STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Travelscape, LLC, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 08-ALJ-17-0076-CC **FINAL ORDER AND DECISION**

APPEARANCES: For the Petitioner: James A. Karen, Esquire
Lillie Shanks, Esquire
Burnet R. Maybank, III, Esquire

For the Respondent: Milton G. Kimpson, Esquire
Andrew L. Richardson, Jr., Esquire

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) pursuant to the request of Petitioner, Travelscape, LLC, an online travel company doing business as Expedia.com (Petitioner), for a contested case hearing under S.C. Code Ann. § 12-60-460 (Supp. 2006). Petitioner is contesting an assessment and penalties for sales and accommodations taxes issued to it by the South Carolina Department of Revenue (Department) for the periods between July 1, 2001 through June 30, 2006.[1] A hearing was held before me on October 21 and 22, 2008 at the offices of the ALC.

LEGAL ISSUES RAISED

The following issues were raised in this proceeding:

1. Whether the gross proceeds received by Petitioner from the rental of South Carolina hotel rooms are subject to sales tax under S.C. Code Ann. § 12-36-920 (2000 & Supp. 2007)?

2. Whether imposition of sales tax on the taxpayer violates the Commerce Clause of the United States Constitution?

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[1] Pursuant to S.C. Code Ann. § 12-54-85(C) (Supp. 2007) taxes may be assessed beyond the normal three-year limitations period for several reasons, including situations where "(2) the taxpayer failed to file a return or document as required by law[.]"

3. Whether Petitioner is entitled to a waiver of failure to file and failure to pay penalties?

STIPULATIONS OF FACT

At the hearing into this matter and pursuant to ALC Rule 25(C), the parties entered the following written stipulations of fact into the Record:

1. Petitioner is an online travel company doing business as Expedia.com through the website, www.expedia.com, and telephone call centers. Petitioner is a single member Nevada Limited Liability Company located in Las Vegas, Nevada. Petitioner's single member, Expedia, Inc., a Washington corporation, is located in Bellevue, Washington.[2] Petitioner contracts with hotels across the country, including hotels located in South Carolina.

2. Under its merchant business model, the contractual agreements between Petitioner and supplier hotels set room rates that the hotels are willing to accept for reservations booked using Petitioner's website (the Net Room Rate). The Net Room Rates contracted between Petitioner and the hotels are at a discounted price from the rates offered to the general public.

3. Petitioner adds its Margin to the Net Room Rate and then offers to book reservations for the public through the www.expedia.com website.

4. A "base" number of rooms available for booking through Petitioner are generally established; however, the supplier hotel retains the right to book the reservations itself through channels other than the Petitioner. Petitioner incurs no liability for unbooked base reservations.

5. When a customer selects the desired hotel accommodations using the www.expedia.com website, the total amount owed by the customer is displayed on the site. In order to complete the reservation process, the customer reserves the room by use of a credit card. Petitioner is the merchant of record for this transaction. The Petitioner charges the customer's credit card account at the time a reservation is made.

6. The price charged by Petitioner to its customers consists of the Net Room Rate that is pre-negotiated with the hotel, Petitioner's Margin, Petitioner's Service Fees and the Tax Recovery Charge, which is the anticipated Accommodations Tax expected to be charged by the hotel.

7. When the customer arrives at the hotel for check-in and the hotel confirms that the customer has a valid reservation, the hotel assigns a room to the customer. The customer does not make any further payment to the hotel except for incidental charges and additional services purchased from the hotel. Only the guest has the right to occupy the room.

[2] Petitioner contracts with hotels to provide bookings to the public through Expedia, Inc.'s website, www.expedia.com. Petitioner's business activities are reported to the Securities and Exchange Commission, with Expedia, Inc. as the reporting company.

8. The hotel thereafter invoices Petitioner the agreed upon Net Room Rate. The invoice from the hotel includes charges for the room and Accommodations Tax based upon the Net Room Rate. The hotel remits this sales tax to the South Carolina Department of Revenue (Department). No Accommodations Tax is paid on the difference between the proceeds received by Petitioner from its customer, and the Net Room Rate Petitioner pays to the hotel. At no time has Petitioner filed Accommodations Tax returns with or paid Accommodations Tax to the Department.

Petitioner's Operations & Business Model

9. Hotel reservations are typically booked through Petitioner in the following manner: a potential guest calls Petitioner or visits the www.expedia.com website, searches for available hotel accommodations and books a reservation through Petitioner at a facility selected by the customer.

10. Petitioner charges its customer's credit card the total reservation price at the time the reservation is booked. The reservation is booked prior to the actual hotel stay.

11. Petitioner's total reservation price includes (1) the Room Reservation Rate displayed on the website (which consists of the sum of the Net Room Rate and the Margin), plus (2) Tax Recovery Charges, (3) Service Fees, and in some cases (4) certain hotel-imposed fees such as resort fees. The Room Reservation Rate displayed on the website is a combination of (a) the Net Room Rate for rooms reserved on the traveler's behalf and (b) the Margin retained by Petitioner. Petitioner's Service Fees are amounts retained by Petitioner as compensation in servicing the reservation. Petitioner's Accommodations Tax Recovery Charges are a recovery of the estimated transaction taxes (e.g., Accommodations Tax, occupancy, room tax, excise tax, value added tax, etc.) that Petitioner pays to the hotel supplier in connection with the customer's hotel reservations.

12. Pursuant to the hotel contracts, the Net Room Rate that is pre-negotiated with the hotel must be kept confidential and is not disclosed to consumers or competitors.

13. The Tax Recovery Charges are combined with Service Fees in order to preserve the confidentiality of the Net Room Rate. Petitioner does not impose Tax Recovery Charges on the Margin or fees it charges as compensation for its services. The Service Fee is compensation for the servicing of the customer's travel reservation.

14. Employees and representatives of Petitioner visit South Carolina in order to enable Petitioner to establish and maintain hotel relationships and obtain the discounted Net Room Rate for rooms booked for using the www.expedia.com website.

15. Expedia had one employee who resided in South Carolina during the third and fourth calendar quarters of 2003 and the first and second calendar quarters of 2004.

16. Auditors from the Department examined Petitioner's records for the period July 1, 2000 through June 30, 2006 (the "Audit Period"). Following the audit, the Department took the position that the transactions between Petitioner and its Internet customers were retail sales and

that Petitioner should have reported and remitted sales tax on these transactions. A proposed assessment for sales taxes was issued to the Petitioner on February 14, 2007.

17. Petitioner fully cooperated with the Department during the course of the audit by responding to requests for information and producing books and records for the Department's review.

18. The proposed assessment was calculated based upon the total amount received by Petitioner from its Internet customers without credit or offset for taxes the Petitioner paid to the hotels and in turn remitted to the Department. [3]

19. The Department's proposed assessment consisted of sales taxes of $4,120,542.24; interest of $666,736.41; and penalty of $1,589,176.06, all totaling $6,376,454.71 (hereafter, the "Proposed Assessment"). Petitioner timely protested the Proposed Assessment on August 1, 2007. The Department issued its Determination on January 23, 2008. In response to the Department's Determination, Petitioner timely filed a notice of request for a contested case hearing before the South Carolina Administrative Law Court on February 20, 2008.

20. The following terms as used by the parties had the indicated meanings:

"**Net Room Rate**" means the net discount rate that Petitioner and its supplier hotels have pre-negotiated for hotel rooms booked through Petitioner's website.

"**Margin**" means the mark-up added by Petitioner to the Net Room Rate as compensation to Petitioner.

"**Room Reservation Rate**" means the price at which room reservations are offered to the public and is the sum of the Net Room Rate and the Margin.

"**Service Fees**" means fees imposed by Petitioner for its services.

"**Tax Recovery Charge**" means the estimated sales and use and/or accommodations tax ("Accommodations Tax") calculated based upon the Net Room Rate.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following additional findings of fact by a preponderance of evidence:

Over the course of the audit period from July 2001 to June 2006, Petitioner had contracts with 364 South Carolina hotels allowing it to rent hotel rooms to its customers over the internet.

[3] By earlier stipulation of the parties, the issue of credit or offset, if any, that the taxpayer may be entitled, is not before the Court at this time.

