

AGENDA
FLORIDA DEPARTMENT OF REVENUE

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MEMBERS

Governor Charlie Crist
Attorney General Bill McCollum
Chief Financial Officer Alex Sink
Commissioner Charles Bronson

October 27, 2009

Contact: Robert Babin
(850-487-1453)

9:00 A.M.
LL-03, The Capitol
Tallahassee, Florida

ITEM	SUBJECT	RECOMMENDATION
1.	Respectfully request approval of the minutes of September 29, 2009. (ATTACHMENT 1)	RECOMMEND APPROVAL
2.	Respectfully request adoption and approval to file and certify with the Secretary of State under Chapter 120, Florida Statutes to: <ul style="list-style-type: none">• Establish new procedures for adjusting the distribution of communication services tax proceeds to local governments (<i>Rule 12A-19.080, Florida Administrative Code/F.A.C.</i>). (ATTACHMENT 2)	RECOMMEND APPROVAL
3.	FOR DISCUSSION ONLY The purpose of this item is to discuss the applicability of tax to the sale of transient rentals in Florida through Internet travel companies. (ATTACHMENT TO FOLLOW)	NO ACTION REQUIRED – FOR DISCUSSION ONLY

**MEETING OF THE GOVERNOR AND CABINET
AS HEAD OF THE DEPARTMENT OF REVENUE**

September 29, 2009

MINUTES

With Governor Crist presiding and all members present, the Department of Revenue was convened in LL-03, The Capitol.

The following official actions were taken.

ITEM 1. Approved the minutes of August 25, 2009.

ITEM 2. Approved and granted authority to file and certify with the Secretary of State under Chapter 120, Florida Statutes, amendments to state tax rules and forms to better organize, update, and clarify the rules to promote better understanding and compliance.

Proposed Rules on State and Local Sales and Use Tax

Groceries, food, and beverage sales: help businesses understand the tax status of these sales by providing revisions that reorganize, clarify and simplify, rules. (*Rules 12A-1.011, 12A-1.0115, 12A-1.071, and 12A-1.097, F.A.C.*).

ATTACHMENT # 1

October 27, 2009

MEMORANDUM

TO: The Honorable Charlie Crist, Governor
Attention: Pat Gleason, Director of Cabinet Affairs

The Honorable Bill McCollum, Attorney General
Attention: Rob Johnson, Cabinet Affairs

The Honorable Alex Sink, Chief Financial Officer
Attention: Robert Tornillo, Chief Cabinet Aide
Amber Hughes, Cabinet Aide

The Honorable Charles Bronson, Agriculture Commissioner
Attention: Jim Boxold, Chief Cabinet Aide
Cathy Giordano, Cabinet Aide

FROM: Robert Babin, Legislative and Cabinet Services Director

SUBJECT: Rulemaking—Proposed Communications Services Tax Rule

What the Department is requesting: Final adoption of this proposed new Communications Services Tax rule, and approval to file and certify it with the Secretary of State under Chapter 120, Florida Statutes.

Why this proposed new Communications Services Tax rule is necessary: This proposed new rule is necessary to:

- Administratively implement Section 202.18(3)(c), Florida Statutes, relating to distribution adjustments resulting from misallocation of tax; and,
- Establish procedures, scheduling, and review under Section 202.18(3)(c), Florida Statutes, for distributing adjustments to local governments resulting from misallocation errors.

ATTACHMENT #2

What this new rule does:

- Defines key terms;
- Explains that distribution adjustments can be required due to taxpayer misallocations of the following components of this tax:
 - State portion;
 - Gross receipts tax portion;
 - Local portion.
- Establishes calculations used to determine when the Department will make adjustments, based on specific factors, and gives examples of how these determinations will be made;
- Enables local governments to request a review of the Department's documentation regarding distribution adjustments; and,
- Provides:
 - an annual schedule for these adjustments that accommodates local government budget cycles; and,
 - procedures for notifying affected local governments about adjustments to their distributions.

Were comments received from external parties: Yes. The Department held a rule development workshop on April 1, 2009, at which comments were received that resulted in the following changes being made to the proposed rule:

- The annual adjustment cycle was changed to run from February 1st through January 31st;
- Distribution adjustments will be combined into one electronic file on February 1st, instead of April 1st;
- General questions from affected parties concerning distribution adjustments must be received by the Department by March 1st, instead of May 1st, for each annual cycle; and,
- A final adjustment file will be posted by the Department on April 1st, instead of June 1st.

A rule hearing was subsequently held on August 31, 2009. No one submitted comments at this hearing.

