IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

VS.

RAMARA M GARRETT
_____/

CASE NO.: 2015-304526 CFDB
DIVISION: M. FOXMAN

Defendant's Omnibus Motion for Relief: State Obtained and Used Inadmissible Evidence in Violation of Accountant-Client Privilege; Improperly used Evidence from a Federal Search Warrant; the Information Filed is Not Supported by Non-Privileged Admissible Testimony from a Material Witness; Successor Liability Bars Prosecution; Counts I and II of the Information are Filed Outside the Statute of Limitations

Pursuant to Fla. R. Crim. P. 3.140(b), § 90.55, Fla.Stat., Art.1, §12, 23, and 25, Fla. Const, the defendant, Ramara Garrett ("Ms. Garrett"), moves the Court for the relief described below and states:

Summary of the Argument

Ms. Garrett raises many claims in this omnibus motion (the "Motion"), but they all stem from a common nucleus of operative facts. Ms. Garrett was first the target of a federal investigation which produced a great deal of evidence, but no conviction. After her acquittal and following a lengthy but fruitless campaign finance investigation, the State commenced this prosecution alleging, essentially, that Ms. Garrett failed to pay sales tax on short term rental properties ("STRs") managed by Waverly Property Group LLC ("Waverly"). Ms. Garret's claims are these:

1. Her right to claim as privileged her communications with her accountant should be respected. Ms. Garrett asserts her privilege and seeks a remedy for its violation.
2. The federal government obtained and turned over to the State a tremendous amount of information, including accountant-client privileged material which was admissible in

federal court, but not in state court. Because the State did not seek its own warrant, evidence collected via the federal warrant should be suppressed.

3. If the State is stripped of the use of inadmissible or privileged evidence, its charging document fails because it is not supported by the sworn testimony of a material witness.
4. Ms. Garret sold her business and is not personally liable for unpaid sales tax.
5. The State's prosecution was commenced too late and is time barred by the statute of limitations.

Factual Basis for Relief

Waverly was a real estate company involved in renting properties, both short term (six months or less) and long term (longer than six months). Additionally, Ms. Garrett was a licensed Florida Realtor and Broker. Waverly had a book of business giving them the right to lease certain properties, some of which were owned by members of Waverly (including Mr. Jim Sotolongo, Ms. Garrett's *de facto* husband). Interested persons would rent properties (typically higher end luxury properties) and enter into contracts with Waverly. Many of these contracts were entered into months before the intended stay. Not only did Waverly have an active book of rental properties and satisfied customers (both renters and property owners), but it was also a source of leads for selling or buying real estate. Waverly's business became valuable enough that it was acquired by another real estate company; Waverly's assets (essentially everything but the name) were sold to Exit Realty of Daytona and Aswin Suri (collectively "Exit"), as set forth in the purchase agreement ("Agreement") attached. (Exhibit "A")

On January 9, 2012, Ms. Garrett notified the Florida Department of Revenue ("DOR") that Waverly was closing its sales tax account effective December 2011 as it had been sold **and notified DOR that the STR accounts had been transferred and Waverly was no longer managing them**. The last Waverly STR guest, Marietta Dunkirk of Morrisville, IL ("Ms.

Dunkirk") stayed at a Waverly-managed property from August 4, 2012 to August 11, 2012. (Exhibit "B"). According to the State, Ms. Dunkirk's payment to Waverly was received on July 5, 2012, and no Waverly-related financial transactions took place after that date. (Exhibit "C").

Additionally, DOR records indicate the following important contacts:

1. 1/9/12 - DOR notes "cancelled account effective 12/31/2011 per written request received from Ramara Garrett."

2. 2/7/12 - DOR notes "Ramara Garret called me back ... she said she sold the company to Exit Realty"

3. 3/26/12 - DOR learns Ramara Garrett was arrested on federal fraud charges (Ramara Garrett was ultimately acquitted).

4. 5/1/12 - DOR notes Ramara Garrett has counsel

In 2012, Waverly did not file any tax returns nor pay any taxes, and this inaction results in the charges against Ms. Garrett personally. On or about September 9, 2015, Ms. Garrett was arrested on a warrant having been charged in a September 11, 2015 Information with:

(a) Tax Evasion - § 212.12 (2)(e), Fla. Stat. Ann. - (3rd degree felony);
(b) Failure to File Six Consecutive Tax Returns - § 212.12 (2)(c), Fla. Stat. Ann. - (3rd degree felony); and
(c) Theft of Sales Tax - § 212.15(2)(b), Fla. Stat. Ann. - (3rd degree felony)
Exhibit "D".

The gravamen of the allegations is that Ms. Garrett, as the sole managing member of Waverly, failed to file returns and failed pay sales tax for STRs in 2012. There is no dispute Waverly filed tax returns through December 2011. Waverly did not book any short or long term rentals in 2012.

During the course of discovery in this prosecution, the State produced extensive discovery including boxes of files taken from Waverly's office pursuant to a Federal search warrant. Additionally, law enforcement interviewed Mary Aldrich ("Ms. Aldrich"), Ms. Garret's

accountant.

Ms. Aldrich is an enrolled agent authorized by the IRS to perform tax related services. On August 16, 2015, in a recorded interview with multiple government agents present, Ms. Aldrich went into great detail as to her job description and business relationship with Ms. Garrett and Waverly (interview attached as Exhibit "E", Aldrich). Ms. Aldrich is a sole practitioner providing tax services to businesses and individuals. Aldrich, p. 6. Her practice, called Tiger Tooth Tax Consulting, Inc., provides "tax services, accounting services, consulting services, analytical services." Id. Ms. Aldrich is an enrolled agent, which means she "is a federally licensed practitioner who has been granted permission by the IRS to practice before them." Id. at p. 7. However, Ms. Aldrich provided the State with extensive information regarding Ms. Garrett:

> Now, in the records that you all came to me about last year, in there, the subpoena actually exists. I believe I also, when I gave you two thumb drives, containing every ounce of information I had, you will find a copy of the subpoena of Marilyn Garrett in that file and that date would be clear on that.
> (Id. at p. 10).

According to the Florida government agent conducting Ms. Aldrich's interview, Investigator Jack Bisland, those records were produced after the State sent Ms. Aldrich a subpoena demanding them. Id. Investigator Bisland met with Ms. Aldrich on many occasions before the interview was conducted, including on February 18, February 25, and February 27 of 2014. Id. at 14.

Ms. Aldrich acted as an accountant for Waverly, as she prepared at least one tax return for the company. Id. at 19. Every document from her relationship with Waverly was provided to the State on thumb drives in 2014. Id. It is clear from the interview that the entire State case against Ms. Garrett was built from the discussions and documents provided by Ms. Aldrich - the State did not even know with certainty whether Ms. Garrett was an owner of Waverly until

confirming it with Ms. Aldrich. Id. at 16-17. As we explain, this evidence is inadmissible in Florida state court.

Argument

I. Accountant Privilege - Testimony and Evidence Provided by Ms. Aldrich Should be Excluded from State's Evidence

Both federal and Florida courts recognize an accountant-client privilege ("the Privilege"). 26 U.S.C.A. § 7525 (West); § 90.5055, Fla. Stat. Ann. While the federal courts do not extend the Privilege to criminal cases (see 26 U.S.C.A. § 7525), Florida courts absolutely do. See 3 Wharton's Criminal Evidence § 11:36 (15th ed.) (15th ed.) The Privilege gives an accountant's client the right to exclude testimony and evidence that was disclosed in confidence to the accountant:

> (2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.
> § 90.5055(2), Fla. Stat. Ann.

The Florida statute extends this privilege to both certified and non-certified accountants. Ms. Aldrich acted as a non-certified accountant for Waverly and Ms. Garrett. Ms. Aldrich is also a self-described "enrolled agent" which the federal courts specifically address as included in the accountant-client privilege. 26 U.S.C.A. § 7525.

Because federal courts do not extend the Privilege to criminal cases, the federal prosecutors were able to obtain privileged information through their search warrant and were able to use that information at trial. Much of the information turned over to the State by the federal prosecutors was obtained in derogation of the Privilege – again, that is fine for federal prosecutors, but not for the State. Any privileged information the State received from the federal prosecutors should be excluded just as if it had come directly from Ms. Aldrich – the State should not be allowed to

circumvent the Privilege through cooperation with the federal prosecutors.

Note that there can be no "informal" or "implied" waiver of the Privilege based on prior acts. *Prime Group, LLC v. Abbo*, 171 So. 3d 234 (Fla. 4th DCA 2015). The Privilege cannot be considered waived before the State produces a list of documents it obtained through Ms. Aldrich and an evidentiary hearing is held during which this Court can determine admissibility of each individual document or statement. *Id.* It is also important to note that Ms. Aldrich was never authorized by Ms. Garrett to speak to the Florida DOR about anything:

> Q: Okay. Were you ever a designee on behalf of Ramara Garrett to speak with the State of Florida Department of Revenue on behalf of her or her company as it related to the sales tax liability from the operation of short-term rentals . . .
> A: I was designated to speak to the county of Volusia in reference to a tourist tax.
> Aldrich, p. 41.

And again by Ms. Aldrich at page 49: "I have not spoken to the Department of Revenue on collections about any entity relative to Ramara Garrett." Ms. Garret has not been charged with anything related to Volusia County tourism taxes, and Ms. Aldrich's response makes it clear that she was not at all authorized to discuss Florida State sales tax or to disclose documents regarding the same, which is what Ms. Garrett is charged with failing to remit. Ms. Garrett objects to the use of this privileged information.

In reviewing the State's discovery answer it seems that the State does not know that the Privilege is treated differently in State courts than it is in federal courts, and this has led to the State building its entire case around privileged communications and documents on which it cannot rely for the purposes of Ms. Garrett's prosecution. The State should be precluded from using any and all privileged information obtained from, or generated for the benefit of, Ms. Aldrich, whether this information was communicated to the State directly or obtained as a result of the federal search warrant.

WHEREFORE, the defendant, Ms. Garrett, requests that this Honorable Court conduct an evidentiary hearing to identify privileged evidence, exclude such evidence wherever relied upon, and grant any further relief necessary.

II. Federal Warrant

The State has never obtained a search warrant for anything related to Ms. Garrett. Instead, the State relied on evidence passed down by the federal government after its unsuccessful prosecution of Ms. Garrett on unrelated charges. The federal government obtained this evidence through a search warrant issued on January 1, 2013. Exhibit "F". The State should not now be allowed to use that evidence against Ms. Garrett in this unrelated case.

There is ample case law on using physical evidence garnered from a federal prosecution in a state action. However, there is a "lack of precedent on how courts should treat digital copies of electronic information . . . ." (*United States v. Hulscher*, 4:16-CR-40070-01-KES, 2017 WL 657436, at *2 (D.S.D. Feb. 17, 2017)). In *Hulscher*, the court decided that in order to search a cell phone that had been seized and searched pursuant to a federal warrant, and in order to review physical copies produced from those digital files found on the phone, the state level law enforcement officers should have requested their own search warrant. *Id*. The court discussed the government's position, which assumedly the State will parrot here, and ruled that:

> According to the government, law enforcement agencies can permanently save all unresponsive data collected from a cell phone after a search for future prosecutions on unrelated charges. If the government's argument is taken to its natural conclusion, then this opens the door to pretextual searches of a person's cell phone for evidence of other crimes. Under the government's view, law enforcement officers could get a warrant to search an individual's cell phone for minor infractions and then use the data to prosecute felony crimes. No limit would be placed on the government's use or retention of unresponsive cell phone data collected under a valid warrant.
> (*Id*. at 4).

The item in question in *Hulscher* was a phone, but computers and flash drives and software, all implicated here, should be treated no differently. What is relevant is the court's conclusion that the use of digital evidence, or copies of digital evidence, obtained via federal search warrant is prohibited in a state action absent an independent state-level warrant.

Instead of requesting a warrant or subpoenaing government agencies for tax records, instead of building its case from scratch, the State has piggybacked onto the federal investigation. Under many circumstances this corner-cutting may not impact the overall provability of the State's case, but here it is absolutely fatal to the State's use of any evidence obtained via federal search warrant of any record, hard copy or digital.

WHEREFORE, the defendant, Ms. Garrett, requests that this Honorable Court conduct an evidentiary hearing to identify illegally obtained evidence and to preclude the State's use of that evidence.

III. The State does not Have the Sworn Testimony from a Material Witness Necessary to Maintain its Information

The State's charging affidavit ("the 707") is sworn to by Investigator Michael Taylor. The only part of it that is material to the charges that were actually filed is the following:

> On or about January 9, 2012, Ramara Garrett provided a written request to the Florida Department of Revenue to close the sales tax account effective December 2011.
>
> However, from January 2012 through August 2012 Ramara Garrett, through Wavery (sic) Property Group, LLC continued to practice real estate leasing short-term vacation rentals, even after May 2, 2012 when the Florida Department of Business and Professional Regulation Voided (sic) its Authority (sic) to operate. During this period, Ramara Garrett through Waverly Property Group, LLC collected $10,057.17 in Sales Tax Revenue owed to the state of Florida. . .
>
> However, Ramara Garrett did not file the required Sales and Use Tax Reports monthly (on the account she previously closed) with the Florida Department of Revenue as required. Further, she did not remit the $10,057.17 in Sales Tax Revenue collected and owed to the state of Florida . . . thus depriving the state of Florida . . . from the benefit and use of the tax revenues collected.
> See the 707.

How could Investigator Taylor know firsthand whether Ms. Garrett paid her taxes? How could he determine the amounts due to the state of Florida on his own? The answer is, of course, that he could not, nor could he be called to testify as to either matter. Investigator Taylor was only a conduit of information from the DOR to the State Attorney. Investigator Taylor is not made a material witness just because he spoke with people who keep tax records – to be a material witness he would have to be able to testify to something to which nobody else, or almost no one else, could testify. *State v. Weinberg*, 780 So. 2d 214, 215 (Fla. 5th DCA 2001). Just as the court applied this rule to the investigator in *Weinberg*, Investigator Taylor is not capable of interpreting tax records himself, which means he "has no importance except for possibly establishing a chain of evidence." *Id.* at 216. Here, the 707 does not reference sworn testimony from anyone other than Investigator Taylor.

The only other material witness that the State could possibly point to as having provided sworn testimony in order to support its Information is Ms. Aldrich. As addressed, *supra*, her testimony should be excluded as privileged.

WHEREFORE, the defendant, Ms. Garrett, requests that this Honorable Court dismiss Counts I, II, and III as alleged in the State's Information.

IV. Successor Liability Precludes the Prosecution of Ms. Garrett for Failure to Pay Taxes Generated by a Business She no Longer Owned

According to § 213.758(g)(1-3), Fla. Stat. Ann., a business is considered "transferred" when more than fifty percent of the business' equity, assets, or stock of goods is transferred to another party. As of December 31, 2011, all of Waverly's rental management contracts and one-hundred percent of their rental leads were transferred to Exit. Notably, "[a] transferee, or a group of transferees acting in concert, of more than fifty percent of a business, assets of a business, or stock of goods of a business is liable for any unpaid tax owed by the transferor

arising from the operation of that business . . . ." *Id.* at (4)(a). Ms. Garrett transferred ownership of Waverly to Exit as of December 31st, 2011 and therefore was not responsible for any sales taxes that may have been generated after that time. The State's Information alleges that Ms. Garrett is somehow criminally responsible for Exit's failure to pay the sales taxes generated by the property management company it bought. According to § 213.758, Fla. Stat. Ann., as a matter of law she is not. Ms. Garrett transferred her ownership interest in Waverly to Exit as of December 31st, 2011, and she is not liable for any taxes due after that date.

WHEREFORE, the defendant, Ms. Garrett, requests that this Honorable Court dismiss Counts I, II, and III as alleged in the State's Information.

V. The Statute of Limitations for Counts I and II Expired Before the State Began Prosecuting Ms. Garrett

The State alleges that between January 1, 2012 and September 21, 2012 Ms. Garrett committed the crimes of I) tax evasion, II) failure to file six consecutive tax returns, and III) theft of sales taxes in excess of $300.00 but less than $20,000.00. Exhibit "E". The Information in this cause was filed on September 11, 2015. *Id*. The first two charges, tax evasion and failure to file six consecutive tax returns, are third degree felonies with statutes of limitations of three years. § 775.15(2)(b), Fla. Stat. Ann. The third charge is a third degree felony but has a statutorily enumerated five year statute of limitations. § 212.15(3), Fla. Stat. Ann.

Counts I and II are barred by the three year statute of limitations on third-degree felonies even under the most tortured reading of the applicable statutes and administrative code. First, the Information, which the state filed on September 11, 2015, provides a six month date range for the alleged criminal activity, all or most of which falls outside the three year window the State had to file charges. Second, the State is incorrect in its interpretation of when sales taxes on short term rentals are considered due to the Department of Revenue, and when the correct interpretation of the law is used then all of the conduct alleged to be criminal in nature falls

outside of the three year statute of limitations. Finally, even if the Court finds that the State correctly interpreted the due date of STR tax and it was due on the 21st of the month following the month in which it was collected, the last taxable transaction alleged by the State took place in July of 2012, giving the State only until August 21st, 2015 to file its Information.

a. The Date Range Provided in the Information Does not Allege that the Criminal Conduct Took Place Before the Statute of Limitations had Run on Counts I and II

A charging document is not always defective just because the State alleges that a crime occurred on the wrong date. *Tingley v. State*, 549 So. 2d 649, 651 (Fla. 1989). However, the Information is defective if it does not allege that a crime was committed before the applicable statute of limitations has run. *Id.* In fact, putting the defense on notice for statute of limitations purposes is the only reason a specific date is required in an Information: "The reason for requiring a definite date is to show that the prosecution is not barred by the statute of limitations." *Sparks v. State*, 273 So. 2d 74, 75 (Fla. 1973).

Here, the State alleges that Ms. Garrett's conduct over a nearly nine month period in 2012 constituted the two charged criminal acts composing Counts I and II. Because the State filed its information on September 11, 2015 only the last ten days of that nine month period fall within the three year statute of limitations. The State has not alleged that any or all of the conduct necessary to support the charges took place within the three year statute of limitations. The date range alleged by the Information is clearly an attempt by the State to reach back beyond the applicable three year statute of limitations and as such Counts I and II should be dismissed.

b. None of the "Sales and Use" Sales Taxes Were Due Within Three Years of the Date on which the State Filed its Information

i. If Taxes are Considered Due on the Day Collected, No Conduct Falls Within the Statute of Limitations

Taxes on **tangible** goods are due to the State by the 1st of the month following the month of their collection, and a non-payer could face discipline starting on the 21st of that following

month. *Farhud v. Clark*, 399 So. 2d 1079 (Fla. 1st DCA 1981). Assumedly, this is why the State has alleged that Ms. Garrett's criminal conduct ended on the 21st of September, which is the 21st day of the month after the month during which the last STR occupancy took place. For most aspects of the tax collection process, it is true that the process for remitting tax on STRs mirrors the process for remitting sales tax for tangible goods. See § 212.031(3), Fla. Stat. Ann.: "The same duties imposed by this chapter upon dealers in tangible personal property respecting the collection and remission of the tax . . . shall apply to and be binding upon all persons who manage any leases or operate real property . . . ." However, § 212.031(3), Fla. Stat. Ann. also states that:

> **The tax imposed by this section** . . . shall be charged by the lessor or person receiving the rent or payment in and by a rental or license fee arrangement with the lessee or person paying the rental or license fee, and **shall be due and payable at the time of the receipt of such rental or license fee payment by the lessor or other person who receives the rental or payment**.
> Id. (emphasis supplied).

It would be possible to read this as indicating that the tax was "due and payable" from the lessee to the lessor at the time that the rest of the rent is paid, except that later in this exact subsection the legislature has opted to use the following language:

> Notwithstanding any other provision of this chapter, the tax imposed by this section on the rental, lease, or license for the use of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility to hold an event of not more than 7 consecutive days' duration **shall be collected at the time of the payment** for that rental, lease, or license **but is not due and payable to the department** until the first day of the month following the last day that the event for which the payment is made is actually held, and becomes delinquent on the 21st day of that month.
> Id.

The legislature uses the term "collected" for taxes paid from a lessee to a lessor, and uses the term "due and payable" as the term referencing the procedure for remitting those funds to the government. Applying these definitions to the language just two sentences before this, it is very

possible to interpret this statute as mandating that the rent from a STR is due and payable to the State when it is collected from the lessee. This means that the rent Ms. Garrett collected was due and owing to the State immediately upon her collection of it, not on the 21st of the following month. Again to the 1st DCA: "Our conclusion that the crime was committed at the time petitioner failed to report or remit his taxes as they became due and owing is consistent with federal law regarding the statute of limitations for prosecution for filing a false return . . ." *Farhud* at 1081. This means that none of Ms. Garrett's allegedly improper conduct occurred within the three year statute of limitations. That the language chosen by the Florida legislature requires tortured interpretation is no fault of Ms. Garrett's, and any ambiguity must absolutely be resolved in her favor. *Alachua County v. Expedia, Inc.*, 110 So. 3d 941, 945 (Fla. 1st DCA 2013), *approved,* 175 So. 3d 730 (Fla. 2015).

ii. If Taxes are Considered Due by the 21st Day of the Month Following the Month in Which the Tax was Collected, No Conduct Falls Within the Statute of Limitations

Even if the Court agrees with the State that taxes were due on the 21st of the month following the month in which the tax was collected, the statute of limitations had still run on both counts as of the date that the Information was filed. It was Waverly's policy to collect 50% of the total cost of the STR as a deposit when the booking was made. The other 50% was due 30 days before the initial date of occupancy on the STR. The rental dates of the last STR for which Ms. Garrett allegedly failed to remit sales tax was August 4, 2012 through August 11, 2012. That booking was made by Ms. Dunkirk. Judging by the information the State has turned over in discovery, the last payment that Ms. Dunkirk paid Waverly was for $2,410.12 and was paid to Waverly on July 5, 2012. July 5 is exactly thirty days before Ms. Dunkirk's scheduled occupancy of the Waverly property. This means that 100% of the taxes due and owing to the State of Florida were collected by July 5, 2012, which in turn means that, according to the

interpretation of the law put forth by the State, Ms. Garrett should have paid the collected sales taxes to the State of Florida on August 21, 2012 – three years and twenty days **before** the State filed the Information.

Counts I and II of the Information alleging tax evasion and failure to file six consecutive tax returns respectively must be dismissed because the State did not commence prosecution before the statute of limitations had run.

WHEREFORE, the defendant moves this Honorable Court to dismiss counts I and II with prejudice.

Conclusion

Here, the State improperly relies on privileged evidence obtained from a federal search warrant or from witness interviews which violate Florida's additional statutory protection. For the reasons set out in this Motion, the State's Information should be dismissed with prejudice or their evidence suppressed. Good faith does not apply. Finally, the State's delay in commencing prosecution time bars Counts I and II, although Ms. Garrett is not subject to prosecution where she transferred ownership to a successor, Aswin Suri.

Certificate of Electronic Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service via the Florida Courts E-Filing Portal, in accordance with Administrative Order No. AOSC13-49, to the Office of the State Attorney, at eservicevolusia@sao7.org this 26th day of May, 2017.

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175 So.3d 730
Supreme Court of Florida.

ALACHUA COUNTY, et al., Petitioners,
v.
EXPEDIA, INC., et al., Respondents.

No. SC13–838.
|
June 11, 2015.
|
Rehearing Denied Sept. 22, 2015.

Synopsis
Background: Counties and county tax collectors brought declaratory action against online travel companies, seeking to establish that the Tourist Development Tax applied to the full amount paid to the companies by tourists for hotel rooms, rather than only the portion paid by the companies to hotels. The Circuit Court, Leon County, James O. Shelfer, J., granted summary judgment in favor of companies. Counties and tax collectors appealed. The Court of Appeal, 110 So.3d 941, affirmed and certified a question to the Supreme Court. Counties and tax collectors filed application for review, which was granted.

[Holding:] The Supreme Court, Perry, J., held that Tourist Development Act (TDT) imposed tax on only funds received by online travel companies (OTC) from tourists for rental of transient accommodations.

Decision approved.

Pariente, J., filed opinion concurring in the result.

Canady, J., concurred in the result.

Lewis, J., filed dissenting opinion in which Polston, J., joined.

Attorneys and Law Firms

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Opinion

PERRY, J.