During the period from February 2004 to June 2006, Petitioner had contracts with 356 South Carolina hotels. These contracts set a base number of hotel rooms that Petitioner is allowed to sell to its customers during defined time periods. Petitioner's website advertises hotel accommodations for which it has entered into those contracts. The contracts set a rental for Petitioner that is generally a discounted price from the normal rates offered to the general public. A "base" number of rooms are established allowing Petitioner to market a minimum number and category of rooms to its customers.

Petitioner increases or "marks-up" the discounted price of the hotel rooms and then offers the rooms for sale to the public at the increased price on its internet website. When a customer selects the desired hotel accommodations using Petitioner's website, the site shows the total price due for the rental of a room(s). Once a customer reserves the room by use of a credit card, it is Petitioner that collects money from the customer, thereafter makes arrangements with the hotel to reserve the room, and then communicates the appropriate reservation information to its customer.

Once a customer pays for the accommodation(s), Petitioner directs that customer to the particular hotel with a prepaid reservation for lodging at a price determined by Petitioner. Petitioner is the merchant of record for these transactions.[4] In fact, Petitioner charges the customer's credit card upon making the room reservation, not after the hotel stay has occurred. The customer makes no payments to any entity other than the taxpayer unless he or she purchases additional guest services or incidentals at the hotel site. If there are such additional purchases, those transactions normally take place directly with the hotel or a third party vendor and Petitioner is not involved.

Petitioner's 2001 and 2002 10-K annual reports to the Securities and Exchange Commission specified that the company was engaged in the sale of hotel rooms or, in other words, that the above transactions were sales of hotel rooms. Melissa Maher, nevertheless, testified on behalf of Petitioner that use of the term "sell" in the hotel industry referred to "renting hotel rooms."

[4] The invoice a customer receives from its credit card company shows that the hotel reservations were purchased from the Petitioner.

CONCLUSIONS OF LAW

Based upon the above Stipulations and Findings of Fact, I conclude the following as a matter of law:

General Findings

S.C. Code Ann. § 1-23-600 grants jurisdiction to the Court to hear contested cases under the Administrative Procedures Act. Additionally, S.C. Code Ann. § 12-60-460 grants the ALC the authority to conduct contested case hearings in matters concerning tax assessments.

The standard of proof in these administrative proceedings is a preponderance of the evidence. Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998). Additionally, the burden of proof is generally upon the party asserting the affirmative in an adjudicatory administrative proceeding. 2 Am. Jur. 2d Administrative Law § 354 (2004). In this case, Petitioner, the taxpayer, requested a contested case hearing to challenge the Department's proposed assessment. Thus, since Petitioner asserts the affirmative, it must carry the burden of proving the Department's proposed assessment is incorrect. Id.; cf. Cloyd v. Mabry, 295 S.C. 86, 367 S.E.2d 171 (1988) ("A taxpayer contesting an assessment has the burden of showing the valuation of the taxing authority is incorrect.").[5]

Imposition of the Accommodations Tax

As noted above, the Department seeks an assessment and penalties for sales taxes it claims were due between July 1, 2001 through June 30, 2006. S.C. Code Ann. § 12-36-920 (2000 & Supp. 2007) imposes a sales tax on the gross proceeds derived from the rental of accommodations in South Carolina (Accommodations Tax). The South Carolina Accommodations Tax is imposed on the vendor rather than the customer (i.e., accommodation guest) and is thus referred to as a vendor tax. Id. Under Section 12-36-920(A), vendors are required to remit a tax on the "gross proceeds derived from the rental or charges for any rooms . . . furnished to transients by any hotel . . . or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration."

The Department contends that since Petitioner charges transients for accommodations, the money it receives as compensation should be considered "gross proceeds" derived from the

[5] Other jurisdictions have also reached the same conclusion. See, e.g., In re Broce Const. Co., Inc., 27 Kan. App. 2d 967, 980, 9 P.3d 1281, 1290 (2000) ("[O]ur Supreme Court has long held that "the tax found by the tax commission to be due is presumed to be valid [and] the taxpayer has the burden of showing its invalidity.").

furnishing of accommodations to transients within the meaning of the statute. Thus, Petitioner should be taxed under Section 12-36-920(A) at a rate of 7% on the entire amount received from its customers instead of the discounted room rate it now forwards to the hotels to be remitted to the Department. Petitioner disputes the Department's position that it "sells"[6] hotel accommodations and instead asserts that it is in the business of "facilitating" hotel reservations. Notably, Petitioner is not a hotel, inn, or a place in which rooms, lodging, or sleeping accommodations are furnished. Accordingly, Petitioner contends that it is not subject to the Accommodations Tax because it does not **furnish** accommodations within the meaning of the statute. This case thus turns on whether Petitioner is a vendor subject to the Accommodations Tax.

Implication of the Term Furnish in Section 12-36-920

Application of Section 12-36-920(E)

Petitioner premises its contention that is does not furnish accommodations upon the presumption that the act of furnishing a room under the Accommodations Tax is limited only to the physical act of providing a room to a transient. In other words, furnishing and renting both involve the transfer of possession – a function Petitioner does not provide. Following that reasoning, Petitioner contends that since it does not own or manage any hotels, it cannot actually furnish hotel rooms to customers. Rather, it merely facilitates the "booking" of rooms at a hotel.

S.C. Code Ann § 12-36-920(E) provides that the tax on accommodations for transients is "imposed on every person engaged or continuing within this State in the business of furnishing accommodations to transients for consideration." In determining the meaning of that provision, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." Chem-Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control, 374 S.C 201,

[6] While Petitioner's 2001 and 2002 10-K annual reports to the Securities and Exchange Commission specified that the company was engaged in the sale of hotel rooms, Melissa Maher testified on behalf of the Petitioner that use of the term "sell" in the hotel industry referred to "renting hotel rooms." That parsing of the term, however, does not remove Petitioner from the requirement to remit the Accommodations Tax. S.C. Code Ann. § 12-36-100 (2000) defines sale to include "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration including: * * * (2) a rental, lease, or other form of agreement[.]" Though Petitioner now seeks to describe its merchant model business as the facilitation of hotel reservations, the evidence established that the basics of the merchant business model have not substantially changed during the audit period. Nevertheless, given the definition of "business" found in Section 12-36-20 for purposes of sales tax, it is clear that even the "facilitation" of reservations for South Carolina hotels in the merchant sales model on behalf of its customers squarely places Petitioner "engaged or continuing in this State in the business of furnishing accommodations to transients for consideration."

205, 648 S.E.2d 601, 603 (2007). However, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation . . . ." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). Furthermore, in Edisto Fleets, Inc. v. S.C. Tax Commission, 256 S.C. 350, 182 S.E.2d 713 (1971), it was stated that:

> It is the settled law of this jurisdiction that tax statutes cannot be extended by implication beyond the clear import of the language used and that any substantial doubt must be resolved against the state and in favor of the taxpayer. Where a tax statute is ambiguous and it is reasonably susceptible of an interpretation that would exclude taxation, any substantial doubt must be resolved against the state and in favor of the taxpayer.

Id. at 357, 182 S.E.2d at 716 (Bussey, J., dissenting); see also S.C. Nat'l Bank v. S.C. Tax Comm'n, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) ("In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt."). Nevertheless, in Crescent Manufacturing Co. v. Tax Commissionn, 129 S.C. 480, 124 S.E. 761 (1924), the South Carolina Supreme Court observed:

> If the intent of the Legislature is apparent from an examination and consideration of the statute as a whole, the rule of strict construction in favor of the taxpayer has no application. That rule of strict construction of penal laws and tax status "is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislation purpose," . . . "and does not prevent the courts from calling to their aid all other rules of construction and giving each its appropriate scope . . . ."

Id. at 492, 124 S.E. at 765 (citations omitted).

