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April 1, 2004

VIA FACSIMILE

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**Re: *Application of Tourist Development Tax to Hotel Reward Point
Programs***
Our File No. 0141

Dear Ms. Haynie and Ms. Collie:

This correspondence addresses the question of whether or not the use of reward points to secure short-term lodging is "consideration" subject to the Tourist Development Tax (TDT). I conclude that the use of reward points in consideration of lodging constitutes a taxable event when the reward point program grants a credit to the hotel when the points are redeemed.

Reward Point Program. In correspondence supporting their position, the taxpayers (various hotel organizations) describe the reward point system as a marketing program designed to encourage continued business and brand loyalty. The program awards points to participating customers when they stay at one of the taxpayers' branded properties. With some, but not all of the programs, the guest may use the points for upgrades or discounts on retail purchases. All of the programs provide for the redemption of points in consideration of short term occupancy at the subject hotel properties.

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The programs differ structurally. One of the identified taxpayers has formed a subsidiary corporation for purposes of administering the program, whereas others merely opened a separate account for the administration. All of the taxpayers ultimately are responsible to fund the cost of administering the program, whether the program fund is a separate legal entity or not. Of the greatest significance to my analysis is the fact that each taxpayer requires each of its branded hotels to mandatorily contribute a percentage of room revenues received from the guests who participate. These required payments are made to the central program fund on a monthly basis. When a customer redeems the points in consideration of lodging at a hotel, that hotel receives a credit against the monthly obligation to fund the program account. Grant Thornton explains in one of its letters to the Comptroller, if the amount of credit to a hotel exceeds the amount due from that hotel to the program account in any particular month, the credit is carried forward and applies against that hotel's obligation to pay in the following month.

The taxpayers contend that the points are used to obtain a "free" room in the future, and are not redeemed with the hotel, but instead are redeemed through the central reward point program administrative office. Thus, the taxpayers argue, there is no taxable consideration to the hotel because the stay is "free." They additionally contend there is no transfer of value between the customer and the hotel because the customer redeems directly with the central reward point administrator.

General Principles of TDT. "Every person who rents, leases or lets for consideration any living quarters or accommodations in any hotel . . . for a term of six months or less is exercising a privilege which is subject to taxation," unless the transaction is exempt under the provisions of Chapter 212. Section 125.0104 (3)(a), *Florida Statutes*. The tax is computed on the total consideration paid for the right of occupancy. *Florida Administrative Code*, Rules 12A-3.006(2); 12A-1.061(3). It is the intent of the Florida Legislature to tax each and every rental unless it is specifically exempt. Section 212.21(2), *Florida Statutes*. The tax is paid on the "total rental charge" with no deductions, except to the extent the transaction is expressly exempted. *Florida Administrative Code*, Rule 12A-1.061(1).
See also, Section 212.03(1), *Florida Statutes*.

There must be consideration transferred for the right to use or occupy the room in order to subject the transaction to TDT, and the provision of a truly free room, when there is "no consideration involved between the guest and the public lodging establishment" is not a taxable transaction. Section 212.03(4), *Florida Statutes* (providing that no tax is imposed on rooms provided to guests without consideration "involved between the guest" and the hotel.) However, Rule 12A-1.061(3) defines the taxable consideration to include "credits" and "anything of value." Moreover, the TDT is due on any portion of taxable consideration paid to an agent of the hotel. *See, e.g.,*

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TAA97(A)-066 (Agent selling cars is a dealer responsible to collect and remit sales tax, but if the agent fails to perform this duty as required, the consignor, as principal is still liable for the tax). See also, Rule 12A-1.060(3) (agent receiving rental consideration is a “dealer”); Section 212.03(2) (any “person receiving the rent shall remit the tax”).

Analysis and Discussion. A two-step analysis is appropriate in resolving this question. The first step is to address whether or not there is consideration paid by the patron for lodging at the hotel when reward points are used. If there is consideration paid, the second question is whether or not the consideration is “involved between the guest and the public lodging establishment.” Section 212.03(4).

It is axiomatic that generally the courts do not inquire into the adequacy of consideration. See, e.g., *Bayshore Royal Co. v. Doran Jason Co.*, 480 So.2d 651, 656 (Fla. 2d DCA 1985). Consideration to support a transaction may be so slight or ephemeral, that even the promise to forebear from exercising a right that one does not own is sufficient consideration to support a contract, so long as the one who forebears from enforcing the nonexistent right in good faith believes he has the right at the time he contracts. *Alpha Electric Supply Corporation v. Drake Contracting, Inc.*, 407 So.2d 363 (Fla. 5th DCA 1981). Consistent with these principles regarding the definition and adequacy of consideration, the Florida Department of Revenue, in Rule 12A-1.061(3) has included within the scope of taxable consideration anything of value, including credits.