This case is before this Court for review of the decision of the First District Court of Appeal in *Alachua County v. Expedia, Inc.*, 110 So.3d 941 (Fla. 1st DCA 2013). In its decision, the district court certified the following question of great public importance:

DOES THE "LOCAL OPTION TOURIST DEVELOPMENT

> ACT," CODIFIED AT SECTION 125.0104, FLORIDA STATUTES, IMPOSE A TAX ON THE TOTAL AMOUNT OF CONSIDERATION RECEIVED BY AN ON–LINE TRAVEL COMPANY FROM TOURISTS WHO RESERVE ACCOMMODATIONS USING THE ON–LINE TRAVEL COMPANY'S WEBSITE, OR ONLY ON THE AMOUNT THE PROPERTY OWNER RECEIVES FOR THE RENTAL OF THE ACCOMMODATIONS?

Id. at 951–52. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

For the reasons that we explain below, we approve the First District's decision by answering the certified question of great public importance to clarify that the tax at issue applies only to the funds received for the rental of transient accommodations.

BACKGROUND

The present review concerns statutory interpretation of the Tourist Development Tax (hereinafter "TDT"). § 125.0104, Fla. Stat. (2014). In certifying the present question of great public importance, the First District asks this Court for guidance on whether the TDT applies to total monetary amounts online travel companies (hereinafter "OTCs") charge their customers for securing reservations for transient accommodations in certain Florida counties. ***732** We respond by answering the certified question in the negative.

The OTCs engage in business arrangements with Florida hotels, motels, and other providers of transient housing for rent (hereinafter "hotels"). The OTCs operate Internet sites on the worldwide web for purposes of allowing their customers to retrieve travel-related information pertaining to hotels, airlines, and automobile rental companies.

Alachua County, other counties, and certain county tax collectors (hereinafter "Counties") filed a joint declaratory action in the Second Judicial Circuit, in and for Leon County against the OTCs. The Counties argued that the TDT applied to the difference between the total monetary amounts the OTCs' customers paid to them, and the lesser monetary amount the OTCs remit to the hotels. This difference is known as the markup charges. The Counties further argued that the customers, not the OTCs, are the persons who exercise the privilege that is taxable under the TDT.

The circuit court concluded that if the markup charges are subject to taxation, the Legislature must clearly inform the OTCs, by the statute, what is to be taxed. The circuit court further concluded that the statute must plainly state that OTCs are obligated to collect and remit said taxes to the Counties. However, the circuit court found that the TDT does not clearly impose any tax on the amount the OTCs charge their customers by way of the markup charges.

Although the Counties alternatively argued that the OTCs had effectively become the taxpayer who actually "rents, leases, or lets" the hotel rooms to the customers, the trial court noted that "neither the Legislature nor the Department of Revenue have yet acted to declare as much." Therefore, the trial court granted the OTCs' motion for summary judgment. The Counties appealed.

In affirming the trial court's judgment, the First District determined that

> [t]he crux of this dispute involves determining what is the privileged activity which the Tourist Development Tax taxes—renting a room to a tourist, or a tourist renting a room *from* a hotel? That is, did the Legislature declare that it is a privilege to rent a hotel room in Florida, or did it declare that it is a privilege *to* operate a hotel in this state?

Expedia, 110 So.3d at 944. The First District ultimately held that "the privilege being exercised for purposes of the [TDT] is renting rooms to tourists, not the other way around." *Id.* at 945 (footnote omitted).

The Counties moved the district court for rehearing en banc, or in the alternative, for certification of a question of great public importance to this Court. The First District denied the Counties' motion for rehearing en banc, but it granted their motion to certify a question of great public importance. *Id.* at 951–52. Thereafter, we granted the Counties' subsequently filed petition for discretionary review, accepted briefs on the merits from the parties and amici curiae, and heard oral arguments.

ANALYSIS

Standard of Review

[1] This Court's consideration of the First District's certified question concerns a pure question of law. Therefore, our review of the First District's *Expedia* decision is de novo. *See generally Aravena v. Miami–Dade Cnty.*, 928 So.2d 1163, 1166 (Fla.2006).

*733 Merits

[2] We rephrase the certified question as follows:

> Are the total monetary amounts that OTCs charge their customers to secure reservations for transient accommodation rentals in Florida counties subject to taxation under section 125.0104, Florida Statutes?

And, we answer the rephrased certified question in the negative.

In answering the rephrased certified question, we examined the TDT's plain language and its antecedent statute, the Transient Rental Tax (hereinafter "TRT"). *See* § 212.03, Fla. Stat. (2014). In so doing, we have determined that the TDT contains no language, as the Counties assert, that clearly directs that it should be applied to the markup charges and service fees associated with merchant model transactions for hotel room rentals.

Moreover, despite the operation of a given business model transaction, the monetary amount the hotels require for occupancy is the sole determinant for the charges that are taxable under the TDT. It is evident from the substance of the Counties' alternative arguments that they misunderstand our decision in *Miami Dolphins, Ltd. v. Metropolitan Dade County,* 394 So.2d 981 (Fla.1981). Therefore, we clarify that *Miami Dolphins* primarily provides instruction that the TRT and TDT are statutes that should be read in pari materia to fully understand the legislative intent and function of Florida's transient rental taxation statutes.

The Transient Rental Taxation Statutes

[3] [4] Our precedent establishes that "[i]n construing statutes, [the] first consider[ation] [is] the plain meaning of the language used. [The statute's plain] meaning controls unless it leads to a result that is either unreasonable or clearly contrary to legislative intent." *J.M. v. Gargett,* 101 So.3d 352, 356 (Fla.2012) (quoting *Tillman v. State,* 934 So.2d 1263, 1269 (Fla.2006)). Furthermore, we have previously held that a proper conclusion about "legislative intent is determined primarily from the statute's text." *Bennett v. St. Vincent's Med. Ctr., Inc.,* 71 So.3d 828, 837 (Fla.2011) (quoting *Heart of Adoptions, Inc. v. J.A.,* 963 So.2d 189, 198 (Fla.2007)). We, thus, look to the express language found in the statutes at issue to ascertain the Legislature's intent regarding the extent of the taxing scope.

The TDT provides, in pertinent part:

> 1. 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, 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, unless such person rents, leases, or lets for consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.

§ 125.0104(3)(a), Fla. Stat. (2014). In addition, the TRT provides, in pertinent part:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel, apartment house, roominghouse, tourist or trailer camp, mobile home park, recreational vehicle park, condominium, or timeshare resort. However, any person who rents, leases, lets, or grants a

> license to others ***734** to use, occupy, or enter upon any living quarters or sleeping or housekeeping accommodations in any apartment house, roominghouse, tourist camp, trailer camp, mobile home park, recreational vehicle park, condominium, or timeshare resort and who exclusively enters into a bona fide written agreement for continuous residence for longer than 6 months in duration at such property is not exercising a taxable privilege. For the exercise of such taxable privilege, a tax is hereby levied in an amount equal to 6 percent of and on the total rental charged for such living quarters or sleeping or housekeeping accommodations by the person charging or collecting the rental. Such tax shall apply to hotels, apartment houses, roominghouses, tourist or trailer camps, mobile home parks, recreational vehicle parks, condominiums, or timeshare resorts, whether or not these facilities have dining rooms, cafes, or other places where meals or lunches are sold or served to guests.

§ 212.03(1)(a), Fla. Stat. (2014). In examining the disputed language within the TDT and TRT, we find no clear legislative intent to require taxation on the total monetary charges incurred by customers who obtain reservations for hotel room rentals through the OTCs' Internet-based services.

It is undisputed that the TRT (enacted in 1949), and the TDT (enacted in 1977) were established to collect taxes on the transient rental of hotel rooms. For reasons that we will fully address in the following section, we interpret that "person who rents" under the TDT, and "every person is exercising a taxable privilege who engages in the business of renting" under the TRT, address the same subject matter; namely, the referenced *person* is the hotel. We reach this conclusion noting the statutory definition provided in Chapter 212, Florida Statutes: " '[p]erson' includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or other group or combination acting as a unit and also includes any political subdivision, municipality, state agency, bureau, or department and includes the plural as well as the singular number." § 212.02(12), Fla. Stat. (2014).

Thus, in light of the broad statutory definition of "person," we find it is reasonable to read the disputed language in the TDT as "[a hotel that] rents,...." *See Gargett,* 101 So.3d at 356. Similarly, for the TRT, we read the disputed language as "every [hotel] is exercising a taxable privilege [that] engages in the business of renting,...." *Id.*

Contrary to the Counties' arguments, we see nothing in the legislative history of these closely related statutes that demonstrates the Florida Legislature intended that the tax required by the TDT and TRT pertains to anything other than the monetary amount hotels charge for room rentals. Furthermore, the record before us supports our conclusion that, since its enactment of the respective statutes, the Legislature has chosen not to revise the statutes or otherwise specify that taxable "consideration" with respect to hotel room rentals includes the markup charges the OTCs include within the total charges to their customers for securing reservations. In other words, since the inception of the transient rental tax statutes, the taxable portion of such transactions has been based solely on the monetary amount a hotel actually sets and receives for the transient rental of hotel rooms in Florida.

Relevant Business Models for Transient Rental Transactions

Despite the plain language in the statutes at issue, the Counties argue that, ***735** under so-called merchant model transactions, the full amount of charges the OTCs require of their customers for Florida hotel room reservations is subject to taxation under the TDT. We disagree.

The record before us shows that the amount the OTCs charge their customers for facilitating Florida hotel room reservations is fully negotiated between the OTC and hotel. Thus, under merchant model transactions, the markup portion of the total charges reflects the agreed-upon remuneration for the services an OTC provides by way of its Internet-based website. Conversely, under the agency model, travel companies facilitate hotel room reservations in a similar fashion as do the OTCs under merchant model transactions. However, after a hotel room is reserved, the customer makes all payments for the room rental directly to the hotel. In turn, the hotel remits to its travel company partners a negotiated monetary commission based on the hotel room rentals the travel companies facilitate. Both business models, therefore,

achieve the same end—capturing the monetary costs hotels require for occupancy of transient lodging.

The Counties argue that the taxable amount under the TDT is contingent upon which business entity receives the payment associated with the confirmed hotel reservation. We reject this argument because it presumes that a person other than the hotel exercises the taxable privilege. Instead, we conclude that the statute concerns only the amount of funds a hotel requires for a customer to occupy the hotel room it rents on a transient basis. Thus, it is irrelevant to the taxation issue at hand which actors are involved and what roles they play in transactions for facilitating transient hotel room reservations. Under either transaction model, the tax required by the TDT will be based solely upon the transient rental rate of a room, that is, the price of possession established by the hotel for which it is in the business of selling.

Finally, as the OTCs and their supporting amici curiae point out, when in the past several sessions of the Legislature, the markup charges taxation issue has been raised as proposed legislation, the Legislature has repeatedly declined to revise the TRT or TDT to require such taxation. Accordingly, we hold that the Legislature's presumptive awareness of the issue for which the Counties now seek redress reflects the Legislature's willingness to maintain the status quo of not subjecting the OTCs' markup charges to the transient rental taxes. *See generally Dep't of Revenue v. Bonard Enter., Inc.,* 515 So.2d 358, 359 (Fla. 2d DCA 1987) ("The [L]egislature is presumed to have been aware of the Department's foregoing position. Not having thereafter amended the relevant legislation, the [L]egislature may be considered to have thereby implicitly affirmed that position as reflecting the legislative intent." (citing *White v. Johnson,* 59 So.2d 532 (Fla.1952))).

In the next section, we explain that the Counties have misread *Miami Dolphins* insofar as they rely on it as a basis for concluding that the markup portion of the OTCs' charges is subject to the TDT.

Our Prior Decision

The Counties rely on our previous statement that the TDT tax is "imposed on all renters of the covered types of premises" to suggest that we previously held that hotel guests are exercising the taxable privilege subject to the TDT. *See Miami Dolphins,* 394 So.2d at 989. Contrary to the Counties' assertion, in *Miami Dolphins* we did not hold that the customers of transient hotel rooms are the persons exercising the privilege that is taxable by the TDT. In fact, as the First District correctly discussed, our *Miami Dolphins* decision does not address whether the occupants ***736** of rented hotel rooms are exercising a taxable privilege. *Expedia,* 110 So.3d at 945 ("The [supreme court] did not hold, nor was it asked to address, whether the taxable privilege addressed in the [TDT] is exercised by those renting rooms from hotels or by those renting rooms to tourists.").

Nevertheless, the Counties assert that because the TDT and TRT conflict as to what is the taxable privilege, there is no need for the statutes to be read in pari materia. In arriving at such a conclusion, the Counties rely on an isolated portion of the instruction provided in *Miami Dolphins,* that states: "the [TDT] may modify and conflict with the [TRT] as needed." *Miami Dolphins,* 394 So.2d at 988. However, the explanation in *Miami Dolphins* that the TDT should have the ability to conflict with the TRT should be contextually understood. Rather than finding irreconcilable conflict between the TDT and TRT, in *Miami Dolphins* we provided clear guidance for why the statutes should be read in pari materia.

> We are inclined ... to adopt the reasoning of the circuit court....
>
> The circuit court found that the [TDT] is to be read in pari materia with chapter 212, Florida Statutes, the state transient rentals tax, and that when such is done, the former is "complete and whole in every way with all legal policies of significance set and enacted by the legislature...."
>
> When read in pari materia with chapter 212, Florida Statutes, the [TDT] contains all of the elements and establishes the policy necessary to implement the [L]egislature's goals. Any omissions therein are to be filled by the applicable provisions of the transient rentals tax. In the event of conflict between any provisions of the two, the provisions of the act will govern. While its provisions are used to fill any gaps in the act, the transient rentals tax is simply the base on which the [TDT] rests; the [TDT] may modify and conflict with the transient rentals tax statute as needed.
>
> ....
>
> Clearly, the [TDT] in the case sub judice need not be stricken as an unconstitutional delegation of legislative powers. If read in conjunction with chapter 212, it passes muster for completeness, certainty and reviewability.

Id. at 987–88.

In light of our previous statements, we reiterate in this case that the TRT and TDT should be read in pari materia to fully understand the purpose and function of these transient rental taxation statutes. Namely, the TRT and TDT have been enacted to capture tax revenue from the charges Florida hotels require for transient rentals of lodging accommodations. In *Miami Dolphins,* our acknowledgement that the statutes at issue can "conflict" reflects an understanding that the TDT was enacted for the specific purpose of providing tax revenue to Florida counties for the funding of statutorily specified initiatives that promote tourism or otherwise foster the tourism industry. *See* § 125.0104(5), Fla. Stat. (2014).

Because the TRT, which was enacted nearly thirty years earlier, does not have such restraints on the uses of tax revenue as does the TDT, in *Miami Dolphins* we acknowledged that the two statutes will invariably conflict "as needed" so that the TDT may be able to fulfill the Legislature's intent that revenue streams from that statute have only specific authorized uses. *See* § 125.0104(5), Fla. Stat. (2014). In contrast, the tax revenue from the TRT becomes part of the State's general fund, which may be used for any lawful purpose the Legislature decides.

***737 CONCLUSION**

We are bound by the constraints of existing jurisprudence to interpret Florida's TDT in accordance with the legislative intent found in the statute's plain language. *See Gargett,* 101 So.3d at 356; *Bennett,* 71 So.3d at 837. Thus, we conclude today that the language found in both of Florida's transient rental statutes is not ambiguous, and it does not provide a basis for interpreting that the TDT provides authority for the Counties to promulgate ordinances that subject the total monetary amounts OTCs charge their customers to the tax. Only the transient rental rate, which is set by the hotel and collected by the OTC in accordance with its contract with the hotel, is subject to taxation pursuant to the TDT. Accordingly, we answer the rephrased certified question in the negative and, therefore, approve the First District's *Expedia* decision.

Additionally, we commend counsel for the parties, as well as the amici curiae, for the high quality of the arguments presented in this closely contested case. The principled advocacy by the members of the Bar provided this Court with welcomed and valued assistance in our continuous efforts to resolve important questions of law.

It is so ordered.

LABARGA, C.J., and QUINCE, J., concur.

PARIENTE, J., concurs in result with an opinion.

CANADY, J., concurs in result.

LEWIS, J., dissents with an opinion, in which POLSTON, J., concurs.

PARIENTE, J., concurring in result.

I agree with the majority's conclusion that only the monetary amount ultimately received by a hotel—not the total monetary amount paid by customers to an online travel company (OTC)—is subject to the Tourist Development Tax (TDT). I concur in result, however, because I disagree with the statutory construction analysis applied by the majority to reach this conclusion. In my view, the TDT statute is not as clear and unambiguous as either the majority or the dissent claim. *See* majority op. at 736–37; dissenting op. at 739–40.

There are at least two possible reasonable constructions of the TDT statute: namely, (1) the construction endorsed by the majority that the tax is intended to be placed on the amount received by the hotels, or (2) the construction endorsed by the dissent that the tax is intended to be placed on the total amount paid by hotel guests to the OTCs—an amount which would include the markup received by the OTCs. In other words, the legislative intent is not clear.

The fact that both the majority and the dissent conclude that the statute is clear and unambiguous as to their conflicting interpretations is in and of itself an illustration of the statute's ambiguity. *See Bush v. Holmes,* 919 So.2d 392, 408 (Fla.2006) ("Ambiguity suggests that reasonable persons can find different meanings in the same language." (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So.2d 452, 455 (Fla.1992))). This lack of clarity of legislative intent is further evident in considering whether the OTCs are the entities that "rent[ ], lease[ ], or let[ ] for consideration" within the meaning of the TDT statute, § 125.0104(3)(a) 1., Fla. Stat. (2014), as well as whether, after viewing the TDT statute in pari materia with the Transient Rental Tax statute, the entities subject to the Transient Rental Tax statute are the same entities as covered in the TDT statute.

***738** When a statute is ambiguous, courts must attempt to discern legislative intent through statutory construction. *See Bautista v. State,* 863 So.2d 1180, 1185 (Fla.2003). The principle of statutory construction most applicable here is that where ambiguity exists in a taxing statute, such as the TDT statute, the statute must be construed in a manner that favors the taxpayers. *See Harbor Ventures, Inc. v. Hutches,* 366 So.2d 1173, 1174 (Fla.1979). Thus, I agree with the majority that, under the current legislative scheme, the tax should be levied on only the amount ultimately received by the hotels, which is the lower amount because it does not include the markup received by the OTCs.

But I disagree with the majority's reliance on the Legislature's inaction with respect to amending the statutes to clarify its intent regarding the markup charges. *See* majority op. at 735–36. Legislative inaction, at times, may be utilized as a basis for statutory construction when there has been legislative inaction subsequent to a judicial construction of the statute. *See, e.g., Goldenberg v. Sawczak,* 791 So.2d 1078, 1081 (Fla.2001). Prior to the current opinion in this case, this Court has not had occasion to interpret the relevant statute. Thus, I would not attribute any significance that rises to the level of statutory construction to the Legislature's inaction in this context.[1]

If anything, the record reveals that the Florida Cabinet has been struggling with this issue for some time without a definitive resolution. For example, at a Cabinet meeting in June of 2011, Florida Commissioner of Agriculture Adam Putnam expressed the view that this is "a significant policy matter that one way or the other the Legislature is going to have to speak to." At that same Cabinet meeting, the Executive Director of the Florida Department of Revenue (DOR) stated, "We think that the statute is unclear. We think the Legislature should clarify it." The DOR has apparently not taken an official position on the correct interpretation of the statute, except to state that the statute is unclear.

Undoubtedly, the counties would like to receive the tax income resulting from this untapped stream of revenue, and apparently the hotels would prefer for the OTCs to pay a higher tax to help level any competitive disadvantage. After all, the markup amounts received by the OTCs are, in general, a significant percentage of the total amount paid by hotel patrons who book hotel rooms through the OTCs— ***739** ranging between twenty-five and forty-five percent, according to the DOR's 2009 estimates. On the other hand, these markups are the result of business arrangements willingly entered into by the hotels.

The Florida Association of Destination Marketing warns in an amicus curiae brief that if this Court sides with the OTCs—which is effectually the result of today's decision—the major hotel chains may create their own merchant motels, and the Association further predicts dire consequences in the form of a drastic reduction of tax revenues to the counties. Conversely, other amici curiae, such as the American Society of Travel Agents and the Florida Chamber of Commerce, argue that increased taxes would have a chilling effect on tourism and result in tax revenue losses to the government.

These types of policy concerns are quintessentially within the legislative domain and could and should be addressed by the Legislature. It is not this Court's place to impose its view of the better policy, especially when it comes to a taxation scheme. *See, e.g., Rollins v. Pizzarelli,* 761 So.2d 294, 299 (Fla.2000) ("An interpretation of a statutory term cannot be based on this Court's own view of the best policy.").

Because the statute is not clear and unambiguous, I would rely primarily on the principle that the lack of clarity in the statutory language should be construed in favor of the taxpayers and against the taxing authority. Thus, I concur with the result reached by the majority and would adopt the reasoning of the First District in *Alachua County v. Expedia, Inc.,* 110 So.3d 941 (Fla. 1st DCA 2013).

LEWIS, J., dissenting.

I respectfully dissent because I would conclude that the plain and ordinary language of the TDT statute requires the tax to be levied on the full consideration charged by an OTC that uses the merchant model business plan.[2] The statute straightforwardly provides that the "[t]ax shall be due on the consideration paid for occupancy...." § 125.0104(3)(a)2.a., Fla. Stat. (2014). Additionally, the statute directs that "[t]he tourist development tax shall be levied, imposed, and set ... at a rate of 1 percent or 2 percent of each dollar and major fraction of each dollar of the *total consideration* charged for such lease or rental." § 125.0104(3)(c) (emphasis supplied). Nothing in this language suggests that the consideration paid to secure the occupancy of a hotel room may be divided up such that the TDT is levied on only a portion of the transaction.

As recognized by the majority, when statutory language is unambiguous, the statute must be given its plain and

obvious meaning. *See* majority op. at 733; *see also N. Carillon, LLC v. CRC 603, LLC,* 135 So.3d 274, 277 (Fla.2014). The *total* consideration charged is the total amount charged to the customer to reserve the hotel room, regardless of whether that reservation is made through an OTC or directly through the hotel. To levy the tax on only a *portion* of the consideration charged is contrary to the plain language of the statute. However, despite the clear intent expressed by the words "total consideration charged," the majority nonetheless concludes that the language of the statute does not "require taxation on the ***740** *total monetary charges incurred by customers* who obtain reservations ... through the OTCs' Internet-based services." majority op. at 734 (emphasis supplied).

An OTC customer pays one lump sum for the hotel room to the OTC. This lump sum, referred to by the OTCs as the "offer price," "nightly reservation rate," "room cost," or "room rate," includes the bundled-together charges for the discounted room reservation and the markup for services charged by the OTC, with no indication of how the payment is allocated between these charges. The customer is unaware of what portion of the consideration paid to the OTC is transferred to the hotel, and knows only that the "room cost" or "room rate" is the amount he or she must pay to reserve the right to occupy the hotel. Accordingly, the only clear and common sense reading of the statute is that the "total consideration charged for occupancy" is the total amount the customer is charged to reserve the hotel room, or, in other words, the total amount paid to the OTC.

Additionally, the statute directs that the tax shall be charged by the party that receives the consideration for the lease or rental and collected from the customer at the time that he or she pays such consideration. *See* § 125.0104(3)(f). In a merchant model transaction, the customer makes his or her payment directly to the OTC, not the hotel, and in fact never makes a payment to the hotel for the room reservation.[3] Although the hotel receives payment for the room reservation, the OTC remits this payment. Because the OTC is not the customer, the plain meaning of the statute is that the TDT is to be collected on the *total* consideration paid to the OTC at the time of the transaction between the OTC and the customer.

Moreover, the substance of the transaction is that the customer submits a payment to the OTC for the right to occupy the hotel room. The markup charges for service are part of the transaction that grants the customer the right of occupancy, and such charges are only incidental to the predominant purpose of the transaction—the reservation of the hotel room. In resolving questions that relate to tax liability, the relevant consideration is the substance of the transaction, rather than the form. *See Leon Cnty. Educ. Facilities Auth. v. Hartsfield,* 698 So.2d 526, 529 (Fla.1997) (citing *Bancroft Inv. Corp. v. City of Jacksonville,* 157 Fla. 546, 27 So.2d 162, 171 (1946)). The interpretation given to the statute by the majority allows hotels to place form over substance. Should hotels wish to reduce the amount of TDT paid, they can simply collect the tax on a price charged exclusively for the use of the room, then label various supplies and benefits traditionally included in a hotel reservation as services—housekeeping services, room supplies, et cetera—thereby avoiding tax on these "services."