Here, the facts clearly establish that Petitioner does not own any of the hotels for which it books rooms. Petitioner also does not provide its services on-site at the hotel. However, the requisites of Section 12-36-920(E) are not limited to hotel owners or operators. In fact, there is no requirement that a person own the property to meet the criterion of furnishing a room under any portion of Section 12-36-920.[7] Instead, Section 12-36-920(E) broadly imposes the tax on every entity in the business of "furnishing" accommodations that are located in the State of South Carolina to transients for consideration. Moreover, the general concept of "furnishing" does not express a condition precedent of ownership. "Where a word is not defined in a statute,

[7] As discussed below, S.C. Code Ann § 12-36-920(C) further reflects the legislative intent that there is no such ownership requirement contained in any portion of Section 12-36-920.

our appellate courts have looked to the usual dictionary meaning to supply its meaning." Lee v. Thermal Engineering Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002); see also City of Charleston, S.C. v. Hotels.com, LP, 520 F.Supp.2d 757 (D.S.C. 2007) (applying the dictionary definition of "furnish" in interpreting Section 12-36-920). "Furnish" is defined in part as "to provide what is needed"; "supply" or "give." Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary. None of those terms connotes ownership. In fact, one could "furnish" items that they neither owned nor had the authority to supply. Nevertheless, at least under the analysis in this case, there is an implicit requirement of a person's authority and the ability to provide an accommodation. Here, clearly Petitioner possessed the authority to book rooms on behalf of the hotels from which it took bookings. Thus, the relevant issue is what Petitioner provided when it booked the hotel room(s).

In simple terms, a customer who wishes to book a hotel room upon Petitioner's site enters a request to book the room. After payment is assured via a credit card, Petitioner, through its computers, verifies the availability of the room(s) with the hotel and then issues the customer a confirmation of his room reservation. Accordingly, the facts establish that Petitioner was not merely receiving payment on behalf of a hotel when it booked a room.[8] Here, a customer with a prepaid hotel room reservation purchased on Petitioner's website has a right to occupy the room for a particular time. In other words, as a result of the transaction that occurs upon Petitioner's website, a customer obtains the right to be furnished a room. This right to occupy a room is also in keeping with the common meaning of the term room "reservation" -- "an arrangement to have something (as a hotel room) held for one's use ; *also* **:** a promise, guarantee, or record of such engagement." Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary. Therefore, an Expedia guest, armed with a prepaid room reservation purchased on the Expedia.com website, has a right to occupy a hotel room at a particular hotel for a particular time.

[8] Petitioner ascribes importance to the fact that customers are not guaranteed a room when they click "book it." It points out that the customer does not have a reservation until the hotel books the reservation. This argument, however, attributes excessive importance to the moment when the customers click "book it." In other words, while the reservation transaction that occurs upon Petitioner's website is not complete at the point when the customer clicks "book it," when a customer completes their reservation transaction with Petitioner, the customer receives a reservation for a room in the hotel.

Petitioner nonetheless contends that it does not furnish rooms or accommodations because customers of Petitioner are not provided a specific hotel room until after they arrive at the hotel and present the hotel suitable identification. Under Petitioner's interpretation of Section 12-36-920(E), "furnishing" is basically limited to the physical act of providing a room key to a hotel guest. However, Petitioner has failed to distinguish that room registration practice from that of any other hotel registration that may occur. Thus, the only implication offered by Petitioner's reasoning is that since the actual hotel room is not assigned until a customer arrives upon the hotel property, the sale or rental does not occur until that arrival.[9] In other words, Petitioner's supposition centers not upon the existence of the right to a room or accommodation but upon where that right is ultimately exercised.[10] This reasoning assigns de minimis value to a prepaid reservation and conversely assigns significant importance to physically providing the accommodations to guests.

The flaw in Petitioner's reasoning is revealed in the Petitioner's own assigned value to a prepaid reservation. Usually, the right to occupy the room is exercised upon arriving at the hotel and requesting the use of the room. Nevertheless, if a party fails to cancel a reservation, that person is charged for the use of the room whether they occupy it or not -- or, more importantly, whether they physically arrive upon the property or not. Thus, the furnishing of a room within the context of Petitioner's business model means something more than actually taking possession of the room. If indeed the failure to cancel a reservation results in a charge for the use of a room,

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[9] Petitioner also pointed out that its contracts with South Carolina hotels provide that Petitioner "bear[s] no risk for failure to book any rooms and that nothing in this agreement constitutes a sale or rental of rooms from [the hotel] to [Petitioner]." The provision in the contract assigning the risk for failure to book a room does not affect the rights the customer receives upon receiving a hotel reservation, but is rather a contractual agreement between the hotels and the Petitioner regarding liability for failure to book a room. Furthermore, Petitioner's agreement with a hotel that its acts do not constitute a sale or rental of room, does not absolve Petitioner of its responsibilities under South Carolina law. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 371 S.C. 365, 638 S.E.2d 109 (Ct. App. 2006) ("If a contract provision contravenes an applicable statute, that provision is invalid, and the statute prevails."); 17A C.J.S. Contracts § 207 (1999) ("Parties cannot by private contract abrogate statutory requirements and any act in derogation of such laws is an absolute nullity."); see e.g. Lyerly v. American Nat. Fire Ins. Co., 343 S.C. 401, 540 S.E.2d 469 (Ct. App. 2000) ("[A] party may not contractually shorten the otherwise applicable statute of limitations for bringing suit."); see also Pulliam v. Doe, 246 S.C. 106, 142 S.E.2d 861 (1965) ("It is well established that applicable statutes become a part of a contract of insurance upon issuance as effectually as if they had been written therein.").

[10] Petitioner also notes that if a traveler makes a reservation and then cancels, the Accommodations Tax does not apply because no room was furnished. According to Petitioner, this possibility demonstrates that it does not "furnish" a room until the room is occupied. However, this fact reflects nothing more than that a customer is granted the unilateral right to retract his prerogative to possess the room.

the room must be contractually furnished upon making the reservation or, in this instance, the acceptance of the online booking. It is at that point when the customer has a right to use the accommodations.

Moreover, it is significant that the customer's transaction of booking the hotel room does not involve interaction with the hotel at all. Petitioner is the merchant of record for the transactions in which a hotel room is booked by Petitioner. It is Petitioner who accepts money from the customer and thereafter makes arrangements with the hotel to reserve the room, and then communicates the appropriate reservation information to its customer. The customer's credit card invoice shows that the hotel reservations were purchased not from the hotel but from Petitioner. In renting a room, a customer makes no payments to anyone other than Petitioner unless he or she purchases additional guest services at the hotel site. If there are such additional purchases, those transactions normally take place directly with the hotel or a third party vendor and Petitioner is not involved. Based upon these same set of facts, the court held in City of Charleston, S.C. v. Hotels.com, LP, 520 F.Supp.2d 757 (D.S.C. 2007), that:

> If consumers access a website, use it to book a hotel room, pay the website directly, and never pay the hotel, or interact with the hotel at all until they arrive, the court cannot accept Defendants' assertion that they do not furnish accommodations to consumers.

Id. at 768.

Furthermore, "[t]he legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense." S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, --- S.E.2d ----, 2008 WL 4693075, at *7 (Ct. App. 2008). In seeking to ascertain the meaning of a statute, a court must also "presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile." Id. at *8.

Significantly, in Section 12-36-920(E), the General Assembly did not expressly limit the application of the tax to businesses that own or manage the accommodation. This fact is particularly salient in light of a review of other sections of the Sales and Use Tax Act. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose."). For instance, Section 12-

36-920(A) provides that the tax applies to not just the rental of the accommodation but to the "charges" for the room. Application of the tax to the charges goes beyond just the rental rate and imposes the tax on all the associated charges to obtain the room. Likewise, the definition of "business" under the Accommodations Tax includes "all activities" in which the object is to directly or **indirectly** profit. S.C. Code Ann. § 12-36-20 (2000).

In addition, Petitioner points out that, since 1955, the General Assembly has amended or recodified the Accommodations Tax several times, but it has never specifically expanded the tax to cover online companies like Petitioner or any other intermediary which is compensated by a party other than the hotel or other place of accommodation. For instance, in 1976, the General Assembly expanded the list of businesses set forth in Section 12-36-920(A) to include campgrounds. The 1976 amendment, however, was clearly necessary to clarify whether a space at a campground was an accommodation subject to the tax or simply the lease of property. Here, the statute, as it currently exists, imposes a tax upon Petitioner because it was furnishing an accommodation as contemplated by the statute. Thus, there was no need for the statute to be amended to specifically enumerate companies like Petitioner since those companies already fell within the broad language of the statute. Therefore, since it was unnecessary to amend the statute to expressly cover companies like Petitioner, there can be no inference ensuing from the General Assembly's failure to do so.

