffs' averments that the Defendants purchase rooms from hotels "and then re-sell these rooms to guests at a marked up or retail rate." 985 So.2d at 623. The proof now before the Court does not support those allegations. After six years of litigation there is no evidence before the Court that Orbitz buys rooms from hotels and then itself re-sells or (more importantly in the critical language of the Ordinance) "rents, leases, or lets" those rooms to consumers. *See* Orange County Ordinance 25-136(a).

After remand, Plaintiffs filed their own Motion for Summary Judgment on May 12, 2010, contending they were entitled to summary judgment as "the necessary facts are established conclusively [by Plaintiffs' affidavits] as well as other proofs which are described in this Motion and in separate filings." *See* Plaintiffs' Motion for Summary Judgment, May 12, 2010, p. 7. According to

Plaintiffs, application of the applicable standard of law "leads to the unassailable conclusion that Plaintiffs are entitled to summary declaratory judgment." *Id.*, p. 9. Moreover, Plaintiffs contended that Defendants' own statements, admissions in pleadings, and responses to Requests for Admission "provide all of the undisputed facts necessary to support this Motion." *Id.*, p. 10. In oral argument Plaintiffs repeatedly urged the Court to grant summary judgment as they viewed the case as involving no undisputed facts.

On January 20, 2011, this Court entered a comprehensive Order denying Plaintiffs' Motions for Summary Judgment. The parties thereafter engaged in significant discovery and Orbitz filed its own motion for summary judgment. Now Plaintiffs have reversed completely their view of whether the case is indeed confined to undisputed facts. They urge the Court that trial is needed to resolve countless issues of material fact, including those listed in an entire section of their Memorandum entitled "FACTS WHICH DISPUTE ORBITZ'S MOTION." *See* Plaintiffs' Memorandum in Opposition dated October 10, 2011. Contrary to their initial entreaties to the Court to dispose of this case by reading the statute and Ordinance and applying it to the admitted facts, presently Plaintiffs conclude that "only a trial can resolve the issues of characterization regarding Orbitz's Merchant Model." *Id.*, p. 50.

As will be discussed in more detail below, the Court does not find any genuine issues of material fact on the record presented. There are undoubtedly differing constructions by the parties of the pertinent statute and Ordinance; varying characterizations of the legal effect of what takes place over the internet in the Orbitz Merchant Model; and opposing conclusions as to the effects of the foregoing.

However, at its base, this case presents a routine determination that the taxing authorities cannot extend the tourist development tax as presently written to a type of business transaction never contemplated when the statute and Ordinance were written, and which is not clearly contained within the scope of the revenue laws. Even though the details of the arrangements between Orbitz and its numerous hoteliers vary, the substance of the transactions is not in dispute. There is no factual issue to be tried as to the reach of the TDT laws and whether they include the extra sums Orbitz charges its customers to help them make reservations with various hotels. The parties, and this Court, all affirm that TDT is owed on the sums charged by the hotels to Orbitz, consistent with the practices each side admits have been conducted to date.

III. The Statute, the Ordinance, and the Regulations.

The TDT in this case first gained life upon enactment of Fla. Stat. § 125.0104 (2009) (originating in 1977 under Chapter 77-209, Laws of Florida and

further amended), the Local Option Tourist Development Act, which permits Counties to enact such taxes. Subsection (3)(a) thereof 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...." Fla. Stat. § 125.0104(2)(a) (2009) (originating in 1977 under Chapter 77-209, Laws of Florida and further amended).

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." Fla. Stat. § 125.0104(f) (2009) (originating in 1977 under Chapter 77-209, Laws of Florida and further amended). Thus, the consumer using the hotel room is the one who actually pays the TDT.

However, "The person receiving the consideration for such rental or lease shall receive, account for, and remit the tax to the Department of Revenue ...." Fla. Stat. § 125.0104(g) (2009) (originating in 1977 under Chapter 77-209, Laws of Florida and further amended). That is, the person renting or leasing the accommodations has the obligation to collect the TDT and then to remit the tax to

government authorities. Only if the person obligated to collect the TDT fails to do so is he liable for the uncollected tax. In this case, Plaintiffs contend Orbitz was obligated to collect TDT, failed to do so on *all* of the monies which Plaintiffs contend constituted the room rent, and is therefore liable for TDT on the sums collected from its customers in excess of the amounts the hotels insisted on receiving to grant possession of their rooms.

