

Taxation of Online Travel Services

Lawsuits Generally Not Succeeding In Effort to Expand Hotel Taxes to Online Travel Services

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Introduction

A number of lawsuits have been filed recently by cities and counties claiming that online travel companies (OTCs, such as Expedia, Hotels.com, Orbitz, Priceline, and Travelocity) are in violation of their hotel occupancy tax ordinances.¹ The suits claim that hotel occupancy tax should be paid on the amount of hotel reservation transactions that accrues to the OTC, described variously as a facilitation fee, service fee, commission, markup, or difference between the “retail” and “wholesale” rates. Altogether, some 70 lawsuits have been filed in 25 states and the District of Columbia.

Put another way, the question is whether hotel occupancy taxes should be calculated based either (1) on the amount the hotel receives, or (2) on the amount the consumer

pays. In the former case, hotel tax is imposed only on the hotel’s charge for the accommodation. In the latter case, any money spent in procuring accommodations is conceivably subject to hotel tax, even if the money is spent on other services such as an online travel service, travel agent, personal assistant, or conference booking coordinator. In all but three states, services are generally exempt from sales taxation.²

City litigation efforts have also raised other serious questions by attempting to judicially enforce new interpretations of hotel occupancy tax statutes rather than pursuing legislative amendments, acting outside of established administrative procedures, and engaging in questionable oversight due to the hiring of private contingency-fee lawyers to pursue these lawsuits. In many cases, contingency lawyers

Key Findings

- *Local officials in 25 states and the District of Columbia have sought to reinterpret hotel occupancy tax ordinances to apply to amounts paid by consumers to online travel booking services, with limited success. OTCs have prevailed in cases in 18 states, while governments have prevailed in cases in 3 states and the District of Columbia. Cases are pending in 5 states.*
- *In traditional hotel transactions, travelers book a room and pay a hotel tax based on the amount they pay to the hotel. Online travel companies (OTCs) facilitate such transactions between consumers and hotels, and keep part of what the consumer pays as a service fee.*
- *OTCs neither operate hotels nor resell hotel rooms as wholesalers, placing them outside the proper scope of hotel occupancy taxes.*
- *Most U.S. states and cities do not tax services, so taxing only Internet-based travel facilitation services (and doing so at a high rate) suggests that the real motivation is to shift tax burdens to nonresidents, burdening the free flow of interstate commerce.*
- *Local governments should not expect easy revenue from pursuing such claims.*

¹ OTCs are sometimes referred to as third-party intermediaries (TPIs), accommodations intermediaries, travel intermediaries, or travel booking facilitators.

² States that impose sales tax on services generally are Hawaii, New Mexico, and South Dakota.

Table 1

*Status of Local Government Litigation Against Online Travel Companies
as of March 2012*

State	Litigation?	Disposition
Alabama	X	OTC services not taxable under hotel tax.
Alaska		
Arizona		
Arkansas	X	Government failed to exhaust administrative remedies.
California	X	OTC services not taxable under hotel tax.
Colorado		
Connecticut		
Delaware		
Florida	X	OTC services not taxable under hotel tax.
Georgia	X	OTC services not taxable under hotel tax.
Hawaii	X	Case pending.
Idaho		
Illinois	X	OTC services taxable.
Indiana	X	Government failed to exhaust administrative remedies.
Iowa		
Kansas		
Kentucky	X	OTC services not taxable under hotel tax.
Louisiana		
Maine		
Maryland	X	Case pending.
Massachusetts		
Michigan	X	Case pending.
Minnesota		
Mississippi		
Missouri	X	OTC services not taxable under hotel tax.
Montana	X	Case pending.
Nebraska		
Nevada		
New Hampshire		
New Jersey	X	Government lacked standing to pursue claim.
New Mexico	X	OTC services not taxable under hotel tax.
New York	X	OTC services not taxable under hotel tax.
North Carolina	X	OTC services not taxable under hotel tax.
North Dakota		
Ohio	X	OTC services not taxable under hotel tax.
Oklahoma	X	OTC services not taxable under hotel tax.
Oregon		
Pennsylvania	X	OTC services not taxable under hotel tax. Another case pending.
Rhode Island		
South Carolina	X	OTC services taxable.
South Dakota		
Tennessee	X	OTC services not taxable under hotel tax.
Texas	X	In two cases, OTC services not taxable under hotel tax. In one case, OTC services taxable.
Utah		
Vermont		
Virginia		
Washington	X	Case voluntarily dismissed.
West Virginia		
Wisconsin	X	Case dismissed.
Wyoming		
District of Columbia	X	OTC services taxable.

Source: Tax Foundation review of litigation. See Appendix for detailed case information.

seeking to litigate in this area actively encourage states and localities to pursue legislation designed to improve their chances of obtaining a favorable court judgment.

To date, judges have shown skepticism of the cities' claims, with OTCs prevailing in 18 of the 25 states where lawsuits have been filed; cases in five states remain pending while the governments have prevailed, at least initially, in three states plus the District of Columbia. Many cities have backed off pursuing litigation as it became clear that easy revenue would not be forthcoming, contrary to proponents' claims. Nevertheless, due to the continuation of this trend and the increasingly serious impact it has on interstate commerce (somewhere between 5 and 25 percent of hotel bookings are now done through OTCs³), federal legislation may be forthcoming to halt local hotel tax predation and preserve the status quo of hotel taxes based only on hotel occupancy.

Booking a Hotel Room: The "Merchant" Model and Online Travel Services

If a traveler goes directly to a hotel's website and books a room, the calculation of the hotel tax is simple. The traveler stays at the hotel and pays the hotel a room charge plus a local hotel tax based on the room charge. If the amount paid by the traveler to the hotel for the accommodation is \$100 a night, and the hotel tax is 15 percent, the tax owed is \$15. No other parties are involved and no other amounts are paid by the consumer. The hotel keeps the room charge and forwards the tax money to the government. If a traveler books the room through a travel agent (the "agent" model), the hotel compensates the travel agent but this does not affect the amount received by the hotel from the customer, or the amount paid in tax.

When a traveler uses an online travel company to book the room (the "merchant" model), the traveler sorts through hotels on the OTC's website and books the room there. Travelers pay one unified charge to the OTC, which encompasses the room rate agreed upon with the hotel (closely guarded, as hotels do not want other guests and competitors learning the amount of the discount given to OTC bookings), the taxes owed on that amount, and the remainder, which is kept by the OTC as a facilitation fee. After the hotel stay has occurred, the hotel bills the online travel company for the amounts owed, and the hotel is responsible for forwarding taxes to the government.

For example, assume the hotel agrees to a contract whereby it will receive only \$70 a night for any OTC-facilitated rentals of the normally \$100-a-night room (plus \$15 in tax). Hotels agree to such contracts because they can reach a market through the OTC that they would not otherwise reach. If the traveler using the OTC website books the room at \$90 a night inclusive of taxes and fees, \$70 is forwarded to the hotel as a room charge, 15 percent of that amount (\$10.50) is forwarded to the hotel to pay hotel taxes to the government, and the remainder (\$9.50) is retained by the OTC as its service fee on the transaction.

A typical lawsuit claims, "[T]he internet travel sites negotiate room prices with hotels at a wholesale rate, then charge travelers who book through their websites a higher retail rate. However, the companies remit taxes only on the lower wholesale rate."⁴ It is a seductive argument that apparently won the day in the Texas case, as commentator Billy Hamilton describes:

³ See Billy Hamilton, *Shirt Tales and Online Travel Companies*, 54 STATE TAX NOTES 661, 664 (2009).

⁴ Judy DeHaven, *Lyndhurst is suing travel websites for its local hotel tax*, NEW JERSEY STAR-LEDGER, Jun. 25, 2008. See also Jon Ralston, *Weighing the pros and cons of Clark County suing Web sites for room tax revenue*, LAS VEGAS SUN, Aug. 2, 2009 ("The issue, which has been percolating for years, is starting to bubble up again on Grand Central Parkway as county commissioners may soon be asked to sue Internet travel sites to recoup room tax revenue lost because of a differential between what Expedia & Co. pay for blocks of rooms and what they sell them for to customers. That is, the companies buy blocks of rooms for \$100 each, sell them for, say \$150, and pay the room tax only on the \$100.")

The jury was told, ‘if you buy a shirt at J.C. Penney, you pay tax on the total price of the shirt not some wholesale price with part of the price carved out from tax.’ It’s an interesting analogy, Cindy Ohlenforst, an attorney for one of the online booking companies, told me

But suppose you hired a neighbor’s teenager or a personal shopper to buy the shirt. Let’s say the shopper found a shirt for \$80 at Walmart and charged you \$20 for her time. In that case, you haven’t bought a shirt for \$100. You’ve bought an \$80 shirt and you’ve paid \$20 for nontaxable services.⁵

In the online travel company context, there is no “wholesale” purchase followed by a “retail” sale, but rather one retail transaction that has a room rental component and a service component. This service provider or “merchant model” existed long before online service providers, in the form of bundled packages of hotel accommodations with other services.

Online Travel Services Are Generally Outside the Scope of Hotel Tax Statutes

While precise wording can vary, hotel tax statutes typically provide that hotel taxes are paid by hotel occupants based on the amount they pay to the hotel. Amounts paid by guests to others are not subject to the hotel tax. (Depending on what the transaction is, they may be subject to other taxes, and any company providing a service to a guest must pay income tax on the amount.)

While some cities (including New York City, South San Francisco, and Washington,

D.C.) have legislatively changed their statutes to expand hotel taxes to amounts paid by the consumer to anyone connected with the hotel transaction, most cities have been reluctant to do so. Instead, they have filed lawsuits seeking to collect these amounts from OTCs, claiming that their activities fall under existing statutes as “hotel operators” or “hotel room wholesalers.” Such broad statutes could encompass not only online travel companies, but also travel agents, advertisers, or even paid secretaries or co-workers who help book travel. The Washington, D.C. statute has already been criticized by a friendly judge as “impossible to reconcile any meaning out of the confusion.”⁶

In most of the cases brought by the cities, courts have declined to extend the hotel tax statute to cover OTC services as beyond its plain meaning or intended scope. Even where a court has concluded that the statute could conceivably cover OTC services, they have generally declined to do so under the long-standing rule that ambiguous statutes with more than one possible interpretation should be resolved in favor of taxpayers.⁷

City Lawsuits Seek New Tax Revenue by Expanding Hotel Tax Base to OTC Services

A properly structured tax on goods and services should apply to all goods and services once and only once. Goods and services primarily used by nonresidents should not be subject to higher, discriminatory taxes. Further, a well-designed, principled tax system does not attempt to micromanage consumer decisions. Such a system minimizes tax distortion of investment and production decisions and avoids discriminatory taxation of nonresidents

⁵ Hamilton, at 661.