Further, although two different models may be used by travel companies—the agency model or the merchant model—the TDT is imposed on the full consideration paid by the customer for the right to occupy the room under only the agency model. The majority concludes that because the consideration for both the travel agency's services and the hotel room are charged by the hotel under the agency model, the entire amount is taxable under the TDT. *See* majority op. at 735. Under this holding, by categorizing a portion of the consideration as a service charge, hotels are able to avoid tax liability on a portion of the transaction. However, regardless of which business model is employed, the ***741** purpose and result of the transaction is the same—to reserve a hotel room with the aid of a travel company. Because the substance of the transactions are the same, the same tax liability should be imposed. *See Hartsfield,* 698 So.2d at 529 (citing *Bancroft Inv. Corp.,* 27 So.2d at 171). Moreover, with respect to excise taxes, all similarly situated taxpayers should be treated alike. *See Gray v. Cent. Fla. Lumber Co.,* 104 Fla. 446, 140 So. 320, 325 (1932).

Additionally, reading the statute to apply to the total consideration charged by an OTC would be consistent with the administrative rule promulgated by the Florida Department of Revenue that interprets the statute to require that the tax be charged on the full amount paid to an OTC. Rule 12A–1.061(4)(b)1. of the *Florida Administrative Code* states that a rental charge includes "*any charge* or surcharge to guests or tenants for the use of items or services that is required to be paid by the guest or tenant as a condition of the use or possession, or the right to the use or possession, of any transient accommodation." (Emphasis supplied). The interpretation given to a statute by an agency charged with the enforcement of that statute is afforded great deference. *See Fla. Dep't of Revenue v. Fla. Mun. Power Agency,* 789 So.2d 320, 323 (Fla.2001).

Several other state and federal courts have also reached

this result. *See Vill. of Rosemont, Ill. v. Priceline.com Inc.,* No. 09–C–4438, 2011 WL 4913262 (N.D.Ill. Oct. 14, 2011); *see also City of Charleston, S.C. v. Hotels.com, LP,* 586 F.Supp.2d 538 (D.S.C.2008); *Expedia, Inc. v. City of Columbus,* 285 Ga. 684, 681 S.E.2d 122 (2009). *But see Expedia, Inc. v. City & Cnty. of Denver, Co.,* —— P.3d ——, No. 13CA0779, 2014 WL 2980979 (Colo.App. July 3, 2014) (concluding that the Lodger's Tax ordinance does not unambiguously include OTC service fees, and holding that the tax does not apply to such fees). Although the wording of the various tax statutes differs, the substance of the tax is similar. For example, the Illinois statute at issue in *Rosemont* provided that a tax of 7% of the room rental rate was to be imposed on the renter, and would be collected by the hotel or motel. 2011 WL 4913262, at *1. The Illinois court concluded that the OTC service fee was part of the agreement reached for access to the room, and therefore was subject to the tax. *Id.* at *3. Similarly, in *City of Columbus,* the statute provided that the tax would be charged on lodging charges actually collected. 681 S.E.2d at 125. The court there held that because the room rate offered by the OTC included the service fee, that fee was taxable under the statute. *Id.* at 128. I agree with these cases, and would hold here that the service fees charged by OTCs are part of the total consideration and are therefore subject to the TDT.

Accordingly, for the reasons stated above, I respectfully dissent.

POLSTON, J., concurs.

All Citations

175 So.3d 730, 40 Fla. L. Weekly S325

Footnotes

1 Additionally, prior to the First District Court of Appeal's 2013 opinion we review here, no appellate court had ruled on the merits of this issue. In *Orange County v. Expedia, Inc.,* 985 So.2d 622, 630 (Fla. 5th DCA 2008), the Fifth District Court of Appeal declined to address this issue, when it reversed the trial court's dismissal of Orange County's complaint seeking a declaratory judgment that the TDT is due on the markup and remanded to the trial court to consider the County's declaratory judgment action. On remand, the trial court denied the County's motion for summary judgment, holding that the tax did not apply to the markup received by the OTCs, construing the statute against the taxing authority and in the light most favorable to the taxpayer. *Orange Cnty. v. Expedia, Inc.,* No. 48–2006–CA–2104–O, 2011 WL 7657975 (Fla.Cir.Ct. Jan. 20, 2011). The issue had also been raised in federal trial courts with inconclusive results. *See, e.g., Cnty. of Monroe v. Priceline.com, Inc.,* 265 F.R.D. 659 (S.D.Fla. Mar.15, 2010) (granting class certification as to the issue of whether the TDT applies to the markup charged by the OTCs); *Brevard Cnty. v. Priceline.com, Inc.,* No. 6:09–cv–1695–Orl–31KRS, 2010 WL 680771 (M.D.Fla. Feb. 24, 2010) (denying the OTC's motion to dismiss with respect to whether the TDT applies to the markup); *Leon Cnty. v. Hotels.com, L.P.,* No. 06–21878–CIV–HUCK/SIMONTON, 2006 WL 3519102 (S.D.Fla. Dec. 6, 2006) (denying the OTC's motion to dismiss as to whether the TDT applies to the markup).

2 Under the merchant model business plan, customers reserve a hotel room on the OTC webpage and pay the OTC directly for the transaction. The OTC later transmits a discounted payment for the room reservation to the hotel and retains the rest as a facilitation fee or service charge. Currently, and under the result reached by the majority, the TDT is levied on only the portion of the consideration paid to the OTC that is remitted to the hotel, and not the service charge that is retained by the OTC.

3 The customer does pay the hotel for incidentals he or she incurs during the stay.

110 So.3d 941
District Court of Appeal of Florida,
First District.

ALACHUA COUNTY, Charlotte County, Escambia County, Flagler County, Hillsborough County, Doug Beldon as Hillsborough County Tax Collector, Lee County, Leon County, Doris Maloy as Leon County Tax Collector, Manatee County, Nassau County, Okaloosa County, Pasco County, Pinellas County, Diane Nelson as Pinellas County Tax Collector, Polk County, Joe G. Tedder as Polk County Tax Collector, Seminole County, St. Johns County, Wakulla County, and Walton County, Appellants,
v.
EXPEDIA, INC., et al., Appellees.

No. 1D12–2421.
|
Feb. 28, 2013.
|
Opinion on Rehearing April 16, 2013.

Synopsis

Background: Counties and county tax collectors brought declaratory action against online travel companies, seeking to establish that the Tourist Development Tax applied to the full amount paid to the companies by tourists for hotel rooms, rather than only the portion paid by the companies to hotels. The Circuit Court, Leon County, James O. Shelfer, J., awarded summary judgment to companies. Counties and tax collectors appealed.

Holdings: The District Court of Appeal, Thomas, J., held that:

[1] privileged activity taxed by the Tourist Development Tax was the renting of rooms to tourists, rather than the renting of rooms by tourists, and

[2] Tourist Development Tax did not apply to fees retained by the companies.

Affirmed; question certified; motion for rehearing en banc denied.

Padovano, J., filed dissenting opinion.

Attorneys and Law Firms

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Opinion

THOMAS, J.

In this case before us, we address the Tourist Development Tax, codifed in section 125.0104, Florida Statutes, and levied pursuant to Florida's Local Option Tourist Development Act of 1977. The question presented on appeal is whether the Tourist Development Tax ("Tax") applies to the entire amount that Appellees ("Online Travel Companies" or "Companies") collect from hotel customers who reserve their hotel room through Online Travel Companies. We find that the additional sums of money earned by the Companies are not taxable. And as required by Florida Supreme Court precedent, we must read the statute "strongly in favor of the taxpayer and against the government." *Maas Bros., Inc. v. Dickinson,* 195 So.2d 193, 198 (Fla.1967). Thus, we affirm the trial court's ruling that the Tax applies only to the amount of money the Companies send to the hotels for the reserved rooms, and not to the additional compensation retained by the Companies. As the trial

court here correctly determined, it is for the Legislature, and not the judiciary, to decide whether to apply the Tax to the full amount that the Companies charge their customers who utilize their website to obtain a hotel reservation.[1]

Factual & Procedural Background

Online Travel Companies operate websites that allow consumers to view comparative information about competing travel service providers, such as hotels, car rental companies, and airlines. If a customer makes a reservation request from one of the Companies' websites, that Company submits a reservation request to the hotel on behalf of the customer. The hotel decides whether to accept the request, based on rate and availability, and if the hotel chooses to accept the reservation, the hotel makes the reservation in the customer's name. The Company then collects the total payment directly from the customer when the reservation is completed, and sends a portion of the payment to the hotel. The customer pays nothing to the hotel for the room. Upon arrival, the hotel provides the hotel room to the customer.[2]

***943** Appellants asserted below that the Tourist Development Tax applied to the difference between the monetary amount paid to the hotel and the amount collected by the Companies from consumers using their websites. In their declaratory action, Appellants asserted that the Companies were exercising a taxable privilege by renting, leasing or letting hotel rooms; however, in their summary judgment motion, Appellants argued that the taxable privilege at issue was being exercised not by the Companies, but by **tourists** renting hotel rooms.

Thus, the trial court found that it first had to determine "who and what the Legislature intends to tax"—tourists who utilize hotels and motels in Florida, or "the hotels and motels themselves for the privilege of doing business here?" If the Tax was intended to apply to the consumer, then the full amount paid by the consumer to the Companies would be subject to the Tax, and the Companies would be obligated to collect and remit the Tax on the amount involved in the transaction which exceeded the amount the Companies pay to the hotel. But "[i]f the privilege the Legislature seeks to tax is the opportunity of operating a hotel in Florida, which was the Legislature's clear intention in 1949 when it passed the Transits Rental Tax (TRT) under Florida Statute 212.03, then the hotel in which the tourist stays must collect the tax on the lesser amount that the hotel receives for the room and submit that lesser amount of tax to the counties."

The trial court noted that the Tax is currently paid only on the amount received by hotels, not the "mark-up realized" under the Merchant Model, and determined that if this mark-up "is to be subjected to the [Tax] in the future the Legislature, not the Court, must by statute clearly inform the [Companies] of what is to be taxed and that the [Companies] are responsible for collecting and remitting the tax to the counties." The court also found that the Tax statute, "as currently written does not clearly impose the [Tax] on the amount that the [Companies] charge to their customers," and that this ambiguity must be resolved in the Companies' favor "and against extending the reach of the taxing authority."

The court also addressed Appellants' alternative argument that the Companies' Merchant Model meant that the Companies "have morphed from a pure service provider matching the tourists with a hotel owner into a taxpayer who actually 'rents, leases, or lets' the rooms to the tourist as defined by the statute." The court found that the Companies "may have brought themselves within the reach of the [Tax]," but that neither the Legislature nor the Department of Revenue have yet acted to declare as much. Thus, the court granted the Companies' motion and denied Appellants' motion.[3]

Analysis

The Tourist Development Tax was enacted in 1977. It allows participating counties to assess what is commonly called a "bed tax" for hotel stays within their territorial limits. The statute 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, resort motel ... for a term of 6 months or less **is exercising a privilege which is subject to taxation under this section,** unless such person rents, leases, or lets for ***944** consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.

§ 125.0104(3)(a) 1., Fla. Stat. (emphasis added).

This tax is "in addition to any other tax imposed pursuant to chapter 212 and in addition to all other taxes and fees and the consideration for the rental or lease." § 125.0104(3)(e), Fla. Stat. The reference to chapter 212 addresses the statewide bed tax, known as the "Transient Rentals Tax" authorized in the "Florida Revenue Act of 1949" codified at section 212.01, *et. seq.,* Florida Statutes. Section 212.03(1)(a), Florida Statutes, is similar to section 125.0104(3)(a) 1. It provides:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel....

§ 212.03(1)(a), Fla. Stat.

[1] The crux of this dispute involves determining what is the privileged activity which the Tourist Development Tax taxes—renting a room *to* a tourist, or a tourist renting a room *from* a hotel? That is, did the Legislature declare that it is a privilege to rent a hotel room in Florida, or did it declare that it is a privilege to operate a hotel in this state? Appellants argue that the plain language of the statute states that it is tourists who are exercising a privilege, not the hotels. We respectfully disagree.

Both the Tourist Development Tax and the Transient Rentals Tax impose a duty to charge, collect, and remit the bed tax. *See* § 125.0104(3)(f), Fla. Stat. ("The tourist development tax 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."); § 125.0104(8)(a), Fla. Stat. ("Any person who is taxable hereunder who fails or refuses to charge and collect from the person paying any rental or lease the taxes herein provided ... is, in addition to being personally liable for the payment of the tax ..." criminally liable.);[4] § 212.03(2), Fla. Stat. ("The tax provided for herein shall be in addition to the total amount of the rental, shall be charged by the lessor or person receiving the rent in and by said rental arrangement to the lessee or person paying the rental, and shall be due and payable at the time of the receipt of such rental payment by the lessor or person, as defined in this chapter, who receives said rental or payment."). Logically, therefore, that duty is imposed on the hotels, not the tourist. Thus, although the tourist is obligated to pay the tax when it is charged, the tourist is not obligated to charge himself the tax, collect it from himself, or remit it to the proper taxing authority. That duty is imposed on hotels, motels, and others for exercising the privilege of engaging in the business of renting rooms to consumers.

Appellants contend that their position that the taxable privilege is exercised by tourists is supported by our supreme court's opinion in *Miami Dolphins, Ltd. v. Metropolitan Dade County,* 394 So.2d 981 (Fla.1981). We disagree. In that case, the appellant argued that the Tourist Development Tax violated the equal protection clause in the United States Constitution, because the "county is attempting to impose a tax on nonresidents alone on the privilege of renting living space for less ***945** than six months." *Id.* at 988. We note, however, that this was the appellant's characterization of the issue. The supreme court rejected the equal protection argument, observing that the Tourist Development Tax is "imposed ... on anyone who rents certain kinds of living space for a term of six months or less," and "is imposed on all renters of the covered types of premises" regardless of whether they are residents or non-residents. *Id.* at 989. The court did not hold, nor was it asked to address, whether the taxable privilege addressed in the Tourist Development Tax is exercised by those renting rooms from hotels or by those renting rooms to tourists. It simply recognized the obvious—the tax is imposed on tourists and residents and collected by the hotels.

Furthermore, the court also held that the Transient Rental Tax statute is to be read together with the Tourist Development Tax statute. *Id.* at 987–88. As with the latter, the ultimate person paying the Transient Rental Tax is the tourist, not the hotel. In both instances, the Legislature determined that operating a hotel in a county is a privilege "subject to taxation," and with that privilege comes the obligation to collect the Tax from the customer.

Thus, we hold that the privilege being exercised for purposes of the Tourist Development Tax is renting rooms **to** tourists, not the other way around.[5] This leaves us with Appellants' alternative argument that the Companies have an obligation to charge the Tourist Development Tax on the entire amount they collect from customers, not just the portion of that amount they forward to the hotels.

Again, the statute states that the local option tax is "due on the consideration paid **for occupancy** in the county ...." § 125.0104(3)(a) 2.a., Fla. Stat. (emphasis added). It also provides that the tax is levied on the "total consideration charged **for such lease or rental.**" §

125.0104(3)(c), Fla. Stat. (emphasis added). This tax is to be charged by the "person receiving the consideration for the lease or rental ...." § 125.0104(3)(f), Fla. Stat. (emphasis added). Once charged and collected, the person "receiving the consideration for such lease or rental" must remit the tax to the Department of Revenue. § 125.0104(3)(g), Fla. Stat. (emphasis added).

[2] It is well-established law in Florida that courts must "construe tax statutes in favor of taxpayers where an ambiguity may exist." *Harbor Ventures,* 366 So.2d at 1174. Here, because the legislature has not provided a statutory definitional scheme to create special meanings for the terms "rents, leases, or lets for consideration," the court must give those words their ordinary and common usage. *See Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.,* 894 So.2d 954, 961 (Fla.2005).

***946** [3] 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. Thus, the consideration received for the "lease or rental" is that amount received by the hotels for the use of their room, and not the mark-up profit retained by the Companies for facilitating the room reservation. *See also* Fla. Admin. Code R. 12A–1.061(3)(a) ("Rental charges or room rates for the use or possession, or the right to the use or possession, of transient accommodations are subject to tax...."). Notably, section 125.0104(3)(e), Florida Statutes, recognizes the difference between taxes and fees on the one hand, and financial consideration on the other: "The tourist development tax shall be in addition to any other tax imposed pursuant to chapter 212 and in addition to all other taxes and fees and the consideration for the rental or lease." *See also* Fla. Admin. Code R. 12A–1.061(3)(b) ("Rental charges or room rates include any charge or surcharge to guests or tenants for the use of items or services that is required to be paid by the guest or tenant as a condition of the use or possession, or the right to the use or possession, of any transient accommodation."). Thus, the tax at issue is on the actual rate paid for **occupancy** of the room, that is, the consideration for the room itself (the "rental or lease"), not any taxes or other fees.

Indeed, "rental" is defined as "income received from rent." *Black's Law Dictionary,* 1300 (7th ed. 1999). Additionally, "net rent" is defined as the "rental price for property after payment of expenses, such as ... taxes." *Id.* at 1299. Also, in interpreting section 212.03(2), Florida Statutes, this court in *Florida Revenue Commission v. Maas Bros., Inc.,* explained that it is not "the incident of payment and receipt of the rental charged that constitutes the taxable transaction and creates the tax liability" under the Act, but engaging in the business of renting space. 226 So.2d 849, 852–53 (Fla. 1st DCA 1969).

The Companies are simply conduits through which consumers can compare hotels and rates and book a reservation at the chosen hotel. They do not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers, as contemplated by the Tourist Development Tax enabling statute or the counties' ordinances. In this role, the Companies collect the monies owed for the room, including taxes and fees, and pass on to the hotels the money for the room rental and the taxes on the price of the room. The consideration the Companies ultimately keep is not for the rental or lease, but for their service in facilitating the reservation.

At the risk of belaboring the obvious, the Companies do not own, possess or have a leasehold interest to convey in any hotel room, but merely transfer a reservation request from the tourist to a hotel.

The Companies are not in the business of renting, leasing, letting, or granting licenses to use transient accommodations, as they are online travel companies, not hoteliers. Similarly, the difference between the fees they charge their customers, and what the hotels require be paid to place a customer in a room, is not "solely for the use or possession" of the hotel room. Rather, the Companies operate their businesses, including sophisticated websites, to the benefit of both their customers and the hotels. The Tourist Development Tax does not plainly evince an intention to include the additional fees that 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 ***947** for allowing customers to occupy their rooms—is what has been taxed.

Conclusion

For the foregoing reason, we AFFIRM the trial court's summary judgment in favor of Appellees, and its denial of Appellants' motion for summary judgment.

AFFIRMED.

DAVIS, J., concurs.

PADOVANO, J., Dissents with Opinion.

PADOVANO, J., dissenting.

I respectfully dissent. The local option tourist development tax authorized by section 125.0104, Florida Statutes, is a tax on the amount of money a tourist pays to stay in a hotel in Florida. The portion of those funds earned by an online travel company, whether remitted by the hotel after payment of the bill or retained initially by the travel company at the time of the reservation, is subject to the tax. This conclusion is required not only by precedent we are bound to follow, but also by the plain language of the statute.

The holding by the majority that a portion of the total bill paid by the tourist is exempt from the local option tourist development tax is contrary to the decision by the Florida Supreme Court in *Miami Dolphins, Ltd., v. Metropolitan Dade County,* 394 So.2d 981 (Fla.1981). One of the questions presented in that case was whether the tax discriminated against tourists from other states. The supreme court answered the question in the negative and, as a part of its decision, the court defined the nature of the tax. As the court stated, the county ordinance implementing the local option tourist development tax imposed the tax on "*the total rental charged every person who rents, leases or lets for consideration any living quarters* ... for a term of six months or less." *Id.* at 989. (emphasis added). The court observed that the tourist development tax is *a tax imposed on all renters* of the covered types of premises. *Id.* (emphasis added).

It is clear from the language of the *Miami Dolphins* opinion that the Florida Supreme Court considers the local option tourist development tax as a tax due on funds paid by the tourist, not a tax due on money received by the hotel. It is also clear from the language of the opinion that the tax is due on the gross amount of the hotel bill, not on the net amount the hotel may receive after payment of expenses or commissions to an online booking agent. Yet the majority of this court has concluded that the tax at issue is actually a tax on the business of renting a hotel room and the amount due is limited to the hotel's portion of the total funds paid by the tourist to rent the room. On this point, I believe that the majority has misapplied the holding in *Miami Dolphins.*

I acknowledge that the issue before the court in *Miami Dolphins* is not the same as the issue we have before us here. If the matter were that simple we would have no controversy at all. The point is that the supreme court defined the nature of the tax by stating that it was a tax on money paid by the tourist, not as a tax on the money received by the hotel after payment of expenses. Curiously, the majority seems to concede this point in its statement that the *Miami Dolphins* decision "simply recognized the obvious—the tax is imposed on tourists and residents and collected by the hotels." I think this statement regarding the nature of the tax is obvious, as well, but it is contrary to the rationale of the majority opinion.

The online travel companies rely heavily on the statement of legislative intent in section 125.0104, Florida Statutes, which is as follows:

> (3)(a)1. It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration ***948** any living quarters or accommodations in any hotel, apartment 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, unless such person rents, leases, or lets for consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.

The travel companies contend that this section authorizes a tax on the exercise of the privilege of "renting, leasing or letting" rooms *to* transients." (emphasis added). But that is not what the statute says. To the contrary, the statute merely identifies the act of renting, leasing and letting as the taxable event. It does not state that the tax is to be assessed on the rental income received by the hotel for the privilege of renting a room "to" a tourist as the travel companies argue. This section of the statute is written passively to define the transaction that is subject to the tax.

The travel companies argue that the statute must be construed to impose a tax on the business income received by the hotels, because the terms "rent" and "lease" are used to describe actions taken by the owner of the property, in this case the hotel. They point out in the answer brief that "rent" means "to grant the possession and enjoyment of property ... in return for payment," that

"lease" means "to grant the temporary possession or use of (lands, tenements, etc.) to another, usually for compensation at a fixed rate; let," and that "let" means "to grant occupancy or use of (land, buildings, rooms, space, etc., or movable property)" in return for payment. *Dictionary.com* (based on *Random House Dictionary*) (2012); *see also Collins English Dictionary* (10th ed. 2009). The problem with this argument is that the terms "rent" and "lease" are also used to describe an action taken by the person who pays for the right to occupy the property.

The first definition of the transitive verb "rent" in the American Heritage Dictionary of the English Language online is "[t]o obtain occupancy or use of (another's property) in return for regular payments." *AHDictionary.com.* Indeed, the hard copy of the American Heritage Dictionary does not even include the meaning in which one grants the use of property to another. It lists only the meaning consonant with the primary online definition—"[t]o use (another's property) in return for regular payments"—and "[t]o be for rent." *American Heritage Dictionary* 708 (4th ed. 2001). Likewise, the MacMillan Dictionary online lists as the first definition of "rent" as "to pay money regularly to use a house, room, office, etc. that belongs to someone else." *MacMillanDictionary.com; see also Cambridge Dictionary Online,* Dictionary.Cambridge.org/dictionary/american-english/. The Oxford Dictionaries U.S. English Usage site lists *only* the connotation, "pay someone for the use of (something, typically property, land, or a car): *they rented a house together in Spain.*" *Oxford Dictionaries Online,* OxfordDictionaries.com (emphasis in original). As Bryan Garner explains, the transitive verb "rent"

> may refer to the action taken by either the lessor or the lessee; the word has had this doubleness of sense from at least the 16th century. Both the lessee and the lessor are *renters,* so to speak, though usually this term is reserved for tenants.

Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed.), p. 756 (emphasis in original).

Garner makes a similar observation as to the term "lease": "To say that one *leases* property nowadays does not tell the reader or listener whether one is lessor or ***949** lessee." *Id.* at 514. Accordingly, dictionaries, including *Black's,* generally list dual definitions of "lease." *See Black's Law Dictionary,* 909 (8th ed.); *The American Heritage Dictionary of the English Language* Online, AHDictionary.com; *Merriam–Webster Dictionary Online,* Merriam–Webster.com/; *Oxford Dictionaries Online,* OxfordDictionaries.com. The definition in the Cambridge Dictionary Online lists the sense in which the lessee is the acting party as the first of the two alternate meanings. *See Cambridge Dictionary Online,* http://dictionary.cambridge.org/ ("to use or allow someone else to use land, property, etc. for an agreed period of time in exchange for money: *I leased my new car instead of buying it.*") (emphasis in original).

Because these terms can be used interchangeably to describe the action by either party in the making of a lease or rental agreement, we cannot say for certain that they are used in the statute to describe the act of providing a hotel room for a price. We could just as well read the phrase "any person who rents ..." to mean any person who pays money to a hotel for the privilege of staying there. And while "let" has no other meaning than the one in which the property owner is the actor, this term is listed in the disjunctive in the statute. Therefore, it need not be understood as merely another term for "rent" or "lease." Again, the statute merely defines the kind of transaction that is subject to the tax. It does not seek to assess the tax based on the activity of one of the parties to the transaction.