Orange County's TDT may be found in Ordinances 25-136 et seq. Following the State statute, 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, 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." Orange County 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." Orange County Ordinance 25-137(b).

IV. 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 which has obviously never been amended to directly include these transactions.

As presently constituted, there are provisions in the TDT that weigh in favor of the Plaintiffs' arguments, and other provisions that favor Orbitz, if the Court restricts its analysis to the bare terms of the TDT. For example, in the setting of this case, there is statutory ambiguity as to whether the words "total consideration charged" for the hotel room rental refers to the amount *received by Orbitz* or the amount *accepted by the hotel* for delivery of a room to a consumer. In the same vein it is uncertain whether "the consideration paid for occupancy" is the gross amount received by Orbitz or the net amount accepted by the hotel. Likewise, there is uncertainty over whether it is Orbitz or the hotel which is the "person" who "rents, leases or lets" the room. Similarly, there is obscurity as to whether the statutory language requiring the tax be collected "at the time of

payment of the consideration for such lease or rental" refers to the deposit charged by Orbitz or to the final sum accepted by the hotel from Orbitz at the conclusion of the consumer's hotel stay.

In no way does this Court criticize the legislative bodies which drafted these laws for their lack of ability to foresee the future. Such uncertainties in the statutory language are to be expected when one considers that the taxing authorities had no way to conceive of the business model used here before invention of computers, and widespread use of the internet as a tool of commerce, leading in turn to the business of internet travel companies. Nevertheless, to the extent these statutory uncertainties may be resolved by traditional rules of construction or other legal principles, the Court will do so.

The judicial labors in this case begin, as is customary, with a review of the pertinent legal principles. The overriding rule in tax cases is that, in general, tax laws are not favored and that ambiguities favor the taxpayer.

"No tax shall be levied except in pursuance of law." FLA. CONST., Art. VII, Section 1(a). As formulated by the 5th DCA, "Counties do not possess inherent power to tax; the legal authority of a county to tax must derive from the state." *Gilreath v. Westgate Daytona, Ltd.,* 871 So.2d 961, 966 (Fla. 5th DCA 2004); FLA. CONST., Art. VII, Section 1(a), 9(a).

Because the legislature wields the broad power to select the precise words used in drafting statutes, it has the obligation to write its revenue statutes clearly and unambiguously; correspondingly, it has long been recognized that a reviewing court's duty is "to construe tax statutes in favor of taxpayers where an ambiguity may exist." *Gilreath*, *supra*, 871 So.2d at 966 (quoting *Harbor Ventures, Inc. v. Hutches*, 366 So.2d 1173, 1174 (Fla. 1979); *Maas Brothers, Inc. v. Dickinson,* 195 So.2d 193 (Fla. 1967). This legal principle is widely accepted by State and Federal courts when reviewing State and Federal tax laws.

Against this backdrop, the Court now applies law to facts. In so doing, the Court disregards the parties' occasionally heated accusations as to how the other characterizes the business or legal effects of what Orbitz does. Rather, the Court examines the substance of the transaction, not its partisan description by each side.

The statutory language is not disputed. Both sides agree these are the laws that apply to Orbitz's business. Moreover, the true essence of Orbitz's business practice is not in dispute. Extensive discovery and unhelpful "expert" opinions on the legal, economic or other ramifications of the online travel companies' Merchant Model do not change the core of what Orbitz does and how it does it.

The enabling statute places a tax on "every person who *rents, leases, or lets for consideration* any living quarters or accommodations in any hotel...." Fla.

Stat. § 125.0104(3)(a) (2009) (emphasis added) (originating in 1977 under Chapter 77-209, Laws of Florida and further amended). Similarly, the Ordinance taxes "every person who *rents, leases or lets for consideration* any living quarters in any hotel, apartment hotel, [or] motel...." Orange County Ordinance 25-137(a)(emphasis added).

There is no statutory definitional scheme provided by the legislature creating special meanings for the terms "rents, leases, or lets for consideration," so the Court must give those words their ordinary and common usage. *Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd.,* 894 So.2d 954, 961 (Fla. 2005). To "rent, lease or let" in ordinary meaning denotes the granting of possessory or use rights in property. Inherent in that idea is the notion that one actually has sufficient control of the property to be entitled to grant possessory or use rights.