⁶ *District of Columbia v. Expedia*, No. 2011-CA-002117-B at *20 (D.C. Sup. Ct. Oct. 12, 2011).

⁷ See, e.g., *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (“[I]f doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer”); *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927) (“The provision is part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers”); *Leavell v. Blades*, 141 S.W. 893, 894 (Mo. 1911) (“When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it”); *United States v. Merriam*, 263 U.S. 179, 188 (1923) (“If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer”). For complete list of federal and state cases holding this rule, please see Tax Foundation, *How Is the Money Used? Federal and State Cases Distinguishing Taxes and Fees* (forthcoming 2012).

who use fewer services than residents and have no democratic recourse.

Unfortunately, states stray from these principles. Whole categories of transactions, primarily services but also politically favored investment and consumer actions, are exempt from sales taxation. Business inputs are often taxed, resulting in multiple taxation. Nonresidents are made to bear a disproportionate share of the tax burden, through high taxes on items thought to be used primarily by them: restaurant meals, car rentals, and hotel rooms.

These two unprincipled efforts by states—exempting many goods and services from sales taxation while imposing high taxes on items thought to be used by nonresidents—have led directly to the online travel company disputes. State and local governments are loathe to tax services, like the service of booking a hotel room, in the belief that service providers are more likely to leave if taxation becomes excessive. But because officials want to extract more revenue from out-of-state travelers and out-of-state businesses, the result is an effort to tax only services provided by out-of-state and Internet businesses. As *The Economist* magazine recently summarized:

Business travelers are easy to tax. We dart in and out of town, we use easily taxable amenities like airports, hotels, and taxis, and, most important, we don't vote—at least not in our destination cities. Every business traveller has probably spent a night in a hotel where both state and local taxes are added to travellers' bills.⁸

Rather than correct or contain these misguided ideas, states and cities instead are looking for ways to expand them.

Many of the city lawsuits claim that the imposition of hotel tax on OTC services already exists and that they are simply attempting to collect tax amounts already owed. This is a disingenuous argument, since the collection of such taxes has not been expected prior to the lawsuits. In most cases, the hotel tax law is being amended or its interpretation dramatically changed, so it cannot reasonably be said that the taxes are owed yet “uncollected.” Even if a new law is not required for the city to press for payment, businesses (and ultimately, consumers) will be paying a higher rate of taxes to the government than before, which makes it a tax increase.

Consequently, claims of “revenue losses” are misplaced. The revenue was never to have been gained, so it cannot have been lost. In any event, good policy analysis goes beyond merely evaluating whether a proposal raises revenue. An idea might raise millions of dollars in new revenue but it would be a bad policy if it did so in a damaging way. As one Nevada attorney said on the issue, “[T]he law doesn't change just because the economic times are tough right now.”⁹ It is cynical to equate “might raise revenue” with “preventing revenue losses,” as it assumes what the analysis is meant to figure out: whether the taxation is lawful and justified.

The mischaracterization that online travel companies have collected taxes (or disguised taxes as other charges¹⁰) but have not remitted them is similarly problematic, as it ignores the economic effects of taxation. Customers pay one total amount to the online travel companies, which then is divided among the hotel, the government, and the online travel company. The cities' claim is essentially that some portion of the profit kept by the online travel company is in reality “owed” taxes.

⁸ *Duluth vs. Expedia: Suing for Sales Tax*, ECONOMIST, May 21, 2011.

⁹ Todd Bice quoted in Scott Wyland, *County won't sue online firms to get room taxes*, LAS VEGAS REVIEW-JOURNAL, Nov. 18, 2009.

¹⁰ See, e.g., Dan Bucks, Guest opinion: *Online travel firms should pay state taxes like Montana businesses do*, BILLINGS GAZETTE, Nov. 19, 2010, http://billingsgazette.com/news/opinion/guest/article_6d615934-19a0-5ad2-943b-46118d8e3056.html (“We believe that Travelocity, Priceline, Orbitz and Expedia have been collecting this tax from Montana visitors, but keeping a part of it for themselves and shortchanging us.”).

In any event, state and local governments have other revenue-raising options aside from discriminating against nonresidents by applying taxes to services primarily used by the nonresidents, or only to online versions of services. As one commentator pointed out, “If states or localities want to raise more revenue, they could just raise the rate rather than argue about which price to apply it to.... Whatever the solution, it should be a well thought-out, comprehensive approach, and not this case-by-case approach that is draining resources from the companies, the localities, and the courts.”¹¹

Cities’ Lawsuits Have Not Succeeded but Have Produced Extended Litigation and Negative Impacts on Tourism Industry

While the 70 related lawsuits filed in 25 states and the District of Columbia involve different statutes and different governments, there are commonalities. They generally involve claims by the local governments that online travel companies are in violation of their hotel occupancy tax ordinances due to a failure to pay the hotel occupancy tax on the amount of the transaction that accrues to the OTC, described variously as a facilitation fee, service fee, commission, markup, or difference between the “retail” and “wholesale” rates. The statutes in question usually do not explicitly speak to these services but the governments assert that the tax encompasses them.

Of those 70 cases, 26 cases have produced a judicial opinion on the merits. While there are cases pending or dormant, a review of the conclusions reached by judges weighing similar claims can be instructive. Two questions in

particular come up with some frequency: (1) whether OTCs are “operators” of hotels and (2) what precisely the hotel occupancy tax taxes.

Court Rulings on Whether Online Travel Companies Are Hotel Operators

In 15 cases, judges specifically considered whether online travel companies are hotel “operators” for purposes of hotel occupancy tax statutes. The vast majority of the cases (12 out of 15) find that OTCs are not hotel operators.¹²

For example, in a case brought by Anaheim, California, the judge wrote:

OTCs do not control and run hotels....

The hotel controls the production of the product sold (the hotel room and accompanying amenities), the quantity of production, the quality of production, the channels of distribution of the product (i.e., whether and what quantity of rooms will be made available through a particular intermediary), and the pricing of the product (whether sold directly to the consumer or to an intermediary).¹³

Further, rejecting a claim that OTCs are operators because they take on some reporting responsibilities associated with the transaction, the judge stated: “One cannot logically conclude, however, that because a hotel operator is required to furnish a receipt specifying the amount of taxes, therefore any entity that furnishes a receipt of some sort to the consumer must be an operator.”¹⁴

¹¹ Weissman, *supra* note 2.

¹² Twelve supporting cases: *Pitt County, N.C. v. Hotels.com, L.P.*, 553 F.3d 148 (4th Cir. 2009); *Louisville/Jefferson County Metro Government v. Hotels.com, L.P.*, 590 F.3d 381 (6th Cir. 2009); *City of Birmingham v. Orbitz, Inc.*, No. CV 09-3607 (Ala Cir. Ct. Nov. 18, 2011); *Expedia, Inc. v. City of Anaheim*, No. JCCP 4472 (Sup. Ct. Los Angeles Co. Feb. 1, 2010); *Orange County v. Expedia, Inc.*, No. 48-2006-CA-2104-O (Cir. Ct. Orange County, Florida Jan. 20, 2011); *Expedia, Inc. v. City of Columbus*, 681 S.E.2d 122 (Ga. 2009); *St. Louis County v. Prestige Travel, Inc.*, No. SC 91228 (Mo. Jun. 28, 2011); *City of Findlay v. Hotels.com, L.P.*, 441 F. Supp.2d 855 (N.D. Ohio 2006); *City of Philadelphia v. City of Philadelphia Tax Review Board*, No. 216 CD 2011 (Pa. Cmwlth. Feb. 2, 2012); *City of Goodlettsville v. Priceline.com, Inc.*, No. 3:05-cv-00561 (M.D. Tenn. Feb. 21, 2012); *City of Houston v. Hotels.com*, No. 14-10-00349-CV (Tex. Ct. App. Oct 25, 2011); *City of Orange v. Hotels.com*, 2007 WL 2787985 (E.D. Tex. Sep. 21, 2007).

¹³ *City of Anaheim*, at 14-15 (internal quotations omitted).

¹⁴ *City of Anaheim*, at 23.

A Florida appellate court reached a similar conclusion:

The Defendants do not own, lease, operate or manage any hotels. They do not become involved in any of the myriad activities inherent in running a hotel business, from buying the property, to building or contracting the construction of the facilities, to staffing the various hotel operations or services, or to providing any hotel amenities. The individual hotels, not the online travel companies, register guests, establish check-in and check-out times and procedures, and set all the rules and procedures governing stays on that property.... Perhaps most importantly, the Defendants do not own or control the rooms for which they offer to obtain reservations. They do not rent a block of rooms in advance of booking, and then re-let those rooms to their customers; they are not obligated to make reservations for any minimum number of rooms; and there is no penalty if they do not assist in making a specific number of reservations.¹⁵

Similarly, the U.S. Court of Appeals for the Fourth Circuit, citing the *Webster's Dictionary* definition of “operator,” concluded that “an online travel company is not a retailer because it is not a business of a type that is similar to a hotel, motel or tourist home or camp. As a result, an online travel company is not subject to the Pitt County occupancy tax.”¹⁶ The U.S. Court of Appeals for the Sixth Circuit also found that “OTCs are not like or similar to the listed types of businesses because they

‘have neither ownership, nor physical control, of the rooms they offer for rent.’”¹⁷ The Kentucky Court of Appeals concluded that OTCs are “merely a broker” rather than a provider of accommodations.¹⁸ A federal judge in New Mexico found that OTCs are not “vendors” who furnish lodging, and instead “earn for their services, including providing their customers with the vast content on their websites....”¹⁹ The Texas Court of Appeals explained the element of hotel operation that OTCs do not possess:

The hotel offers occupancy in exchange for payment of the invoiced discounted rate. An OTC, on the other hand, does not have rooms or occupancy; as Houston concedes, the OTCs do not have the right to use or possess hotel rooms. Instead, the OTCs have websites and provide information. The content of a given OTC’s website includes material provided by the hotel, which may include photographs, descriptions, and listings of the amenities and services available onsite—but the OTC also provides information about the hotel’s competitors. Visitors to the website can access maps, check room availability, and compare rates, ratings, and the reviews of other consumers. . . . In sum, the OTC does not merely help the website visitor make a reservation; it also helps consumers make informed choices in spending their travel dollars, and to do so conveniently and efficiently. When the consumer pays the OTC, the payment includes compensation for these benefits.²⁰

¹⁵ *Id.* at 18-19.