Section 212.21(2) expresses the intent of the Florida Legislature to tax each and every rental unless it is specifically exempt. Moreover, the total consideration, including payment by “credits” or “other things” of value is subject to the tax. Rule 12A-1.061(2)(e) and (3). In construing tax statutes, the primary consideration is to ascertain and give effect to the Legislature’s intent, determined principally from the language of the statute. *Miele v. Prudential - Bache Securities*, 656 So.2d 470 (Fla. 1995). Statutes and rules should be interpreted as they are written and effect should be given to each word. *Florida Department of Revenue v. Florida Municipal Power Agency*, 789 So.2d 320, 324 (Fla. 2001). Thus, when the language of a statute or rule is clear and unambiguous “the statute must be given its plain and ordinary meaning.” *Metro Dade County v. Milton*, 707 So.2d 913 (Fla. 3rd DCA 1998). Words of common usage, when employed in a statute or administrative rule should be construed in their plain and ordinary sense. *Zuckerman v. Alter*, 615 So.2d 661, 663 (Fla. 1993).

In construing TDT, any exception or exemption is to be strictly construed against the taxpayer. *Department of Revenue v. Kemper Investors Life Insurance Company*, 660 So.2d 1124, 1127 (Fla. 1st DCA 1995). See also, *State ex rel Szabo Food Serv., Inc. of N.C. v. Dickinson*, 286 So.2d 529 (Fla. 1973); *Department of Revenue v. Skop*, 383 So.2d 678 (Fla. 5th DCA 1980). The authority to tax the consideration for short-term rental is clear; the burden to show that a particular transaction is exempt or excepted

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from the tax falls on the taxpayer. See, *Dept. of Revenue v. Val-Pak Direct Marketing*, 862 So.2d 1, 5 (Fla. 2d DCA 2003).

When the Legislature and DOR enact statutes and rules that specify the tax is due on the “total” amount of the “consideration,” including “other things of value” and “credits,” we should presume that these authorities understood the plain and ordinary meaning of these words. *Hankey v. Yarian*, 755 So.2d 93, 96 (Fla. 2000); *Aetna Casualty and Surety Company v. Huntington National Bank*, 609 So.2d 1315, 1317 (Fla. 1992). See also, *Florida v. Riscorp Inc. Co.*, 2004 WL 502901 (1st DCA 2004). Reference to a dictionary is permissible, if necessary, to determine the meaning of these terms. *L.B. v. State*, 700 So.2d 370, 372 (Fla. 1997); *Dept. of Revenue v. Val-Pak Directing Marketing*, supra, 862 So.2d, at 4-5; *Green v. State*, 607 So.2d 471, 473 (Fla. 1992).

Webster’s New World Dictionary (Third College Edition) defines “value” with several semantic variations. One definition is “purchasing power”; another definition is “the worth of a thing in ... goods at a certain time.” Black’s Law Dictionary (Sixth Edition) defines “consideration” in relevant part to mean, “Some right ... accruing to one party, or some forbearance ... or responsibility, given ... or undertaken by the other.” Citing, *Restatement 2nd Contracts*. Another definition of “consideration” in Black’s is, “The cause, motive, price or impelling influence which induces a contracting party to enter into a contract.” Black’s defines “credit” in relevant part as, “The correlative of a debt; that is, a debt considered from the creditor’s standpoint or that which is incoming or due to one. That which is due to a person as distinguished from debit, that which is due by him.”

Applying these principles and definitions to the facts, as represented, it is my opinion that the reward points are redeemed as consideration for the lodging. The hotels are required by the reward point programs to contribute money periodically to a central reward point program fund. This is a debt due from the hotels to the reward program account. When a customer redeems points in consideration of the lodging, the hotel where that customer stays by virtue of the redemption receives a benefit (or value) in the form of a credit against the hotel’s debt obligation to the program’s account. This reduction of the hotel’s debt is both the use of “credits” and something of “value” in consideration of short-term rental accommodations, and this consideration is made expressly subject to the tax in DOR Rule 12A-1.061(3).

The companies have concluded that the maintenance of reward point programs are valuable in establishing and maintaining brand loyalty. As a condition of maintaining affiliation with the brand, each property is required to fund the reward point program. It is understandable that there are significant administrative costs, marketing expenses and other operational expenditures that are required in order to establish, promote and

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maintain a credible reward point program of a national (and probably international) scope. To support this significant endeavor, each property is indebted on a contractually established basis to fund the reward point program account pursuant to a prearranged formula. There is an obvious benefit in favor of a hotel when a guest redeems points to stay at the hotel. This value can be measured in dollars because there is a predetermined formula, according to the information submitted by the accountant on behalf of the taxpayers, that determines the amount of credit the hotel may take against its obligation to pay into the program on a monthly basis. To put it even more simply, if no customer redeems points to stay at a particular property, that hotel will pay the maximum amount it is contractually obligated to pay into the program fund. To the extent customers redeem points to stay at that property, that amount that it owes on a monthly basis is correspondingly reduced pursuant to a formula that is established and imposed on the participants in the program. Therefore, where the amount of debt reduced by the redemption of points is known, the tax may be computed by such dollar figure, on the other hand, where the dollar figure is unknown the tax would be computed, in accordance with Section 125.0104(3)(c), Florida Statutes, based upon the fair market value of the room let.