Likewise, in legal meaning these words are traditionally used to describe legal interests in real property, including the lessee's rights to possession and quiet enjoyment, and the lessor's right of reversion. *Burnette v. Thomas*, 349 So.2d 1208 (Fla. 2d DCA 1977). Once more, it is presumed that the lessor has the legal right to grant possessory rights to another, and that the lessor will receive a return of possessory rights at the conclusion of the term of the lease.

Cutting through the thicket of argument in this case, and disregarding characterizations of the parties, the Court holds that when Orbitz acts pursuant to

its Merchant Model it does not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers, as contemplated by the TDT enabling statute or Ordinance. The reason underpinning the Court's conclusion is an elementary one: Orbitz does not own, possess or have a leasehold interest to convey in any of the hotel's rooms when it transfers a reservation request over the internet to a hotel, and thereby puts the hotel and the customer together.

These facts are not in dispute: Orbitz never takes title to any rooms; does not buy rooms from hotels in advance of its transactions with its customers; never receives itself a leasehold interest in any rooms from the hotels that in turn Orbitz sublets or assigns to its customers; never obtains a present right to occupy any rooms for itself or its employees; is not penalized or financially harmed for failing to "rent, lease or let" any rooms; does not suffer any economic loss of any sort (other than the obvious lost income for failing to engage in a business transaction) if it does not "rent, lease, or let" a room; does not select or control in any fashion which precise rooms are rented by the hotels to Orbitz's customers; does not register guests or establish check-in and check-out times and procedures; does not set the rules and procedures otherwise governing stays on the hotel's property as to matters such as available amenities and their uses, children, pets, parking and the ilk; and has no power to dispossess a hotel

customer from a room in favor of an Orbitz-referred customer in the event the hotel accepts too many reservations and thereby overbooks.

What Orbitz essentially does is put customers and hoteliers together using an internet-based marketplace, and electronically passes along its customers' reservation requests to one of many different hotels for the latter's consideration and acceptance. It is the hotels themselves, though, not Orbitz, who are subject to the TDT on the amount they insist on being paid before a customer may use their property. The hotels, not Orbitz, grant the possessory right to use their hotel rooms to the customers at check-in time, regardless of the internet source through which the customer came to arrive in the hotel lobby. The hotels, not Orbitz, "rent, lease, or let" rooms for consideration.

The case of *Broward County v. Fairfield Resorts*, 946 So.2d 1144 (Fla. 4th DCA 2006), 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, Florida. As part of its marketing plan, the resort offered to prospective timeshare owners a $995 "inspection privilege package" that allowed potential customers to stay in rooms for a defined period of time at any Fairfield resort within the next 12 months for the flat fee of $995. 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;

instead they chose to visit the resort for a short-term vacation by using the "inspection privilege package" to pay for their accommodations.

Just as the Plaintiffs do in this case, Broward County contended it was entitled to charge its local TDT on the cost of the "inspection privilege package" as it argued the package was functionally equivalent to prepaid hotel or apartment rooms. In truth, the package was economically indistinguishable from an ordinary paid-in-advance hotel room package: the consumer paid money to a lodging operator in exchange for exclusive use of hotel/apartment rooms for a fixed period of time if he or she did not choose to purchase a timeshare interest.

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 such a transaction, despite it being functionally indistinguishable from an ordinary hotel room or apartment rental.

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 to consumers in making reservations with 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 parties all seemed to urge the Court that Fla. Admin. Code R. 12A-3.001 sheds some light on the administration of TDTs. The Plaintiffs impliedly acknowledge these regulations govern this matter, by citing in support of their arguments related statute Fla. Stat. § 212.03(1)(a) (2009) (originating in 1949 under Chapter 26319, Laws of Florida and further amended). *See* Plaintiff's Memorandum, p. 39. Regulatory provisions of this type are entitled to substantial weight when courts are called upon to interpret a statute. *State ex rel. Szabo Food Servs., Inc. of N.C. v. Dickinson*, 286 So.2d 529, 531 (Fla. 1973).

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). Fla. Admin. Code 12A-1.061. Another regulation states that "rental charges" mean the "total consideration received *solely* for the use or possession, or the right to the use or possession, of any transient accommodation...." *Id.* (emphasis added).