¹⁶ *Pitt County*, 553 F.3d at 313-14.

¹⁷ *Louisville/Jefferson County Metro Government*, 590 F.3d at 388-89.

¹⁸ *City of Bowling Green*, at *2.

¹⁹ *City of Gallup*, at part III.

²⁰ *City of Houston*, at IV.A.

The three cases that have found otherwise did not conclude that OTCs physically operate the hotel but rather exercise control of some level to fall within the statute's framework as a hotel operator. For example, the South Carolina Supreme Court found that the statute's limitation to entities that are "in the business of furnishing accommodations" applies to OTCs because they "directly or indirectly, provide hotel reservations to transients for consideration."²¹ One justice dissented, claiming the majority defined the statute's two mentions of "furnish" in two different ways.²²

Similarly, a federal judge in Illinois focusing on the word "owner" found that while "[t]here is no dispute that defendants do not have an ownership interest in or conduct the operations of the hotels with which they do business," the word "owner" should be interpreted as encompassing "anyone who receives the 'consideration for the rental,'" such as OTCs.²³ Another federal judge, in the Western District of Texas, found "control" of hotels by OTCs, at odds with the Texas Court of Appeals and another federal judge from the Eastern District of Texas. In the class-action *City of San Antonio v. Hotels.com*, the judge found (relying on a jury verdict) that OTCs "control" hotels in that they step into the shoes of the hotel for the purpose of tax collection: "The OTCs have sole control over the decision to establish, change, or dissolve markups, services fees and/or surcharges as they wish."²⁴

These three decisions rely on legal sophistry, giving new meaning to words such as "own," "furnish," and "control" beyond their common understanding. In the vast majority of cases, courts correctly determined that OTCs are not akin to hotels and do not operate or control hotels.

Court Rulings on What Is Taxed by a Hotel Occupancy Tax

In twelve cases, courts focused on the scope of the hotel occupancy tax and what activities it is meant to tax. In nine of those twelve cases, the court concluded that OTC services are beyond the scope of the hotel occupancy tax.²⁵

For example, a New York appellate court ruled that "the plain meaning of [the statute] did not encompass the service fees charged by the travel intermediaries and the legislation may not be extended so as to permit the imposition of the tax in a situation not embraced by it."²⁶ The Missouri Supreme Court unanimously held that "the money [the OTC] retains is compensation for facilitating a reservation, not providing a sleeping room," outside the scope of a tax on amounts paid by hotel guests.²⁷ A federal judge in New Mexico found that because only a portion of a hotel guest's payment ultimately goes to hotel operators, "[i]t would not make sense to interpret 'gross taxable rent' as the full amount charged by Defendants

²¹ *Id.* at 34.

²² *Id.* at 39-40 (Pleicones, J., dissenting).

²³ *Village of Rosemont*, at 4-5.

²⁴ *Op.* at ¶ 80.

²⁵ See *City of Birmingham v. Orbitz, Inc.*, No. CV-09 3607 JSV (Ala. Cir. Ct. Nov. 18, 2011) (finding compensation for facilitation services not encompassed by tax); *City of Santa Monica v. Expedia*, No. SC108568 (Cal. Sup. Ct. Los Angeles Mar. 16, 2011) (finding OTC commission not subject to hotel tax); *Orange County v. Expedia, Inc.*, No. 48-2006-CA-2104-O (Jan. 20, 2011) (finding that tax ordinance does not include OTC services); *St. Louis County v. Prestige Travel, Inc.*, No. SC 91228 (Mo. Jun. 28, 2011) (finding no OTC tax obligation in the statute); *City of Gallup v. Hotels.com*, No. CV 07-644 JC/RLP (D.N.M. Mar. 1, 2010) (finding that gross taxable rent in the statute refers to the amount received by the hotel); *City of Philadelphia v. City of Philadelphia Tax Review Board*, Mar. Term 2010 No. 00764 (Phila. C.P. Jan. 14, 2011) (finding the transaction occurs when the consumer obtained the right to use and occupy the room, not when the reservation was made); *City of Houston v. Hotels.com*, No. 14-10-00349-CV (Tex. Ct. App. Oct. 25, 2011) (finding that a consumer's payment to the OTC is distinct from hotel occupancy); *City of Orange v. Hotels.com*, 2007 WL 2787985 (E.D. Tex. Sep. 21, 2007) (finding the statute only covers amounts received by the hotel). *But see Expedia, Inc. v. City of Columbus*, 681 S.E.2d 122 (Ga. 2009) (finding that tax is amount paid by consumer, including to OTC, if OTC chooses to collect it); *City of San Antonio v. Hotels.com*, No. 5:06-cv-00381 (W.D. Tex. Jul. 1, 2011) (finding that statute's language limiting tax to amounts paid "to hotel" is "surplusage"); *District of Columbia v. Expedia, Inc.*, No. 2011-CA-002117-B (D.C. Sup. Ct. Oct. 12, 2011) (finding tax encompasses any payments made by ultimate purchaser).

²⁶ *City of New York Department of Finance*.

²⁷ *St. Louis County*, at 6.

because only a portion of this amount is actually 'paid to vendors.'"²⁸

An Alabama circuit court judge concluded that OTCs perform facilitation services and are not in the business of renting or furnishing rooms:

The plaintiffs object to the use of the word 'facilitate' in defining the defendant's activities, but the undisputed facts show that that is what they do. They facilitate, or make easier, the making of such reservations.... They provide a service to the public for which they are compensated by their customers. This compensation is not subject to the lodging tax.²⁹

Three cases reached a different conclusion. In Georgia, the State Supreme Court found that OTCs are not obligated to collect hotel occupancy taxes, but if they do, they must be applied to all amounts paid by a consumer for occupancy, including non-separately-stated OTC services.³⁰ A District of Columbia judge concluded that "[i]t is not the transaction between the hotel and the OTC that is the retail sale; rather, it is the subsequent sale to the ultimate purchaser...."³¹

A federal judge in the Western District of Texas (the same as above) chose to disregard a part of the statute in ruling against the OTCs:

The Cities assert that the words 'to the hotel' are mere surplusage, and the Court agrees. If a period were placed immediately after the phrase 'consideration paid by the occupant of the

room,' the tax provision in the Dallas-type ordinance would make perfect sense. Thus, there is every reason to disregard the words 'to the hotel' as surplusage because they are repugnant to the rest of the ordinance and would render the ordinances meaningless.³²

This decision is at odds with the federal judge in the Eastern District of Texas and the Texas Court of Appeals, both of whom found that the statute's requirement that only amounts paid "to the hotel" are taxable.³³

Court Rulings on Cities' Claim that Not Taxing OTC Services Would Undermine the Hotel Occupancy Tax

Although more a public policy argument than a legal argument, some cities have argued that a court's unwillingness to permit taxation of OTC services under the hotel occupancy tax would undermine that tax as a whole. In the Anaheim case, the hearing officer reached that conclusion, as discussed by the judge who reversed him on this point:

The Hearing Officer concluded that an interpretation of the ordinance that bases the transient occupancy tax on the amount charged by the hotel would lead to absurd results. The Hearing Officer considered the following hypothetical: "[A hotel or hotel chain [could establish] a wholly owned subsidiary corporation in a different municipality to handle all its reservation and booking inquiries. The hotel could then provide rooms to the

²⁸ *City of Gallup*, at part III.

²⁹ *City of Birmingham*.

³⁰ *Id.* at 129.

³¹ *Id.* at 14-16.

³² *Op.* at ¶ 155.

³³ *City of Houston*, at IV.A; *City of Orange*, 2007 WL 2787985 at *6 (E.D. Tex. Sep. 21, 2007).

subsidiary at an extremely cheap price and the subsidiary could sell them to consumers at a much higher rate. In this way, the Company would be able to provide accommodations to customers without having to charge the customers the...tax on the amount the customers actually pay for the room.³⁴

Similarly, the judge in the District of Columbia case upheld the law in part out of this worry, stating that government “is correct when it argues that under the OTC’s proposed interpretation, retail sales tax could be avoided altogether by a hotel simply by interposing a shell company between its customers and the hotel.”³⁵

This concern—the threat of hotel tax collections being disrupted unless OTC services are subject to the tax—arises only in the case of a poorly drafted hotel occupancy statute. If the statute is designed to tax amounts spent *by the customer* as part of transactions related to occupancy, then that is very broad and difficult to collect and enforce. Many different transactions are undertaken by travelers that are related to occupancy, such as online travel services, travel agents, personal assistants, conference booking coordinators, conference packages, transportation options, and so forth. If a jurisdiction wishes to tax all services under its sales tax, that is one thing, but there is no justification for subjecting only these services, or only OTC services, to the higher-rate hotel tax.