For these reasons, I do not think that the statement of legislative intent in section 125.0104 supports the argument by the travel companies that the tax is imposed for the privilege of operating a hotel in Florida. And even if that were the case, the statement of legislative intent would not override the plain and unambiguous language of the operative parts of the statute—that is, the parts of the statute that describe how the tax is to be assessed and collected. *See S.R.G. Corp. v. Dep't of Revenue,* 365 So.2d 687, 689 (Fla.1978) (stating that legislative intent is determined primarily from the language of the statute). Several key parts of the statute reveal that the tax is to be based on the total amount of money paid by the tourist, not on the net amount retained by the hotel.

For example, section 125.0104(3)(a) 2.a states the "[t]ax shall be due on the consideration paid for occupancy." Here, the legislature is plainly referring to the amount of money paid by the tourist, not the amount of money retained by the hotel. And if there could be any doubt that the tax is based on the gross amount paid by the tourist, it would be completely removed by section 125.0104(3)(c), which specifies that the tax shall be assessed "at a rate of 1 percent or 2 percent of each dollar and major fraction of each dollar of the *total consideration* charged for such lease or rental." (Emphasis added.) This provision undercuts the argument that a portion of the consideration

can be exempted from taxation. As the statute provides, the tax is to be levied on the full amount paid for the room.

I acknowledge that an ambiguity in a tax statute must be resolved in favor of the taxpayer, *see Department of Revenue v. Brookwood Associates, Ltd.,* 324 So.2d 184, 186 (Fla. 1st DCA 1975); *Maas Brothers, Inc. v. Dickinson,* 195 So.2d 193, 198 (Fla.1967), but the statute at issue here does not strike me as ambiguous at all. It is broad in the sense that it covers many different kinds of tourist accommodations, and it is general in the sense that it refers without specification to both lessors and lessees. But it is not confusing or unclear. It imposes a tax on the funds paid by a ***950** tourist to rent a room in a hotel. The matter is no more complicated than that. As a federal judge observed in ruling on the identical issue, the tax is imposed on the "bargain struck" and that is the money the tourist pays for access to the hotel room. *See Village of Rosemont, Ill. v. Priceline.com, Inc.,* 2011 WL 4913262 (N.D. Ill., 2011).

The majority is correct to say that section 125.0104, Florida Statutes must be read in conjunction with Chapter 212, the Florida Revenue Act of 1949. And the majority is also correct in pointing out that section 212.03(1)(a) specifies that the taxable privilege for the purpose of Chapter 212 is the business of operating a hotel. However, it does not follow from these two propositions that the taxable privilege for the purpose of section 125.0104 is the privilege of operating a hotel, as the majority concludes. Statutes are read in pari materia only to resolve ambiguities and, as I have explained, there is no ambiguity in section 125.0104. Moreover, section 125.0104 was enacted *after* section 212.03(1)(a)(1), and the specific language in section 212.03(1)(a)(1) about the privilege of operating a hotel was not carried forward in section 125.0104. If we are to draw any conclusion from this omission at all, it would be that the taxable event for the purpose of section 125.0104 is *not* the privilege of operating a hotel.

It is significant in my view that the tourist development tax is paid on some transactions arranged by the online companies but not on others. The travel companies employ two different business models. Under the practice described as the "agency model," the travel company books the room, the tourist pays the full amount of the bill to the hotel, and the hotel remits a fee to the travel company. By the practice described as the "merchant model," the travel company books the room, collects the full amount of the hotel bill from the tourist, pays a portion of the bill to the hotel, and retains a portion of the bill for booking the room.

When the travel company employs the agency model, the tax is computed and paid on the full amount of the bill for the room, and the fee that is remitted to the travel company is treated as an expense. In contrast, the tax is not computed on the full amount of the bill if the transaction is arranged under the merchant model. In that case, the tax is paid only on the portion of the funds paid by the tourist that are actually remitted to the hotel. The tax is not paid on that portion of the funds retained by the travel company.

Because the merchant model is merely a different method of completing the same transaction, it cannot have the effect of changing the tax liability on the transaction. When resolving a tax issue, the courts must look to the substance of the transaction, not its form or label. *See Leon Co. Educ. Facilities Auth. v. Hartsfield,* 698 So.2d 526, 529 (Fla.1997); *Reinish v. Clark,* 765 So.2d 197, 208 (Fla. 1st DCA 2000); *TEDC/Shell City, Inc. v. Robbins,* 690 So.2d 1323, 1325 (Fla. 3d DCA 1997). By this basic principle, a taxpayer cannot avoid a tax merely by characterizing a transaction as something other than what it truly is.

If the travel companies could escape the tax merely by changing the form of the transaction, the hotels could do the same thing on their own. There would be nothing to prevent a large hotel chain from setting up a wholly owned subsidiary and then using that company for the exclusive purpose of advertising and promotion and for booking hotel rooms. The subsidiary could then charge the hotel for a portion for the room rate for every booking it makes and retain its portion of the bill tax-free. In my view, a scheme like this is no worse than the one the travel companies ***951** have devised here; nor is it any better. Both schemes seek to avoid taxation by making the transaction appear to be something other than what it is.

The issue presented in this case is just emerging in Florida, but it has been decided in other jurisdictions in a way that is contrary to the majority opinion. For example, in *Expedia, Inc. v. City of Columbus,* 285 Ga. 684, 681 S.E.2d 122 (2009), the Supreme Court of Georgia held that an online travel company using the merchant model must pay a local accommodation tax on the portion of the hotel bill it retains when booking the room. Because the statute at issue in that case imposed a tax on the "lodging charges actually collected" from the tourist, the court concluded that the "wholesale rate" the hotel charged the travel company could not be the rate upon which the tax was computed. Likewise in *City of Charleston, S.C. v. Hotels.com, LP,* 586 F.Supp.2d 538 (D.S.C.2008), a federal court held than an online travel company was

required to pay the local accommodation tax on the portion of the hotel bill it retained for booking rooms in the City of Charleston. The statute in that case imposed a tax on the "gross proceeds" derived from the rental. The Florida statute is substantially the same in that it imposes a tax on "total consideration" for the lease or rental. And in *Village of Rosemont, Ill. v. Priceline.com Inc.,* 2011 WL 4913262 (N.D.Ill., 2011), the court held that Priceline.com was obligated to pay a local accommodation tax on the amount it retained when it booked hotel rooms under the merchant model we have before the court in this case. Numerous other courts have concluded that requiring the online travel companies to pay a local accommodation tax on a hotel bill does not violate the dormant commerce clause. *See Mayor & City Council of Baltimore v. Priceline.com Inc.,* 2012 WL 3043062 (D.Md., 2012); *City of San Antonio v. Hotels.com,* 2008 WL 2486043 (W.D.Tex.2008); *Travelscape, LLC v. S. Carolina Dep't of Revenue,* 391 S.C. 89, 705 S.E.2d 28 (2011).

There are certainly differences in the wording of the statutes in these cases, but the fundamental principle is the same in all of them. The tax at issue is a tax on the total amount of money a tourist pays to stay in a hotel room. That amount cannot be artificially reduced by setting a wholesale rate for the room and then treating the difference on the funds retained by an online travel company as if it is not part of the money the tourist has paid to stay in the room. With respect for my colleagues in the majority, I think that the result should be no different here.

For these reasons, I would hold that the portion of the hotel bill that is retained by the online travel companies is part of the total consideration paid for the accommodation and that it is therefore subject to the local option tourist development tax.

ON MOTION FOR REHEARING EN BANC OR CERTIFICATION

PER CURIAM.

Appellants' Motion for Rehearing En Banc Or, In the Alternative, Requesting a Certification to the Florida Supreme Court of a Question of Great Public Interest, was filed March 15, 2013. We deny the motion for rehearing en banc, but grant the motion for certification.

We certify the following question to the Florida Supreme Court as one of great public importance:

> DOES THE "LOCAL OPTION TOURIST DEVELOPMENT ACT," CODIFIED AT SECTION 125.0104, FLORIDA STATUTES, IMPOSE A TAX ON THE TOTAL AMOUNT OF CONSIDERATION RECEIVED BY AN ON–LINE TRAVEL COMPANY FROM TOURISTS WHO RESERVE ACCOMMODATIONS USING THE ON–LINE ***952** TRAVEL COMPANY'S WEBSITE, OR ONLY ON THE AMOUNT THE PROPERTY OWNER RECEIVES FOR THE RENTAL OF THE ACCOMMODATIONS?

BENTON, C.J., PADOVANO and THOMAS, JJ., concur.

All Citations

110 So.3d 941, 38 Fla. L. Weekly D482

Footnotes

1 There have been several proposed legislative bills to expressly include or exclude the Companies from the Tourist Development Tax. *See* Fla. HB 1241 (2010); Fla. HB 335 (2010); and Fla. HB 493 (2011).

2 This process is known as the "merchant model" which differs from the "agency model" in that, with the latter, the consumer pays the hotel for the room and the hotel then remits a commission to the Online Travel Company.

3 This issue was the subject of litigation in the Ninth Judicial Circuit, in addition to the order on appeal here. We acknowledge our use of some of the analysis of the summary judgment order by Judge Lauten in *Orange County and Martha O. Haynie, Orange County Comptroller v. Expedia, Inc. and Orbitz, LLC* (Fla. Cir. Ct., 9th Cir. Case No. 2006–CA–2104).

4 Note that this provision clearly applies to hotels and motels, etc., and provides that they, too, are taxable under the Tourist

Development Tax.

5 The privilege involved here of renting rooms to tourists is also supported by the plain wording in other provisions in the statute. The statute explicitly provides that the privilege exercised is renting, leasing, or letting a room "for consideration," and that the tax at issue is due "on the consideration paid for occupancy" of such a room in the applicable county. § 125.0104(3)(a) 1., 2.a., Fla. Stat. In a contract, one party sells a product or service **for** consideration, and the other party pays for the product or service **with** that consideration. The statute itself recognizes this principle: "The tourist development tax shall be charged **by the person receiving the consideration for** the lease or rental, and it shall be collected from the ... customer at the time of payment **of the consideration for** such lease or rental." § 125.0104(3)(f), Fla. Stat. (emphasis added). "The person **receiving the consideration for** such rental or lease shall receive, account for, and remit the tax" to the Department of Revenue. § 125.0104(3)(g), Fla. Stat. (emphasis added).

End of Document

3 Wharton's Criminal Evidence § 11:36 (15th ed.)

Wharton's Criminal Evidence | November 2016 Update
Barbara E. Bergman, Nancy Hollander and Theresa M. Duncan

Part One. Analysis
Chapter 11. Privileges
IV. Accountant-Client Privilege

§ 11:36. Scope of privilege; who may invoke privilege

References

West's Key Number Digest

- West's Key Number Digest, Accountants 9
- West's Key Number Digest, Witnesses 196.2

A.L.R. Library

- Privileged communications between accountant and client, 33 A.L.R. 4th 539
- Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R. 3d 1373

Legal Encyclopedias

- 1 Am. Jur. 2d, Accountants §§ 15 to 17

Treatises and Practice Aids

- Hollander and Bergman, Everytrial Criminal Defense Resource Book § 27:5
- Rhodes, Orfield's Criminal Procedure Under the Federal Rules (2d ed.) § 26:428

As is true of any privilege, the state statutes recognizing an accountant-client privilege require the communication between the client and the accountant to be confidential.[71] The person the client consults must be an accountant as defined in the relevant state statute or rule.[72] The client must also fit the definition in the state rule or statute.[73]

In a jurisdiction recognizing the accountant-client privilege, the client may refuse to disclose and may prevent his accountant from disclosing the contents of such a communication.[74] Both the client and the accountant may assert the privilege on behalf of the client.[75] However, no privilege exists where the communication is relevant to an issue of breach of duty on the part of the accountant or the client;[76] likewise, no privilege exists where the client sought the services of the accountant to aid in the perpetration of a crime or fraud.[77]

Footnotes

71 See, e.g., Fla. Stat. Ann. § 90.5055(1):

> (c) A communication between an accountant and his client is 'confidential' if it is not intended to be disclosed to third persons other than:
>
> 1 Those to whom disclosure is in furtherance of the rendition of accounting services to the client.
>
> 2 Those reasonably necessary for the transmission of the communication.

In re October 1985 Grand Jury No. 746, 124 Ill. 2d 466, 125 Ill. Dec. 295, 530 N.E.2d 453 (1988) (in grand jury investigation of accountant's clients, neither tax records given to accountant in order to prepare clients' tax returns nor accountant's own work papers used in preparing returns were confidential within meaning of statutory accountant-client privilege, where information was provided to accountant with understanding that there could be disclosure to third party, state, or other parties).
McNair v. Eighth Judicial Dist. Court In and For County of Clark, 110 Nev. 1285, 885 P.2d 576 (1994) (in effort to satisfy judgment against debtors, accountant for debtors would be required to answer questions regarding clients, which did not amount to confidential communications, where accountant failed to establish that requested information came within privilege; tax returns prepared by accountant were also discoverable as relevant in identifying assets and collecting judgment).

72 See, e.g., Fla. Stat. Ann. § 90.5055(1)(a) ("An 'accountant' is a certified public accountant or a public accountant.").
Nev. Rev. Stat. §§ 49.125 to 49.205 (" 'Accountant' means a person certified or registered as a public accountant under chapter 628 of NRS who holds a live permit.").
People v. Simon, 174 Mich. App. 649, 436 N.W.2d 695 (1989) (questioning of defendant's accountant did not breach statutory accountant-client privilege, where privilege was limited to communications made to CPA or CPA's employee, and no evidence existed that defendant's accountant was either).

73 See, e.g., Fla. Stat. Ann. § 90.5055(1)(b) ("A 'client' is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults an accountant with the purpose of obtaining accounting services.").
Idaho R. Evid. 515(a):

> (1) Client. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional accounting services by an accountant, or who consults an accountant with a view to obtaining professional accounting services from the accountant.

74 See, e.g., Fla. Stat. Ann. § 90.5055(2):

> A client has a privilege to refuse to disclose, and to prevent any other person from

> disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.

Md. Code Ann., Cts. & Jud. Proc. § 9-110(b):

> Privilege — In general. — Except as provided in subsections (c) and (d) of this section or unless expressly permitted by a client or the personal representative or successor in interest of the client, a licensed certified public accountant or firm may not disclose:
>
> (1) The contents of any communication made to the licensed certified public accountant or firm by a client who employs the licensed certified public accountant or firm to audit, examine, or report on any account, book, record, or statement of the client;
>
> (2) Any information that the licensed certified public accountant or firm, in rendering professional service, derives from:
>
> (i) A client who employs the licensed certified public accountant or firm; or
>
> (ii) The material of the client.

75 See, e.g., Fla. Stat. Ann. § 90.5055(3):

> The privilege may be claimed by: (a) The client. (b) A guardian or conservator of the client. (c) The personal representative of a deceased client. (d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence. (e) The accountant, but only on behalf of the client. The accountant's authority to claim the privilege is presumed in the absence of contrary evidence.

Idaho R. Evid. 515(c):

> Who May Claim the Privilege. The privilege may be claimed by the client or for the client through the client's lawyer, accountant, guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the accountant or the accountant's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the accountant or the accountant's representative to do so is presumed in the absence of evidence to the contrary.

76 See, e.g., Fla. Stat. Ann. § 90.5055(4) ("There is no accountant-client privilege under this section when: … (b) A communication is relevant to an issue of breach of duty by the accountant to his client or by the client to his accountant.").
Idaho R. Evid. 515(d) ("There is no privilege under this rule: … (3) Breach of Duty by an Accountant or Client. As to a communication relevant to an issue of breach of duty by the accountant to the client or by the client to the accountant.")

[77] See, e.g., Fla. Stat. Ann. § 90.5055(4) ("There is no accountant-client privilege under this section when: (a) The services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or should have known was a crime or fraud.").
Idaho R. Evid. 515(d):

> Exceptions. There is no privilege under this rule:
>
> (1) Furtherance of Crime or Fraud. If the services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

In re Hall County Grand Jury Proceedings, 175 Ga. App. 349, 333 S.E.2d 389 (1985) (prima facie showing by grand jury that testimony it sought from accountant was within exception to accountant-client privilege for communications made in furtherance of scheme to commit crime of fraud).

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399 So.2d 1079
District Court of Appeal of Florida, First District.

Ike FARHUD, Petitioner,
v.
The Honorable Harold R. CLARK, Circuit Court Judge, Division A, Duval County, Florida, Respondent.

No. AB-423.
|
June 22, 1981.

Defendant taxpayer petitioned for writ of certiorari to review order of the Circuit Court, Duval County, which affirmed county court conviction of defendant on charge of intentional evasion of payment of sales tax following his plea of nolo contendere. The District Court of Appeal, held that one-year statute of limitation for prosecution of second-degree misdemeanor barred prosecution of defendant.

Petition granted and cause remanded with instructions to vacate judgment and sentence imposed.

Attorneys and Law Firms

***1080** Louis O. Frost, Jr., Public Defender, William P. White, Chief Asst. Public Defender, Jacksonville, for petitioner.

Jim Smith, Atty. Gen., Lawrence A. Kaden, Asst. Atty. Gen., Tallahassee, for respondent.

Opinion

PER CURIAM.

This petition for writ of certiorari seeks review of an order of the circuit court entered in its appellate capacity. The order for which review is sought affirmed the county court conviction of petitioner on a charge of intentional evasion of payment of sales tax, Section 212.12(2), Florida Statutes (1975), following his plea of nolo contendere which reserved the right to appeal the denial of a motion to dismiss premised upon petitioner's assertion that the statute of limitations had expired prior to the date prosecution was commenced. Since we find a material fundamental error in application of the law which constitutes a departure from the essential requirements of law, we grant the petition for writ of certiorari.

An information was filed January 26, 1979, charging petitioner with evading payment of sales tax. Between August 1, 1973, and July 31, 1976, petitioner, owner of a food market, filed monthly state sales tax returns. August 27, 1976, following an audit, the Department of Revenue tendered a notice of assessment against petitioner alleging unpaid taxes, delinquent penalties and interest for the period August 1, 1973, through July 31, 1976. Petitioner instituted Chapter 120 proceedings to contest the assessment. On January 3, 1978, a proposed order was promulgated and on February 7, 1978, the order assessing $2,238.92 became final. In his motion to dismiss, petitioner contended the statute of limitations had expired prior to January 26, 1979. Following the county court's denial of the motion and petitioner's plea of nolo contendere, petitioner appealed his conviction to the circuit court. The circuit court affirmed the conviction adopting the state's argument that the statute of limitations for the offense did not commence until the time had passed for appeal from the order of final assessment entered by the Department of Revenue, March 9, 1978.

The offense proscribed by Section 212.12(2) is a misdemeanor of the second degree. Since no specific limitation period is set out in Chapter 212 for this offense, the general time limitations are applicable.[1] Section 775.15, Florida Statutes (1975), provides:

> ***1081** (2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:
>
> (d) A prosecution for a misdemeanor of the second degree ... must be commenced within 1 year after it is committed.
>
> (4) An offense is committed either when every element has occurred or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

[1] To determine whether the one year limitation period had expired prior to prosecution, it is necessary to resolve the issue of when the offense of evasion of payment of sales tax is committed. Taxes levied upon sales of tangible personal property are due and payable monthly on the first day of each month. s 212.11(1), Fla.Stat. (1975). Dealers must file a return with the department on or before the twentieth day of the month showing the

gross sales taxable during the preceding calendar month. Id. Sales taxes for each month are due to the department on the first day of the succeeding month and are considered delinquent on the twenty-first day of such month. s 212.15(2), Fla.Stat. (1975). We conclude the offense of evasion of payment of sales tax was committed when petitioner was required to pay the sales tax, i. e., no later than the twenty-first day of the month succeeding the month for which the taxes were collected.

Our conclusion that the crime was committed at the time petitioner failed to report or remit his taxes as they became due and owing is consistent with federal law regarding the statute of limitations for prosecution for filing a false return and is buttressed by decisions from other jurisdictions. It has been held that the period of limitations prescribed by 26 U.S.C.A., s 6531, for a criminal prosecution under 26 U.S.C.A., s 7201, for the offense of attempting to evade or defeat income tax by filing a false income tax return, commences to run from the date of actual filing of the return, where extensions of time have been granted, or from the due date, whichever is later. United States v. Habig, 390 U.S. 222, 88 S.Ct. 926, 19 L.Ed.2d 1055 (1968); United States v. Silverman, 449 F.2d 1341 (2nd Cir. 1971), cert. denied, 405 U.S. 918, 92 S.Ct. 943, 30 L.Ed.2d 788 (1972). See also, United States v. Zudick, 523 F.2d 848 (3rd Cir. 1975). In Bunge v. State, 149 Ga.App. 712, 256 S.E.2d 23 (Ga.1979), the court held that liability for a willful failure to pay sales tax in violation at the Georgia Retailers' and Consumers' Sales and Use Tax Act attached at the time Bunge failed to report or remit his taxes at the time such taxes were due. In reaching this conclusion, the court rejected the assertion that liability for the payment of delinquent sales taxes did not attach until notice and demand was given by the tax commissioner or his delegate. Similarly, in Commonwealth v. Bender, 251 Pa.Super. 454, 380 A.2d 868 (1977), the court held that the offense of willful failure or refusal to remit sales tax was completed the day following the date payment of the tax was due.

[2] [3] Respondent asserts that by seeking review of the alleged deficiency under Chapter 120, petitioner basically sought an extension of time before paying the tax due. We reject this position. Section 212.12(5), Florida Statutes (1975) authorizes the department, upon written request, to extend for up to thirty days the time for making returns. No such extension was granted here. Further, petitioner was not charged with attempting to evade payment of the deficiency assessment, but rather was charged due to his failure to remit taxes when due. We similarly reject respondent's assertion that the pendency of administrative proceedings challenging the assessment precluded criminal prosecution. No provision in Chapter 120 or in Chapter 212 prevents a criminal prosecution during disposition of administrative remedies.

***1082** Accordingly, we find that the statute of limitations had expired prior to commencement of prosecution herein. The circuit court departed from the essential requirements of law by affirming petitioner's conviction when the county court had no jurisdiction of the matter due to expiration of the statute of limitations. The petition for writ of certiorari is granted and the cause is remanded to the circuit court with instructions to vacate the judgment and sentence imposed by the county court.

McCORD, ROBERT P. SMITH, Jr., and ERVIN, JJ., concur.

All Citations

399 So.2d 1079

Footnotes

1 s 212.15(3), Fla.Stat. (1979), provides that prosecution of the misdemeanor of theft of state funds, s 212.15(2), Fla.Stat. (1979), shall be commenced no later than two years from the date of the offense. However, this section did not become effective until July 1, 1979. Ch. 79-359, s 5, Laws of Florida.

171 So.3d 234 (Mem)
District Court of Appeal of Florida,
Fourth District.

PRIME GROUP, LLC, and its wholly owned affiliates and subsidiaries, Sheridan 46 Investment Group, LLC, Prime Group International, LLC, Prime Design Associates, LLC, Prime Auto Group, LLC, Prime Gencore, LLC, Prime Investors & Developers, LLC, d/b/a Prime Homebuilders and its wholly owned affiliates and subsidiaries, Portofino Builders South, Inc., Portofino Vista Builders, LLC, Prime Enterprises, LLC, Prime Commercial Developers, LLC, Prime Holdings Group, LLC, Prime Holdings Group II, LLC, Prime Holdings Group III, LLC, Prime Holdings Group V, LLC, Prime Homes at Portofino Meadows, LLC, Prime Homes at Sheridan Plaza, LLC, Prime Marketings and Sales, LLC, Prime General, LLC, Prime Homes of Florida, LLC, Prime Homebuilders, Inc., Prime Homes at Portofino Professional Center, LLC, Villa Portofino East Builders, Inc., The Falls of Portofino Builders, LLC, Villa Portofino East Commercial Builders, Inc., Villa Portofino West Commercial Builders, Inc., Portofino Village Builders, LLC, Portofino Village Commercial Builders, Inc., Portofino Cove Builders, Inc., Portofino Landings Builders, Inc., Portofino Landings Commercial Builders, LLC, Portofino Springs Builders, LLC, Portofino Preserve Builders, LLC, Portofino Vineyards Builders, LLC, Prime Homes at Portofino Plaza, LLC, Prime Homes at Portofino Plaza Retail, LLC, Universal Capital Fund, LLC, Prime Homes, Inc., Petitioners,
v.
Jeannette ABBO, Respondent.

No. 4D15–1688.
|
Aug. 12, 2015.

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dale C. Cohen, Judge; L.T. Case No. FMCE 07–8949 37/93.

Attorneys and Law Firms

Richard J. Sarafan and Michael L. Schuster of Genovese Joblove & Battista, P.A., Miami, for petitioners.