Major administrative issues in this rule: Establishes uniform procedures and scheduling for making statutory adjustments to local government communications services tax distributions that accommodate local government budget cycles.

Attached are copies of:

- Summaries of proposed rules
- Statements of facts and circumstances justifying the rules
- Federal relation statements
- Summaries of workshops and hearings
- Proposed rule text

STATE OF FLORIDA
DEPARTMENT OF REVENUE
CHAPTER 12A-19, FLORIDA ADMINISTRATIVE CODE
COMMUNICATIONS SERVICES TAX
CREATING RULE 12A-19.080

SUMMARY OF PROPOSED RULE

Proposed new Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), provides local governments and other affected parties a process and timeline on what and how to expect distribution adjustments resulting from misallocation of tax to or between local governments and component parts of the communications services tax.

FACTS AND CIRCUMSTANCES JUSTIFYING PROPOSED RULE

The proposed Rule Chapter 12A-19.080, F.A.C. (Communications Services Tax), is necessary to establish and memorialize the process and procedures the Department will employ when making adjustments to and between the component parts of communications services tax so local governments and other affected parties have this to rely upon.

FEDERAL COMPARISON STATEMENT

The provisions contained in this rule do not conflict with comparable federal laws, policies, or standards.

SUMMARY OF RULE DEVELOPMENT WORKSHOP

HELD ON APRIL 1, 2009

The proposed creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), was noticed in the Florida Administrative Weekly on March 6, 2009 (Vol. 35, No. 9, pp. 1052). A rule development workshop was held on April 1, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, FL, to allow members of the public to ask questions and make comments concerning the proposed rule. No written comments have been received by the Department.

PARTIES ATTENDING

For the Department of
Revenue

JEFF KIELBASA, Deputy Director
LARRY GREEN, Workshop Moderator
VINCE ALDRIDGE, Deputy Director, Technical Assistance and
Dispute Resolution
GRACE REEVES, Revenue Program Administrator
CARLA BRUCE, Tax Law Specialist

From the Public

SCOTT ROBIN, Weiss Serota Helfman Pastoriza Cole
& Boniske, P.L.
DAVID A. FRYE, Florida Association of Telecommunications
Officer & Advisors
SHARON FOX, City of Tampa
MICHAEL MEERS, City of Tallahassee
BETH BRIER, City of Tallahassee

WRITTEN COMMENTS None

Ms. Carla Bruce, Department of Review, presented an overview of the timeline for the distribution of communications services reflected in proposed Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax). Mr. Vince Aldridge, Department of Revenue, provided background information regarding the requirements imposed

on the Department by the law and reflected in the proposed rule. Ms. Bruce followed with a presentation of the provisions of the proposed rule.

Mr. Scott Robin, Weiss, Serota & Helfman, requested information regarding how the Department selects and performs audits of dealers of communications services. Mr. David Frye, Florida Association of Telecommunications Officer & Advisors, asked how the Department handled the misappropriation of the tax. Mr. Jeff Kielbasa, Department of Revenue, responded, clarifying that what is at issue is a misallocation of the tax, not a misappropriation.

The discussion continued regarding the Department's audit process, how taxpayers are selected for an audit, what is the audit frequency, how audits are conducted to account for local rates, and whether penalties are imposed for incorrect local situsing.

Ms. Sharon Fox, City of Tampa, requested that the Department consider changing the date the final distribution adjustment spreadsheet is posted on the local government website from July 1 of each year to April 1. The timeline proposed in the rule puts the final distribution file available as of July 1, a time beyond what is needed for final information for budgeting purposes on an annual basis. The final information is really needed by April 1 to accommodate the budgeting process and would be more advantageous to the local governments. Mr. Meers, City of Tallahassee, agreed with the proposal to change the date to April 1.

CHANGES TO PROPOSED RULE 12A-19.080, F.A.C.:

In response to public comments received at the rule development, the following changes were made to proposed new Rule 12A-19.080, F.A.C.:

- Subsection (1) has been changed to provide that the adjustment cycle will run from February 1 through January 31 of the subsequent year

- Paragraph (4)(a) has been changed to provide that the distribution adjustments will be combined into one electronic file on February 1, rather than April 1, and that all general inquiries regarding the proposed distribution adjustments must be postmarked or time stamped or received by March 1, rather than May 1
- Paragraph (4)(c) has been revised to provide that a final adjustments file will be posted on April 1, rather than June 1

SUMMARY OF RULE HEARING

HELD ON JULY 28, 2009

The Governor and Cabinet, sitting as head of the Department of Revenue, met on July 28, 2009, and approved the publication of the Notice of Proposed Rule for the creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax). A notice for the public hearing was published in the Florida Administrative Weekly on July 17, 2009 (Vol. 35, No. 28, p. 3405).