Further, not taxing OTC-hotel transactions does not threaten to undermine a city’s ability to collect hotel taxes on amounts paid by travelers to hotels for rooming charges. As the judge in the Anaheim case explained:

Despite the Hearing Officer’s concern, it is not necessary to skew the interpretation of the Anaheim ordinance in order to protect the City from the type of abuse suggested by the hypothetical. The hotel in the hypothetical is engaged in a collusive transaction with its subsidiary, charging ‘an extremely cheap price’ to the benefit of its subsidiary, not a price determined in an arms-length transaction. The abuse represented by the hypothetical is not that the hotel is marketing rooms through a third party, but that it is marketing rooms within its own corporate structure.... There is no evidence in the record that the prices charged by hotels to the OTCs are collusive prices. To the contrary, the Hearing Officer found that the prices charged by hotels to OTCs are set in negotiated transactions.³⁶

In the recent Tennessee case the judge concluded that “shell companies” are unlikely because “OTCs and the hotels are independent entities that negotiate in arms-length transactions [where] the hotel has every incentive to keep the net rate as high as possible and to reserve for direct booking as many rooms as it believes it can sell directly to consumers, without sacrificing any potential revenue to the OTCs.”³⁷ The judge further emphasized that it is a legislative role, not a role of the courts, “to enact revenue statutes that clearly state the scope and application of the tax laws and, upon identifying any potential revenue shortfalls in their application, to address those perceived shortfalls by appropriate legislation.”³⁸ The legislature is the one, the judge wrote, who must

³⁴ *City of Anaheim*, at 25.

³⁵ *District of Columbia*, at 14-16.

³⁶ *Id.* at 24-25.

³⁷ *City of Goodlettsville v. Priceline.com, Inc.*, No. 3:05-cv-00561 (M.D. Tenn. Feb. 21, 2012), at *29.

³⁸ *Id.* at *28.

fix a statute that has “simply failed to keep up with the times.”³⁹

Federal Action Could Bar Discriminatory Taxation, Similar to Other Precedents Restraining State Damage to Interstate Commerce

In economics, the idea that individuals should pay taxes in proportion to the government services they use is known as the “benefit principle.” Since visitors use fewer services than residents, and never use the most expensive service (public schools), they should bear a smaller share of the tax burden. Taxes on restaurants, hotels, and car rentals can thus be considered a proxy for a tax on tourists (although there are tourists who stay with friends rather than in hotels, don’t eat out, and don’t rent cars). But the benefit derived from added economic activity from visitors and travelers probably exceeds the government services they use during their stay, undermining the basis for excessive hotel taxation.

Such taxes are often described as taxes on “them, not us.” But we are all “them” to someone else; the net result is everyone paying high hotel taxes everywhere. These taxes can be considerable: The Global Business Travel Association estimates that these taxes alone on travelers can range from \$21.49 to \$40.99 per day.⁴⁰ Hotel taxes nationwide average about 14 percent, much higher than sales taxes on other goods and services.⁴¹

There is no principled basis for only taxing those services provided by Internet businesses. If state and local officials believe that online travel companies should pay sales or excise tax based on the services they provide, the payment

should only occur as part of a general taxation of all services. A non-neutral tax system would apply the same tax rate to all services, and the democratic process can settle on a rate that raises needed revenue while minimizing economic harm. By singling out only services provided by Internet-based travel companies, state and local governments are demonstrating that their true motivation is gouging revenue from out-of-staters, not fairness.

Potential federal action could be justified to maintain settled practices in hotel occupancy taxation: Hotel occupancy taxes would be calculated by the amounts hotels receive in payment from the hotel occupant. Further, states could retain the option of taxing online travel booking services, as long as they tax services generally or at least do not discriminate by only taxing online travel booking services.

Such a proposal would be in line with other federal actions that prevent parochial state government actions from damaging interstate commerce. The people of the United States adopted the Constitution in large part because their existing national government had no power to stop states from imposing trade barriers with each other, to the detriment of the national economy. As U.S. Supreme Court Justice William Johnson wrote in the seminal case of *Gibbons v. Ogden*, invalidating New York’s stifling regulations on interstate water travel:

[States’ power over commerce,] guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures . . . , destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause, that led to the forming of a convention.⁴²

³⁹ *Id.* (internal citations omitted).

⁴⁰ Global Business Travel Association, *Lodging, Rental Car, and Meal Taxes on Travelers in the Top 50 U.S. Cities*, Aug. 2009, <http://www2.gbta.org/foundation/resourcelibrary/Pages/sept09article2.aspx>.

⁴¹ Roger Yu, *Taxes on hotel rooms are rising*, USA TODAY, Apr. 5, 2010, http://www.usatoday.com/money/industries/travel/2010-04-05-1Ahoteltax05_ST_N.htm.

⁴² *Gibbons v. Ogden*, 22 U.S. 1, 224 (1824) (Johnson, J., concurring).

Consequently, among the powers granted to Congress by the new Constitution was “[to] regulate Commerce . . . among the several States,” a provision known today as the Commerce Clause.⁴³ Congress thus has the power to restrain state laws that discriminate against or otherwise burden the flow of interstate commerce.

Congressional actions under the Commerce Clause to remove or prevent state and local burdens on the travel industry are common and have previously been upheld.⁴⁴ City officials claim their motivations are not to burden interstate commerce, but rather to promote fairness and collect owed revenue from the “wholesale” service. In reality, existing tax laws are being contorted to extend to the online travel industry, taxing service transactions with no substantial nexus to the jurisdiction or to hotel occupancy.

The costs imposed in filing and defending these lawsuits are also passed along to taxpayers and travelers. These are magnified in places like California, which requires pre-payment of the disputed (and often enormous) tax amounts before a tax can be challenged in court.⁴⁵

It may be too much to ask that states only tax everything once and only once, and not design taxes to hit only nonresidents. The siren call of revenue (sometimes sold as costless and risk-free⁴⁶) is often tempting enough to override principles and sound policy. The Commerce Clause exists precisely for these situations, when states put tax parochialism ahead of the common national good.

It is in the nation’s interest and the interest of each state and municipality to have a vibrant and dynamic travel industry. Unpredictable and unaccountable taxes are a hindrance to that, and perhaps only congressional action can move the states toward less harmful tax policy.

Conclusion

Aggressive and unjustified taxation of online travel companies is a cost, in that each community hopes to burden out-of-state travelers for its own benefit. Such a burden in one municipality is at best a bother. But when multiplied across the country, it can quickly become death by a thousand cuts.

If a state or local government wishes to tax nonresidents or services, that is acceptable. But if non-residents are taxed at a higher rate than residents, or if only services primarily used by nonresidents are taxed while everything else is exempt, the real motivation becomes clear: a “meddlesome, money-grabbing plan.” When cities and states act in such a way toward one set of businesses, investment and economic growth can be chilled as other businesses take note.

It is important that our state and local governments collect revenue needed to provide the services demanded by their constituents. But that need does not justify impositions on interstate commerce, burdens on the national economy, or the corruption of sound tax principles.

⁴³ U.S. Const. art. I, sec. 8, cl. 3.

⁴⁴ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding congressional action prohibiting state and local statutes that interfered with use of hotels by interstate travelers); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (same with restaurants used by interstate travelers); the Internet Tax Freedom Act, P.L. No. 105-277 (prohibiting state and local taxation of Internet access); 49 U.S.C. section 40116 (prohibiting state and local taxation of the sale of air transportation); 49 U.S.C. section 14505 (prohibiting state and local taxation of the sale of motor carrier transportation).

⁴⁵ See, e.g., *Expedia, Inc. v. City and County of San Francisco*, No. JCCP 4472 (Sup. Ct. Los Angeles June 19, 2009).

⁴⁶ In several instances, private contingency-fee lawyers have sought to be hired by a city to sue the online travel companies on the city’s behalf with no up-front cost, with the agreement that they get a cut of any amounts collected. The city’s oversight is often lax, resulting in abuses when private sector individuals are given governmental authority to pursue the collection of disputed taxes. A similar program at the federal level has been canceled due to rampant abuse. The Tax Foundation filed a friend-of-the-court brief opposing giving tax collection powers to private contingency-fee lawyers in a case currently on appeal to the California Supreme Court. See Joseph Henchman and Justin Burrows, *The Dangers of Privatizing Tax Collection: Priceline.com, Inc. v. City of Anaheim*, June 25, 2009, <http://www.taxfoundation.org/research/show/25286.html>.

Appendix: Cases

This section contains information on all OTC hotel tax cases that have issued a decision on the merits.

Six cases from six states, where the OTCs prevailed or where litigation is ongoing, are not included as they have not involved decisions on the merits, either due to a failure by the government to exhaust administrative remedies (Arkansas, California, Indiana, North Carolina, and Wisconsin) or where the government lacked standing to bring the case (New Jersey).⁴⁷ Pending cases in six states are not included as they have not reached merits decisions (Hawaii, Maryland, Michigan, Montana, Pennsylvania, Texas).

Federal Appellate Courts

U.S. Court of Appeals for the Fourth Circuit

January 14, 2009

*Pitt County, North Carolina v. Hotels.com, L.P.*⁴⁸

Decision: OTC services not subject to hotel tax. Unanimous decision of 3-judge panel, affirming decision of the U.S. District Court for the Eastern District of North Carolina.

Statute: “Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration....”⁴⁹

Analysis: “Online travel companies are not operators of the hotels whose rooms they offer to the public on the internet [citing *Webster’s Dictionary*

definition of “operator”].... We therefore conclude that under the plain meaning of § 105.164.4(a)(3), an online travel company is not a retailer because it is not a business of a type that is similar to a hotel, motel or tourist home or camp. As a result, an online travel company is not subject to the Pitt County occupancy tax.”⁵⁰

U.S. Court of Appeals for the Sixth Circuit

December 22, 2009

*Louisville/Jefferson County Metro Government v. Hotels.com, L.P.*⁵¹

Decision: OTC services not subject to hotel tax. Unanimous decision, affirming decision of the U.S. District Court for the Western District of Kentucky.