Application of Sections 12-36-920 (A), (B), (C) and (D)

Petitioner argues that the language of Sections 12-36-920 (A), (B), (C) and (D) reflect the legislative intent that Petitioner's provision of online hotel reservations is not the act of furnishing a room under the Accommodations Tax. Those sections, however, simply do not reflect the General Assembly's intent to circumscribe the businesses to which the Accommodations Tax applies. Indeed, in analyzing these arguments, it important to note that "a court should not focus on any single section or provision but should consider the language of the statute as a whole." Chem-Nuclear, 648 S.E.2d at 603. Additionally, "[t]he language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id.

Petitioner claims that the application of the Accommodations Tax to its business inconsistently requires a liberal interpretation of the term "furnish" in Section (E) and a narrow interpretation of the phrase "accommodations furnished" in Section (A) as a service that can only

be provided by hotels. The words of the statute must be construed in context and "must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Municipal Ass'n of S.C. v. AT&T Comm. of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004). Likewise, in construing a statute, this Court should not consider the particular clause being construed in isolation, but should read the clause in "conjunction with the purpose of the whole statute, and in light of the object and policy of the law." S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991).

Here, the meaning of the term "furnish" is clear from the context of both statutory provisions. In subsection (E), the operative phrase is "in the business of furnishing accommodations." That phrase applies to "**every person**" who engages or continues within this State in the business of furnishing accommodations to transients for recompense. As explained above, Petitioner's provision of hotel reservations meets the criteria of furnishing an accommodation. On the other hand, in subsection (A), the operative phrase is "rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients by any hotel, inn . . ." In that provision, the word "furnished" is followed by the phrase "by any hotel, inn . . ." Nevertheless, as further explained below, when viewed in light of the entire statute, the most reasonable interpretation of the phrase "furnished . . . by any hotel, inn . . ." in subsection (A) is that it simply sets forth where the "rooms, campground spaces, lodgings, or sleeping accommodations" must be located. The notion that the phrase limits tax liability to the hotel or inn itself is refuted by subsection (C) of the statute. Therefore, there is no inconsistency in the application of the term "furnish" in reaching the conclusion that the Accommodation Tax applies to Petitioner. Subsection (A) sets forth **what** the tax is imposed upon and subsection (E) sets forth **who** is responsible for collecting and remitting the tax.

Petitioner next argues that Section 12-36-920(A) sets forth the list of businesses which are subject to the Accommodations Tax as "hotels, inns, tourist courts, tourist camps, motels, campgrounds, and residences." Petitioner further claims that since the General Assembly did not include in that list businesses facilitating reservations at such places, under the doctrine of "expressio unius est exclusio alterius," it is not subject to Section 12-36-920(A). That doctrine provides that:

> the enumeration of particular things excludes the idea of something else not mentioned. Under the rule, exceptions made in a statute give rise to a strong inference that no other exceptions were intended.

Pennsylvania Nat. Mut. Cas. Inc. Co. v. Parker, 282 S.C. 546, 554-55, 320 S.E.2d 458, 461 (1984) (citations omitted). Though Section 12-36-920(A) lists entities which could potentially be subject to the Accommodations Tax such as hotels and inns, as explained above, that list limits the application of the tax to where the accommodation is provided, not from whom the gross proceeds are derived. Since a reservation received at Petitioner's website furnishes the right to an accommodation at one of the locations listed in subsection (A), the doctrine of "expressio unius est exclusio alterius" does not preclude Petitioner from being subject to tax liability.

Petitioner also avers that the language used in Section 12-36-920(B) reflects legislative intent that the Accommodations Tax does not apply to Petitioner. Section 12-36-920 imposes two distinct vendor taxes related to transient accommodations. Section 12-36-920(A) imposes a sales tax at the rate of 7 percent on the gross proceeds derived from the "rental or charges" for any rooms etc., whereas Section 12-36-920(B) imposes a 5 percent sales tax for the "additional guest charges" specified in subsection (B). Petitioner seeks to apportion meaning to the fact that the phrase, "any place where rooms, lodges, or accommodations are furnished to transients for consideration," in Section 12-36-920(B) is nearly identical to the phrase "any place in which rooms, lodges, or sleeping accommodations are furnished to transients for consideration," in Section 12-36-920(A). According to Petitioner, the use of these nearly identical phrases demonstrates that the General Assembly intended for the taxes imposed by subsections (A) and (B) to be imposed on the same taxpayers – i.e., those places where rooms, lodges, or accommodations are furnished to transients for consideration. However, as discussed above, subsection (E) sets forth **who** is responsible for collecting and remitting the taxes imposed by Section 12-36-920 and subsections (A) and (B) set forth **what** is being taxed. Subsection (B) simply provides that additional guest charges "at any place where rooms, lodgings, or accommodations are furnished to transients for a consideration" are subject to taxation.

Petitioner also contends that Section 12-36-920(C) clarifies which types of businesses are required to pay the Accommodations Tax. Under Petitioner's analysis, Section 12-36-920(C) provides that the only other businesses required to remit the Accommodations Tax other than the hotels which physically provide rooms or lodging are "real estate agents, brokers, corporations,

or listing services." Petitioner interprets Section 12-36-920(C) as a "remitter provision" that, consistent with normal agent/principal rules, requires an agent to remit taxes collected on behalf of the principal. Since Petitioner views its function as independent – and at arms-length – from the hotels, Petitioner submits it is not a business which is either required to pay or remit the Accommodations Tax.

Petitioner's premise, however, erroneously presumes that it is not engaged in the business of furnishing accommodations under the statute. Furthermore, I find that Petitioner's interpretation is a patent expansion of the intent of subsection (C). Subsection (C) provides that:

> Real estate agents, brokers, corporations, or listing services required to remit taxes under this section shall notify the department if rental property, previously listed by them, is dropped from their listings.

Thus, subsection (C) merely creates a responsibility that businesses or persons who are required to remit Accommodations Taxes must notify the Department if the listing is dropped. Moreover, rather than operate to limit the application of the provisions of Section 12-36-920(A), subsection (C) actually reflects a legislative intent that Section 12-36-920(A) be read broadly. For instance, clearly "real estate agents, brokers, corporations, or listing services" are not included among the businesses described in subsection (A). Yet, in subsection (C), the General Assembly plainly includes them as businesses or persons who may be required to remit Accommodations Taxes. Thus, though these entities are not necessarily the owners or operators of rental units, the statute contemplates their liability for the tax if they are "in the business of furnishing accommodations to transients for consideration." See S.C. Code Ann. § 12-36-920(E) (2000).

Petitioner further argues that subsection (D) reflects the Legislature's intent that the Accommodations Tax applies only to the place in which rooms, lodging, or sleeping accommodations are furnished. The Court disagrees. As set forth above, the gross proceeds paid for the provision of the physical room includes, under South Carolina law, all the "charges" paid to attain that right. Though subsection (D) contemplates the existence of a taxpayer who "owns or manages rental units," it does not limit tax liability to only the owner or manager of the unit, nor does it limit the tax to only the funds collected by the owner or manager of the unit. Moreover, in a very real sense, Petitioner is managing the rental of the properties in this case. The American Heritage College Dictionary defines "manage" as "to direct or control the use of." American Heritage College Dictionary 822 (3rd ed. 1993). Here, Petitioner has the authority to

bind the property concerning the rental of certain units. Moreover, pursuant to that authority, it even collects the funds for the rental of those units.[11]

Other Authority

Finally, it is also notable that in Louisville/Jefferson County Metro Government v. Hotels.com, No. 3:06-CV-480-R, 2008 WL 4500050 (W.D. Ky. 2008), the court held that accommodations taxes did not apply to internet travel companies. The business model that was considered in Metro Government was virtually the same as Petitioner's business model. The issue the court considered in Metro Government, however, is distinguishable from the issue before this court. In Metro Government, the court was seeking to determine whether "internet businesses that have neither ownership, nor physical control, of the rooms they offer for rent are 'like or similar' to 'motor courts, motels, hotels, or inns.'" Obviously, here, as in Metro Government, resolution of whether the accommodations tax applies to the internet company focuses upon an analysis of the "business" of the internet company. Nevertheless, the decisive issue in this case is not whether Petitioner's business is "like or similar" to the hotel business, but whether Petitioner is engaged "in the business of furnishing accommodations" to travelers for consideration. The South Carolina Sales and Use Tax defines "business" to include "all activities, with the object of gain, profit, benefit, or advantage, **either direct or indirect**." S.C. Code Ann. § 12-36-20 (2000) (emphasis added). A business does not necessarily have to be "alike in substance or essentials"[12] to the hotel itself to nonetheless be engaged in an activity with the object to either directly or **indirectly** profit from furnishing hotel accommodations to travelers. Furthermore, as explained above, the business of furnishing accommodations merely

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[11] Petitioner contends that John McCormack, a policy manager for the Department, admitted in a deposition that Petitioner does not manage hotels. In the deposition, the following exchange occurred:

> *Attorney for Petitioner*: I take it you have no information to suggest that it [Petitioner] is a manager of any hotels.
>
> *Mr. McCormack*: As I would understood [*sic*] the term "manager," yes, I would agree that I don't think they're managing the hotel.