The value that is received by the hotel is extinguishment of a debt that is otherwise owed. There are analogous authorities in tax law that hold that the extinguishment of debt is a taxable event. For example, 26 U.S.C. Section 61(a) provides in part that "gross income" means all income from whatever source derived, including "income from discharge of indebtedness ..." Additionally, the U.S. Supreme Court has held that where a corporation purchases and retires its bonds at a price less than the issuing price or face value of the bonds, the excess of the issuing price or face value over the purchase price is taxable gain or income to the corporation. *United States v. Kirby Lumber Company*, 284 U.S. 1 (1931). See also, 7 A.L.R. 2d 871 (1949), "Income Tax: Cancellation of Debt Upon Payment of Less than Amount Due." When an employer pays income taxes assessed against its employee, such amount is held to constitute additional taxable income to the employee. *Old Colony Trust Company v. Commissioner of Internal Revenue Service*, 279 U.S. 716 (1929). If a loan is discharged rather than repaid, then income is attributable to the borrower who has had the debt discharged on his behalf. *Twenty-Mile Joint Venture v. Commissioner of Internal Revenue Service*, 200 F. 3rd 1268 (10th Cir. 1999).

The redemption of the reward points at issue results in a cancellation of indebtedness that the hotel is obligated to pay to the reward point fund. Such cancellation of or credit against indebtedness is included within the gross receipts that are subject to taxation. *Vukasovich, Inc. v. Commissioner of Internal Revenue Service*, 790 F. 2d 1409 (9th Cir. 1986) (holding that the \$37,000 which a taxpayer gained by a cancellation of indebtedness was "income" within the meaning of the statute defining gross income).

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Having reached the conclusion that the redemption of reward points is of value, and results in a credit in favor of the hotel, thereby reducing the amount of debt the hotel otherwise owes the reward point program, I now address the second question. The statute, Section 212.03 (4) states in pertinent part that “no tax shall be imposed upon rooms provided guests when there is no consideration involved between the guest and the public lodging establishment.” The taxpayer takes the position that the reward points are redeemed through the central program authority and therefore no consideration passes between the hotel and the guest.

This argument ignores the fact that TDT is assessed when the consideration is received by an agent of the property owner. See, e.g., Section 212.03(2) (any “person receiving the rent shall remit the tax”); *Florida Administrative Code*, Rule 12A-1.060(3) (agent receiving rental consideration is a “dealer” for the tax); TAA97(A)-066. The definition of “dealer” includes an agent appointed to represent the owner of a property. Section 212.06 (2)(j), *Florida Statutes*, defines “dealer” to include any person who grants a license to use accommodations in hotels. The program administrator acts as an agent for the hotel, and thus is a dealer granting a license to occupy the room, and is responsible to collect and remit the tax. If the agent fails to remit, the principal of the agent (i.e., the hotel) is liable. TAA 97(A)-066. To avoid the tax merely by running the program through a subsidiary or affiliate violates the rule that in questions of taxation it is the substance of the transaction that governs, and one should ignore the formal structure when the form is at variance with the substance. *American Tel. and Tel. Co. v. Florida Dept. of Revenue*, 764 So.2d 665 (Fla. 1st DCA 2000). Lastly, despite the taxpayers’ tortured construction, a reasonable interpretation of the statute will find there is consideration directly flowing between the customer and the hotel, because the redemption of the points, (whether through an intermediary or not) results in a direct benefit to the property (i.e., an extinguishment or reduction of a debt otherwise owed by the hotel). And, it is the guest who chooses to redeem his valuable points for a “license” (or right) to stay at a particular hotel.

Conclusion. It is my opinion that the reward point programs, as currently structured, provide for the transfer of consideration to a hotel when points are redeemed and used for lodging at the particular property. The hotels have debts to the program that are reduced by reward point redemptions. Thus, the use of the points results in a transfer of value or consideration. This is distinguishable from a hypothetical scenario in which a hotel gives a free room to a customer to inculcate goodwill in the brand name. In the hypothetical circumstance of a room given for free, the hotel would receive no reduction or extinguishment of a debt.

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Please feel free to contact me should you wish to discuss these matters further, and feel free to share this correspondence with persons who have an interest in this subject.

Sincerely,

Usher L. Brown

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