Statute: A tax on “the rent for every occupancy of a suite, room or rooms, charged by all persons, companies, corporations, or other like or similar persons, groups or organizations doing business as motor courts, motels, hotels, inns or like or similar accommodation businesses.”⁵²

Analysis: “The district court reasoned that OTCs are not like or similar to the listed types of businesses because they ‘have neither ownership, nor physical control, of the rooms they offer for rent.’ According to the counties, this reading impermissibly adds the terms ‘owner’ and ‘physical establishment’ to the ordinances. We are unpersuaded by this argument, however, because the notions of ownership and physical control over the rooms for rent are simply shared characteristics of motor courts, motels, hotels, and inns. The district court thus properly applied the principle of *ejusdem generis* to the ordinances in question.... Furthermore, unlike in [hypotheticals suggested by the counties, of hotels forming subsidiaries and escaping taxation], none of the OTCs here are under common ownership with the physical establishments that control the rooms.”⁵³

⁴⁷ Failure to exhaust administrative remedies: See *City of Fayetteville v. Hotels.com, L.P.*, No. CV 07-567-01 (Ark. Cir. Ct. Washington County Jul. 25, 2008); *City of Oakland, California v. Hotels.com, LP*, No. 07-17258 (9th Cir. Jul. 16, 2009); *Lake County Convention and Visitors Bureau v. Hotels.com, L.P.*, No. 2:06-cv-00207-JVBAPR (N.D. Ind. Mar. 30, 2010); *Wake County, et al. v. Hotels.com, LP*, No. 06-CVS-16256 (N.C. Gen. Ct. Nov. 19, 2007) (case ongoing); *City of Madison v. Expedia, Inc.*, No. 2007-cv-004488 (Wis. Dane County Cir. Ct. Jul. 24, 2008). Improper standing: *Lyndhurst, N.J., Township v. Priceline.com, Inc.*, 657 F.3d 148 (3d Cir. 2011).

⁴⁸ 553 F.3d 308 (4th Cir. 2009).

⁴⁹ N.C. Gen. Stat. § 105.164.4(a)(3).

⁵⁰ *Pitt County*, 553 F.3d at 313-14.

⁵¹ 590 F.3d 381 (6th Cir. 2009).

⁵² Ky. Rev. Stat. § 91A.390(1).

⁵³ *Louisville/Jefferson County Metro Government*, 590 F.3d at 388-89.

Other Courts

Alabama (City of Birmingham)

Alabama Circuit Court

November 18, 2011

*City of Birmingham v. Orbitz, Inc.*⁵⁴

Decision: OTC services not subject to hotel tax.

Statute: “There is levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person, firm or corporation engaging in the business of renting or furnishing any room or rooms, lodging or accommodations to transients in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration,” as calculated as a percentage “of the charge for such room, rooms, lodgings, or accommodations, including the charge for use or rental of personal property and services furnished in such room.”⁵⁵

Analysis: “The plaintiffs object to the use of the word ‘facilitate’ in defining the defendant’s activities, but the undisputed facts show that that is what they do. They facilitate, or make easier, the making of such reservations.... The plain language of the statute and the plaintiffs’ ordinances compel the Court to the conclusion that the defendants in this case are not engaged in the business of renting or furnishing any room or rooms in any hotel.... These defendants are not hoteliers. They provide a service to the public for which they are compensated by their customers. This compensation is not subject to the lodging tax.”⁵⁶

California (City of Santa Monica)

Superior Court for Los Angeles County

March 16, 2011

*City of Santa Monica v. Expedia*⁵⁷

Decision: OTC services not subject to hotel tax.

Statute: “[T]here is hereby imposed and levied on each and every transient a tax equivalent to fourteen percent (14%) of the total amount paid for room rental by or for any such transient to any hotel; which said tax shall be collected from such transient at the time and in the manner hereinafter provided.... [Room rental is t]he total charge made by any such hotel for lodging and/or lodging space furnished any such transient.”⁵⁸

Analysis: “If the ‘commission’ is a charge for some other service, and thus should be separately identified in the consumer’s bill, it is not subject to transient occupancy tax.”⁵⁹

“If a city decided to base a transient occupancy tax on the total amount *paid* by the transient for the hotel room (or for the hotel room and any ‘commission’ for the services of an intermediary) there seems to be no reason why such a tax scheme could not be drafted and considered. A new marketing methodology or other changed circumstances do not provide a basis for a court to rewrite a statute....”⁶⁰

“Santa Monica argues that excluding from taxation the amount paid to the OTC by the transient as an increment over and above the wholesale price of the room charged by the hotel operator lies outside the intent of the statute and deprives the Santa Monica ordinance of all serious purpose.... The fact that the Santa Monica ordinance does not tax the value of the service provided by the OTCs does not render the taxing scheme absurd. The fact that without the OTCs’ services the hotels might themselves pay for alternative marketing arrangements does not render the transactions between the OTCs and the hotels a ‘sham.’”⁶¹

California (City of Anaheim)

Superior Court for Los Angeles County

February 1, 2010

*Expedia, Inc. v. City of Anaheim*⁶²

Decision: OTC services not subject to hotel tax.

⁵⁴ No. CV 09-3607 JSV (Ala. Cir. Ct. Nov. 18, 2011), *aff’d*, No. 1100874 (Ala. Apr. 13, 2012).

⁵⁵ Ala. Code § 40-26-1 *et seq.*

⁵⁶ *City of Birmingham*.

⁵⁷ No. SC108568.

⁵⁸ Santa Monica Mun. Code § 6.68.020; Santa Monica Mun. Code § 6.68.010(d).

⁵⁹ *City of Santa Monica*, at 8.

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 12-13.

⁶² No. JCCP 4472 (Feb. 1, 2010).

Statute: “For the privilege of occupancy of space in any hotel, each transient is subject to and shall pay a tax in the amount of fifteen percent of the rent.”⁶³

“‘Rent’ means the consideration charged by an operator for accommodations, including without limitation any (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of such accommodations including, but not limited to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service.”⁶⁴

“‘Operator’ means any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity. Where the operator performs its functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator and shall have the same duties and liabilities as its principal.”⁶⁵

Analysis: “OTCs do not control and run hotels....

“None of these facts comprise incidents of control of a hotel or give the OTCs the right to run the business of a hotel. The hotel controls the production of the product sold (the hotel room and accompanying amenities), the quantity of production, the quality of production, the channels of distribution of the product (*i.e.*, whether and what quantity of rooms will be made available through a particular intermediary), and the pricing of the product (whether sold directly to the consumer or to an intermediary).”⁶⁶

“At most the Hearing Officer’s findings would allow a conclusion that the OTCs are agents of the hotel for purposes of marketing a portion of the hotels’ production (such portion having been determined by each hotel). But a mere agency relationship is not enough for shifting or sharing tax responsibilities under the Anaheim ordinance. Rather, the ordinance imposes such responsibility only on managing agents, agents who have been delegated

sufficient discretion to allow them to make corporate policy....”⁶⁷

“The Hearing Officer considered the following hypothetical: ‘A hotel or hotel chain could establish a wholly owned subsidiary corporation in a different municipality to handle all its reservation and booking inquiries. The hotel could then provide rooms to the subsidiary at an extremely cheap price and the subsidiary could sell them to consumers at a much higher rate. In this way, the Company would be able to provide accommodations to customers without having to charge the customers the tax on the amount the customers actually pay for the room.’ Despite the Hearing Officer’s concern, it is not necessary to skew the interpretation of the Anaheim ordinance in order to protect the City from the type of abuse suggested by the hypothetical. The hotel in the hypothetical is engaged in a collusive transaction with its subsidiary, charging ‘an extremely cheap price’ to the benefit of its subsidiary, not a price determined in an arms-length transaction. The abuse represented by the hypothetical is not that the hotel is marketing rooms through a third party, but that it is marketing rooms within its own corporate structure.... There is no evidence in the record that the prices charged by hotels to the OTCs are collusive prices. To the contrary, the Hearing Officer found that the prices charged by hotels to OTCs are set in negotiated transactions.”⁶⁸

Florida (Leon County)

[Circuit Court, 2nd Judicial Circuit, Leon County, Florida](#)

April 19, 2012

*Leon County v. Expedia, Inc.*⁶⁹

Decision: OTC services not subject to hotel tax.

State Statute: “It is declared the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel... for a term of 6 months or less is exercising a privilege which is subject to taxation under this section [unless otherwise exempt].”⁷⁰ The TDT “shall be

⁶³ Anaheim Mun. Code § 2.12.010.

⁶⁴ Anaheim Mun. Code § 2.12.005.080.

⁶⁵ Anaheim Mun. Code § 2.12.005.050.

⁶⁶ *City of Anaheim*, at 14-15 (internal quotations omitted).

⁶⁷ *Id.* at 20.

⁶⁸ *Id.* at 24-25.

⁶⁹ No. 2009-CA-4319 (Apr. 19, 2012).

⁷⁰ F.S. 125.0104.

due on the consideration paid for occupancy in the county”⁷¹ The TDT “shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental.”⁷²

Analysis: “[The statute says the tax] shall be collected from the lessee, tenant, or customer at the time of payment of consideration. And I don’t think you can get around that language, because when it goes on to the customer’s credit card, that’s the payment.”⁷³ “Arguing fairness, if property is going to be taken by the state, and that’s what a tax is, the tax statutes have to be strictly construed”⁷⁴

Florida (Orange County)

Circuit Court, 9th Judicial Circuit, Orange County, Florida

January 20, 2011

*Orange County v. Expedia, Inc.*⁷⁵

Decision: OTC services not subject to hotel tax.

State Statute: “It is declared the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel . . . for a term of 6 months or less is exercising a privilege which is subject to taxation under this section [unless otherwise exempt].”⁷⁶ The TDT “shall be due on the consideration paid for occupancy in the county”⁷⁷ The TDT “shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment of the consideration for such lease or rental.”⁷⁸

Analysis: “The difficulty arises not from the language chosen by the Legislature and the local authorities, which are reasonably plain when viewed in isolation, but from application of these laws to a type of internet business transaction which was

undoubtedly not contemplated at the time the TDT was initially drafted and enacted, and has apparently never been amended to directly address these circumstances.”⁷⁹

“The Defendants do not own, lease, operate or manage any hotels. They do not become involved in any of the myriad activities inherent in running a hotel business, from buying the property, to building or contracting the construction of the facilities, to staffing the various hotel operations or services, or to providing any hotel amenities. The individual hotels, not the online travel companies, register guests, establish check-in and check-out times and procedures, and set all the rules and procedures governing stays on that property Perhaps most importantly, the Defendants do not own or control the rooms for which they offer to obtain reservations. They do not rent a block of rooms in advance of booking, and then re-let those rooms to their customers; they are not obligated to make reservations for any minimum number of rooms; and there is no penalty if they do not assist in making a specific number of reservations.”⁸⁰

“Clearly, a net amount of rent accepted by the hotels themselves is properly subject to tax. The remainder of the charges to the hotel customers, however, reasonably can be viewed as separate fees or profits made by the online travel companies in exchange for the services they provide in informing customers about hotel accommodations, or in sending customers to hotels The Court finds that the TDT was not crafted to include within it the income earned by the online travel agencies in the transactions at issue in this case”⁸¹

⁷¹ F.S. 125.0104(2)(a).