"A judicial admission, to be binding, must be one of fact and not a conclusion of law or an expression of opinion…" 32 C.J.S. Evidence § 397 (1996). In this case, McCormack's statement, which includes the words "I don't think," is an expression of opinion. Moreover, the meaning of the term "manage" as it is used in Section 12-36-920(D) is a question of law, not of fact. Therefore, McCormack's statement is not binding on this Court.

[12] See Merriam-Webster's Online Dictionary, www.m-w.com defining "similar."

requires the authority and the ability to provide an accommodation, not the ownership of the accommodation.

For similar reasons, the Court also finds the Fourth Circuit's decision in Pitt County v. Hotels.com, L.P., No. 07-1900, 2009 WL 81448 (4th Cir. January 14, 2009) to be distinguishable from the present case. In that case, a county in North Carolina brought a class action suit against a group of online travel companies for failure to pay the county's hotel occupancy tax. The dispositive issue in the case was whether the online travel companies constituted "retailers" within the meaning of N.C. Gen. Stat. § 105-164.4(a)(3) (2007). Section 105-164.4(a)(3) defined retailers to include "[o]perators of hotels, motels, tourist homes, tourist camps, and similar type businesses." The Fourth Circuit concluded that the online travel companies constituted neither "operators of hotels" nor "similar type businesses" and thus found that the county's complaint failed to state a claim upon which relief could be granted.

In the present case, unlike in Pitt County, the Court need not find that Petitioner is an operator of a hotel or a "similar type" of business in order to determine that Petitioner is liable for the Accommodations Tax. Rather, the Court must only conclude that Petitioner is engaged "in the business of furnishing accommodations" to transients for consideration. As discussed above, being engaged "in the business of furnishing accommodations" does not require an entity to operate a hotel or to be "of the same kind, character and nature"[13] as a hotel.

Facilitation fee – Gross Proceeds

Petitioner argues that the difference between the amount it collects from its customer and the discounted amount paid to the hotel suppliers, characterized as a "facilitation fee," is a non-taxable service. In other words, the "facilitation fee" should not be considered as a portion of the "gross proceeds" because it is not gross proceeds derived from the rental or charges for any rooms by any hotel. The Court disagrees.

Section 12-36-920(A) imposes a sales tax on the "gross proceeds" derived from the rental of a hotel room. Under S.C. Code Ann. § 12-36-90 (2000 & Supp. 2007), "gross proceeds of sales" or "any similar term" means the value "accruing from the sale, lease, or rental of tangible

[13] See Pitt County, 2009 WL 81448, at *4.

personal property."[14] The term specifically includes "the proceeds from the sale of tangible personal property without any deduction for . . . (ii) the cost of materials, labor, or service." S.C. Code Ann. § 12-36-90(1)(b) (2000).[15]

Under Petitioner's "merchant model," Petitioner charges its customers two fees -- a "Room Charge" and a fee for "Tax Recovery and Services." Both fees include a mark-up for compensation to Petitioner. Afterwards, hotels invoice Petitioner the applicable tax rate for rooms furnished by them to guests. After Petitioner remits the money to the hotel, the hotel remits the tax to the Department. This tax is calculated based upon the room rate that Petitioner has negotiated with the hotels, not the total amount the customer pays to Petitioner.

Petitioner describes its fees as the amount the customer pays to the company for "facilitating reservations." It characterizes itself as "an unrelated third party providing services to its customers." Thus, Petitioner avers that by submitting sales taxes based upon the discounted rates to the hotel, the proper amount of sales taxes are being paid in that the hotels remit tax on the amount of money actually received by them for providing the hotel rooms to Petitioner's customers.

No matter the nomenclature used to describe the fees, however, these amounts are subject to the tax. The fees are charged to the customer for the value of receiving the right to rent a room from a hotel. Even if Petitioner's business is characterized as a "service," the service it provides is by no means unrelated to the rental of the hotel room. This argument would be much more persuasive if the service Petitioner provided was provided distinctly to the hotel, such as providing a conduit for the transfer of funds after a reservation is made with the hotel. Petitioner's service, however, requires very little interaction with the hotel and ultimately results in the culmination of the agreement and payment to rent the hotel room. More importantly, Section 12-36-90(b)(ii) declares that in calculating gross proceeds from the rental of personal property, no deduction is made for the cost of labor or service. The statutory definition of "gross

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[14] Under S.C. Code Ann. § 12-36-60 (2000), "tangible personal property" is defined to include the "furnishing of accommodations."

[15] The term "gross proceeds of sales" also specifically includes "the proceeds from the sale of property sold on consignment by the taxpayer." S.C. Code Ann. § 12-36-90(1)(a) (2000). In a consignment sale, the owner of tangible personal property allows a third party to sell the property. At the time of sale, the third party collects and remits sales tax on the gross proceeds of its retail sale to customers, retains its fee as compensation and then pays the owner for the property. The total amount received for the sale is subject to sales tax without any deduction for labor costs. This scenario is similar to the transactions in which Petitioner is engaged.

proceeds" thus does not allow the cost of a service to be deducted for the purpose of determining "gross proceeds." Rather, "gross proceeds" as the term is used in Section 12-36-920(A) embraces all charges associated with the furnishing of accommodations, including Petitioner's facilitation fee, such that the entire sum collected by Petitioner from its customers is therefore subject to sales tax.

Petitioner also maintains that the General Assembly's use of the phrase "by any hotel …" in Section 12-36-920(A) reflects a legislative intent to restrict the taxing of gross proceeds to only those proceeds collected by the hotel and other businesses described therein for their furnishing of an accommodation. Again, the words of the statute must be construed in context and "must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Municipal Ass'n of S.C., 606 S.E.2d at 470; see also S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991) (The court should not consider the particular clause being construed in isolation, but should read the clause in "conjunction with the purpose of the whole statute, and in light of the object and policy of the law."). Here, interpreting the phrase "furnished to transients by any hotel . . ." to limit the application of the statute only to gross proceeds specifically collected by hotels is a narrow reading of the statute. Petitioner's reading of the statute would apply the limiting phrase "derived from" to both the "rental or charges" and to the hotels, themselves. To the contrary, the clear intent of the statute is to impose a tax on all gross proceeds derived from the rental or charges for the furnishing of any rooms, etc. Therefore, as discussed above, the phrase "by any hotel . . ." limits the application of the tax to where the accommodation is located, not from whom the gross proceeds are derived.

In addition, Petitioner also asserts that various facts distinguish its business in regard to the receipt of gross income. Petitioner notes that:

- Hotels do not charge facilitation fees or pay Petitioner's fee.
- Its facilitation fee is not paid by the hotel or ever even received by the hotel.
- Its facilitation fee is not a charge for services provided with the hotel (*i.e.*, maid services).

Petitioner's facilitation fee nevertheless is a mandatory charge as a condition for obtaining a reservation for a hotel room through Petitioner. Moreover, whether hotels typically charge a

facilitation fee is irrelevant to the determination of whether Petitioner's fee is a component of gross proceeds. Rather, this determination centers on the issue of whether the fee, itself, is a component of the gross proceeds collected for the rental of the room. The question is from whom and for what are those proceeds applicable.

Clearly, the fee is paid by the customer of Petitioner as a portion of the charge to receive a reservation for the hotel. That fee is certainly a portion of the gross amount a customer pays to Petitioner for the right to receive a hotel reservation. Furthermore, whether or not the hotel receives the fee is not the issue. The intent of the statute is to tax the proceeds "derived" from the rental or charges for any rooms. In other words, the fundamental issue is how much did the customer pay for the right to obtain the reservation. Here, the customers paid a greater amount than what was used as a basis for calculating the sales tax owed. Therefore, the corresponding underpayment of sales tax was in violation of Section 12-36-920.