It is undisputed that Orbitz is not in the *business* of renting, leasing, letting, or granting licenses to use transient accommodations, as it is an online travel company, not an hotelier. Similarly, the difference between the fees it charges its customers, and what the hotels require be paid to put an Orbitz customer in a room, are not "*solely* for the use or possession" of the hotel rooms, as Orbitz runs and operates its business, including a sophisticated and expensive website that benefits both hoteliers and potential hotel customers.

This Court does not explicitly ground its judgment in this case on the foregoing laws, despite both parties' invitations to rely on aspects of those laws, as the *Fairfields Resorts* case specifically holds that Fla. Stat. § 212.03(1) (2009) (originating in 1949 under Chapter 26319, Laws of Florida and further amended) is "inapplicable to the county 'tourist development tax' at issue here." *See* 946 So.2d at 1147, fn. 2. That holding binds this Court regardless of the suggestion of both sides that the Court read the TDT statute under the light of Fla. Stat. § 212.03 (2009) (originating in 1949 under Chapter 26319, Laws of Florida and further amended).

Turning to another and more critical aspect of 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. [citations 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 advertising hotel facilities, setting up internet websites, and forwarding and assisting in the making of reservations on behalf of hotel customers. The rent itself, the amount charged by the hotels for allowing customers to occupy their rooms, 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 Statute or Ordinance now read when those laws are construed, as they must be, "strongly in favor of the taxpayer and against the government." *Id.*

The Plaintiffs offer a plethora of reasons for the Court to conclude otherwise. Several will be discussed below.

First, the County argues that the substance of what Orbitz does is "sell" hotel "inventory" it has obtained access to electronically. In purely economic terms, this is one possible characterization of Orbitz's business. However, the

TDT on its face does not apply to the *sale* of hotel rooms. Rather, the taxable privileges are described as being restricted to the "renting, leasing, or letting" of rooms, all categories that imply (in common and legal understanding) that the landlords or lessors actually own or operate the realty they are granting possession of. In this case, Plaintiffs are commended for conceding that "the hotel owns or controls the actual rooms," *see* Plaintiff's Memorandum, p. 6, para. 1, which is undeniably an undisputed fact on the record presented. Because the hotels own or control their properties, they are the ones who are able to rent, lease or let their rooms.

Plaintiffs insist there is effectively an "agency" relationship between Orbitz and the hotels and that such a relationship justifies imposition of the tax on Orbitz as to the latter's profits in the transaction. The facts are undisputed that such an "agency" relationship is regularly disavowed by Orbitz and the hotels in their contracts and is not otherwise supported by summary judgment proof.

At one point in their Memorandum the Plaintiffs insist that Orbitz is required by the hotels to charge the consumer a minimum price for a room, what Plaintiffs call the "parity rate," *see* Memorandum, pp. 17-20, which the County argues at length proves the full charges billed by Orbitz are the amount required to be taxed. Confusingly, however, Plaintiffs then cover the other tack by arguing elsewhere in their Memorandum that "over thirty contracts allow Orbitz

to set the retail price in Orbitz's 'sole discretion'." Memorandum, p. 14, para. 1. This disparity in the Orbitz/hotel contracts is not, in the Court's view, sufficient to determine who owes the TDT. The Ordinance does not impose taxes based upon who sets the rental rate; rather it taxes the transaction based upon the sum accepted by the person who actually rents, leases or lets its room. That person is the hotelier.

Second, the County says that because Orbitz is the "merchant of record" for billing and credit card purposes, it therefore owes the TDT on all amounts it charges. The Court does not discern why the details of how the customer's credit card is charged should determine the liability for eventual tax liability. Either Orbitz is the "person" that is "renting, leasing or letting" a hotel room or it is not. If not, the fact that Orbitz protects its own financial interests by arranging to bill the customer's credit card to hold the reservation it has just arranged with a hotel on the customer's behalf does not change the essence of the transaction. Under the Merchant Model a customer rents a room from the hotel company not from the online travel agency that assists in the transaction.