⁷² F.S. 125.0104(f).

⁷³ *Leon County*, at 6.

⁷⁴ *Leon County*, at 8.

⁷⁵ No. 48-2006-CA-2104-O (Jan. 20, 2011).

⁷⁶ F.S. 125.0104. *See also* Orange County Ordinances 25-136 *et seq.* (identical language).

⁷⁷ F.S. 125.0104(2)(a).

⁷⁸ F.S. 125.0104(f). *See also* Orange County Ordinances 25-137(a) (identical language).

⁷⁹ *Orange County*, at 14.

⁸⁰ *Id.* at 18-19.

⁸¹ *Id.* at 20-22.

Georgia (City of Atlanta)

[Supreme Court of Georgia](#)

May 16, 2011

*City of Atlanta v. Hotels.com*⁸²

Decision: OTC services not subject to hotel tax. Unanimous.

Statute: “There is levied and assessed and there shall be paid a tax of seven percent of the rent for every occupancy of a guestroom in a hotel in the city.”⁸³ Rent is defined as “the consideration received for occupancy valued in money....”⁸⁴ Further, “Every person occupying a guestroom in a hotel in this city is liable for the tax levied in this article.”⁸⁵

Analysis: “Under the statute and ordinance the tax is on the consumer. The statute and ordinance do not tax any transaction between a non-occupant such as an OTC and the hotel. Thus, reading the ordinance in toto and in pari materia to the Enabling Statute, the amount that is taxable is the retail amount paid for occupancy by someone who will occupy the room. Since the consumer cannot obtain the right to occupy the room without paying the retail room rate charged by the OTC, it is the retail room rate that is the taxable amount or ‘rent’ under the City’s ordinance.”⁸⁶

Georgia (City of Columbus)

[Supreme Court of Georgia](#)

June 15, 2009

*Expedia, Inc. v. City of Columbus*⁸⁷

Decision: OTCs are not operators of hotels and are not obligated to collect taxes, but must remit any taxes they collect. 4-3 decision.

Statute: Imposes “an excise tax in the amount of seven percent of the charge to the public upon the furnishing for value of any room or rooms or lodging or accommodations furnished by any person licensed by or required to pay business or

occupation taxes to Columbus for operating a hotel within the meaning of this article.”⁸⁸ “Any tax levied...in this Code section is also imposed upon every...entity who is a hotel or motel guest and who receives a room.... The person or entity collecting the tax from the hotel or motel guest shall remit the tax to the governing authority imposing the tax....”⁸⁹

Analysis: “Due to a lack of evidence regarding the amount of the facilitation fee, no one can discern which portion of the room rate is allegedly for Expedia’s facilitation fee. Since Expedia has chosen to represent the room rate to the public as the price a customer must pay to secure his right to occupy the room, the City has no choice, under a clear and unambiguous reading of its ordinance, but to tax the customer for the published room rate demanded by Expedia.”⁹⁰

“As borne out by the facts of the case, Expedia, by virtue of its contracts with City hotels, elects of its own accord to collect hotel occupancy taxes. It may change its business practices at any time and any injunction should reflect this fact.”⁹¹

Dissent (Hunstein): “As the majority acknowledges, neither it nor the trial court has found Expedia to be an innkeeper or operator under the City’s ‘Hotel-Motel Occupancy Excise Tax’ ordinance. Accordingly, when Expedia sells to persons who ultimately occupy motel or hotel rooms in the City, Expedia does so not as an innkeeper but as a private party who, under the plain language of the ordinance, is not subject to the ordinance’s terms.... Expedia is not different from the tourist who, after renting a room, hands the keys over to a traveler in the parking lot in exchange for reimbursement and a fee. The City’s ordinance simply does not govern transactions between a non-innkeeper entity like Expedia and the users of the rooms, who occupy

⁸² No. S11A0508; S11X0509; S11A0510; S11X0512 (Ga. May 16, 2011).

⁸³ Atlanta Ordinance § 146-79.

⁸⁴ Atlanta Ordinance § 146-77.

⁸⁵ Atlanta Ordinance § 146-80.

⁸⁶ *City of Atlanta*, at 5.

⁸⁷ 681 S.E.2d 122 (Ga. 2009).

⁸⁸ Columbus Ordinance § 19-111.

⁸⁹ Ga. Code § 48-13-51(a)(1)(B)(ii).

⁹⁰ *City of Columbus*, 681 S.E.2d at 128.

⁹¹ *Id.* at 129.

the rooms but do not pay the hotel and instead pay Expedia.”⁹²

Dissent (Melton, Hunstein, Hines): “[T]he trial court granted equitable relief [an injunction] despite the fact that a motion for a declaratory judgment, an adequate remedy at law, was pending at the same time. By longstanding principles, the grant of equitable relief in this situation was improper.”⁹³

Illinois (Village of Rosemont)

U.S. District Court for the Northern District of Illinois, Eastern Division

October 14, 2011

*Village of Rosemont, Illinois v. Priceline.com, Inc.*⁹⁴

Decision: Transactions with OTCs are subject to tax, as they are not services but the rental of property by an “owner,” defined as “anyone who receives the ‘consideration for the rental.’”

Statute: A tax upon “the privilege of renting a hotel or motel room within the Village of Rosemont [at a rate of] 7% of the room rental rate [excluding] taxes or other non-room rental charges added to the hotel bill.”⁹⁵ Paid by the rentor (customer who “seeks the privilege occupying the hotel or motel room,” but it is the duty of “the owner of every hotel or motel to secure the tax from the rentor...and to pay over to the Village Collector the tax.”⁹⁶ Owner is defined as any person (a) having “an ownership interest in [a hotel],” (b) “conducting the operation of a hotel,” or (c) “receiving the consideration for the rental of such hotel or motel room.”⁹⁷

Analysis: “Because the customer cannot access the hotel room unless and until he pays the OTC’s entire charge, the OTCs are owners who receive ‘consideration for...rental[s],’ within the meaning of the ordinance.”⁹⁸

“The term ‘owner’ is defined by the Ordinance to include anyone who receives the ‘consideration for

the rental’.... A classification for taxation purposes carries a strong presumption of validity, and it will survive a challenge on equal protection grounds unless the party asserting the challenge negates every conceivable basis for the classification.”⁹⁹

Kentucky (City of Bowling Green)

Court of Appeals of Kentucky

April 29, 2011

*City of Bowling Green v. Hotels.com*¹⁰⁰

Decision: OTC services not subject to hotel tax. Unanimous.

Statute: A tax on “the rent for every occupancy of a suite, room, or rooms, charged by all persons, companies, corporations, or other like or similar persons, groups, or organizations doing business as motor courts, motels, hotels, inns, or like or similar accommodations businesses.”¹⁰¹

Analysis: “In construing statutes, we must give them a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.... The OTCs do not provide physical accommodations within the City of Bowling Green.... [A provider of temporary corporate apartments is different from OTCs] because it had an actual physical presence within the county and was not merely a broker of the rooms.”¹⁰²

Missouri (St. Louis County)

Supreme Court of Missouri

June 28, 2011

*St. Louis County v. Prestige Travel, Inc.*¹⁰³

Decision: OTC services not subject to hotel tax. Unanimous en banc.

Statute: A tax on “the amount of sales or charges for all sleeping rooms paid by the transient guests of

⁹² *Id.* at 129 (Hunstein, P.J., dissenting).

⁹³ *Id.* at 130 (Melton, J., dissenting).

⁹⁴ No. 09-C-4438 (E.D. Ill. Oct. 14, 2011).

⁹⁵ Rosemont Ordinance § 10-23(a).

⁹⁶ Rosemont Ordinance § 10-23(b)-(c).

⁹⁷ Rosemont Ordinance § 10-22.

⁹⁸ *Village of Rosemont*, at 4-5.

⁹⁹ *Id.* at 17-18.

¹⁰⁰ --- S.W.3d ---, 2011 WL 1600505 (Ky. App. Apr. 29, 2011).

¹⁰¹ Ky. Rev. Stat. 91A390(1).

¹⁰² *City of Bowling Green*, at *2.

¹⁰³ No. SC 91228 (Mo. Jun. 28, 2011).

hotels and motels situated within St. Louis County, Missouri.”¹⁰⁴

Analysis: “When read in context, it is clear the obligation to file the tax was placed solely on those ‘engaged in the business of operating a hotel or motel.’ This supports the finding that Prestige was not liable for the tax. Furthermore, because taxing statutes must be construed strictly, and taxes are not to be assessed unless they are expressly authorized by law, this Court will not read a tax obligation into the law where one was not clearly expressed.”¹⁰⁵

New Mexico (City of Gallup)

[U.S. District Court for the District of New Mexico](#)

March 1, 2010

*City of Gallup v. Hotels.com*¹⁰⁶

Decision: OTC services not subject to hotel tax.

Statute: “There is hereby imposed an occupancy tax of revenues of five percent (5%) of gross taxable rent for lodging paid to vendors on and after August 1, 1998. Every vendor providing lodging shall collect the tax thereon on behalf of the city and shall act as a trustee therefor.”¹⁰⁷

Analysis: “It would not make sense to interpret ‘gross taxable rent’ as the full amount charged by Defendants because only a portion of this amount is actually ‘paid to vendors’.... Plaintiffs have not established that Defendants collected taxes over and above what they have remitted to the vendors.”¹⁰⁸

New York (City of New York)

[New York Supreme Court, Appellate Division, First Department](#)

November 29, 2011

*Expedia, Inc. v. City of New York Department of Finance*¹⁰⁹

Decision: OTC services not subject to hotel tax. Unanimous 5-0.