Terrence P. O'Connor of Morgan, Carratt and O'Connor, P.A., Fort Lauderdale, for respondent.

Opinion

PER CURIAM.

We grant the petition for writ of certiorari, quash the April 29, 2015 order of the trial court, and remand for further proceedings. The challenged order found that petitioners had waived accountant-client privilege[1] at an earlier, September 16, 2014 hearing. Such finding is facially erroneous because, at the time of the September 16, 2014 hearing, the accounting firm had not yet provided the list of documents to which petitioners could direct an assertion of privilege. The result of the April 29, 2015 order was that the trial court found a waiver of the accountant-client privilege without first affording petitioners notice or an opportunity to object.

There are no transcripts of either hearing as each hearing was held on a "uniform motion calendar" where the introduction of evidence is not permitted. *D'Amato v. D'Amato,* 848 So.2d 462, 463–64 (Fla. 4th DCA 2003). Nonetheless, we may consider the propriety of the April 29, 2015 order because the error in finding a waiver of an ***236** assertion of privilege without notice or evidentiary basis is apparent on the face of the order. *Young v. Levy,* 140 So.3d 1109, 1111–12 (Fla. 4th DCA 2014); *Celebrity Cruises, Inc. v. Fernandes,* 149 So.3d 744, 749 n. 3 (Fla. 3d DCA 2014). The trial court's April 29, 2015 order was erroneous on its face because the court determined that petitioners waived the accountant-client privilege without conducting an evidentiary hearing either on that date or at the September 16, 2014 hearing. *Eight Hundred, Inc. v. Fla. Dep't of Revenue,* 837 So.2d 574, 576 (Fla. 1st DCA 2003).

Petition granted; order quashed; and case remanded for further proceedings consistent with this opinion.

WARNER, STEVENSON and GERBER, JJ., concur.

All Citations

171 So.3d 234 (Mem), 40 Fla. L. Weekly D1878

Footnotes

1 Section 90.5055, Florida Statutes, entitled "Accountant-client privilege," states in relevant part that

> (2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.

§ 90.5055(2), Fla. Stat. (2015).

273 So.2d 74
Supreme Court of Florida.

Samuel F. SPARKS, Petitioner,
v.
STATE of Florida, Respondent.

No. 42039
|
Feb. 7, 1973.

Defendant petitioned for writ of certiorari to review decision of the District Court of Appeal, Fourth District, 256 So.2d 537, affirming in part conviction for securities law violations. The Supreme Court, Adkins, J., held that indictment or information alleging the commission of an offense 'on or about' a stated date is not fatally vague in the absence of a showing that time is material to the crime charged or that the accused is prejudiced by the use of the phrase.

Writ discharged.

Attorneys and Law Firms

***75** James M. Russ and Michael F. Cycmanick, Orlando, for petitioner.

Robert L. Shevin, Atty. Gen. and Andrew I. Friedrich, Asst. Atty. Gen., for respondent.

Opinion

ADKINS, Justice.

By petition for writ of certiorari, we have for review a decision of the District Court of Appeal, Fourth District (Sparks v. State, 256 So.2d 537), which allegedly conflicts with several prior decisions of this Court and the other District Courts of the State on the same point of law. Fla.Const., art. V, s 4, F.S.A. We have considered the cases cited for conflict and have determined that we have jurisdiction.

Petitioner, Samuel F. Sparks, was convicted on a charge of violating the State securities laws. The conviction was affirmed on appeal. Sparks challenges the validity of the direct information which charged him with selling the securities in violation of applicable law 'on Or about the 15th day of May, 1967.' A standard form was used for the information with the words 'or about' added. Sparks challenges the use of 'or about,' contending that the date of the commission of the crime with which he is charged is not specifically stated.

[1] Florida Rules of Criminal Procedure, Rule 3.140(d)(3), 33 F.S.A., requires that the information state 'as definitely as possible' the time of the commission of the crime. This Court has held that 'at or about' is not specific enough to satisfy the common law rule requiring a definite date (Morgan v. State, 13 Fla. 671 (1869-1871) Term); Straughter v. State, 83 Fla. 683, 92 So. 569 (1922); Pickeron v. State, 94 Fla. 268, 113 So. 707 (1927); and Skipper v. State, 114 Fla. 312, 153 So. 853 (1934)), and that the allegation of the time of the offense is a matter of substance, and not of form. Dickson v. State, 20 Fla. 800 (1884); Pickeron v. State, Supra, and Skipper v. State, Supra. The reason for requiring a definite date is to show that the prosecution is not barred by the statute of limitations. Morgan v. State, 51 Fla. 76, 40 So. 828 (1906).

[2] [3] However, it is not necessary to state the exact date of the offense if that date is not known; it is acceptable to state that the commission of the crime occurred within set limits if those limits are specifically stated. Overstreet v. Whiddon, 130 Fla. 231, 177 So. 701 (1937). It is not even essential that the date proved at trial be the date stated in the indictment or information. Hunter v. State, 85 Fla. 91, 95 So. 115 (1923), and Straughter v. State, Supra. While the bar against the use of 'on or about' continues to be applied within the State (State v. Chapman, 240 So.2d 491 (Fla.App.3d, 1970)), the exceptions have made the ironclad bar meaningless as a protection of the accused, and CrPR, Rule 3.140(d)(3), has erased the common law requirement of a definite date.

The courts of many states have receded from the bar on the use of 'on or about' on the basis of statutory construction. State v. Harp, 31 Kan. 496, 3 P. 432 (1884); Rema v. State, 52 Neb. 375, 72 N.W. 474 (1897); State v. McDonald, 16 S.D. 78, 91 N.W. 447 (1902); Brunner v. State, 154 Md. 655, 141 A. 346 (Ct.App.1928); State v. Forler, 38 Wash.2d 39, 227 P.2d 727 (1951); People v. LaMarca, 3 N.Y.2d 452, 165 N.Y.S.2d 753, 144 N.E.2d 420 (Ct.App.1957); and State v. McKeehan, 91 Idaho 808, 430 P.2d 886 (1967).

The courts of many other states have also receded from the old rule, without relying on statutory authority. The courts of Connecticut and Louisiana have chosen to treat the words 'or about' as surplusage. Rawson v. State, 19 Conn. 292 (1848), and State v. Alford, 206 La. 100, 18 So.2d 666 (1944). Alabama found the words to be

synonymous with 'approximately,' and therefore acceptable. Shiflett v. State, 37 Ala.App. 300, 67 So.2d 284 (1953). Arizona and Alaska have relied upon their rules of criminal procedure to discard the common ***76** law rule. State v. Martin, 2 Ariz.App. 510, 410 P.2d 132 (1966), and Selman v. State, 411 P.2d 217 (Alaska 1966).

However, the common law rule against the use of 'on or about' in stating the date of the offense in an indictment or information still applies in some states in those cases where time is material to the crime charged (State v. Lee, 202 Or. 592, 276 P.2d 946 (1954); State v. McDonald, Supra; and People v. LaMarca, Supra), or where time goes to the essence of the crime. Bell v. State, 217 Ind. 323, 27 N.E.2d 362 (1940); State v. District Court, 125 Mont. 481, 240 P.2d 854 (1952); State v. Pickles, 46 N.J. 542, 218 A.2d 609 (1966); Brunner v. State, Supra; and Rema v. State, Supra.

[4] [5] [6] We hold that an indictment or information alleging the commission of an offense 'on or about' a stated date is not fatally vague in the absence of a showing that time is material to the crime charged or that the accused is prejudiced by the use of the phrase. Because of the availability of a motion for statement of particulars and our discovery proceedings, defendant is no longer in the position of having to prepare a defense just from the four corners of the indictment or information. The reason for the common law rule having ceased, the rule is discarded and previous holdings based upon the common law rule are overruled.

The writ of certiorari previously issued is discharged.

It is so ordered.

ROBERTS, Acting C.J., and BOYD, McCAIN and DEKLE, JJ., concur.

All Citations

273 So.2d 74

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780 So.2d 214
District Court of Appeal of Florida,
Fifth District.

STATE of Florida, Appellant,
v.
Deborah Dee WEINBERG, Appellee.

No. 5D00-1339.
|
Feb. 9, 2001.
|
Rehearing Denied March 19, 2001.

Defendant was charged with obtaining a controlled substance by fraud. The Circuit Court, Hernando County, Richard Tombrink, Jr., J., granted the motion to dismiss information. State appealed. The District Court of Appeal, Cobb, J., held that investigating officer was not a material witness and thus information could not be based solely on officer's affidavit.

Affirmed.

Attorneys and Law Firms

***215** Robert A. Butterworth, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellant.

A.R. Mander, III of Greenfelder, Mander, Murphy, Dwyer & Morris, Dade City, for Appellee.

Opinion

COBB, J.

The issue here is whether the trial court erred in dismissing a one count information filed against Deborah Weinberg for obtaining a controlled substance by fraud. Weinberg, in a motion to dismiss, maintained that an information had to be based upon the sworn testimony of a material witness and this was not satisfied by the sworn affidavit of the investigating officer, Detective Clifton, since Clifton was not a material witness. The state's response was that Detective Clifton had spoken with a staff person from the doctor's office.

The assistant state attorney testified that at the time she signed the information she had received the sworn probable cause affidavit from Detective Clifton, a police report, an arrest warrant signed by another judge, and finally, that she may have spoken directly with Detective Clifton but could not remember.[1] The trial court below framed the issue as whether Detective Clifton was a material witness and subsequently concluded he was not. Specifically, the court defined a material witness as a person who can give testimony no one else, or at least very few, can give.

The state argues it is entitled to rely upon the sworn affidavit of the law enforcement officer when filing a felony information. Fla.R.Crim.P. 3.140(g). Additionally, the state claims *State v. Hartung,* 543 So.2d 236 (Fla. 5th DCA), *rev. denied,* 551 So.2d 461 (Fla.1989) is "on all fours with the issue in this case." *Hartung* stands for the proposition that an assistant state attorney who signs an information need not personally administer oath to or personally question, see and hear the testimony of the material witness. The testimony of a material witness may be sworn to before anyone authorized to administer an oath, and then transmitted to the state. The assistant state attorney can then "properly certify that he has received testimony under oath from the material witness...." *Hartung* at 237.

In the instant case, Detective Clifton collected evidence in the form of an altered prescription which the doctor's office verbally verified had been altered. The state maintains that this makes Detective Clifton a "material witness." It is clear, however, that while an investigating officer may be a material witness in some situations, this would not be the case here since the pharmacist and doctor would be the ***216** material witnesses and there was no sworn affidavit from either. The altered prescription is not something that can be interpreted by Detective Clifton and, as such, she has no importance except for possibly establishing a chain of evidence.

Accordingly, we affirm the trial court's dismissal of the information in this case and hold that Detective Clifton was not a material witness and the state should not have relied solely on her affidavit when signing the information.

AFFIRMED.

SAWAYA and ORFINGER, R.B., JJ., concur.

All Citations

780 So.2d 214, 26 Fla. L. Weekly D440

Footnotes

1 While the state only appeals the trial court's order granting Weinberg's motion to dismiss, we caution the lower court that efforts by defense counsel to subpoena state attorneys and inquire into oral communications, sworn or otherwise, between them and a state witness should normally be rejected. *See Olson v. State,* 705 So.2d 687 (Fla. 5th DCA 1998). We also note that the motion to dismiss was untimely pursuant to Florida Rule of Criminal Procedure 3.140(g), but that point has not been raised on appeal.

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549 So.2d 649
Supreme Court of Florida.

Raymond Harold TINGLEY, Petitioner,
v.
STATE of Florida, Respondent.

No. 69651.
|
Sept. 14, 1989.
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Rehearing Denied Oct. 26, 1989.

Defendant was convicted in the Circuit Court, Brevard County, John Antoon, II, J., of four counts of sexual battery on child, and he appealed. The District Court of Appeal, 495 So.2d 1181, affirmed, and defendant petitioned for review. The Supreme Court, Overton, J., held that time was not substantive part of charging document and that there could be variance between dates proved at trial and those alleged in charging document.

Decision of District Court of Appeal approved.

Kogan, J., filed dissenting opinion, in which Shaw and Barkett, JJ., joined.

Attorneys and Law Firms

***649** James B. Gibson, Public Defender and Michael S. Becker, Asst. Public Defender, Seventh Judicial Circuit, Daytona Beach, for petitioner.

Robert A. Butterworth, Atty. Gen. and Richard B. Martell, Asst. Atty. Gen., Daytona Beach, for respondent.

Opinion

OVERTON, Justice.

This is a petition to review *Tingley v. State,* 495 So.2d 1181 (Fla. 5th DCA 1986), in which the district court held that the state, by a bill of particulars, could change the time period in which an alleged sexual battery occurred to a period prior to the time stated in the indictment. We find conflict with *Pickeron v. State,* 94 Fla. 268, 113 So. 707 (1927); *Dickson v. State,* 20 Fla. 800 (1884); *Phelan v. State,* 448 So.2d 1256 (Fla. 4th DCA 1984); *Perez v. State,* 371 So.2d 714 (Fla. 2d DCA 1979); and *Russell v. State,* 349 So.2d 1224 (Fla. 2d DCA 1977). We have jurisdiction. Art V, § 3(b)(3), Fla. Const. For the reasons expressed below, we approve the district court's decision. We hold that time is not a substantive part of a charging document and that our present discovery rules eliminate the need for the specificity required by prior case law.

The relevant facts reflect that a grand jury indicted Raymond Harold Tingley on four counts of sexual battery of a minor, contrary to the provisions of section 794.011(2), Florida Statutes (1983). The indictment charged Tingley with four sexual batteries against two different young girls, and it set forth that the incidents occurred between April 1, 1982, and September 30, 1982. In response to a defense motion for a bill of particulars, the state filed the following responses: (1) the offenses occurred between June 1, 1983, and August 1, 1983; (2) the crimes occurred between April 1, 1982, and September 20, 1982; (3) the crimes occurred between September 1, 1981, and September 20, 1982; and (4) the crimes occurred between September 1, 1981, and March 1, 1982. The final time period was in response to a later defense motion for a bill of particulars.

At trial, the evidence established that the children were originally unclear as to when the incidents occurred, primarily due to their youth and a three-year time lapse between the occurrence of the crimes and the children's complaints. Trial testimony eventually placed the crimes as occurring in October, November, and December of 1981, within the time frame of the last ***650** amendment to the bill of particulars. Tingley was found guilty and sentenced to concurrent life prison terms with a minimum of twenty-five years without parole.

On appeal, the Fifth District Court of Appeal affirmed, rejecting Tingley's contention that the last bill of particulars was an impermissible amendment which voided the indictment. The district court emphasized that Tingley "does not argue that the amendment occurred too close in time to the trial to prevent him from being able to effectively present a defense, or that it delayed, or hampered his defense at trial." 495 So.2d at 1182. The district court addressed the argument that time must be specifically alleged in an indictment and the question of whether time was a substantive element of this offense, concluding:

> The better-reasoned rule appears to us to be that unless time is a specific element of a certain crime, it is not a substantive, essential part of the indictment. A conviction may be obtained for a crime even though there is a variance between

> the dates proved at trial and those alleged in the indictment, so long as the indictment and proofs show the crime was committed before the return date of the indictment and within any applicable statute of limitations time period.

Tingley, 495 So.2d at 1183 (footnotes omitted) (citing 3 *Wharton's Criminal Procedure* § 273 (12th ed. 1975); *Hunter v. State,* 85 Fla. 91, 95 So. 115 (1923); *cf. State v. Beamon,* 298 So.2d 376 (Fla.1974), *cert. denied,* 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975); *Straughter v. State,* 83 Fla. 683, 92 So. 569 (1922)). We agree with the district court's decision. Although time is an important part of a charging document, it is not a substantive element of this offense. It is extremely important to note that, under our present rules, Tingley was afforded a full range of discovery, and thus was neither surprised nor hampered in his defense.

A number of jurisdictions hold that time, although it is an important part of an indictment for sexual battery offenses, is not generally considered a substantive part of the charging document. *See State v. Palmer,* 306 S.W.2d 441 (Mo.1957); *Martinez v. State,* 77 Nev. 184, 360 P.2d 836 (1961); *State v. Sysinger,* 25 S.D. 110, 125 N.W. 879 (1910); *Faulkner v. State,* 390 S.W.2d 754 (Tex.Crim.App.1965); *Lear v. Commonwealth,* 195 Va. 187, 77 S.E.2d 424 (1953). Consequently, such a change does not require grand jury action. *People v. Crosby,* 58 Cal.2d 713, 375 P.2d 839, 25 Cal.Rptr. 847 (1962); *State v. Blendt,* 49 Del. 528, 120 A.2d 321 (Super.Ct.1956); *State v. Mottram,* 155 Me. 394, 156 A.2d 383 (1959); *Saucier v. State,* 95 Miss. 226, 48 So. 840 (1909). Under this rule, as long as a defendant is neither surprised nor hampered in preparing his defense, there can be a variance between the dates proved at trial and those alleged in an indictment or information. Pursuant to this rule, it must be shown that the crime was committed before the return date of the indictment or information and within the applicable statute of limitations. *People v. McGowan,* 415 Ill. 375, 114 N.E.2d 407 (1953); *State v. Thomas,* 177 Kan. 230, 277 P.2d 577 (1954); *State v. Hollis,* 273 P.2d 459 (Okla.Crim.App.1954). We have previously adopted this rule by implication. *See Sparks v. State,* 273 So.2d 74 (Fla.1973); *Hunter v. State,* 85 Fla. 91, 95 So. 115 (1923). Further, we have held that the exact date of the offense need not be alleged. *See Lightbourne v. State,* 438 So.2d 380 (Fla.1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); *Sparks v. State,* 273 So.2d 74 (Fla.1973); *Hunter v. State,* 85 Fla. 91, 95 So. 115 (1923); *see also State v. Belton,* 468 So.2d 495 (Fla. 5th DCA 1985); *State v. Bandi,* 338 So.2d 75 (Fla. 4th DCA 1976), *cert. denied,* 344 So.2d 323 (Fla.1977).

The common law principle expressed in *Pickeron v. State,* 94 Fla. 268, 113 So. 707 (1927), and *Dickson v. State,* 20 Fla. 800 (1884), that times and dates within an indictment or information could not be modified by amendment, was adopted to assure fair notice of the charges under an indictment or information at a time when there was no discovery. Times have changed. As this Court explained in *Sparks v. State,* 273 So.2d 74 (Fla.1973), our discovery rules have eliminated the necessity for a number ***651** of prior common law rules developed to assure a fair trial when no discovery existed. The fact that Tingley claims neither that he was surprised nor that he was hampered in preparing his defense demonstrates our discovery rules' effectiveness. Defense counsel took thorough depositions of the victims prior to trial. Tingley merely seeks the benefit of the old rules when the rationale for their existence has been eliminated. As this Court explained in *State v. Waters,* 436 So.2d 66, 69 (Fla.1983):

> The early cases establishing the requirement of detailed specificity in indictments and informations were decided long before this Court adopted broad reciprocal discovery procedures. Our present discovery rules provide defendants with a much better means for avoiding surprise or embarrassment in the preparation of a defense than just the terms utilized in a charging document. Further, trial courts have the authority to remedy a lack of definiteness by granting a defendant's motion for a statement of particulars.

In summary, we conclude that time is not ordinarily a substantive part of an indictment or information and there may be a variance between the dates proved at trial and those alleged in the indictment or information as long as: (1) the crime was committed before the return date of the indictment; (2) the crime was committed within the applicable statute of limitations; and (3) the defendant has been neither surprised nor hampered in preparing his defense.

We approve the decision of the district court of appeal in the instant case.

It is so ordered.

EHRLICH, C.J., and McDONALD and GRIMES, JJ., concur.

KOGAN, J., dissents with an opinion, in which SHAW and BARKETT, JJ., concur.

KOGAN, Justice, dissenting.

I respectfully dissent.

The issue presented concerns the nature of the charging document used in this case, an indictment by a grand jury. At the conclusion of its proceedings, the grand jury decides whether there is sufficient evidence to justify charging an individual with a particular crime. In a situation in which a series of similar crimes are committed against a victim by the same defendant over a period of time, as in this case, the grand jury could conclude that the evidence is not sufficient to sustain an indictment for a particular crime, on a particular date, but finds sufficient evidence exists to charge the defendant with committing another crime on another date. In other words, the grand jury may well have considered evidence that one or more of these offenses took place at a time outside the dates alleged in the indictment, but concluded that the evidence was insufficient to support an indictment for those crimes. However, the grand jury may determine that other similar crimes occurred during the dates alleged in the indictment and thus charges the defendant accordingly. When the state changes the dates in the indictment by a statement of particulars it may be charging the defendant with a crime that the grand jury has found was not indictable because of insufficient evidence, thus thwarting the intent of the grand jury.

The state receives the indictment from the grand jury and is limited by the findings made by the grand jury. The prosecution does not have the authority to amend an indictment. If a defendant is charged by information, which is prepared by the state attorney's office, the state may freely amend that information. However, the grand jury is a separate, independent entity, not an arm of the state attorney's office. Only the grand jury can amend its indictment or issue a superceding indictment.

In this case, by amending the indictment with a statement of particulars the state has exceeded its powers. The dates alleged in the statement of particulars, outside the scope of the indictment, may refer to acts that the grand jury found were not indictable because of a lack of evidence. The state's use of the statement of particulars to amend the indictment thwarts the will of the grand jury.

***652** The majority argues that our present reciprocal discovery rules eliminate the danger of surprise or embarrassment to the defendant resulting from the state's departure from the facts stated in the grand jury indictment. Although these discovery rules provide a means of clarifying any confusion within the charging document, they do not give the state attorney's office the power to invade that which is within the province of the grand jury. If the state believes that the indictment is incorrect, it may ask the grand jury to issue a superceding indictment. In essence, when the charging document is an indictment, only the grand jury has the power to amend the document, regardless of the discovery provisions available to the defense or the state.

Dissenting from the majority opinion in the district court, Judge Dauksch correctly concluded:

> The state obtained a conviction for crimes which were not alleged in the indictment, i.e. convictions for sexual batteries on dates other than the dates alleged in the indictment. There is no authority for a state attorney to amend an indictment in such a manner as to go outside the crimes charged in the indictment. Only a grand jury has the authority to alter an indictment. *Pickeron v. State,* 94 Fla. 268, 113 So. 707 (1927); *Dickson v. State,* 20 Fla. 800 (1884); *Phelan v. State,* 448 So.2d 1256 (Fla. 4th DCA 1984); *Perez v. State,* 371 So.2d 714 (Fla. 2d DCA 1979); *Russell v. State,* 349 So.2d 1224 (Fla. 2d DCA 1977).

Tingley, 495 So.2d at 1183 (Dauksch, J., dissenting). As Judge Dauksch further points out, a statement of particulars is not a vehicle by which the state can change the times alleged in the indictment.

Accordingly, I would quash the decision of the Fifth District Court of Appeal.

SHAW and BARKETT, JJ., concur.

All Citations

549 So.2d 649, 14 Fla. L. Weekly 445

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United States Code Annotated
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 77. Miscellaneous Provisions (Refs & Annos)

26 U.S.C.A. § 7525, I.R.C. §□7525

§ 7525. Confidentiality privileges relating to taxpayer communications

Effective: October 22, 2004

Currentness

(a) Uniform application to taxpayer communications with federally authorized practitioners.--

(1) General rule.--With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

(2) Limitations.--Paragraph (1) may only be asserted in--

(A) any noncriminal tax matter before the Internal Revenue Service; and

(B) any noncriminal tax proceeding in Federal court brought by or against the United States.

(3) Definitions.--For purposes of this subsection--

(A) Federally authorized tax practitioner.--The term "federally authorized tax practitioner" means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.

(B) Tax advice.--The term "tax advice" means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A).

(b) Section not to apply to communications regarding tax shelters.--The privilege under subsection (a) shall not apply to any written communication which is--

(1) between a federally authorized tax practitioner and--

(A) any person,

(B) any director, officer, employee, agent, or representative of the person, or

(C) any other person holding a capital or profits interest in the person, and

(2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662(d)(2)(C)(ii)).

CREDIT(S)

(Added Pub.L. 105-206, Title III, § 3411(a), July 22, 1998, 112 Stat. 750; amended Pub.L. 108-357, Title VIII, § 813(a), Oct. 22, 2004, 118 Stat. 1581.)

Notes of Decisions (30)

26 U.S.C.A. § 7525, 26 USCA § 7525
Current through P.L. 115-30. Also includes P.L. 115-32. Title 26 current through 115-34.

End of Document

West's Florida Statutes Annotated
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)

West's F.S.A. § 90.5055

90.5055. Accountant-client privilege

Currentness

(1) For purposes of this section:

(a) An "accountant" is a certified public accountant or a public accountant.