Third, the County notes that under some of its contracts Orbitz refers to the hotel consumer as an "Orbitz guest" rather than as a guest of the hotel. Given that Orbitz obtained the customer from its own labors, earned income from that work, and presumably wants to engage in future transactions with its customer,

the Court is not the least bit surprised that it would refer to a customer in this way. That nomenclature is not relevant to the tax Ordinance.

Fourth, Plaintiffs point to testimony their counsel obtained from depositions of hotel employees, or from a lawsuit filed in California, to the effect that Orbitz obtains for its customer the "right to occupy a room" at a hotel. Memorandum, p. 16-7. The Court will not quibble with Plaintiffs' interpretation of Orbitz's business process or the admissions it obtained from lay witnesses about the subtleties of a tax statute. It seems implicit in any process where Orbitz assists its customers in getting reservations at a hotel that the customer indeed gains the "right to occupy the room." If the customer did not obtain the hotel's permission to have access to a room in exchange for money, the entire transaction would be illusory. Ultimately, however, the hotels grant possessory rights to their rooms, not Orbitz.

Fifth, Plaintiffs argue that because Orbitz allows anyone to visit and use its website, the alleged "service" component of the charges paid by the consumer to Orbitz is actually free of charge. From that predicate, Plaintiffs argue that all sums paid to Orbitz are therefore based on "room costs" alone and fully taxable under the TDT. *See* Memorandum, p. 22-23. The Court agrees with the County that it is possible for consumers to use Orbitz's website, or those created and funded by other online travel companies, without charge. Much content on the

Web appears to be "free," but it undoubtedly was created and maintained at significant cost to the website owner or operator. Thus, potential consumers of personal injury lawyer services may access and learn about legal principles from websites created and supported by contingency fee law firms without any immediate charge by the firm if the potential clients do not sign a fee contract with the law firm. No one would argue, however, that the costs of creating and maintaining the website for the law firm does not eventually come from the fees it earns in successful cases. Likewise, there is no doubt the costs involved in maintaining Orbitz's website ultimately is paid by those who do business with Orbitz. It cannot seriously be argued that all of the charges Orbitz collects constitute room rent alone when some portion of the monies must cover Orbitz's costs and profits or its business would soon fail.

Sixth, Plaintiffs argue that hotel rooms are sold through various channels of distribution and that there is no rational reason under economics principles for the full charges imposed by Orbitz to the consumer not to be taxed. Conceptually, this Court agrees that the County proposes a reasonable argument in favor of extending the TDT to Orbitz. Legally, the Court cannot go so far. This is an issue the Court suggests the County take up with the legislature if it wishes to tax Orbitz and other online travel companies.

Seventh, and related to the foregoing, Plaintiffs submit the affidavit of an economics and antitrust professor to analyze the TDT and its application to internet travel companies according to "well-established principles of economics." *See* Memorandum, p. 25. The Court declines Plaintiffs' offer to use their retained economics professor as its divining rod in locating legislative intent. Once more, while some of Plaintiffs' arguments make economic sense, those arguments more properly should be offered to the legislature.

Eighth, Plaintiffs raise the spectre that Orbitz can manipulate the division between its non-taxable service fee and the taxable amount it pays the hotel for the room "to avoid paying taxes altogether." *See* Memorandum, p. 35. As Plaintiffs rhetorically ask about a theoretical $200/night room, "What is to prevent Orbitz from charging $0.01 for the wholesale/net rate, and $199.99 for 'service fees,' to avoid paying taxes altogether?" *Id.* In the County's view, "Orbitz and the hotels have effectively arrogated to themselves the right to decide how much of the total retail price for rooms will be taxed." *Id.*

Plaintiffs have gotten a bit too caught up in their arguments with this point. Microeconomic pricing theory, and commonsense, both demonstrate that manipulation of the prices in this way for purposes of harming the County's tax revenues is unthinkable. Orbitz and the hotels have antagonistic business interests in dividing the revenue from a hotel room transaction. This is a zero

sum game. Every penny that Orbitz takes from the gross charges its customers pay reduces monies in the hotel's coffers; every cent the hotels insist upon for rental of their rooms reduces Orbitz's profits. Neither side will reduce its profits to short the County money, particularly where neither of them is responsible for paying under a taxing scheme *where the TDT is paid entirely by the consumer.*

Moreover, even if the hotels and Orbitz themselves owed the TDT (which is not so), this argument proves to be too much. Plaintiffs suggest the hotels will reduce the rental rate they accept for a $200.00/night room to $0.01 so that they do not have to collect a 6% TDT charged to and paid by the end consumer. It is fanciful to contend that the hotels voluntarily will agree (for tax-avoidance purposes) to a 99% or greater discount on the room rate in exchange for not having to charge customers a 6% TDT that the hotels and the online travel companies themselves are not even obligated to pay. There is not a good argument to be made that the hotels would reduce the acceptable level of room charges even 6%, much less 99%, for these purposes. Merely working through this argument demonstrates its inherent weaknesses.