Statute: Imposes on a hotel occupant a tax on the rent or charge per day for each hotel room.¹¹⁰

Analysis: “[T]he plain language of the enabling legislation did not clearly and unambiguously provide the City with broad taxation powers with respect to imposing a hotel occupancy tax. Rather, it permitted the City to impose the tax on ‘hotel occupants.’ Given the well-established rule that a statute that levies a tax ‘must be narrowly construed’ and ‘any doubts concerning its scope and application are to be resolved in favor of the taxpayer,’ the plain meaning of this phrase did not encompass the service fees charged by the travel intermediaries and the legislation may not be extended so as to permit the imposition of the tax in a situation not embraced by it.”¹¹¹

Ohio (City of Findlay)

[U.S. District Court for the Northern District of Ohio](#)

July 26, 2006

*City of Findlay v. Hotels.com, L.P.*¹¹²

Decision: OTC services not subject to hotel tax. To the extent OTCs collected what they indicated to consumers were taxes, they are obligated to remit them to the City.

Statute: “The transient guest tax...shall be paid by the transient guest to the vendor, and each vendor shall collect from the transient guest the full and exact amount of the tax payable on each taxable lodging. The tax required to be collected under this chapter shall be deemed to be held in trust by the vendor until paid to the [City].”¹¹³

Analysis: “The plain definition of ‘vendor’ in the City’s ordinance is too narrow to reach Defendants, who are not alleged to own or operate any hotels.... [E]ven if the exception clause in the City’s definition section created an ambiguity regarding whether Defendants are ‘vendors,’ the Ohio Supreme Court maintains that when it finds statutes defining

¹⁰⁴ St. Louis County Rev. Ordinances § 502.500.

¹⁰⁵ *St. Louis County*, at 6.

¹⁰⁶ No. CV 07-644 JC/RLP (D.N.M. Mar. 1, 2010).

¹⁰⁷ Gallup Ordinance § 3-2C-4; Gallup Ordinance § 3-2C-7(A).

¹⁰⁸ *City of Gallup*, at part III.

¹⁰⁹ No. 6174 650761/09 (N.Y. Ct. App. Nov. 29, 2011).

¹¹⁰ *See* Uncons Laws of NY ch 288-C, § 1.

¹¹¹ *City of New York Department of Finance*.

¹¹² 441 F.Supp.2d 855 (N.D. Ohio 2006).

¹¹³ Findlay Ord. § 195.06.

subjects of taxation to be ambiguous, it resolves the ambiguity in favor of the taxpayer.”¹¹⁴

Ohio (City of Columbus)

U.S. District Court for the Northern District of Ohio

October 14, 2009

*City of Columbus v. Hotels.com*¹¹⁵

Decision: Court rejected City’s claim that OTCs are engaged in criminal or fraudulent activity.

Analysis: “[N]othing has been presented which would justify a finding that its conduct in attempting to influence legislation and related activities could be classified as fraudulent or criminal.”¹¹⁶

Oklahoma

District Court of Oklahoma County

March 11, 2011

*State v. Priceline.com, Inc.*¹¹⁷

Decision: OTC services not subject to hotel tax.

Statute: Tax on the gross receipts of each sale of “[s]ervice of furnishing rooms by hotel, apartment hotel, public rooming house, motel, public lodging house, or tourist camp.”¹¹⁸

Analysis: The Court granted the OTCs’ motion to dismiss the case after considering the briefs.

Pennsylvania (County of Lawrence)

Commonwealth Court of Pennsylvania

August 3, 2011

*County of Lawrence, Pennsylvania v. Hotels.com, L.P.*¹¹⁹

Decision: Trial to proceed on the question of whether “the Companies take title to the hotel rooms before renting them out to patrons,” and if so, whether the statute is applicable to the companies. Other claims by County dismissed.

Statute: County commissioners authorized to “impose an excise tax on the consideration received by each operator of a hotel, as defined by this section, from each transaction of renting a room or rooms to accommodate transients. If levied the tax shall be collected by the operator from the patron of the room and paid over to the county.”¹²⁰ An operator is a person or persons “who maintain, operate, manage, own, have custody of or otherwise possess the right to rent or lease overnight accommodations in a hotel to the public for consideration.”¹²¹

Analysis: “We note that the County has alleged that the Companies take title to the hotel rooms at issue before renting them out to patrons.... We note that these allegations are strenuously contested by the Companies, but if they are proven, it would present common pleas with a viable question whether these activities are sufficient to make the Companies hotel ‘operators’ within the meaning of the ordinance. We express no opinion on this at this premature stage....”¹²²

Note: The Court was reviewing an order from a trial judge who dismissed the case but passed away before issuing a written opinion. The Court notes that his transcribed remarks suggested a finding of fact against the County, but further proceedings are needed to produce a written opinion. The trial judge, addressing his remarks to the County, had said: “I think they’re [the Companies] right on the exhaustion. I think they’re right on the ordinance itself. I think you jumped the gun. Go to the legislature and get what you need from them, they write the statute and go to the county and get the ordinance. You’re trying to pull yourselves up by your own bootstraps. And it isn’t going to work.”¹²³

¹¹⁴ *City of Findlay*, 441 F.Supp.2d at 859-60.

¹¹⁵ Case No. 3:07cv2117 (N.D. Ohio Oct. 14, 2009).

¹¹⁶ *Id.*

¹¹⁷ No. CJ-2010-8952 (Mar. 22, 2011).

¹¹⁸ Okla. Stat. § 68-1354(A)(6).

¹¹⁹ No. 2541 (Pa. Cmwlth. Ct. Jun. 6, 2011).

¹²⁰ 16 P.S. § 1770.6(a). *See also* Lawrence County Ordinance No. 317 (identical language).

¹²¹ 16 P.S. § 1770.6(f). *See also* Lawrence County Ordinance No. 317 (identical language).

¹²² *County of Lawrence*, at 8.

¹²³ *Id.* at 3, *citing* Reproduced Record at 1180-81.

Pennsylvania (City of Philadelphia)Commonwealth Court of Pennsylvania

February 2, 2012

*City of Philadelphia v. City of Philadelphia Tax Review Board*¹²⁴**Decision:** OTC services not subject to hotel tax.**Statute:** Operator collects tax from a hotel patron; operator is “a person or entity that maintains, operates, manages, owns, has custody of, or otherwise possesses the right to rent or lease overnight accommodations in any hotel to the public for consideration.”¹²⁵**Analysis:** “[T]he booking of a reservation through Expedia does not provide a customer with the use or possession of a room or the right to the same. Rather, this booking merely establishes the expectation that a room will be available to a customer at a set point in time in the future. Additionally, as Expedia notes, hotels typically permit cancellations and changes in itineraries, and it would be illogical to assess a tax on a future event which may never occur. In the end, the record supports the Board’s determination that ‘[i]t is not until an individual has registered at a hotel facility and has obtained and paid for a room, that the actual rental has occurred. . . .’”¹²⁶**Note:** A prior court decision in this case included a 2005 admonishment of the City’s failure to follow administrative procedures. “This court is troubled by the fact that it does not appear that the City has ever performed an audit, provided notice or attempted to collect the Tax from Defendants, other than by filing the instant lawsuit. It is the function of the court system to resolve legal disputes; its role is not to levy or collect taxes (absent an appeal).”¹²⁷**South Carolina**Supreme Court of South Carolina

January 18, 2011

*Travelscape, LLC v. South Carolina Department of Revenue*¹²⁸**Decision:** OTC services are subject to hotel tax, as OTC is “engaged...in the business of furnishing accommodations.” The tax raises no constitutional concerns because no two states can tax the same OTC transaction. 4-1 decision with written dissent.**Statute:** A tax on “the gross proceeds derived from the rental or charges for any rooms...furnished to transients by any...place in which rooms, lodgings, or sleeping accommodations are furnished to transients for consideration.”¹²⁹ “Gross proceeds of sale” is defined as “the value proceeding or accruing from the sale, lease, or rental of tangible personal property...without any deduction for...the cost of materials, labor, or service.”¹³⁰ The tax is imposed “on every person engaged or continuing within this State in the business of furnishing accommodations to transients for consideration.”¹³¹**Analysis:** “In our view, the fees charged by Travelscape for its services are subject to sales tax under the plain language of section 12-36-920(A) as gross proceeds.... [Gross proceeds] includes the value obtained from the rental of accommodations without deduction for the cost of services.”¹³²“Travelscape’s argument ignores the antecedent language in (E) that it applies to all persons ‘engaged...in the business of furnishing accommodations.’... Accordingly, we find the context of ‘furnish’ as it appears in subsection (E) demonstrates that it encompasses the activities of entities such as Travelscape who, whether directly or indirectly, provide hotel reservations to transients for consideration.”¹³³**Dissent:** “The question before us is whether the legislature intended the statutory seven percent sales tax to reach the separate fee charged by Travelscape for the service it provides. I do not believe the¹²⁴ No. 216 CD 2011 (Pa. Cmwlth. Feb. 2, 2012), *aff’g* Mar. Term 2010 No. 00764 (Phila. C.P. Jan. 14, 2011).¹²⁵ Phila. Code § 19-2401.¹²⁶ No. 216 CD 2011 (Pa. Cmwlth. Feb. 2, 2012).¹²⁷ *City of Philadelphia v. Hotels.com*, No. 0106023, 122014 (Phila. C.P. May 25, 2006) at 3.¹²⁸ 705 S.E.2d 28 (S.C. 2011).¹²⁹ S.C. Code § 12-36-920(A).¹³⁰ S.C. Code § 12-36-90(1)(b)(ii).¹³¹ S.C. Code § 12-36-920(E).¹³² *Travelscape*, 705 S.E.2d at 33.¹³³ *Id.* at 34.

statute unambiguously answers this question.... As the majority acknowledges, the word ‘furnished’ as used in subsection (A) connotes physically providing accommodations to customers, which Travelscape does not do. Thus, in order to find Travelscape to be in the business of ‘furnishing accommodations,’ the majority imposes a different meaning of the word ‘furnish’ in subsection (E).... In my opinion, giving the term ‘furnish’ a different meaning in subsection (A) than is given in subsection (E), is in contravention to the rule of statutory construction that the same terms or words in a statute should be given the same meaning.”¹³⁴

Tennessee (City of Goodlettsville)

U.S. District Court for the Middle District of Tennessee

February 21, 2012

*City of Goodlettsville v. Priceline.com, Inc.*¹³⁵

Decision: OTC services not subject to hotel tax.