SUMMARY OF RULE HEARING

HELD ON AUGUST 31, 2009

The proposed creation of Rule 12A-19.080, F.A.C. (Distribution Adjustments Resulting From Misallocation of Tax), was noticed in the Florida Administrative Weekly on August 7, 2009 (Vol. 35, No. 31, pp. 3698-3700). A rule hearing was held on August 31, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, FL, to allow members of the public to ask questions and make comments concerning the proposed rule. No one attended to provide comment. No written comments have been received by the Department.

STATE OF FLORIDA
DEPARTMENT OF REVENUE
CHAPTER 12A-19, FLORIDA ADMINISTRATIVE CODE
COMMUNICATIONS SERVICES TAX
CREATING RULE 12A-19.080

12A-19.080 Distribution Adjustments Resulting From Misallocation of Tax.

(1) The purpose of this rule is to establish procedures when the Department determines that misallocations of communications services taxes require adjustments to distributions of the taxes. This determination will occur annually, with the adjustment cycle running from February 1 through January 31 of the subsequent year.

(2) DEFINITIONS: For purposes of this rule, the following terms are defined:

(a) "Distribution adjustments" are the reallocation of tax between local taxing jurisdictions or reallocation of tax distributed incorrectly to either the state, gross receipts or local portion of Communications Services Tax. This reallocation may be the result of incorrect local jurisdictional situsing, misapplication of tax on the return, or other filing errors causing tax misallocation.

(b) "Situsing" is the assignment of a service address to a local taxing jurisdiction.

(c) A "completed audit" is as an audit that has been paid and all formal or informal protest rights have been exercised or expired.

(3) DISTRIBUTION THRESHOLDS

(a) The Department's determination will occur annually on or about November 15 and notice of this determination will be mailed to each affected local jurisdiction.

1. When the distribution adjustment is less than ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the immediately preceding six months, the Department will make such adjustments in the month immediately following the Department's determination that misallocations occurred.

2.a. When the distribution adjustment is equal to or exceeds ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the immediately preceding six months, the Department will make such adjustments beginning with the March distribution, unless affected jurisdictions seek another form of reallocation as described in sub-subparagraph

2.b. The adjustments will be made over a time period that equals the time period that the misallocations occurred.

b. Affected jurisdictions may seek another form of reallocation of proceeds other than by monthly Department distributions. The affected jurisdictions may execute a written agreement specifying a method of adjustment. A copy of the written agreement must be provided to the Department no later than the first day of the month following 90 days after the date the Department transmits notice of the misallocation.

(b) Example: A jurisdiction's average monthly distribution is \$10,000. The jurisdiction's sum total of adjustments for the adjustment cycle is (\$9,000). All adjustments are from audits with a 36-month audit period. The (\$9,000) will be allocated equally over a 36-month period with a monthly adjustment of (\$250). [(\$9000) / 36 months = (\$250)].

(c) Example: A jurisdiction's average monthly distribution is \$10,000. The jurisdiction's sum total of adjustments for the adjustment cycle is (\$8,000.00). The (\$8,000) adjustment will be made to the jurisdiction's December distribution.

(4) DISTRIBUTION ADJUSTMENT TIMELINE.

(a) On February 1, distribution adjustments will be combined into one electronic file organized by county and then jurisdiction within the county. For each local jurisdiction, the file will identify the taxpayer names, federal identification numbers, and the amount of the distribution adjustment. The file will be posted to the Local Government Communications Services Tax Information Sharing System. All local jurisdictions will have 30 days to review and make general inquiries regarding their proposed distribution adjustment. A local jurisdiction may make the inquiry to the Florida Department of Revenue, Local Government Unit, by mail at 5050 W. Tennessee St., Tallahassee, FL 32399-0100, or by e-mail to local-govt-nit@dor.state.fl.us, or by phone to (850)921-9181. All general inquiries regarding proposed distribution adjustments must be postmarked or otherwise time stamped or received by March 1.

(b) At any time, a local government may request to review adjustment documentation. Local governments who seek to review the documentation regarding their distribution adjustment(s) must submit a written letter specifying which adjustment(s) the local jurisdiction wishes to review. The letter must include:

1. The name of the local government;
2. The requestor's name, mailing address, phone number and email address;
3. The requestor's signature; and
4. Specification of which adjustment(s) by taxpayer name and federal identification number the local government is requesting to review. The federal identification number can be found in the Adjustment Distribution File or Distribution Data Download file posted on the Local Government Communications Services Tax Information Sharing System. The letter should be sent to the Florida Department of Revenue, Security and Disclosure Officer, P.O. Box 37372, Tallahassee, FL 32315-7372.