(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults an accountant with the purpose of obtaining accounting services.

(c) A communication between an accountant and the accountant's client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of accounting services to the client.

2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The accountant, but only on behalf of the client. The accountant's authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no accountant-client privilege under this section when:

(a) The services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or should have known was a crime or fraud.

(b) A communication is relevant to an issue of breach of duty by the accountant to the accountant's client or by the client to his or her accountant.

(c) A communication is relevant to a matter of common interest between two or more clients, if the communication was made by any of them to an accountant retained or consulted in common when offered in a civil action between the clients.

Credits

Laws 1978, c. 78-361, § 12. Amended by Laws 1995, c. 95-147, § 478, eff. July 10, 1995.

Editors' Notes

COMMENTARY ON 1978 AMENDMENT

This amendment provides an accountant-client privilege. Although a similar privilege was recognized prior to the Codes's adoption, Fla.Stat. § 473.131 (1975), as originally enacted, the Code did not recognize a separate accountant-client privilege.

The privilege is drafted in a similar manner to the other privileges recognized in the Code. The privilege attaches to confidential communications between a client and a certified public accountant or public accountant, Dees v. Scott, 347 So.2d 475 (Fla. 1 D.C.A.1977), and to other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice. The privilege belongs to the client, but may be claimed by

the accountant in the client's absence.

The privilege may be waived by voluntary disclosure, see Section 90.507; Savino v. Luciao, 92 So.2d 817 (Fla.1957). The privilege will not be recognized when the accountant's services were sought to aid in the commission or planning of what the client knew or should have known was a crime or fraud, when the communication is relevant to an issue of breach of duty by the accountant to the client, e.g., malpractice, or by the client to the accountant, e.g., nonpayment of professional fees, and when two persons are adverse parties in a civil suit and the communication was made by one of them when they both had consulted an accountant concerning a matter of common interest. The exception in Subsection (4)(c) applies even if the communication was made outside the presence of one of the clients. For example, if two partners communicate with an accountant about partnership matters, in a civil action between the partners the communications made by one partner to the accountant, even if made when the other partner was not present, are not privileged. These exceptions are similar to those recognized under the lawyer client privilege, see Section 90.502(4).

The Florida accountant-client privilege is not recognized in federal tax cases. See Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. denied 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375 (1953).

Notes of Decisions (29)

West's F. S. A. § 90.5055, FL ST § 90.5055
Current with chapters from the 2017 First Regular Session of the 25th Legislature in effect through May 23, 2017

End of Document

West's F.S.A. § 213.758

213.758. Transfer of tax liabilities

Effective: June 11, 2015

Currentness

(1) As used in this section, the term:

(a) "Business" means any activity regularly engaged in by any person, or caused to be engaged in by any person, for the purpose of private or public gain, benefit, or advantage. The term does not include occasional or isolated sales or transactions involving property or services by a person who does not hold himself or herself out as engaged in business. A discrete division or portion of a business is not a separate business and must be aggregated with all other divisions or portions that constitute a business if the division or portion is not a separate legal entity.

(b) "Financial institution" means a financial institution as defined in s. 655.005 and any person who controls, is controlled by, or is under common control with a financial institution as defined in s. 655.005.

(c) "Insider" means:

1. Any person included within the meaning of insider as used in s. 726.102; or

2. A manager of, or a person who controls a transferor that is, a limited liability company or a relative as defined in s. 726.102 of any such persons.

(d) "Involuntary transfer" means a transfer of a business, assets of a business, or stock of goods of a business made without the consent of the transferor, including, but not limited to, a transfer:

1. That occurs due to the foreclosure of a security interest issued to a person who is not an insider;

2. That results from an eminent domain or condemnation action;

3. Pursuant to chapter 61, chapter 702, or the United States Bankruptcy Code;[1]

4. To a financial institution if the transfer is made to satisfy the transferor's debt to the financial institution; or

5. To a third party to the extent that the proceeds are used to satisfy the transferor's indebtedness to a financial institution. If the third party receives assets worth more than the indebtedness, the transfer of the excess may not be deemed an involuntary transfer.

(e) "Stock of goods" means the inventory of a business held for sale to customers in the ordinary course of business.

(f) "Tax" means any tax, interest, penalty, surcharge, or fee administered by the department pursuant to chapter 443 or any of the chapters specified in s. 213.05, excluding chapter 220, the corporate income tax code.

(g) "Transfer" means every mode, direct or indirect, with or without consideration, of disposing of or parting with a business, assets of the business, or stock of goods of the business, and includes, but is not limited to, assigning, conveying, demising, gifting, granting, or selling, other than to customers in the ordinary course of business, to a transferee or to a group of transferees who are acting in concert. A business is considered transferred when there is a transfer of more than 50 percent of:

1. The business;

2. The assets of the business; or

3. The stock of goods of the business.

(2) A taxpayer engaged in a business who is liable for any tax arising from the operation of that business and who quits the business without the benefit of a purchaser, successor, or assignee, or without transferring the business, assets of the business, or stock of goods of a business to a transferee, must file a final return for the business and make full payment of all taxes arising from the operation of that business within 15 days after quitting the business. The Department of Legal Affairs may seek an injunction at the request of the department to prevent further business activity of a taxpayer who fails to file a final return and make payment of the taxes associated with the operation of the business until such taxes are paid. A temporary injunction enjoining further business activity shall be granted by a circuit court if the department has provided at least 20 days' prior written notice to the taxpayer.

(3) A taxpayer who is liable for taxes with respect to a business who transfers the taxpayer's business, assets of the business, or stock of goods of the business must file a final return and make full payment within 15 days after the date of transfer.

(4)(a) A transferee, or a group of transferees acting in concert, of more than 50 percent of a business, assets of a business, or stock of goods of a business is liable for any unpaid tax owed by the transferor arising from the operation of that business unless:

1. a. The transferor provides a receipt or certificate of compliance from the department to the transferee showing that the transferor has not received a notice of audit and the transferor has filed all required tax returns and has paid all tax arising from the operation of the business identified on the returns filed; and

b. There were no insiders in common between the transferor and the transferee at the time of the transfer; or

2. The department finds that the transferor is not liable for taxes, interest, or penalties after an audit of the transferor's books and records. The audit may be requested by the transferee or the transferor and, if not done pursuant to the certified audit program under s. 213.285, must be completed by the department within 90 days after the records are made available to the department. The department may charge a fee for the cost of the audit if it has not issued a notice of intent to audit by the time the request for the audit is received.

(b) A transferee may withhold a portion of the consideration for a business, assets of the business, or stock of goods of the business to pay the tax owed to the state by the transferor taxpayer arising from the operation of the business. The transferee shall pay the withheld consideration to the state within 30 days after the date of the transfer. If the consideration withheld is less than the transferor's liability, the transferor remains liable for the deficiency.

(c) The Department of Legal Affairs may seek an injunction at the request of the department to prevent further business activity of a transferee who is liable for unpaid tax of a transferor and who fails to pay or cause to be paid the transferee's maximum liability for such tax due until such maximum liability for the tax is paid. A temporary injunction enjoining further business activity shall be granted by a circuit court if:

1. The assessment against the transferee is final and either:

a. The time for filing a contest under s. 72.011 has expired; or

b. Any contest filed pursuant to s. 72.011 resulted in a final and nonappealable judgment sustaining any part of the assessment; and

2. The department has provided at least 20 days' prior written notice to the transferee of its intention to seek an injunction.

(5) The transferee, or transferees acting in concert, of more than 50 percent of a business, assets of the business, or stock of goods of a business who are liable for any tax pursuant to this section shall be jointly and severally liable with the transferor for the payment of the tax owed to the state from the operation of the business by the transferor up to the transferee's or transferees' maximum liability for such tax due.

(6) The maximum liability of a transferee pursuant to this section is equal to the fair market value of the business, assets of the business, or stock of goods of the business transferred to the transferee or the total purchase price paid by the transferee for the business, assets of the business, or stock of goods of the business, whichever is greater.

(a) The fair market value must be determined net of any liens or liabilities, with the exception of liens or liabilities owed to insiders.

(b) The total purchase price must be determined net of liens and liabilities against the assets, with the exception of:

1. Liens or liabilities owed to insiders.

2. Liens or liabilities assumed by the transferee that are not liens or liabilities owed to insiders.

(7) After notice by the department of transferee liability under this section, the transferee has 60 days within which to file an action as provided in chapter 72.

(8) This section does not impose liability on a transferee of a business, assets of a business, or stock of goods of a business when:

(a) The transfer is pursuant to an involuntary transfer; or

(b) The transferee is not an insider, and the asset transferred consists solely of a one- to four-family residential real property and furnishings and fixtures therein; real property that has not been improved with any building; or owner-occupied commercial real property; and, in each case, is not accompanied by a transfer of other assets of the business.

(9) The department may adopt rules necessary to administer and enforce this section.

Credits

Added by Laws 2010, c. 2010-166, § 8, eff. May 28, 2010. Amended by Laws 2012, c. 2012-55, § 1, eff. April 6, 2012; Laws 2013, c. 2013-189, § 3, eff. July 1, 2013; Laws 2015, c. 2015-148, § 14, eff. June 11, 2015.

Editors' Notes

RETROACTIVITY

<The introductory language of Laws 2015, c. 2015-148, § 14, provides:>

<"Effective upon this act becoming a law [June 11, 2015] and operating retroactively to January 1, 2015, paragraph (c) of subsection (1) of section 213.758, Florida Statutes, is amended to read:">

Footnotes

[1] 11 U.S.C.A. § 101 et seq.

West's F. S. A. § 213.758, FL ST § 213.758
Current with chapters from the 2017 First Regular Session of the 25th Legislature in effect through May 23, 2017

End of Document

West's Florida Statutes Annotated
Title XIV. Taxation and Finance (Chapters 192-221) (Refs & Annos)
Chapter 212. Tax on Sales, Use, and Other Transactions (Refs & Annos)

West's F.S.A. § 212.031

212.031. Tax on rental or license fee for use of real property

Effective: July 1, 2010

Currentness

(1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property unless such property is:

1. Assessed as agricultural property under s. 193.461.

2. Used exclusively as dwelling units.

3. Property subject to tax on parking, docking, or storage spaces under s. 212.03(6).

4. Recreational property or the common elements of a condominium when subject to a lease between the developer or owner thereof and the condominium association in its own right or as agent for the owners of individual condominium units or the owners of individual condominium units. However, only the lease payments on such property shall be exempt from the tax imposed by this chapter, and any other use made by the owner or the condominium association shall be fully taxable under this chapter.

5. A public or private street or right-of-way and poles, conduits, fixtures, and similar improvements located on such streets or rights-of-way, occupied or used by a utility or provider of communications services, as defined by s. 202.11, for utility or communications or television purposes. For purposes of this subparagraph, the term "utility" means any person providing utility services as defined in s. 203.012. This exception also applies to property, wherever located, on which the following are placed: towers, antennas, cables, accessory structures, or equipment, not including switching equipment, used in the provision of mobile communications services as defined in s. 202.11. For purposes of this chapter, towers used in the provision of mobile communications services, as defined in s. 202.11, are considered to be fixtures.

6. A public street or road which is used for transportation purposes.

7. Property used at an airport exclusively for the purpose of aircraft landing or aircraft taxiing or property used by an airline for the purpose of loading or unloading passengers or property onto or from aircraft or for fueling aircraft.

8. a. Property used at a port authority, as defined in s. 315.02(2), exclusively for the purpose of oceangoing vessels or tugs docking, or such vessels mooring on property used by a port authority for the purpose of loading or unloading passengers or cargo onto or from such a vessel, or property used at a port authority for fueling such vessels, or to the extent that the amount paid for the use of any property at the port is based on the charge for the amount of tonnage actually imported or exported through the port by a tenant.

b. The amount charged for the use of any property at the port in excess of the amount charged for tonnage actually imported or exported shall remain subject to tax except as provided in sub-subparagraph a.

9. Property used as an integral part of the performance of qualified production services. As used in this subparagraph, the term "qualified production services" means any activity or service performed directly in connection with the production of a qualified motion picture, as defined in s. 212.06(1)(b), and includes:

a. Photography, sound and recording, casting, location managing and scouting, shooting, creation of special and optical effects, animation, adaptation (language, media, electronic, or otherwise), technological modifications, computer graphics, set and stage support (such as electricians, lighting designers and operators, greensmen, prop managers and assistants, and grips), wardrobe (design, preparation, and management), hair and makeup (design, production, and application), performing (such as acting, dancing, and playing), designing and executing stunts, coaching, consulting, writing, scoring, composing, choreographing, script supervising, directing, producing, transmitting dailies, dubbing, mixing, editing, cutting, looping, printing, processing, duplicating, storing, and distributing;

b. The design, planning, engineering, construction, alteration, repair, and maintenance of real or personal property including stages, sets, props, models, paintings, and facilities principally required for the performance of those services listed in sub-subparagraph a.; and

c. Property management services directly related to property used in connection with the services described in sub-subparagraphs a. and b.

This exemption will inure to the taxpayer upon presentation of the certificate of exemption issued to the taxpayer under the provisions of s. 288.1258.

10. Leased, subleased, licensed, or rented to a person providing food and drink concessionaire services within the premises of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, publicly owned recreational facility, or any business operated under a permit issued pursuant to chapter 550. A person providing retail concessionaire services involving the sale of food and drink or other tangible personal property within the premises of an airport shall be subject to tax on the rental of real property used for that purpose, but shall not be subject to the tax on any license to use the property. For purposes of this subparagraph, the term "sale" shall not include the leasing of tangible

personal property.

11. Property occupied pursuant to an instrument calling for payments which the department has declared, in a Technical Assistance Advisement issued on or before March 15, 1993, to be nontaxable pursuant to rule 12A-1.070(19)(c), Florida Administrative Code; provided that this subparagraph shall only apply to property occupied by the same person before and after the execution of the subject instrument and only to those payments made pursuant to such instrument, exclusive of renewals and extensions thereof occurring after March 15, 1993.

12. Property used or occupied predominantly for space flight business purposes. As used in this subparagraph, "space flight business" means the manufacturing, processing, or assembly of a space facility, space propulsion system, space vehicle, satellite, or station of any kind possessing the capacity for space flight, as defined by s. 212.02(23), or components thereof, and also means the following activities supporting space flight: vehicle launch activities, flight operations, ground control or ground support, and all administrative activities directly related thereto. Property shall be deemed to be used or occupied predominantly for space flight business purposes if more than 50 percent of the property, or improvements thereon, is used for one or more space flight business purposes. Possession by a landlord, lessor, or licensor of a signed written statement from the tenant, lessee, or licensee claiming the exemption shall relieve the landlord, lessor, or licensor from the responsibility of collecting the tax, and the department shall look solely to the tenant, lessee, or licensee for recovery of such tax if it determines that the exemption was not applicable.

13. Rented, leased, subleased, or licensed to a person providing telecommunications, data systems management, or Internet services at a publicly or privately owned convention hall, civic center, or meeting space at a public lodging establishment as defined in s. 509.013. This subparagraph applies only to that portion of the rental, lease, or license payment that is based upon a percentage of sales, revenue sharing, or royalty payments and not based upon a fixed price. This subparagraph is intended to be clarifying and remedial in nature and shall apply retroactively. This subparagraph does not provide a basis for an assessment of any tax not paid, or create a right to a refund of any tax paid, pursuant to this section before July 1, 2010.

(b) When a lease involves multiple use of real property wherein a part of the real property is subject to the tax herein, and a part of the property would be excluded from the tax under subparagraph (a)1., subparagraph (a)2., subparagraph (a)3., or subparagraph (a)5., the department shall determine, from the lease or license and such other information as may be available, that portion of the total rental charge which is exempt from the tax imposed by this section. The portion of the premises leased or rented by a for-profit entity providing a residential facility for the aged will be exempt on the basis of a pro rata portion calculated by combining the square footage of the areas used for residential units by the aged and for the care of such residents and dividing the resultant sum by the total square footage of the rented premises. For purposes of this section, the term "residential facility for the aged" means a facility that is licensed or certified in whole or in part under chapter 400, chapter 429, or chapter 651; or that provides residences to the elderly and is financed by a mortgage or loan made or insured by the United States Department of Housing and Urban Development under s. 202, s. 202 with a s. 8 subsidy, s. 221(d)(3) or (4), s. 232, or s. 236 of the National Housing Act; or other such similar facility that provides residences primarily for the elderly.

(c) For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges. Such charges shall be included in the total rent or license fee subject to tax under this section whether or not they can be attributed to the ability of the lessor's or licensor's property as used or operated to attract customers. Payments for intrinsically valuable personal property such as franchises,

trademarks, service marks, logos, or patents are not subject to tax under this section. In the case of a contractual arrangement that provides for both payments taxable as total rent or license fee and payments not subject to tax, the tax shall be based on a reasonable allocation of such payments and shall not apply to that portion which is for the nontaxable payments.

(d) When the rental or license fee of any such real property is paid by way of property, goods, wares, merchandise, services, or other thing of value, the tax shall be at the rate of 6 percent of the value of the property, goods, wares, merchandise, services, or other thing of value.

(2)(a) The tenant or person actually occupying, using, or entitled to the use of any property from which the rental or license fee is subject to taxation under this section shall pay the tax to his or her immediate landlord or other person granting the right to such tenant or person to occupy or use such real property.

(b) It is the further intent of this Legislature that only one tax be collected on the rental or license fee payable for the occupancy or use of any such property, that the tax so collected shall not be pyramided by a progression of transactions, and that the amount of the tax due the state shall not be decreased by any such progression of transactions.

(3) The tax imposed by this section shall be in addition to the total amount of the rental or license fee, shall be charged by the lessor or person receiving the rent or payment in and by a rental or license fee arrangement with the lessee or person paying the rental or license fee, and shall be due and payable at the time of the receipt of such rental or license fee payment by the lessor or other person who receives the rental or payment. Notwithstanding any other provision of this chapter, the tax imposed by this section on the rental, lease, or license for the use of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility to hold an event of not more than 7 consecutive days' duration shall be collected at the time of the payment for that rental, lease, or license but is not due and payable to the department until the first day of the month following the last day that the event for which the payment is made is actually held, and becomes delinquent on the 21st day of that month. The owner, lessor, or person receiving the rent or license fee shall remit the tax to the department at the times and in the manner hereinafter provided for dealers to remit taxes under this chapter. The same duties imposed by this chapter upon dealers in tangible personal property respecting the collection and remission of the tax; the making of returns; the keeping of books, records, and accounts; and the compliance with the rules and regulations of the department in the administration of this chapter shall apply to and be binding upon all persons who manage any leases or operate real property, hotels, apartment houses, roominghouses, or tourist and trailer camps and all persons who collect or receive rents or license fees taxable under this chapter on behalf of owners or lessors.

(4) The tax imposed by this section shall constitute a lien on the property of the lessee or licensee of any real estate in the same manner as, and shall be collectible as are, liens authorized and imposed by ss. 713.68 and 713.69.

(5) When space is subleased to a convention or industry trade show in a convention hall, exhibition hall, or auditorium, whether publicly or privately owned, the sponsor who holds the prime lease is subject to tax on the prime lease and the sublease is exempt.

(6) The lease or rental of land or a hall or other facilities by a fair association subject to the provisions of chapter 616 to a show promoter or prime operator of a carnival or midway attraction is exempt from the tax imposed by this section; however,

the sublease of land or a hall or other facilities by the show promoter or prime operator is not exempt from the provisions of this section.

(7) Utility charges subject to sales tax which are paid by a tenant to the lessor and which are part of a payment for the privilege or right to use or occupy real property are exempt from tax if the lessor has paid sales tax on the purchase of such utilities and the charges billed by the lessor to the tenant are separately stated and at the same or a lower price than those paid by the lessor.

(8) Charges by lessors to a lessee to cancel or terminate a lease agreement are presumed taxable if the lessor records such charges as rental income in its books and records. This presumption can be overcome by the provision of sufficient documentation by either the lessor or the lessee that such charges were other than for the rental of real property.

(9) The rental, lease, sublease, or license for the use of a skybox, luxury box, or other box seats for use during a high school or college football game is exempt from the tax imposed by this section when the charge for such rental, lease, sublease, or license is imposed by a nonprofit sponsoring organization which is qualified as nonprofit pursuant to s. 501(c)(3) of the Internal Revenue Code.

Credits

Laws 1969, c. 69-106, §§ 21, 35; Laws 1969, c. 69-222, § 6; Laws 1971, c. 71-360, § 3; Laws 1971, c. 71-986, § 3; Laws 1977, c. 77-194, § 2; Laws 1978, c. 78-107, § 1; Laws 1979, c. 79-400, § 95; Laws 1982, c. 82-154, § 2; Laws 1982, c. 82-207, § 1; Laws 1983, c. 83-217, §§ 71, 72; Laws 1983, c. 83-297, § 4; Laws 1985, c. 85-310, § 2; Laws 1986, c. 86-152, § 66; Laws 1986, c. 86-166, §§ 2, 8; Laws 1987, c. 87-6, §§ 8, 25; Laws 1987, c. 87-101, § 10; Laws 1987, c. 87-548, §§ 3, 4. Amended by Laws 1990, c. 90-132, § 92, eff. July 1, 1990; Laws 1992, c. 92-348, § 57, eff. Dec. 16, 1992; Laws 1993, c. 93-86, § 4, eff. April 23, 1993; Laws 1995, c. 95-147, § 1108, eff. July 10, 1995; Laws 1995, c. 95-391, § 2, eff. June 17, 1995; Laws 1996, c. 96-397, § 20, eff. Oct. 1, 1996; Laws 1997, c. 97-221, § 4, eff. July 1, 1997; Laws 1998, c. 98-140, § 3, eff. July 1, 1998; Laws 1999, c. 99-238, § 1, eff. June 4, 1999; Laws 1999, c. 99-270, § 1, eff. July 1, 1999; Laws 1999, c. 99-363, § 1, eff. July 1, 1999; Laws 2000, c. 2000-182, § 2, eff. Jan. 1, 2001; Laws 2000, c. 2000-183, § 1, eff. July 1, 2000; Laws 2000, c. 2000-260, § 53, eff. July 1, 2000; Laws 2000, c. 2000-345, § 1, eff. July 1, 2000; Laws 2000, c. 2000-345, § 3, eff. July 1, 2003; Laws 2001, c. 2001-140, § 26, eff. Oct. 1, 2001; Laws 2001, c. 2001-140, § 27, eff. July 1, 2003; Laws 2002, c. 2002-218, § 55, eff. May 1, 2002; Laws 2006, c. 2006-101, § 1, eff. July 1, 2006; Laws 2006, c. 2006-197, § 10, eff. July 1, 2006; Laws 2010, c. 2010-4, § 3, eff. June 29, 2010; Laws 2010, c. 2010-147, § 5, eff. July 1, 2010.

Editors' Notes

VALIDITY

<For validity of this section, see Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324 (2015).>

Notes of Decisions (34)

West's F. S. A. § 212.031, FL ST § 212.031

Current with chapters from the 2017 First Regular Session of the 25th Legislature in effect through May 23, 2017

End of Document

West's Florida Statutes Annotated
Title XIV. Taxation and Finance (Chapters 192-221) (Refs & Annos)
Chapter 212. Tax on Sales, Use, and Other Transactions (Refs & Annos)

West's F.S.A. § 212.12

212.12. Dealer's credit for collecting tax; penalties for noncompliance; powers of Department of Revenue in dealing with delinquents; brackets applicable to taxable transactions; records required

Effective: July 1, 2014

Currentness

(1)(a) 1. Notwithstanding any other law and for the purpose of compensating persons granting licenses for and the lessors of real and personal property taxed hereunder, for the purpose of compensating dealers in tangible personal property, for the purpose of compensating dealers providing communication services and taxable services, for the purpose of compensating owners of places where admissions are collected, and for the purpose of compensating remitters of any taxes or fees reported on the same documents utilized for the sales and use tax, as compensation for the keeping of prescribed records, filing timely tax returns, and the proper accounting and remitting of taxes by them, such seller, person, lessor, dealer, owner, and remitter (except dealers who make mail order sales) who files the return required pursuant to s. 212.11 only by electronic means and who pays the amount due on such return only by electronic means shall be allowed 2.5 percent of the amount of the tax due, accounted for, and remitted to the department in the form of a deduction. However, if the amount of the tax due and remitted to the department by electronic means for the reporting period exceeds $1,200, an allowance is not allowed for all amounts in excess of $1,200. For purposes of this subparagraph, the term "electronic means" has the same meaning as provided in s. 213.755(2)(c).