All other matters argued by Plaintiffs and not specifically addressed above have been considered and rejected.

One final matter bears brief mention to the extent it has not yet been discerned, that of the proper roles of the legislature in writing and of the courts in

interpreting tax laws. The Florida legislature knows beyond peradventure that ambiguities exist under the TDT statute as to the precise legal issues now before the Court, *i.e.,* whether the TDT as presently written includes the activities of online travel companies in electronically transmitting reservations or assisting customers in obtaining reservations for hotel rooms. Despite being unequivocally informed of the statutory ambiguity, the legislature has failed repeatedly to correct it.

This case has been pending since 2006, a period of six years. Similar cases have been actively litigated in federal and Circuit courts throughout Florida, between Counties and online travel companies, also for many years. The Court has no doubt that an informed legislative body naturally would be aware of disputes involving revenue sources as substantial as those at issue in this case. However, there is no need to find a reasoned basis for constructive knowledge. The legislative and executive branches have each been given actual notice of the donnybrook between Counties and online travel companies over the reach of the TDT.

In 2008, the Executive Director of the Florida Department of Revenue, whose Department is charged with overseeing tax provisions, spoke publicly and unequivocally to a legislative committee about the ambiguity in the TDT statute: "As I told Chairman Attkisson, one of the most important things that you can do

for taxpayers is to provide certainty. *The easiest way to provide certainty is to amend the statute and make it clear what is taxable.* You know, the Department didn't really have a position one way or the other; but we would like to see that certainty." *See* Transcript of Excerpt from April 16, 2008 Video Archives of Fla. House of Representatives Government Efficiency and Accountability Council, Ex. B to the Affidavit of Scott Siekerski (emphasis added). This statement from the Executive Director of the Department of Revenue expresses the executive branch's considered opinion that this tax statute is unclear in its reach.

In other remarks from the Department of Revenue to the executive branch, its Executive Director reported to the Florida Cabinet that the TDT was written in 1949 and it "really hasn't been updated to reflect some of the new ways of doing business and even some of the new products." *See* June 16, 2011 Florida Cabinet Transcript, p. 49, Ex. 10 to Orbitz's Motion for Summary Judgment. Once more, the executive branch is opining that the tax statute is insufficiently clear as to whether it includes transactions like those engaged in by Orbitz.

Undoubtedly in response to these perceived deficiencies in the statutory language of the enabling TDT, in 2010 the Florida House passed House Bill 1241, which provided that the TDT would apply only to owners or operators of transient accommodations. Such a Bill would give clear support to Orbitz's legal position here. However, the Senate failed or refused to pass this Bill.

On the other hand, that same year diametrically opposite legislation was proposed in House Bill 335, which would have amended the law in the opposite direction clearly calling for a tax on online travel companies. It, too, did not become law.

In the face of proposed statutory amendments designed to clarify the meaning of the TDT, one of which was presumably supported by the online travel companies and the other by County governments, it is crystal clear the legislature itself recognizes the failings of the TDT as presently drafted. The opposing amendments, neither of which passed, serve as a legislative acknowledgment of the lack of clarity in this law and also of the legislature's unwillingness to enter the political fray or resolve the ambiguity by appropriate amendment.

The confusion continued the following year. In 2011, House Bill 493 passed. It stated rather clearly that online travel company services would not be subject to TDT. Once more, that Bill did not become law.

The Florida Department of Revenue, the Florida legislature, and the Florida Cabinet are all fully aware of the need for clarification of the TDT statute in respect to the precise issue of whether it applies to the charges imposed by online travel companies. They all know there is insufficient clarity in the language of the present law. This Court does not deem it to be the constitutional

role of a Circuit Court judge to impose a tax the legislature itself has thus far demonstrated it is unwilling to enact.