(c) On April 1, a final adjustments file will be posted to the Local Government Communications Services Tax Information Sharing System.

(d) On or about November 15, if the Department determines that misallocations have occurred, it will mail notification of this determination to each affected local jurisdiction.

(e) The December distribution of communications services tax will include adjustments for those jurisdictions whose net adjustments are less than ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the six months immediately preceding November 1.

(f) March Distribution of the subsequent year: For those jurisdictions whose net adjustments are equal to or in excess of the ninety percent (90%) of the average monthly distributions to the affected jurisdiction for the six months immediately preceding November 1, the first distribution adjustments will occur in March, unless the Department has received a written agreement specifying a different method of adjustment from affected jurisdictions by March 1.

(g) If any date specified above falls on a Saturday, Sunday, or federal or state legal holiday, the specific action will occur on the next succeeding workday.

(5) All information posted to the Local Government Communications Services Tax Information Sharing System for all jurisdictions to review is confidential taxpayer information pursuant to Section 213.053, F.S. This information shall not be distributed by the local government, except for use(s) as described in Section 213.053(8)(v), F.S.

Rulemaking Authority 202.26(3)(a) FS. Law Implemented 202.18(3)(c), 202.22(5), 202.231, 202.35(3) FS. History—New _____.

ADDENDUM

CABINET MEETING: October 27, 2009

AGENCY: Department of Revenue

AGENDA ITEM: 3

TOPIC: Internet Travel Companies

Sale of Transient Rentals in Florida through Internet Travel Companies

There has been rapid growth in the number of companies that advertise hotel lodgings on the Internet on sites where customers can choose, pay for, and receive a confirmed reservation for a hotel room. These companies operate under various business models but generally pay a discounted rate to the hotels and charge customers a greater amount that includes the company's own mark-up and fees. The internet travel company industry generally takes the position that sales (transient rental) tax and local occupancy taxes are owed only on the discounted rate received by the hotel and that they have no obligation to collect, report or remit taxes on the amount charged customers (which includes the amount of the mark-up). They maintain that the amount of the mark-up represents a charge for services not taxable under Florida law.

This issue is not unique to Florida. Over the past ten years states and local governments across the country have issued rulings, conducted audits, and filed lawsuits based on interpretations of applicable state and local laws. In Florida, several local governments have filed lawsuits taking the position that the correct application of the local taxes is to the entire amount paid by the customer to the internet travel company.

Under Florida law, every person is exercising a taxable privilege who engages in the business of renting transient accommodations. Florida's transient rental tax is imposed at the state and local levels by parallel, but not identical, statutory provisions.

State level tax

- Section 212.03, F.S.,

- Tax due based on "total rental charged" for transient rental

Local level taxes

- Section 125.0104, F.S. – Tourist Development Tax
 - Tax due based on “total consideration charged” for transient rental
- Section 125.0108, F.S. – Tourist Impact Tax
 - Tax due based on “total consideration charged” for transient rental
- Section 212.0305, F.S. – Convention Development Tax
 - Tax due on “the amount of any payment made by any person” for transient rental
- Chapter 67-930, Laws of Florida– Municipal Resort Tax
 - Tax due based on “rent received by the person” renting transient accommodations

The Department began looking at this issue in 2003. The issue presented is whether the term the “total rental charged” under Chapter 212 includes only the amount charged directly by the hotel for a room to the internet travel company or the total amount charged by the internet travel company to the customer, including the mark-up. The Legislature has repeatedly considered the issue in recent years:

2004 Session – Legislation discussed but not introduced to clarify tax **is due** on amounts charged by internet travel companies, but to be prospective in application (amnesty granted for past periods)

- Proposed amendment to SB 2218
- Drafted as result of workgroup meetings with Department staff, legislative staff, and certain industry members

November 2004 – Senate Interim Study completed on issue (Report Number 2005-131)

- Recommends submission for consideration legislation developed by the workgroup that requires tax be collected and remitted on the total rental charged the customer by the internet travel company for the hotel room

2005 Session - Legislation introduced to clarify tax **is due** on amounts charged by internet travel companies, but to be prospective in application (amnesty granted for past periods)

- HB 1357, SB 2454, and SB 2558

2006 Session - Legislation introduced to clarify tax **is due** on amounts charged by internet travel companies, but to be prospective in application (amnesty granted for past periods)