2. The executive director of the department is authorized to negotiate a collection allowance, pursuant to rules promulgated by the department, with a dealer who makes mail order sales. The rules of the department shall provide guidelines for establishing the collection allowance based upon the dealer's estimated costs of collecting the tax, the volume and value of the dealer's mail order sales to purchasers in this state, and the administrative and legal costs and likelihood of achieving collection of the tax absent the cooperation of the dealer. However, in no event shall the collection allowance negotiated by the executive director exceed 10 percent of the tax remitted for a reporting period.

(b) The Department of Revenue may deny the collection allowance if a taxpayer files an incomplete return or if the required tax return or tax is delinquent at the time of payment.

1. An "incomplete return" is, for purposes of this chapter, a return which is lacking such uniformity, completeness, and arrangement that the physical handling, verification, review of the return, or determination of other taxes and fees reported on the return may not be readily accomplished.

2. The department shall adopt rules requiring such information as it may deem necessary to ensure that the tax levied

hereunder is properly collected, reviewed, compiled, reported, and enforced, including, but not limited to: the amount of gross sales; the amount of taxable sales; the amount of tax collected or due; the amount of lawful refunds, deductions, or credits claimed; the amount claimed as the dealer's collection allowance; the amount of penalty and interest; the amount due with the return; and such other information as the Department of Revenue may specify. The department shall require that transient rentals and agricultural equipment transactions be separately shown. Sales made through vending machines as defined in s. 212.0515 must be separately shown on the return. Sales made through coin-operated amusement machines as defined by s. 212.02 and the number of machines operated must be separately shown on the return or on a form prescribed by the department. If a separate form is required, the same penalties for late filing, incomplete filing, or failure to file as provided for the sales tax return shall apply to the form.

(c) The collection allowance and other credits or deductions provided in this chapter shall be applied proportionally to any taxes or fees reported on the same documents used for the sales and use tax.

(d) 1. A dealer entitled to the collection allowance provided in this section may elect to forego the collection allowance and direct that the amount be transferred into the Educational Enhancement Trust Fund. Such an election must be made with the timely filing of a return and may not be rescinded once made. If a dealer who makes such an election files a delinquent return, underpays the tax, or files an incomplete return, the amount transferred into the Educational Enhancement Trust Fund shall be the amount of the collection allowance remaining after resolution of liability for all of the tax, interest, and penalty due on that return or underpayment of tax. The Department of Education shall distribute the remaining amount from the trust fund to the school districts that have adopted resolutions stating that those funds will be used to ensure that up-to-date technology is purchased for the classrooms in the district and that teachers are trained in the use of that technology. Revenues collected in districts that do not adopt such a resolution shall be equally distributed to districts that have adopted such resolutions.

2. This paragraph applies to all taxes, surtaxes, and any local option taxes administered under this chapter and remitted directly to the department. This paragraph does not apply to a locally imposed and self-administered convention development tax, tourist development tax, or tourist impact tax administered under this chapter.

3. Revenues from the dealer-collection allowances shall be transferred quarterly from the General Revenue Fund to the Educational Enhancement Trust Fund. The Department of Revenue shall provide to the Department of Education quarterly information about such revenues by county to which the collection allowance was attributed.

Notwithstanding any provision of chapter 120 to the contrary, the Department of Revenue may adopt rules to carry out the amendment made by chapter 2006-52, Laws of Florida, to this section.

(2)(a) When any person required hereunder to make any return or to pay any tax or fee imposed by this chapter either fails to timely file such return or fails to pay the tax or fee shown due on the return within the time required hereunder, in addition to all other penalties provided herein and by the laws of this state in respect to such taxes or fees, a specific penalty shall be added to the tax or fee in the amount of 10 percent of either the tax or fee shown on the return that is not timely filed or any tax or fee not paid timely. The penalty may not be less than $50 for failure to timely file a tax return required by s. 212.11(1) or timely pay the tax or fee shown due on the return except as provided in s. 213.21(10). If a person fails to timely file a return required by s. 212.11(1) and to timely pay the tax or fee shown due on the return, only one penalty of 10 percent,

which may not be less than $50, shall be imposed.

(b) When any person required under this section to make a return or to pay a tax or fee imposed by this chapter fails to disclose the tax or fee on the return within the time required, excluding a noncompliant filing event generated by situations covered in paragraph (a), in addition to all other penalties provided in this section and by the laws of this state in respect to such taxes or fees, a specific penalty shall be added to the additional tax or fee owed in the amount of 10 percent of any such unpaid tax or fee not paid timely if the failure is for not more than 30 days, with an additional 10 percent of any such unpaid tax or fee for each additional 30 days, or fraction thereof, while the failure continues, not to exceed a total penalty of 50 percent, in the aggregate, of any unpaid tax or fee.

(c) Any person who knowingly and with a willful intent to evade any tax imposed under this chapter fails to file six consecutive returns as required by law commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

(d) A person who makes a false or fraudulent return and who has a willful intent to evade payment of any tax or fee imposed under this chapter is liable for a specific penalty of 100 percent of any unreported tax or fee. This penalty is in addition to any other penalty provided by law. A person who makes a false or fraudulent return with a willful intent to evade payment of taxes or fees totaling:

1. Less than $300:

a. For a first offense, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

b. For a second offense, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

c. For a third or subsequent offense, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. An amount equal to $300 or more, but less than $20,000, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. An amount equal to $20,000 or more, but less than $100,000, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

4. An amount equal to $100,000 or more, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(e) A person who willfully attempts in any manner to evade any tax, surcharge, or fee imposed under this chapter or the payment thereof is, in addition to any other penalties provided by law, liable for a specific penalty in the amount of 100 percent of the tax, surcharge, or fee, and commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(f) When any person, firm, or corporation fails to timely remit the proper estimated payment required under s. 212.11, a specific penalty shall be added in an amount equal to 10 percent of any unpaid estimated tax. Beginning with January 1, 1985, returns, the department, upon a showing of reasonable cause, is authorized to waive or compromise penalties imposed by this paragraph. However, other penalties and interest shall be due and payable if the return on which the estimated payment was due was not timely or properly filed.

(g) A dealer who files a consolidated return pursuant to s. 212.11(1)(e) is subject to the penalty established in paragraph (e) unless the dealer has paid the required estimated tax for his or her consolidated return as a whole without regard to each location. If the dealer fails to pay the required estimated tax for his or her consolidated return as a whole, each filing location shall stand on its own with respect to calculating penalties pursuant to paragraph (f).

(3) When any dealer, or other person charged herein, fails to remit the tax, or any portion thereof, on or before the day when such tax is required by law to be paid, there shall be added to the amount due interest at the rate of 1 percent per month of the amount due from the date due until paid. Interest on the delinquent tax shall be calculated beginning on the 21st day of the month following the month for which the tax is due, except as otherwise provided in this chapter.

(4) All penalties and interest imposed by this chapter shall be payable to and collectible by the department in the same manner as if they were a part of the tax imposed. The department may settle or compromise any such interest or penalties pursuant to s. 213.21.

(5)(a) The department is authorized to audit or inspect the records and accounts of dealers defined herein, including audits or inspections of dealers who make mail order sales to the extent permitted by another state, and to correct by credit any overpayment of tax, and, in the event of a deficiency, an assessment shall be made and collected. No administrative finding of fact is necessary prior to the assessment of any tax deficiency.

(b) In the event any dealer or other person charged herein fails or refuses to make his or her records available for inspection so that no audit or examination has been made of the books and records of such dealer or person, fails or refuses to register as a dealer, fails to make a report and pay the tax as provided by this chapter, makes a grossly incorrect report or makes a report that is false or fraudulent, then, in such event, it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it for the taxable period of retail sales of such dealer, the gross proceeds from rentals, the total admissions received, amounts received from leases of tangible personal property by such dealer, or of the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, or of the sales or cost price of all services the sale or use of which is taxable under this chapter, together with interest, plus penalty, if such have accrued, as the case may be. Then the department shall proceed to collect such taxes, interest, and penalty on the basis of such assessment which shall be considered prima facie

correct, and the burden to show the contrary shall rest upon the dealer, seller, owner, or lessor, as the case may be.

(6)(a) The department is given the power to prescribe the records to be kept by all persons subject to taxes imposed by this chapter. It shall be the duty of every person required to make a report and pay any tax under this chapter, every person receiving rentals or license fees, and owners of places of admission, to keep and preserve suitable records of the sales, leases, rentals, license fees, admissions, or purchases, as the case may be, taxable under this chapter; such other books of account as may be necessary to determine the amount of the tax due hereunder; and other information as may be required by the department. It shall be the duty of every such person so charged with such duty, moreover, to keep and preserve as long as required by s. 213.35 all invoices and other records of goods, wares, and merchandise; records of admissions, leases, license fees and rentals; and records of all other subjects of taxation under this chapter. All such books, invoices, and other records shall be open to examination at all reasonable hours to the department or any of its duly authorized agents.

(b) For the purpose of this subsection, if a dealer does not have adequate records of his or her retail sales or purchases, the department may, upon the basis of a test or sampling of the dealer's available records or other information relating to the sales or purchases made by such dealer for a representative period, determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total purchases. This subsection does not affect the duty of the dealer to collect, or the liability of any consumer to pay, any tax imposed by or pursuant to this chapter.

(c) 1. If the records of a dealer are adequate but voluminous in nature and substance, the department may sample such records and project the audit findings derived therefrom over the entire audit period to determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total purchases. In order to conduct such a sample, the department must first make a good faith effort to reach an agreement with the dealer, which agreement provides for the means and methods to be used in the sampling process. In the event that no agreement is reached, the dealer is entitled to a review by the executive director. In the case of fixed assets, a dealer may agree in writing with the department for adequate but voluminous records to be statistically sampled. Such an agreement shall provide for the methodology to be used in the statistical sampling process. The audit findings derived therefrom shall be projected over the period represented by the sample in order to determine the proportion that taxable purchases bear to total purchases. Once an agreement has been signed, it is final and conclusive with respect to the method of sampling fixed assets, and the department may not conduct a detailed audit of fixed assets, and the taxpayer may not request a detailed audit after the agreement is reached.

2. For the purposes of sampling pursuant to subparagraph 1., the department shall project any deficiencies and overpayments derived therefrom over the entire audit period. In determining the dealer's compliance, the department shall reduce any tax deficiency as derived from the sample by the amount of any overpayment derived from the sample. In the event the department determines from the sample results that the dealer has a net tax overpayment, the department shall provide the findings of this overpayment to the Chief Financial Officer for repayment of funds paid into the State Treasury through error pursuant to s. 215.26.

3. a. A taxpayer is entitled, both in connection with an audit and in connection with an application for refund filed independently of any audit, to establish the amount of any refund or deficiency through statistical sampling when the taxpayer's records are adequate but voluminous. In the case of fixed assets, a dealer may agree in writing with the department for adequate but voluminous records to be statistically sampled. Such an agreement shall provide for the methodology to be used in the statistical sampling process. The audit findings derived therefrom shall be projected over the period represented by the sample in order to determine the proportion that taxable purchases bear to total purchases. Once an agreement has been

signed, it is final and conclusive with respect to the method of sampling fixed assets, and the department may not conduct a detailed audit of fixed assets, and the taxpayer may not request a detailed audit after the agreement is reached.

b. Alternatively, a taxpayer is entitled to establish any refund or deficiency through any other sampling method agreed upon by the taxpayer and the department when the taxpayer's records, other than those regarding fixed assets, are adequate but voluminous. Whether done through statistical sampling or any other sampling method agreed upon by the taxpayer and the department, the completed sample must reflect both overpayments and underpayments of taxes due. The sample shall be conducted through:

(I) A taxpayer request to perform the sampling through the certified audit program pursuant to s. 213.285;

(II) Attestation by a certified public accountant as to the adequacy of the sampling method utilized and the results reached using such sampling method; or

(III) A sampling method that has been submitted by the taxpayer and approved by the department before a refund claim is submitted. This sub-sub-subparagraph does not prohibit a taxpayer from filing a refund claim prior to approval by the department of the sampling method; however, a refund claim submitted before the sampling method has been approved by the department cannot be a complete refund application pursuant to s. 213.255 until the sampling method has been approved by the department.

c. The department shall prescribe by rule the procedures to be followed under each method of sampling. Such procedures shall follow generally accepted auditing procedures for sampling. The rule shall also set forth other criteria regarding the use of sampling, including, but not limited to, training requirements that must be met before a sampling method may be utilized and the steps necessary for the department and the taxpayer to reach agreement on a sampling method submitted by the taxpayer for approval by the department.

(7) In the event the dealer has imported tangible personal property and he or she fails to produce an invoice showing the cost price of the articles, as defined in this chapter, which are subject to tax, or the invoice does not reflect the true or actual cost price as defined herein, then the department shall ascertain, in any manner feasible, the true cost price, and assess and collect the tax thereon with interest plus penalties, if such have accrued on the true cost price as assessed by it. The assessment so made shall be considered prima facie correct, and the duty shall be on the dealer to show to the contrary.

(8) In the case of the lease or rental of tangible personal property, or other rentals or license fees as herein defined and taxed, if the consideration given or reported by the lessor, person receiving rental or license fee, or dealer does not, in the judgment of the department, represent the true or actual consideration, then the department is authorized to ascertain the same and assess and collect the tax thereon in the same manner as above provided, with respect to imported tangible property, together with interest, plus penalties, if such have accrued.

(9) Taxes imposed by this chapter upon the privilege of the use, consumption, storage for consumption, or sale of tangible personal property, admissions, license fees, rentals, communication services, and upon the sale or use of services as herein

taxed shall be collected upon the basis of an addition of the tax imposed by this chapter to the total price of such admissions, license fees, rentals, communication or other services, or sale price of such article or articles that are purchased, sold, or leased at any one time by or to a customer or buyer; the dealer, or person charged herein, is required to pay a privilege tax in the amount of the tax imposed by this chapter on the total of his or her gross sales of tangible personal property, admissions, license fees, rentals, and communication services or to collect a tax upon the sale or use of services, and such person or dealer shall add the tax imposed by this chapter to the price, license fee, rental, or admissions, and communication or other services and collect the total sum from the purchaser, admittee, licensee, lessee, or consumer. The department shall make available in an electronic format or otherwise the tax amounts and the following brackets applicable to all transactions taxable at the rate of 6 percent:

(a) On single sales of less than 10 cents, no tax shall be added.

(b) On single sales in amounts from 10 cents to 16 cents, both inclusive, 1 cent shall be added for taxes.

(c) On sales in amounts from 17 cents to 33 cents, both inclusive, 2 cents shall be added for taxes.

(d) On sales in amounts from 34 cents to 50 cents, both inclusive, 3 cents shall be added for taxes.

(e) On sales in amounts from 51 cents to 66 cents, both inclusive, 4 cents shall be added for taxes.

(f) On sales in amounts from 67 cents to 83 cents, both inclusive, 5 cents shall be added for taxes.

(g) On sales in amounts from 84 cents to $1, both inclusive, 6 cents shall be added for taxes.

(h) On sales in amounts of more than $1, 6 percent shall be charged upon each dollar of price, plus the appropriate bracket charge upon any fractional part of a dollar.

(10) In counties which have adopted a discretionary sales surtax at the rate of 1 percent, the department shall make available in an electronic format or otherwise the tax amounts and the following brackets applicable to all taxable transactions that would otherwise have been transactions taxable at the rate of 6 percent:

(a) On single sales of less than 10 cents, no tax shall be added.

(b) On single sales in amounts from 10 cents to 14 cents, both inclusive, 1 cent shall be added for taxes.

(c) On sales in amounts from 15 cents to 28 cents, both inclusive, 2 cents shall be added for taxes.

(d) On sales in amounts from 29 cents to 42 cents, both inclusive, 3 cents shall be added for taxes.

(e) On sales in amounts from 43 cents to 57 cents, both inclusive, 4 cents shall be added for taxes.

(f) On sales in amounts from 58 cents to 71 cents, both inclusive, 5 cents shall be added for taxes.

(g) On sales in amounts from 72 cents to 85 cents, both inclusive, 6 cents shall be added for taxes.

(h) On sales in amounts from 86 cents to $1, both inclusive, 7 cents shall be added for taxes.

(i) On sales in amounts from $1 up to, and including, the first $5,000 in price, 7 percent shall be charged upon each dollar of price, plus the appropriate bracket charge upon any fractional part of a dollar.

(j) On sales in amounts of more than $5,000 in price, 7 percent shall be added upon the first $5,000 in price, and 6 percent shall be added upon each dollar of price in excess of the first $5,000 in price, plus the bracket charges upon any fractional part of a dollar as provided for in subsection (9).

(11) The department shall make available in an electronic format or otherwise the tax amounts and brackets applicable to all taxable transactions that occur in counties that have a surtax at a rate other than 1 percent which would otherwise have been transactions taxable at the rate of 6 percent. Likewise, the department shall make available in an electronic format or otherwise the tax amounts and brackets applicable to transactions taxable at 4.35 percent pursuant to s. 212.05(1)(e)1.c. and on transactions which would otherwise have been so taxable in counties which have adopted a discretionary sales surtax.

(12) It is hereby declared to be the legislative intent that, whenever in the construction, administration, or enforcement of this chapter there may be any question respecting a duplication of the tax, the end consumer, or last retail sale, be the sale intended to be taxed and insofar as may be practicable there be no duplication or pyramiding of the tax.

(13) In order to aid the administration and enforcement of the provisions of this chapter with respect to the rentals and license fees, each lessor or person granting the use of any hotel, apartment house, roominghouse, tourist or trailer camp, real property, or any interest therein, or any portion thereof, inclusive of owners; property managers; lessors; landlords; hotel, apartment house, and roominghouse operators; and all licensed real estate agents within the state leasing, granting the use of,

or renting such property, shall be required to keep a record of each and every such lease, license, or rental transaction which is taxable under this chapter, in such a manner and upon such forms as the department may prescribe, and to report such transaction to the department or its designated agents, and to maintain such records as long as required by s. 213.35, subject to the inspection of the department and its agents. Upon the failure by such owner; property manager; lessor; landlord; hotel, apartment house, roominghouse, tourist or trailer camp operator; or real estate agent to keep and maintain such records and to make such reports upon the forms and in the manner prescribed, such owner; property manager; lessor; landlord; hotel, apartment house, roominghouse, tourist or trailer camp operator; receiver of rent or license fees; or real estate agent is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, for the first offense; for subsequent offenses, they are each guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. If, however, any subsequent offense involves intentional destruction of such records with an intent to evade payment of or deprive the state of any tax revenues, such subsequent offense shall be a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

(14) If it is determined upon audit that a dealer has collected and remitted taxes by applying the applicable tax rate to each transaction as described in subsection (9) and rounding the tax due to the nearest whole cent rather than applying the appropriate bracket system provided by law or department rule, the dealer shall not be held liable for additional tax, penalty, and interest resulting from such failure if:

(a) The dealer acted in a good faith belief that rounding to the nearest whole cent was the proper method of determining the amount of tax due on each taxable transaction.

(b) The dealer timely reported and remitted all taxes collected on each taxable transaction.

(c) The dealer agrees in writing to future compliance with the laws and rules concerning brackets applicable to the dealer's transactions.

Credits

Laws 1949, c. 26319, § 12; Laws 1951, c. 26871, § 11; Laws 1957, c. 57-109, § 3; Laws 1957, c. 57-398, § 3; Laws 1961, c. 61-276, § 4; Laws 1963, c. 63-253, § 7; Laws 1965, c. 65-329, § 10; Laws 1965, c. 65-371, § 5; Laws 1967, c. 67-180, § 8; Laws 1968, Ex.Sess., c. 68-27, § 13; Laws 1969, c. 69-106, §§ 21, 35; Laws 1969, c. 69-222, § 17; Laws 1971, c. 71-136, § 125; Laws 1976, c. 76-261, § 10; Laws 1976, c. 76-284, § 3; Laws 1978, c. 78-59, § 3; Laws 1981, c. 81-178, § 10; Laws 1981, c. 81-221, § 2; Laws 1981, c. 81-319, § 6; Laws 1982, c. 82-154, § 8; Laws 1983, c. 83-217, § 73; Laws 1983, c. 83-297, § 9; Laws 1983, c. 83-310, § 59; Laws 1984, c. 84-324, § 7; Laws 1984, c. 84-549, § 20; Laws 1985, c. 85-142, § 2; Laws 1985, c. 85-342, § 63; Laws 1986, c. 86-152, § 76; Laws 1986, c. 86-166, § 7; Laws 1987, c. 87-6, §§ 17, 88; Laws 1987, c. 87-99, § 6; Laws 1987, c. 87-101, §§ 16, 56; Laws 1987, c. 87-402, § 8; Laws 1987, c. 87-548, §§ 30, 31, 32; Laws 1988, c. 88-119, § 12; Laws 1988, c. 88-130, § 74. Amended by Laws 1990, c. 90-132, § 27, eff. Jan. 1, 1992; Laws 1991, c. 91-112, § 32, eff. July 1, 1991; Laws 1991, c. 91-112, § 169, eff. Jan. 1, 1992; Laws 1991, c. 91-224, § 240; Laws 1992, c. 92-319, § 14, eff. Aug. 1, 1992; Laws 1992, c. 92-320, § 19, eff. Jan. 1, 1993; Laws 1994, c. 94-314, § 24, eff. Jan. 1, 1995; Laws 1995, c. 95-147, § 1500, eff. July 10, 1995; Laws 1996, c. 96-397, § 31, eff. Oct. 1, 1996; Laws 1997, c. 97-99, § 26, eff. July 1, 1997; Laws 1998, c. 98-342, § 13, eff. July 1, 1998; Laws 1999, c. 99-2, § 79, eff. June 29, 1999; Laws 1999, c. 99-208, § 14, eff. Jan. 1, 2000; Laws 2000, c. 2000-276, § 3, eff. Jan. 1, 2001; Laws 2000, c. 2000-355, § 17, eff. June 21, 2000; Laws 2002, c. 2002-218, § 26, eff. May 1, 2002; Laws 2002, c. 2002-218, § 28, eff. Jan. 1, 2003; Laws 2003, c. 2003-254, § 20, eff. July 1, 2003; Laws 2003, c. 2003-261, § 187, eff. June 26, 2003; Laws 2005, c. 2005-197, § 3, eff. July 1, 2005; Laws 2005, c. 2005-280, § 16, eff. July 1, 2005; Laws 2006, c. 2006-52, §§ 1, 2, 4, eff. Jan. 1, 2007; Laws 2007, c.

2007-106, § 25, eff. July 1, 2007; Laws 2012, c. 2012-145, § 2, eff. July 1, 2012; Laws 2014, c. 2014-38, § 10, eff. May 12, 2014; Laws 2014, c. 2014-40, § 4, eff. July 1, 2014.

Notes of Decisions (26)

West's F. S. A. § 212.12, FL ST § 212.12
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West's F.S.A. § 212.15

212.15. Taxes declared state funds; penalties for failure to remit taxes; due and delinquent dates; judicial review

Currentness

(1) The taxes imposed by this chapter shall, except as provided in s. 212.06(5)(a)2.e., become state funds at the moment of collection and shall for each month be due to the department on the first day of the succeeding month and be delinquent on the 21st day of such month. All returns postmarked after the 20th day of such month are delinquent.

(2) Any person who, with intent to unlawfully deprive or defraud the state of its moneys or the use or benefit thereof, fails to remit taxes collected under this chapter is guilty of theft of state funds, punishable as follows:

(a) If the total amount of stolen revenue is less than $300, the offense is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Upon a second conviction, the offender is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Upon a third or subsequent conviction, the offender is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the total amount of stolen revenue is $300 or more, but less than $20,000, the offense is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If the total amount of stolen revenue is $20,000 or more, but less than $100,000, the offense is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) If the total amount of stolen revenue is $100,000 or more, the offense is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) Prosecution of a misdemeanor under this section shall commence no later than 2 years from the date of the offense. Prosecution of a felony under this section shall commence no later than 5 years from the date of the offense.

(4) All taxes collected under this chapter shall be remitted to the department. In addition to criminal sanctions, the department is empowered, and it shall be its duty, when any tax becomes delinquent or is otherwise in jeopardy under this chapter, to

issue a warrant for the full amount of the tax due or estimated to be due, with the interest, penalties, and cost of collection, directed to all and singular the sheriffs of the state, and mail the warrant to the clerk of the circuit court of the county where any property of the taxpayer is located. Upon receipt of the warrant, the clerk of the circuit court shall record it, and thereupon the amount of the warrant shall become a lien on any real or personal property of the taxpayer in the same manner as a recorded judgment. The department may issue a tax execution to enforce the collection of taxes imposed by this chapter and deliver it to any sheriff. The sheriff shall thereupon proceed in the same manner as prescribed by law for executions and shall be entitled to the same fees for his or her services in executing the warrant to be collected. The department may also have a writ of garnishment to subject any indebtedness due to the delinquent dealer by a third person in any goods, money, chattels, or effects of the delinquent dealer in the hands, possession, or control of the third person in the manner provided by law for the payment of the tax due. Upon payment of the execution, warrant, judgment, or garnishment, the department shall satisfy the lien of record within 30 days. If there is jeopardy to the revenue and jeopardy is asserted in or with an assessment, the department shall proceed in the manner specified for jeopardy assessment in s. 213.732.