Application of Section 12-36-920(E) to Out-of-State Companies

Seizing upon the phrase "within this State" in Section 12-36-920(E),[16] Petitioner next contends that the Accommodations Tax is limited to transactions where: (1) the taxpayer; (2) the business activity of furnishing accommodations; and (3) the accommodations themselves are all within this State. According to Petitioner, because it is an out-of-state business that performs the act of booking hotel rooms outside of South Carolina, it is not liable for the Accommodations Tax.

Since there is no dispute that the accommodations themselves are located within South Carolina, the Court must only address whether Section 12-36-920(E) limits the Accommodations Tax to transactions where: (1) the taxpayer; and (2) the business activity of furnishing accommodations are both within this State.

Statutes very similar to Section 12-36-920(E) were interpreted in City of Charleston v. Hotels.com, 520 F.Supp.2d 757, and in International Harvester Co. v. Wasson, 281 S.C. 458, 316 S.E.2d 378 (1984) cert. denied, 469 U.S. 882 (1984). The first of these two cases, City of Charleston v. Hotels.com, provides guidance on whether the Accommodations Tax may be

[16] As noted above, Section 12-36-920(E) provides that:

> The taxes imposed by this section are imposed on every person engaged or continuing **within this State** in the business of furnishing accommodations to transients for consideration.

S.C. Code Ann. § 12-36-920(E) (2000) (emphasis added).

imposed on out-of-state businesses. In that case, a civil lawsuit was filed by two South Carolina cities to collect taxes under their respective Accommodations Tax ordinances from certain on-line travel companies. In a motion to dismiss, the defendants argued that S.C. Code Ann. § 6-1-510(1) (2006), the state statute that defined "local accommodations tax," prohibited the cities' proposed application of the ordinances to businesses located outside of the cities' boundaries. Section 6-1-510(1) provided:

> "Local accommodations tax" means a tax on the gross proceeds derived from the rental or charges for accommodations furnished to transients ... **and which is imposed on every person engaged or continuing within the jurisdiction of the imposing local governmental body in the business of furnishing accommodations to transients for consideration.**

S.C. Code Ann. § 6-1-510(1) (2006) (emphasis added). The court, however, rejected the defendants' arguments, explaining: As discussed in the previous subsection,[17] the guiding principle of the court when called upon to determine a statutory ambiguity to is to discern and honor legislative intent. For the same reasons outlined above regarding the enabling statute, the court finds that the most reasonable interpretation of the legislators' intent in passing the definitional statute is that accommodations taxes can be levied against those engaged in the practice of providing hotel rooms within the municipal boundaries, **regardless of the providers' physical location**. Accordingly, the court finds that Plaintiffs are not prohibited by state law from applying their Municipal Accommodations Fee Ordinances against out-of-state persons and businesses, and thus Defendants are not entitled to dismissal on these grounds.
Id. at 767 (emphasis added).

Here, the language of Section 6-1-510(1) is nearly identical to the language of Section 12-36-920(E). Both provide that their respective taxes are imposed on "every person engaged or

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[17] In the previous subsection of its order, the court held that the enabling statute, S.C. Code Ann. § 5-7-30 (2006), which gave municipalities the power to impose taxes "provided, however, that this shall not extend the effect of the laws of the municipality beyond its corporate boundaries," did not prohibit municipalities from levying taxes against out-of-state corporations. The court explained:

> The most reasonable interpretation of the caveat "provided, however, that this shall not extend the effect of the laws of the municipality beyond its corporate boundaries" is that legislators needed to insert a provision to prevent municipalities from attempting to levy taxes against residents or businesses of other municipalities whose activities had no impact on the taxing municipality. If, as Defendants propose, South Carolina legislators had intended to exempt from municipal taxation any person or business not located in that municipality, they could have easily done so with explicit language to that effect.

Id. at 766.

continuing" within their jurisdiction "in the business of furnishing accommodations to transients for consideration." Moreover, the Court finds the federal district court's reasoning to be sound. Similar to that of Section 6-1-510(1), the main purpose of Section 12-36-920(E) is to impose a tax on the amount of money visitors to the State spend on their accommodations. Cf. City of Charleston v. Hotels.com, 520 F.Supp.2d at 768 ("The core purpose of the Ordinances is to levy a tax on the amount of money visitors to the municipality spend on their hotel rooms or other accommodations."). These taxes help the State to cope with the increased burden on governmental services that tourists create. It thus seems rather unlikely that the General Assembly intended to exempt companies like Petitioner from paying these taxes simply because they are headquartered in another state. In the words of the federal district court, had the General Assembly intended to grant such an exemption, "they could have easily done so with explicit language to that effect." City of Charleston v. Hotels.com, 520 F.Supp.2d at 766.[18]

The second case, International Harvester, 281 S.C. 458, 316 S.E.2d 378, sheds light on whether the Accommodations Tax is limited to transactions where the business activity of furnishing accommodations occurs within this State. In that case, the South Carolina Supreme Court addressed whether, under S.C. Code Ann. § 12-35-510 (1976), a sales tax could be imposed upon the sale of truck-tractors by a Delaware corporation to a South Carolina corporation. Section 12-35-510 imposed a sales tax "upon every person engaged or continuing within this State in the business of selling at retail any tangible personal property ...." In construing Section 12-35-510, the court determined that, to be subject to the tax, a taxpayer "must be in business of making retail sales in South Carolina." Id. at 460, 316 S.E.2d at 379. After noting that S.C. Code Ann. § 12-35-20 (1976) defined "business" as "all activities engaged in ... with the object of gain," the court concluded that "[t]here is little question that plaintiff is in business in South Carolina for a profit since it maintains outlets in Greenville and Charleston as

[18] The Court's conclusion in this case is further supported by the last antecedent doctrine. Under it, "referential and qualifying words and phrases, where no contrary intention appears, refer **solely** to the last antecedent." 2A Norman Singer and J.D. Singer, Statutes and Statutory Construction § 47:33 (7th ed. 2007) (emphasis added). In other words, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." In re Bateman, 515 F.3d 272, 277 (4th Cir. 2008) (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)). Here, the clause immediately preceding the phrase "within this State" is "engaged or continuing," not "every person." Moreover, the punctuation used in Section 12-36-920(E) does not suggest that the phrase "within this State" was intended to apply to all antecedents. See Singer & Singer, supra, § 47:33 ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated by the antecedents by commas.").

well as soliciting business in this State by a resident salesman from Carolina Fleet Sales of Charlotte, North Carolina." Id.[19]

Similar to S.C. Code Ann. § 12-35-20 (1976), Section 12-36-20 defines the term "business" to include "**all activities**, with the object of gain, profit, benefit, or advantage, either direct or indirect." S.C. Code Ann. § 12-36-20 (2000) (emphasis added). Therefore, contrary to Petitioner's claims, the phrase "engaged or continuing within this State in the business of furnishing accommodations" in Section 12-36-920(E) does not mandate that the isolated act of booking a hotel room occur within South Carolina. Rather, that phrase simply requires a taxpayer to engage in profit-driven activities within this State involving the furnishing of South Carolina accommodations.

Here, unlike the plaintiff in International Harvester, Petitioner does not maintain outlets or offices in this State, nor does it employ a resident salesman in this State. Nevertheless, "no universal formula has been, or is likely to be, devised for determining what constitutes doing business by a foreign corporation within a state . . ." Krell v. Carolina Bank, 283 S.C. 5, 8, 320 S.E.2d 491, 493 (Ct. App. 1984). Instead, "[t]he question must be resolved upon the facts of the particular case." Id.

In Krell, the Court of Appeals addressed the question of whether Carolina Bank, a bank organized and existing under the laws of North Carolina, was doing business in South Carolina within the meaning of S.C. Code Ann. § 36-2-803(1) (1976). The court concluded that it was, explaining in part:

> Carolina Bank has accounts with three large retail chain stores of different natures operating in South Carolina-Golden Coral Stores, Pantry, Inc. Stores and Mack Stores. These accounts are not one-time transactions such as mortgages and security agreements but are on-going, continuous relationships with business in South Carolina. Further, Carolina Bank has contracted directly with a South Carolina corporation. This contract with First Federal involves all of the mortgages held by Carolina Bank on North Carolina properties owned by North Carolina residents. This contract is not the result of a fortuitous contact with South Carolina; it came through the deliberate actions of Carolina Bank in taking on a South Carolina partner in its mortgage business.