Plaintiffs object to the Court's consideration of these failed legislative activities. Judicial resort to legislative actions, positive or negative, is not uncommon. Indeed, in the leading TDT case in this State, *Fairfield Resorts*, 946 So.2d 1144, 1147, the 4th District Court of Appeal based its decision in part on the legislature's refusal to add timeshares to the TDT when asked to do so ("evidence at the summary judgment hearing revealed that when Broward County requested the legislature to include timeshares within the purview of section 125.0104, it declined.") The legislative inaction in this situation is even more decisive, as the House considered in 2010 separate Bills that supported each parties' respective positions, and neither one became law. That the dueling amendments even needed to be proposed proves the revenue statute is inherently unclear in its application to Orbitz.

V. Conclusion.

A reader might think there is much not to like about the legally mandated outcome of this case other than slavish adherence to legal principles. The Court acknowledges that the County makes many reasonable arguments in favor of extending taxation to the Orbitz business model, albeit arguments based on pragmatism and not on legal principles. If electronic commerce now operates in

a statutory void, but accomplishes a transaction that has traditionally been taxed when performed by historical means, it is difficult on pure policy grounds to argue against extending the tax to include the new means of doing business.

Unquestionably, Orbitz is nibbling at the edges of the TDT tax laws and has situated itself in a TDT tax-free nook from which it now does business. While the Court readily accepts the notion that there is little policy reason for this loophole not to be closed given the lodging industries' and consumers' acceptance of tourist development taxes in what are – practically speaking – effectively identical transactions to those under review, that is not the proper legal test for this case. It may be undeniable that if a consumer books a room directly with a hotel, either by placing a phone call to the hotelier or by using the hotel's own website, TDT is owed on the entire room rate. It similarly may be true that such a tax is regularly paid on tens of thousands of hotel rooms every day in Orange County, Florida, without apparent ill economic effect.

Similarly, if a consumer books a room through a traditional travel agent, or obtains one through Orbitz itself when the latter is not transacting business in the Merchant Model, TDT will be paid by the consumer on the entire charge for the room including on Orbitz's buried services in consummating the transaction. The County's arguments might well resonate that the online travel companies have shorted the County's coffers during a time of general economic hardship.

However, under our legal system those arguments may not be permitted to determine the outcome of this case. When a tax statute is not written clearly and unambiguously and there is uncertainty as to its intendment, the tie goes to the taxpayer. Tax laws are construed "strongly" in favor of the taxpayer. That principle puts the burden of certainty where it ought to rest, on those in our government charged with the duty of writing clear revenue laws.

The Court finds that the present laws are not sufficiently clear when applied to the Merchant Model used by online travel companies, that the executive and legislative branches are both aware of the defect, and that both have failed to act to remedy the problem. It is not this Court's purpose to assume the role of another branch of government simply because that other arm declines to clarify its past enactments when informed of serious ambiguities. The purported factual "disputes" in this case do not change the legal conclusion that the Ordinance is ambiguous as applied to online travel companies operating in the Merchant Model. Whether the County has valid reasons for extending the tax to online travel companies for the benefit of the commonweal is not for this Court to decide.

Orbitz is not subject to TDT on the difference between the "retail" and "wholesale" room charges under Fla. Stat. § 125.0104 (2009) (originating in 1977 under Chapter 77-209, Laws of Florida and further amended) and Orange

County Ordinance 25-136 as those laws are presently written. SUMMARY JUDGMENT FOR ORBITZ IS HEREBY GRANTED.

DONE AND ORDERED in chambers in Orlando, Orange County, Florida this 22nd day of June, 2012.

Frederick J. Lauten
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of June, 2012, I Electronically filed the foregoing with the Clerk of Court by using the ECF copies sent to: David E. Cannella, Esq., Linda S. Brehmer Lanosa, Esq., Stephen D. Milbrath, Esq., Kaye Collie, Esq.; copies mailed to: Mark Altschul, Esq., McDermott, Will & Emery, LLP, 227 West Monroe St., Chicago, IL 60606, and Steven E. Stiff, Esq., McDermott Will & Emery LLP, 201 S. Biscayne Blvd., Floor 22, Miami, Florida 33131-4325.

JUDICIAL ASSISTANT