Credits

Laws 1949, c. 26319, § 15; Laws 1951, c. 26871, § 12; Laws 1959, c. 59-426, § 3; Laws 1961, c. 61-276, § 7; Laws 1963, c. 63-253, § 7; Laws 1967, c. 67-180, § 12; Laws 1969, c. 69-106, §§ 21, 35; Laws 1969, c. 69-267, § 1; Laws 1971, c. 71-8, § 1; Laws 1971, c. 71-355, § 42; Laws 1978, c. 78-95, § 54; Laws 1979, c. 79-359, § 5; Laws 1981, c. 81-178, § 18; Laws 1981, c. 81-259, § 118; Laws 1987, c. 87-6, § 91; Laws 1987, c. 87-101, § 59; Laws 1987, c. 87-402, § 9. Amended by Laws 1991, c. 91-224, § 24; Laws 1992, c. 92-315, § 14, eff. Oct. 1, 1992; Laws 1993, c. 93-233, § 13, eff. July 1, 1993; Laws 1995, c. 95-147, § 1120, eff. July 10, 1995; Laws 1997, c. 97-99, § 11, eff. July 1, 1997.

Notes of Decisions (18)

West's F. S. A. § 212.15, FL ST § 212.15
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West's Florida Statutes Annotated
Title XLVI. Crimes (Chapters 775-899)
Chapter 775. Definitions; General Penalties; Registration of Criminals (Refs & Annos)

West's F.S.A. § 775.15

775.15. Time limitations; general time limitations; exceptions

Effective: October 1, 2016

Currentness

(1) A prosecution for a capital felony, a life felony, or a felony that resulted in a death may be commenced at any time. If the death penalty is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, all crimes designated as capital felonies shall be considered life felonies for the purposes of this section, and prosecution for such crimes may be commenced at any time.

(2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for a felony of the first degree must be commenced within 4 years after it is committed.

(b) A prosecution for any other felony must be commenced within 3 years after it is committed.

(c) A prosecution for a misdemeanor of the first degree must be commenced within 2 years after it is committed.

(d) A prosecution for a misdemeanor of the second degree or a noncriminal violation must be commenced within 1 year after it is committed.

(3) An offense is committed either when every element has occurred or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(4)(a) Prosecution on a charge on which the defendant has previously been arrested or served with a summons is commenced by the filing of an indictment, information, or other charging document.

(b) A prosecution on a charge on which the defendant has not previously been arrested or served with a summons is commenced when either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay. In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered. The failure to execute process on or extradite a defendant in another state who has been charged by information or indictment with a crime in this state shall not constitute an unreasonable delay.

(c) If, however, an indictment or information has been filed within the time period prescribed in this section and the indictment or information is dismissed or set aside because of a defect in its content or form after the time period has elapsed, the period for commencing prosecution shall be extended 3 months from the time the indictment or information is dismissed or set aside.

(5) The period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state. This provision shall not extend the period of limitation otherwise applicable by more than 3 years, but shall not be construed to limit the prosecution of a defendant who has been timely charged by indictment or information or other charging document and who has not been arrested due to his or her absence from this state or has not been extradited for prosecution from another state.

(6) A prosecution for perjury in an official proceeding that relates to the prosecution of a capital felony may be commenced at any time.

(7) A prosecution for a felony that resulted in injury to any person, when such felony arises from the use of a "destructive device," as defined in s. 790.001, may be commenced within 10 years.

(8) A prosecution for a felony violation of chapter 517 or s. 409.920 must be commenced within 5 years after the violation is committed.

(9) A prosecution for a felony violation of chapter 403 must be commenced within 5 years after the date of discovery of the violation.

(10) A prosecution for a felony violation of s. 825.102 or s. 825.103 must be commenced within 5 years after it is committed.

(11) A prosecution for a felony violation of ss. 440.105 and 817.234 must be commenced within 5 years after the violation is committed.

(12) If the period prescribed in subsection (2), subsection (8), subsection (9), subsection (10), or subsection (11) has expired,

a prosecution may nevertheless be commenced for:

(a) Any offense, a material element of which is either fraud or a breach of fiduciary obligation, within 1 year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years.

(b) Any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment, within 2 years from the time he or she leaves public office or employment, or during any time permitted by any other part of this section, whichever time is greater.

(13)(a) If the victim of a violation of s. 794.011, former s. 794.05, Florida Statutes 1995, s. 800.04, s. 826.04, or s. 847.0135(5) is under the age of 18, the applicable period of limitation, if any, does not begin to run until the victim has reached the age of 18 or the violation is reported to a law enforcement agency or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the state attorney for the judicial circuit in which the alleged violation occurred. If the offense is a first or second degree felony violation of s. 794.011, and the offense is reported within 72 hours after its commission, the prosecution for such offense may be commenced at any time. This paragraph applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before December 31, 1984.

(b) If the offense is a first degree felony violation of s. 794.011 and the victim was under 18 years of age at the time the offense was committed, a prosecution of the offense may be commenced at any time. This paragraph applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before October 1, 2003.

(c) If the offense is a violation of s. 794.011 and the victim was under 16 years of age at the time the offense was committed, a prosecution of the offense may be commenced at any time. This paragraph applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before July 1, 2010.

(14)(a) A prosecution for a first or second degree felony violation of s. 794.011, if the victim is 16 years of age or older at the time of the offense and the offense is reported to a law enforcement agency within 72 hours after commission of the offense, may be commenced at any time.

(b) Except as provided in paragraph (a) or paragraph (13)(b), a prosecution for a first or second degree felony violation of s. 794.011, if the victim is 16 years of age or older at the time of the offense, must be commenced within 8 years after the violation is committed. This paragraph applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before July 1, 2015.

(15)(a) In addition to the time periods prescribed in this section, a prosecution for any of the following offenses may be commenced within 1 year after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused:

1. An offense of sexual battery under chapter 794.

2. A lewd or lascivious offense under s. 800.04 or s. 825.1025.

(b) This subsection applies to any offense that is not otherwise barred from prosecution between July 1, 2004, and June 30, 2006.

(16)(a) In addition to the time periods prescribed in this section, a prosecution for any of the following offenses may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused:

1. Aggravated battery or any felony battery offense under chapter 784.

2. Kidnapping under s. 787.01 or false imprisonment under s. 787.02.

3. An offense of sexual battery under chapter 794.

4. A lewd or lascivious offense under s. 800.04, s. 825.1025, or s. 847.0135(5).

5. A burglary offense under s. 810.02.

6. A robbery offense under s. 812.13, s. 812.131, or s. 812.135.

7. Carjacking under s. 812.133.

8. Aggravated child abuse under s. 827.03.

(b) This subsection applies to any offense that is not otherwise barred from prosecution on or after July 1, 2006.

(17) In addition to the time periods prescribed in this section, a prosecution for video voyeurism in violation of s. 810.145 may be commenced within 1 year after the date on which the victim of video voyeurism obtains actual knowledge of the existence of such a recording or the date on which the recording is confiscated by a law enforcement agency, whichever occurs first. Any dissemination of such a recording before the victim obtains actual knowledge thereof or before its confiscation by a law enforcement agency does not affect any provision of this subsection.

(18) If the offense is a violation of s. 800.04(4) or (5) and the victim was under 16 years of age at the time the offense was committed, a prosecution of the offense may be commenced at any time, unless, at the time of the offense, the offender is less than 18 years of age and is no more than 4 years older than the victim. This subsection applies to an offense that is not otherwise barred from prosecution on or before October 1, 2014.

(19) A prosecution for a violation of s. 787.06 may be commenced at any time. This subsection applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before October 1, 2014.

Credits

Act Feb. 10, 1832, § 78; Rev.St.1892, § 2357; Laws 1901, c. 4915, § 1; Gen.St.1906, §§ 3181, 3182; Rev.Gen.St.1920, §§ 5011, 5012; Comp.Gen.Laws 1927, §§ 7113, 7114; Laws 1935, c. 16962, § 1; Laws 1951, c. 26484, § 10; Fla.St.1969, §§ 932.05, 932.06; Laws 1970, c. 70-339, § 109; Fla.St.1970, Supp. § 915.03; Fla.St.1973, § 932.465; Laws 1974, c. 74-383, § 10; Laws 1976, c. 76-275, § 1; Laws 1977, c. 77-174, § 1; Laws 1978, c. 78-435, § 12; Laws 1984, c. 84-86, § 6; Laws 1984, c. 84-550, § 1; Laws 1985, c. 85-63, § 10; Laws 1989, c. 89-143, § 4; Laws 1990, c. 90-120, § 2; Laws 1991, c. 91-258, § 2. Amended by Laws 1993, c. 93-156, § 16, eff. Oct. 1, 1993; Laws 1995, c. 95-158, § 17, eff. July 1, 1995; Laws 1995, c. 95-418, § 139, eff. July 1, 1995; Laws 1996, c. 96-145, § 1, eff. Oct. 1, 1996; Laws 1996, c. 96-280, § 3, eff. Oct. 1, 1996; Laws 1996, c. 96-322, § 3, eff. Oct. 1, 1996; Laws 1996, c. 96-409, § 4, eff. Oct. 1, 1996; Laws 1997, c. 97-36, § 1, eff. Oct. 1, 1997; Laws 1997, c. 97-90, § 1, eff. July 1, 1997; Laws 1997, c. 97-102, § 1812, eff. July 1, 1997; Laws 1997, c. 97-104, § 1, eff. May 24, 1997; Laws 1998, c. 98-174, § 17, eff. Jan. 1, 1999; Laws 1999, c. 99-201, § 7, eff. Oct. 1, 1999; Laws 1999, c. 99-204, § 5, eff. Oct. 1, 1999; Laws 2000, c. 2000-246, § 3, eff. Oct. 1, 2000; Laws 2001, c. 2001-102, § 1, eff. Oct. 1, 2001; Laws 2002, c. 2002-168, § 1, eff. Oct. 1, 2002; Laws 2003, c. 2003-116, § 1, eff. Oct. 1, 2003; Laws 2004, c. 2004-94, § 1, eff. July 1, 2004; Laws 2005, c. 2005-110, § 1, eff. July 1, 2005; Laws 2006, c. 2006-266, § 1, eff. July 1, 2006; Laws 2008, c. 2008-172, § 15, eff. Oct. 1, 2008; Laws 2010, c. 2010-54, § 2, eff. July 1, 2010; Laws 2011, c. 2011-220, § 6, eff. July 1, 2011; Laws 2014, c. 2014-4, § 2, eff. Oct. 1, 2014; Laws 2014, c. 2014-160, § 6, eff. Oct. 1, 2014; Laws 2015, c. 2015-133, § 2, eff. July 1, 2015; Laws 2016, c. 2016-24, § 30, eff. Oct. 1, 2016.

Notes of Decisions (343)

West's F. S. A. § 775.15, FL ST § 775.15

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2017 WL 657436
Only the Westlaw citation is currently available.
United States District Court,
D. South Dakota, Southern Division.

United States of America, Plaintiff,
v.
Robert John Hulscher, Defendant.

4:16–CR–40070–01–KES
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Signed 02/17/2017

ORDER ADOPTING REPORT AND RECOMMENDATION GRANTING MOTION TO SUPPRESS

KAREN E. SCHREIER, UNITED STATES DISTRICT JUDGE

NATURE AND PROCEDURE OF THE CASE

***1** Defendant Robert John Hulscher is charged with two counts: (1) stealing firearms and aiding and abetting stealing firearms under 18 U.S.C. §§ 924(1) and 924(2); and (2) felon in possession of firearms under 18 U.S.C. § 922(g)(1). Hulscher moves to suppress "all evidence from the advanced logical extraction" of his cell phone. Docket 223 at 1. The motion was referred to United States Magistrate Judge Duffy for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

During the evidentiary hearing, neither party provided testimony, but the court received eleven exhibits. The court also took judicial notice of the exhibits submitted with the parties' briefs on Hulscher's motion to suppress. For the following reasons, the report and recommendation is adopted as modified by this opinion.

LEGAL STANDARD

This court's review of a magistrate judge's report and recommendation is governed by 28 U.S.C. § 636 and Rule 72 of the Federal Rules of Civil Procedure. The court reviews de novo any objections to the magistrate judge's recommendations with respect to dispositive matters that are timely made and specific. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Because motions to suppress evidence are considered dispositive matters, a magistrate judge's recommendation regarding such a motion is subject to de novo review. 28 U.S.C. § 636(b)(1)(A); *see also United States v. Raddatz*, 447 U.S. 667, 673 (1980). In conducting de novo review, this court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also United States v. Craft*, 30 F.3d 1044, 1045 (8th Cir. 1994).

FACTS

Hulscher's motion to suppress revolves around the review of his cell phone data by two law enforcement agencies: (1) the Huron Police Department and (2) the Bureau of Alcohol, Tobacco, and Firearms (ATF). Both agencies investigated Hulscher on unrelated charges. The Huron Police Department investigated Hulscher on forgery, counterfeiting, and identity theft charges. ATF investigated Hulscher for various firearm offenses. During the investigation by the Huron Police Department, Sergeant Mark Johnson applied for a warrant to search Hulscher's Apple iPhone. The Third Judicial Circuit of South Dakota issued a search warrant allowing any law enforcement officer in Beadle County to search the iPhone for "(1) The content of any texts, including but not limited to incoming texts, sent texts, draft texts and deleted texts that were sent or received by the cellular communication devices. (2) Incoming or outgoing cell phone call records by the cellular communication devices. (3) The content of the address book for the cellular communication devices. (4) Video and/or photographs on the phones or stored in the internal memory of the cellular communication devices. (5) Any other data on the communication device as it relates to this case." Exhibit 2 at 1–2.

Detective Casey Spinsby of the Huron Police Department extracted the data from the iPhone and created a digital copy. Detective Spinsby performed a search of the data, and in his official report, Detective Spinsby noted several pieces of evidence related to the Huron investigation. Detective Spinsby also noted 531 messages related to the sale, use, or purchase of illegal drugs. As part of his analysis of the cell phone, Detective Spinsby "segregated the data on the phone that was relevant to the Huron state

court prosecution and saved that data separately." Docket 251 at 6 (citing Exhibit F). Hulscher later pleaded guilty to one charge of Grand Theft–More than $1,000 and Less than or equal to $2,500. Detective Spinsby was not looking for and did not find any information related to the illegal possession of firearms.

***2** In preparation for Hulscher's federal trial, ATF Agent Brent Fair reviewed a National Crime Information Center report on Hulscher. The report indicated that Hulscher had been arrested by the Huron Police Department. Agent Fair contacted the Huron Police Department and learned that it had data taken from Hulscher's iPhone. Agent Fair requested a copy of the data and initially received a DVD disc containing Detective Spinsby's segregated data (Exhibit F) that related only to the state charges. Agent Fair then contacted the Huron Police Department again and discovered that the Huron Police Department also had a complete, unsegregated digital copy of Hulscher's iPhone data. Because the complete digital copy of Hulscher's iPhone data could not be sent electronically, Agent Fair drove to Huron with another ATF agent, obtained a complete digital copy of Hulscher's iPhone data, and reviewed the data on his return to Sioux Falls. Agent Fair did not get a search warrant before he reviewed the data.

The government then notified Hulscher's counsel that it intended to use the complete, unsegregated iPhone data (Exhibit E) at trial. Hulscher responded by filing this motion to suppress the complete, unsegregated iPhone data (Exhibit E). Hulscher does not appear to object to the admission of the segregated data (Exhibit F). *See* Docket 224 at 5, 7, 9, and 10. Magistrate Judge Duffy held a hearing on the motion and issued a report and recommendation granting Hulscher's motion to suppress. The government has filed its responsive brief and has four primary objections: (1) that Agent Fair's review of the iPhone data constituted a search within the meaning of the Fourth Amendment; (2) that Agent Fair did not have knowledge of the Beadle County warrant; (3) that the plain view doctrine does not apply; and (4) that the exclusionary rule should apply to this case.

DISCUSSION

I. Agent Fair conducted a search of Hulscher's iPhone. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." U.S. Const. amend. IV. The government, however, argues that Agent Fair never conducted a search of Hulscher's iPhone. Docket 255 at 1–2. The government argues Agent Fair merely conducted a subsequent viewing of evidence that had already been seized.[1] *Id.* Thus, the issue before the court is whether a subsequent viewing of a copy of electronic data from a cell phone constitutes a search when the data was collected under a valid search warrant and was unresponsive to that warrant.

This specific fact scenario is relatively new to Fourth Amendment analysis, and as noted by Professor Orin Kerr, "[e]xisting precedents dealing with the treatment of copies of seized property are surprisingly difficult to find." *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 562 (2005). Despite the lack of precedent on how courts should treat digital copies of electronic information, "[t]here are two obvious choices: courts can treat searches of copies just like searches of originals or else treat copies merely as data stored on government-owned property." *Id.* Here, the government argues for the latter. The government argues that cell phone data can be shared among law enforcement agencies like a box of physical evidence.

As the Supreme Court explained in *Riley*, however, cell phone data is not the same as physical evidence. In *Riley*, the issue before the Supreme Court was whether cell phones could be searched incident to arrest like other physical objects found on arrestees. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). The court held that because cell phones contain immense amounts of personal information about people's lives, they are unique, and law enforcement "officers must generally secure a warrant before conducting such a search." *Id.* at 2485. This court reaches a similar conclusion. As explained by Magistrate Judge Duffy, "[t]he chief evil [that] the Fourth Amendment was intended to address was the hated 'general warrant' of the British crown." Docket 251 at 10 (citing *Payton v. New York*, 445 U.S. 573, 583–84 (1980)). If the scope of the Beadle County warrant was not limited to the Hurron Police Department's counterfeiting investigation, the search warrant would have been an invalid "general warrant." *Id.* at 16 (citations omitted). As explained by Magistrate Judge Duffy, "[t]he conclusion is inescapable: Agent Fair should have applied for and obtained a second warrant [that] would have authorized him to search Mr. Hulscher's cell phone data for evidence of firearms offenses." *Id.* at 32 (citations omitted).

***3** The government argues that this conclusion is "impractical and is contrary to the nature of police investigations and collaborative law enforcement among different agencies." Docket 255 at 1–2. The government's position, however, overlooks the ultimate touchstone of

the Fourth Amendment: reasonableness. *Riley*, 134 S. Ct. at 2482. According to the government, law enforcement agencies can permanently save all unresponsive data collected from a cell phone after a search for future prosecutions on unrelated charges. If the government's argument is taken to its natural conclusion, then this opens the door to pretextual searches of a person's cell phone for evidence of other crimes. Under the government's view, law enforcement officers could get a warrant to search an individual's cell phone for minor infractions and then use the data to prosecute felony crimes. No limit would be placed on the government's use or retention of unresponsive cell phone data collected under a valid warrant.

As the Supreme Court noted in *Riley*, cell phone data can include immense amounts of information such as "thousands of photos," months of correspondence, or "every bank statement from the last five years." *Id.* at 2493. The search of a cell phone can provide far more information than the most exhaustive search of a house. *Id.* at 2491. This is especially true because cell phones collect many different kinds of data in one place such as "an address, a note, a prescription, a bank statement, a video ...." *Id.* at 2489. "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions ...." *Id.* The government's position, which would allow for mass retention of unresponsive cell phone data, is simply inconsistent with the protections of the Fourth Amendment. The government's objection on this point is overruled.

II. Whether Agent Fair knew about the Beadle County warrant is not relevant.

The government objects to Magistrate Judge Duffy's conclusion that "Agent Fair cannot be said to have acted pursuant to a search warrant ...." Docket 255 at 2; Docket 251 at 15. The government, however, introduced no evidence that Agent Fair knew about the warrant. But even if Agent Fair was aware of the Beadle County warrant, the warrant was limited to a search for evidence relating to the counterfeiting charges, and "a reasonable officer who read the search warrant would have known that." Docket 251 at 20. Thus, at best, the government's position is that Agent Fair knew about the Beadle County search warrant and disregarded its parameters. Under either fact scenario—Agent Fair knew about the warrant or did not know about the warrant—a "reasonably well-trained officer would have known that the search was illegal despite the issuing judge's authorization." Docket 251 at 19–20 (citing *United States v. Hudspeth*, 525 F.3d 667, 676 (8th Cir. 2008).

III. The plain view exception does not apply to this case.

The government "objects to the conclusion that the plain view exception is not applicable [to this case]." Docket 255 at 3. In *Horton v. California*, 496 U.S. 128, 135 (1990), the United States Supreme Court explained that the plain view doctrine applies when law enforcement has a prior justification for a search and inadvertently comes across a piece of incriminating evidence. As explained above, Agent Fair's search of the complete, unsegregated iPhone data lacked a sufficient justification. Thus, the plain view doctrine does not apply. The government's objection on this point is overruled.

The government also objects to the conclusion that the plain view doctrine does not apply to digital searches generally. Because this court can rule on the suppression motion based solely on the facts of this case, the government's objection is sustained on this point.

IV. The exclusionary rule applies to the iPhone data.

A violation of the Fourth Amendment does not automatically trigger the application of the exclusionary rule. *Herring v. United States*, 555 U.S. 135, 141 (2009) (citing *United States v. Leon*, 468 U.S. 897, 905–06 (1984)). The court must determine "the efficacy of the rule in deterring Fourth Amendment violations in the future." *Id.* at 141 (citing *United States v. Calandra*, 414 U.S. 338, 347–355 (1974); *Stone v. Powell*, 428 U.S. 465, 486 (1976)). The court must weigh the benefits of applying the rule against its costs. *Id.* When weighing these competing values, the balance—in this case—tips toward excluding the iPhone data. *See id.* (citing *Leon*, 468 U.S. at 910).

***4** As noted by the Supreme Court in *Herring*, "[t]he principle cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free ...." *Id.* (quoting *Leon*, 468 U.S. at 908). Here, the cost of applying the exclusionary rule is minimized because the evidence is peripheral in nature and not directly related to the firearms offense. The government's actions also suggest the evidence is not necessary for a conviction. Prior to Agent Fair's search of the iPhone data, the government was ready to proceed with trial on January 3, 2017. Minutes before voir dire, the parties addressed a late discovery issue, and the court granted a continuance. If the issue had not come before the court, the government would have tried its case, and the iPhone data would not have been used. In contrast, the benefits of

applying the exclusionary rule in this case are clear. If the exclusionary rule is not applied, law enforcement agencies will have carte blanche authority to obtain a warrant for all data on a cell phone, keep the unresponsive data forever, and then later use the data for criminal prosecutions on unrelated charges—erasing the protections specifically contemplated in *Riley*. Based on this weighing, the government's objection is overruled on this point. The unsegregated iPhone data (Exhibit E) is suppressed.

Although the issue was not explicitly addressed in the parties' briefs or the hearing before Magistrate Judge Duffy, the court notes that the iPhone data may be used for impeachment purposes if Hulscher testifies at trial. The Eighth Circuit Court of Appeals has explained that "illegally seized evidence, even if inadmissible, may be used to impeach a testifying defendant." *United States v. Rowley*, 975 F.2d 1357, 1361 (8th Cir. 1992). Thus, if Hulsher testifies at trial and his testimony is inconsistent with the iPhone data, the data may be used for impeachment.

CONCLUSION

The government's review of Hulscher's unsegregated iPhone data constituted a search under the Fourth Amendment. Because the *Leon* good faith exception and the plain view doctrine do not apply, the government's search of Hulscher's iPhone data violated Hulcher's Fourth Amendment rights. Because the benefits of applying the exclusionary rule outweigh the costs of applying the rule, the unsegregated iPhone data is excluded. Therefore, it is ORDERED

(1) That government's objections 1, 2, 4, 5, and 6 are overruled.

(2) That government's objection 3 is sustained.

(3) That Magistrate Judge Duffy's report and recommendation [Docket 251] is adopted as modified by this order.

(4) That Hulscher's motion to suppress Exhibit E and all evidence related to Exhibit E (Docket 223) is granted.

All Citations

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Footnotes

1 Hulscher's brief appears only to object to the search of the non-segregated, nonresponsive data (Exhibit E). *See* Docket 224 at 5, 7, 9, and 10. Because the parties' disagreement is limited to the complete, unsegregated data, the court limits the application of this opinion to the data in dispute.