Statute: A tax “upon the privilege of occupancy in any hotel of each transient in an amount equal to three percent (3%) of the consideration charged by the operator.”¹³⁶

Analysis: “Contrary to the allegations set forth in the Complaint, the evidence demonstrates that OTCs do not purchase or take title to hotel rooms and do not pay the hotels before a booking is made. Instead, the evidence shows that OTCs contract for the right to market an allotment of rooms, in return for the hotel’s promise to reimburse the OTCs at the negotiated net rate for any rooms sold, with no payments made until after a booking occurs and with no penalty for unsold rooms.[...]”

“Although the City is correct that, under Tennessee law, the court should not adopt a statutory interpretation that renders a revenue statute a “virtual nullity,” the court’s interpretation here has no such effect. Under the existing statutory framework, the City and the other class members have collected and will continue to collect substantial occupancy tax revenues on the consideration local hotels receive at the net rate. Furthermore, as several courts have

found, it is not “absurd” for localities to collect tax revenue on the net rate.[...]”

“Moreover, the OTCs and the hotels are independent entities that negotiate in arms-length transactions. In those transactions, the hotel has every incentive to keep the net rate as high as possible and to reserve for direct booking as many rooms as it believes it can sell directly to consumers, without sacrificing any potential revenue to the OTCs.”¹³⁷

Texas (City of Houston)

Texas Court of Appeals (Houston, 14th Dist.)

October 25, 2011

*City of Houston v. Hotels.com*¹³⁸

Decision: OTC services not subject to hotel tax.

Statute: “There is hereby levied within the corporate limits of the city a tax upon the cost of occupancy of any room furnished by any hotel where such cost of occupancy is at the rate of \$2.00 or more per day, such tax to be equal to seven percent of the consideration paid by the occupant of such room to such hotel.”¹³⁹

Analysis: “This is a reasonable reading of the ordinance, as can be seen by comparing the products or services of hotels and OTCs to the defined term occupancy. Simply stated, a hotel has rooms and the concomitant right to use or possess those rooms; to express this right in the terms defined in the resolution, a hotel has occupancy. The hotel offers occupancy in exchange for payment of the invoiced discounted rate. An OTC, on the other hand, does not have rooms or occupancy; as Houston concedes, the OTCs do not have the right to use or possess hotel rooms. Instead, the OTCs have websites and provide information. The content of a given OTC’s website includes material provided by the hotel, which may include photographs, descriptions, and listings of the amenities and services available onsite—but the OTC also provides information about the hotel’s competitors. Visitors to the website can access maps, check room availability, and compare rates, ratings, and the reviews of other

¹³⁴ *Id.* at 39-40 (Pleicones, J., dissenting).

¹³⁵ No. 3:05-cv-00561 (M.D. Tenn. Feb. 21, 2012).

¹³⁶ Goodlettsville City Code § 5-502.

¹³⁷ *City of Goodlettsville*, at *16.

¹³⁸ No. 14-10-00349-CV (Tex. Ct. App. Oct. 25, 2011).

¹³⁹ Houston, Tex. Code of Ordinances § 44-102.

consumers. In many instances, visitors to an OTC's website have the additional opportunity to combine the OTC's services in booking a hotel room with its similar services in arranging cruises, flights, and ground transportation. In sum, the OTC does not merely help the website visitor make a reservation; it also helps consumers make informed choices in spending their travel dollars, and to do so conveniently and efficiently. When the consumer pays the OTC, the payment includes compensation for these benefits."¹⁴⁰

"If Houston's interpretation of the ordinance is also reasonable, then the ordinance is ambiguous and the trial court could have properly granted summary judgment on the ground that the ordinance is ambiguous and therefore must be strictly construed against Houston and in the OTC's favor."¹⁴¹

Texas (City of Orange)

U.S. District Court for the Eastern District of Texas
September 21, 2007
*City of Orange v. Hotels.com*¹⁴²

Decision: OTC services not subject to hotel tax.

State Statute: Municipalities are authorized to impose "a tax on a person who, under a lease, concession, permit, right of access, license, contract, or agreement, pays for the use or possession or for the right to the use or possession of a room that is in a hotel, costs \$2 or more each day, and is ordinarily used for sleeping..."¹⁴³

City Statute: "[A] tax upon the occupancy of any room or space furnished by any hotel or motel...paid by the occupancy of such room or space to such hotel or motel..."¹⁴⁴

Analysis: "Plaintiff does not, and of course, cannot allege that Defendants are 'hotels' or 'motels.' Plaintiff admits that it properly receives the 7% tax

based on the negotiated room rate that is actually paid to the hotels.... The Ordinance clearly states that the tax is imposed only on the amount received by the hotel in consideration for occupancy of the room."¹⁴⁵

Texas (City of San Antonio)

U.S. District Court for the Western District of Texas
July 1, 2011
*City of San Antonio v. Hotels.com*¹⁴⁶

Decision: OTCs "control" hotels in that they step into the shoes of the hotel for the purpose of tax collection. Tax is imposed on consumer for amounts paid to secure hotel accommodation, and statutory reference of "to the hotel" should be disregarded.

Statute: Case is a class action involving 173 Texas cities. The statutes are very similar to the other Texas statutes listed above.

Analysis: "[T]he only contract or agreement at the time hotel occupancy tax is being assessed and collected is between the OTC and the consumer.... There is no contract between the consumer and the hotel until some later date when the occupant actually checks into the hotel."¹⁴⁷ "The OTCs have sole control over the decision to establish, change, or dissolve markups, services fees and/or surcharges as they wish."¹⁴⁸ "[The margin kept by OTCs] is clearly part of the retail cost that the consumer must pay for the right to occupancy."¹⁴⁹

"The OTCs concede that they currently make enough revenue through their markup and service fee to charge taxes on the margin and still make a considerable profit."¹⁵⁰

"The Cities assert that the words 'to the hotel' are mere surplusage, and the Court agrees. If a period were placed immediately after the phrase 'consideration paid by the occupant of the room,' the tax provision in the Dallas-type ordinance would make

¹⁴⁰ *City of Houston*, at IV.A.

¹⁴¹ *Id.*

¹⁴² 2007 WL 2787985 (E.D. Tex. Sep. 21, 2007).

¹⁴³ Tex. Tax Code § 351.002.

¹⁴⁴ Orange, Tex., Code of City Ordinances § 1.604 (2006).

¹⁴⁵ *City of Orange*, 2007 WL 2787985 at *6 (E.D. Tex. Sep. 21, 2007).

¹⁴⁶ No. 5:06-cv-00381 (W.D. Tex. Jul. 1, 2011).

¹⁴⁷ Op. at ¶ 51-52.

¹⁴⁸ Op. at ¶ 80.

¹⁴⁹ Op. at ¶ 108.

¹⁵⁰ Op. at ¶ 118-120.

perfect sense. Thus, there is every reason to disregard the words ‘to the hotel’ as surplusage because they are repugnant to the rest of the ordinance and would render the ordinances meaningless.”¹⁵¹

“Based on the jury’s finding that Defendants are ‘controlling’ hotels, and the Court’s findings and conclusions herein, the Court finds that the OTC’s have a legal duty to collect and remit hotel occupancy taxes imposed under the Cities’ ordinances.”¹⁵²

Wisconsin (City of Madison)

Dane County Circuit Court

October 12, 2011

*City of Madison v. Expedia, Inc.*¹⁵³

District of Columbia (City of Washington)

Superior Court of the District of Columbia

October 12, 2011

*District of Columbia v. Expedia, Inc.*¹⁵⁴

Decision: OTC service is taxable because statute’s purpose is to tax any payments made by ultimate purchaser, including for any services as part of the sale.

Statute: Tax imposed on “the gross receipts from the sale of or charges for any room or rooms, lodgings, or accommodations furnished to a transient by any hotel...or other place in which rooms, lodgings, or accommodations are regularly furnished to transients.”¹⁵⁵ Gross receipts are defined as “the total amount of the sales prices of the retail sales.”¹⁵⁶

Analysis: “Both interpretations are reasonable. Both the Defendant and the District read the statute in the manner a well-informed person might. Because the plain meaning of the statute is open to two reasonable, yet opposing, interpretations, it is necessary under *Acme* to turn to other tools of reasonable

statutory interpretation in order to discern the purpose of the statute and avoid absurd results.”¹⁵⁷

“It is not the transaction between the hotel and the OTC that is the retail sale; rather, it is the subsequent sale to the ultimate purchaser.... The statute is designed to ensure taxation applies to the entirety of the services being taxed.... The District of Columbia is correct when it argues that under the OTCs’ proposed interpretation, retail sales tax could be avoided altogether by a hotel simply by interposing a shell company between its customers and the hotel.”¹⁵⁸

New Law: In April 2011, the District of Columbia enacted a new law explicitly imposing hotel tax on “the net sale or net charges received from the transient by the room remarketer,” defining net sale and net charges as “the gross receipts from the sale of or charges for any room or accommodations received by a retailer from a room remarketer.”¹⁵⁹ Thus, confusingly, the taxable amount is the “net” amount paid to an OTC, defined in turn as the “gross” amount received by the hotel. As the judge in this case noted, “[l]ooking at the two statutory provisions together, it is impossible to reconcile any meaning out of the confusion.”¹⁶⁰ However, the judge nevertheless upheld the tax on OTCs: “Despite its unnecessarily ambiguous plain language, the court holds that the amended sales tax statute would apply to the OTCs transactions with transients prospectively.”¹⁶¹



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¹⁵¹ Op. at ¶ 155.

¹⁵² Op. at ¶ 206.

¹⁵³ No. 2007-cv-004488 (Dane Co. Cir. Ct. Jul. 24, 2008) (case dismissed).

¹⁵⁴ No. 2011-CA-002117-B (Oct. 12, 2011).

¹⁵⁵ D.C. Code § 47-2002 (repealed 2011).

¹⁵⁶ D.C. Code § 47-2001(h) (repealed 2011).

¹⁵⁷ *District of Columbia*, at 10.

¹⁵⁸ *Id.* at 14-16.

¹⁵⁹ D.C. Code § 47-2001 *et seq.*

¹⁶⁰ *District of Columbia*, at 20.

¹⁶¹ *Id.* at 21.