Krell, 283 S.C. at 8-9, 320 S.E.2d at 493.

[19] Notably, however, the court did not state that an entity **must** maintain outlets and employ a salesperson in South Carolina in order to be doing business in this State. Rather, the court simply concluded that an entity that performs such actions in this State is doing business here.

In the present case, Petitioner deliberately contracted with hundreds of South Carolina hotels during the five-year audit period to furnish, for a profit, accommodations to Petitioner's customers traveling into this State. These were not "one-time transactions," but were rather "on-going, continuous relationships" with businesses in South Carolina. The hotels regularly invoiced Petitioner for the rooms and Petitioner, in turn, submitted payment to the hotels. Under these facts, the Court concludes that Petitioner was indeed engaged in profit-driven activities within this State involving the furnishing of South Carolina accommodations.

However, this conclusion does not end the Court's inquiry. In International Harvester, the court also held that an additional "criteria" for a taxable sale was that "the sale must be a sale within South Carolina." International Harvester, 281 S.C. at 460, 316 S.E.2d at 379. After examining the evidence in that case, the court in International Harvester ultimately concluded that the truck sales had taken place in South Carolina. The court explained:

> Section 12-35-100 defines a sale as any transfer of tangible personal property for a consideration. Thus, if the transfer of the trucks, i.e., delivery, took place in South Carolina, the sale would take place in this State. The trucks were manufactured in Indiana and delivered to the purchaser in Greenville, South Carolina, by a common carrier hired and paid by the plaintiff. Further, the Bill of Lading for each truck shows that delivery was made to the purchaser in Greenville, South Carolina. Finally, the President of Senn Trucking, the purchaser, signed an affidavit to the effect that the trucks were delivered in South Carolina. Based on the foregoing factual support, it is concluded that the sales took place in South Carolina.

Id.

Here, Section 12-36-100, like the former Section 12-35-100 at issue in International Harvester, defines "sale" as "any transfer, exchange, or barter, conditional or otherwise, of tangible personal property for a consideration." S.C. Code Ann. § 12-36-100 (2000). Moreover, similar to International Harvester, in this case, the transfer of possession of the physical property involved here – the accommodations – took place in South Carolina. While it is true that Petitioner entered into the sales agreements with its customers outside of South Carolina, International Harvester clearly stands for the proposition that a sale takes place in the State where the sales item is delivered, not the State where the sales agreement is entered into by the vendor. Therefore, the Court concludes that Petitioner's "sales" took place in South Carolina.

For these reasons, the Court concludes that the phrase "within this State" in Section 12-36-920(E) does not exempt Petitioner from tax liability under Section 12-36-920(A).

Commerce Clause

Petitioner further claims that requiring it to collect the Accommodations Tax would violate the Commerce Clause of the United States Constitution.

The Commerce Clause of the United States Constitution provides that Congress has the power to regulate commerce among the several states. The United States Supreme Court has held that, even without affirmative Congressional action, the "dormant" or "negative" Commerce Clause prohibits state taxation that unduly burdens interstate commerce. See General Motors Corp. v. Tracy, 519 U.S. 278 (1997); S.C. State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938). According to the U.S. Supreme Court, a state tax is able to withstand a Commerce Clause challenge when the tax: (i) is applied to an activity with a substantial nexus with the taxing State; (ii) is fairly apportioned; (iii) does not discriminate against interstate commerce; and (iv) is fairly related to the services provided by the State. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

In this case, Petitioner claims that South Carolina does not have a "substantial nexus" with the services that Petitioner provides. Petitioner further claims that applying the tax to its services would violate the Commerce Clause's requirement that taxes be "fairly apportioned." Each argument is addressed below.

Substantial Nexus

In the context of sales taxes,[20] the U.S. Supreme Court has held that a business must have a "physical presence" in a taxing State in order for its activities to have a substantial nexus with that State under the Commerce Clause. See Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (upholding "physical presence" requirement set forth in National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967)). Thus, a State cannot impose the duty to collect sales taxes on "sellers whose only connection with customers in the State is by common carrier or the United States mail." Quill, 504 U.S. at 301 (quoting National Bellas Hess, 386 U.S. at 758).

In ruling on a Motion for Reconsideration filed in the City of Charleston v. Hotels.com litigation discussed above, the court addressed the question of whether, under Quill, the defendants' activities lacked a substantial nexus with South Carolina. The court ruled that they did not, explaining:

[20] As noted above, the parties have stipulated that Section 12-36-920 is a sales tax.

> The court has no hesitation in ruling here that the Dormant Commerce Clause is not implicated by the Defendants' alleged actions. The cases cited by Defendants in which attempted taxation was struck down typically involves scenarios where the only connection between the taxed entity and the taxing jurisdiction is that goods happen to have been shipped through the jurisdiction on the way to their eventual destination. Here, there is both a substantial nexus and a physical presence between the taxing jurisdictions and Defendants, since Defendants are alleged to have proactively marketed, booked, and leased hotel rooms and other accommodations which are physically located in Charleston and Mt. Pleasant. Therefore, the court finds that allowing the levying of municipal accommodations taxes against Defendants for the types of transactions in question would not unduly restrict interstate commerce, and is not a constitutional violation.

City of Charleston v. Hotels.com, LP, Nos. 2:06-CV-1646-PMD and 2:06-CV-2087-PMD, 2008 WL 4921295, at *5 (D.S.C. Apr. 29, 2008).

This Court agrees with the federal district court's analysis. In examining the constitutionality of State taxes under the Commerce Clause, the U.S. Supreme Court has frequently noted that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 646 (1981) (quoting Complete Auto Transit, 430 U.S. at 279). The Supreme Court has further explained that the "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" Commonwealth Edison, 453 U.S. at 624 (quoting Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207, 228 (1980)).

Here, just like the defendants in City of Charleston v. Hotels.com, Petitioner derived income from booking accommodations that were located within South Carolina – accommodations which enjoyed the benefits of local fire and police protection. Moreover, the services of South Carolinians employed at those accommodations were critical to Petitioner's ability to produce that income. While it is true that those working at the South Carolina accommodations were not employees of Petitioner, that fact is of minor constitutional significance. See Scripto, Inc. v. Carson, 362 U.S. 207, 211 (1960) (in finding nexus between appellant and State of Florida based on "continuous local solicitation in Florida" by salesmen, court acknowledged that the salesmen were not "regular employees of appellant devoting full time to its service," but concluded that "such a fine distinction is without constitutional significance"). Rather, "the crucial factor governing nexus is whether the activities performed in

this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 250 (1987) (quoting Tyler Pipe Industries, Inc. v. State Dep't of Revenue, 715 P.2d 123, 126 (Wash. 1986)). As other courts have made clear, a finding of a "substantial nexus" between a state and an out-of-state vendor may be based upon activities performed by an in-state company on behalf of the out-of-state vendor. See, e.g., Arco Bldg. Systems, Inc. v. Chumley, 209 S.W.3d 63, 74 (Tenn. Ct. App. 2006) (in finding a substantial nexus between Tennessee and an out-of-state vendor, the court noted that "unlike the sellers in National Bellas Hess and Quill Corp., this case involves an out-of-state seller that has chosen to rely heavily on an in-state company to perform a wide range of services that are integral to the success of the seller's overall business operations in the taxing state"); State v. Dell Int'l, Inc., 922 So.2d 1257 (La. Ct. App. 2006) (concluding that evidence supported a finding of substantial nexus where foreign retailer had entered into agreement with in-state technical service provider under which service provider provided computer support services on the retailer's behalf and those services were crucial to the retailer's ability to sell its products).

Furthermore, the primary case relied upon by Petitioner to show lack of nexus, McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944), is distinguishable from the present case. In McLeod, the State of Arkansas sought to tax sales of machinery and mill supplies by two Tennessee corporations to residents of Arkansas. The Tennessee corporations were not qualified to do business in Arkansas and did not have a sales office, branch plant or any other place of business in Arkansas. Orders for goods came to Tennessee through solicitation in Arkansas by traveling salesmen domiciled in Tennessee or by mail or telephone. The goods were shipped from Tennessee, collection of the sales price was made in Tennessee, and title to the goods passed upon delivery to a carrier in Tennessee. Based upon these facts, the U.S. Supreme Court determined that the Commerce Clause barred the corporations' liability for the sales tax.