- HB 655

2008 Session – Legislation introduced to clarify that tax **is not due** on amounts charged by internet travel companies and such legislation does not provide basis for assessment or refund for prior periods

- CS/SB 2788 and HB 7147

October 2008 – Update to Senate Interim Study (Report Number 2005-131) completed (Issue Brief 2009-320)

- The update simply confirms that the issue is unresolved

2009 Session - Legislation introduced to clarify tax **is due** on amounts charged by internet travel companies, but to be prospective in application (amnesty granted for past periods)

- HB 579, SB 1970, and CS/SB 2518

Additionally, a draft amendment to Federal Legislation, the Travel Promotion Act of 2009, circulated this fall that appeared to completely ban state taxation of online hotel reservations. This ban would include the amount currently paid by hotels to the state. The proposal never received a committee hearing but was of great concern to many states already facing budget shortfalls.

As mentioned earlier, litigation is also pending throughout the country on this issue, including in Florida. The Florida litigation has been brought by local governments on imposition of the local taxes. These cases include:

- March 2006: Declaratory Judgment action filed by Orange County – pending in 9th Judicial Circuit (Orange County)

- July 2006: Leon County filed action in federal court (Southern District of Florida) – dismissed February 2007

- July 2006: City of Jacksonville/Duval County filed action – pending in 4th Judicial Circuit (Duval County)

-January 2009 and August 2009: Actions filed challenging results of audits done by Broward County – pending in 2nd Judicial Circuit (Leon County).

Regardless of the decision on the tax treatment of these transactions, additional questions have been raised about the way that internet travel companies display tax on bills provided to consumers. When a consumer books a room through an internet travel company, the consumer receives an invoice from the company showing the total charge for the room and a charge typically characterized as “taxes and fees.” The consumer can obtain information from the company’s website explaining that the “taxes and fees” charge is basically an estimate and reimbursement for taxes the company will pay to the hotel and for other service charges.

After the consumer has stayed in the room, the hotel bills the internet travel company directly. Taxes (state transient rental tax and any local taxes) are displayed on this invoice. The amount of taxes on this bill are a lesser amount than the amount for “taxes and fees” shown on the consumer’s bill.

Legislators and other public officials have raised concerns that consumers should be made aware of the actual amount of taxes that are being paid on these rentals. The characterization of these charges by internet travel companies may lead consumers to believe that the “taxes and fees” charged by an internet travel company is the amount of government taxes due on the total charge paid by the consumer for the room. However, the amount of “taxes and fees” shown on the consumer’s bill is always greater than the actual amount of taxes paid by the internet travel company (and subsequently paid to state and local governments) on the discounted room rate charged by the hotel.



STATE OF FLORIDA
CHIEF FINANCIAL OFFICER
ALEX SINK

October 16, 2009

Ms. Lisa Echeverri
Executive Director
Florida Department of Revenue
5050 West Tennessee Street
Tallahassee, Florida 32399-0100

Dear Ms. Echeverri:

Thank you for meeting with me on September 29, 2009, to discuss the responsibility for payment of transient rentals tax by Internet travel companies to the State of Florida. As we discussed, Internet travel companies that book hotel rooms have not been remitting sales and use tax revenues to the State of Florida in the manner directed by section 212.03, Florida Statutes. Particularly in these difficult budget times for our state, it is critical that the State of Florida's Department of Revenue does everything it can to ensure that Florida is receiving all of the revenues to which we are entitled under Florida law.

Other states and local governments have brought administrative and legal actions under their statutory schemes to collect underpaid tax revenue from Internet travel companies. Given Florida's budget needs, I would like to bring this matter up for discussion at the next Cabinet meeting on October 27, 2009.

As we discussed at our meeting last month, if the sale of hotel rooms by Internet travel companies results in lower revenues to the Department of Revenue, then it is my recommendation that the Department of Revenue conduct a thorough audit to determine the nature of these transactions and the amount of the underpayment of Florida's hotel tax. My legal staff has been working with your General Counsel's office, and can assist your General Counsel in developing a list of proposed audit questions. Without an audit by the Department of Revenue, the state does not have a way to verify the amount of tax dollars at stake.

Ms. Lisa Echeverri
October 16, 2009
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I appreciate in advance your willingness to discuss this matter in detail with the Cabinet at our October 27th meeting.

Sincerely,

A handwritten signature in black ink that reads "Alex Sink". The signature is written in a cursive, flowing style.

Alex Sink

AS/rtr

cc: The Honorable Charlie Crist, Governor
The Honorable Charles Bronson, Commissioner, Agriculture and Consumer Services
The Honorable Bill McCollum, Attorney General