The facts of the present case are quite different from those of McLeod. In McLeod, the Tennessee corporations relied very little on the services of Arkansas to facilitate the sale of their goods to Arkansas residents. See Nat'l Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 558 (1977) (noting, in nexus determinations, the "significance of the inquiry" as to whether "the out-of-state seller enjoys services of the taxing State"). While some of their salesmen occasionally travelled to Arkansas to solicit sales, their salesmen were domiciled in

Tennessee. Here, in contrast, Petitioner relies heavily on services and other benefits provided by South Carolina and its residents for the carrying out of Petitioner's sales transactions. Moreover, unlike in McLeod, the physical property being sold[21] by Petitioner in this case (i.e., the accommodations) are located, in a rather permanent fashion, in South Carolina.

For these reasons, the Court concludes that Petitioner was "physically present" in South Carolina during the tax years in question. Accordingly, the Court finds that Petitioner's activities had a "substantial nexus" with South Carolina.

Fairly Apportioned

As noted above, Petitioner also claims that applying the Accommodations Tax to its facilitation fee would violate the "fairly apportioned" prong of the Complete Auto Transit test. The Court disagrees.

"The central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." Goldberg v. Sweet, 488 U.S. 252, 261 (1989). Nonetheless, the U.S. Supreme Court has "long held that the Constitution imposes no single apportionment formula on the States and therefore have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'" Id. (quoting Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983)). Rather, the U.S. Supreme Court determines whether a tax is fairly apportioned "by examining whether it is internally and externally consistent." Goldberg, 488 U.S. at 261.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." Goldberg, 488 U.S. at 261. Here, the tax at issue is imposed only on businesses that furnish accommodations which are located within the boundaries of the State of South Carolina. If every State imposed a similar tax on accommodations furnished within their boundaries, no multiple taxation would occur since the same accommodations cannot be furnished in two different States at once. Therefore, the tax is internally consistent.

"The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." Goldberg, 488 U.S. at 262. In this case, Petitioner contends that the

[21] S.C. Code Ann. § 12-36-100 (2000) defines "sale" to include rentals, leases, and licenses to use.

Department cannot tax the portion of the revenues derived from Petitioner's services since those services were performed outside of South Carolina. The Court disagrees.

As one legal commentator has noted, "[a]lthough 'the term apportionment tends to conjure up allocation by percentages,' the [U.S. Supreme] Court has 'consistently approved taxation of sales without any division of the tax base among different States.'" Samantha K. Graff, State Taxation of Online Tobacco Sales: Circumventing the Archaic Bright Line Penned by Quill, 58 Fla. L. Rev. 375, 407 (2006) (quoting Okla. Tax Comm'n. v. Jefferson Lines, Inc., 514 U.S. 175, 186 (1995)). Instead, the Court has "held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." Jefferson Lines, 514 U.S. at 186 (citing McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940)). Thus, "an internally consistent, conventional sales tax has long been held to be externally consistent as well." Jefferson Lines, 514 U.S at 188.

For instance, in Jefferson Lines, the U.S. Supreme Court addressed the question of whether Oklahoma's sales tax on the full price of a ticket for bus travel from Oklahoma to Texas was externally consistent under the Complete Auto Transit test. In concluding that the tax was externally consistent, the Court declared that "sales with at least partial performance in the taxing State justify that State's taxation of the transaction's **entire gross receipts** . . ." Id. at 189 (emphasis added). Moreover, the Court expressly rejected the argument that the tax should be apportioned between Oklahoma and Texas since apportionment was administratively feasible. The Court explained that there was "no reason to leave the line of longstanding precedent and lose the simplicity of our general rule sustaining sales taxes measured by full value, simply to carve out an exception for the subcategory of sales of interstate transportation services." Id. at 196.

Here, the tax at issue is a conventional sales tax. It taxes the gross proceeds derived from the rental or charges for accommodations located in South Carolina that are furnished to transients for a consideration. Many other states have similar sales taxes.[22] Moreover, because the accommodations are located in South Carolina, the sales transaction clearly entails at least

[22] See, e.g., **Connecticut**: Conn. Gen. Stat. Ann. § 12-408; **District of Columbia**: D.C. Code § 47-2002; **Florida**: Fla. Stat. Ann. § 212.03; **Illinois**: 35 Ill. Comp. Stat. 145/3; **Kansas**: Kan. Stat. Ann. § 79-5302; **Kentucky**: Ky. Rev. Stat. Ann. § 139.200; **Montana**: Mont. Code Ann. § 15-68-102; **North Dakota**: N.D. Cent. Code § 57-39.2-02.1; **Tennessee**: Tenn. Code Ann. § 67-6-205; **Virginia**: Va. Code Ann. § 58.1-603.

partial performance in South Carolina. Furthermore, this Court has determined that the tax is internally consistent. Therefore, based on Jefferson Lines, the Court concludes that the tax is also externally consistent.

In conclusion, the Court finds that imposing the Accommodations Tax on Petitioner does not violate either the "substantial nexus" or the "fairly apportioned" prongs of the Complete Auto Transit test.

Penalty

The Department assessed a penalty of $1,589,176.06 against Petitioner for its failure to remit the Accommodations Tax. However, I find the imposition of a penalty upon Petitioner is not warranted. S.C. Code Ann. § 12-54-160 provides that "[u]nless otherwise specifically prohibited, the department may waive, dismiss, or reduce penalties."[23] The Department issued SC Rev. Proc. Bulletin #02-5 (the "Revenue Procedure") to provide procedural guidance for the waiver or reduction of penalties pursuant to that statute. The Revenue Procedure provides that "[a] complete penalty waiver is appropriate when lack of performance required by a taxpayer is due to reasonable cause." The Revenue Procedure provides that "the taxpayer may have reasonable cause for noncompliance where difficult and complex issues are involved when reasonable persons differ as to the appropriate tax treatment of the issue and there is no Department guidance with respect to the issue." Id., Example F.

Furthermore, the implementation of penalties must be made in light of their purpose. The fundamental purpose of the penalties is not to punish. See Plunkett v. Commissioner, 118 F.2d 644, 650 (1st Cir. 1941). Rather, the penalties "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." Helvering v. Mitchell, 303 U.S. 391, 401 (1938).

Here, the application of the Accommodations Tax to Petitioner is a novel theory. Neither Section 12-36-920 nor any other authority specifically enumerates online travel companies (OTCs) or any other company providing services solely outside the State as subject to the Accommodations Tax. In fact, the Department admits that difficult and complex issues exist in this case. Furthermore, the Department has never pursued taxation of OTCs before the audit of

[23] There is no prohibition on penalty waiver for the Accommodations Tax.

Petitioner or assessed any OTC, other than Petitioner, for the Accommodations Tax.[24] Finally, the Department, even though requested, has not published any official guidance regarding the application of the Accommodations Tax to OTCs. More specifically, the Department has never provided any guidance communicating that hotels are not responsible for the Accommodations Tax of rooms booked through online travel companies or that hotels should stop remitting the Accommodations Tax or filing returns for transactions booked through online travel companies. I therefore find that, since this case is the first instance in which South Carolina has sought an Accommodations Tax from an OTC and the obligation to pay the tax was not reflected by any Department guidance or past Department audits or assessments, Petitioner had reasonable cause in not reimbursing the Accommodations Tax.

Conclusion

The "gross proceeds" generated by the sales transactions between Petitioner and its internet customers are subject to sales tax under Section 12-36-920(A). However, Petitioner has only accounted for sales taxes on the discounted amount (Net Room Rate) paid to the hotel. This was improper as Petitioner's gross proceeds were greater than the Net Room Rate. As the retailer of the hotel room, Petitioner was liable for sales tax on its entire gross proceeds of sale, including not only the Net Room Rate, but also Petitioner's Margin and Service Fees.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that, consistent with this Final Order and Decision, Petitioner remit to the Department the sales tax owed under Section 12-36-920(A) on the Margin and Service Fees collected by Petitioner during the periods between July 1, 2001 through June 30, 2006.

AND IT IS SO ORDERED.

_____
Ralph King Anderson, III
Administrative Law Judge

February 12, 2009
Columbia, South Carolina

[24] The Department has contacted other OTCs in order to begin the audit process. However, it has yet to audit those other OTCs.