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MEMORANDUM

TO: USA Interactive

FROM: Timothy Macht, Esq.
Holland & Knight LLP

RE: Hotel Occupancy Taxes

DATE: January 28, 2003

You have asked us to assess the likelihood that Expedia and Hotels.com (hereafter "the companies") will be required to collect and remit hotel occupancy taxes on the retail price charged to merchant hotel customers for rooms located in the following jurisdictions: California, Florida, Georgia, Illinois, Nevada, New York, and Texas.

Based on our review, it appears that the total price that customers pay to the companies for hotel rooms is subject to taxation in most of the jurisdictions analyzed, given that accommodations tax is typically imposed based on the total consideration received for occupancy. Because this is fairly clear in most jurisdictions, we devote relatively less time to analyzing this issue.[1] The thornier question is this: who is required

Hotels Louisiana

Expedia – Hawaii

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[1] In a memorandum written to Hotels.com, the Jones Day firm agrees that the total charges received by Hotels.com are included in the tax base of most jurisdictions which it analyzed, with the possible exception of Illinois and some California jurisdictions. See Jones Day Memo, pp. 43-45, 46.

EXHIBIT 5

to collect and remit such tax on the customer's total rent payments -- the hotel or the companies, and it is to this question that the bulk of this memorandum is devoted.

Generally speaking, you will find herein that the main protection that the companies have is in the plain language of many of the statutes analyzed, which limit the incidence of the tax to "hotel operators" or to some other synonymous class of persons in charge of a hotel.[2] A few state statutes that we have examined don't have such limiting language (Florida, chief among them), which creates exposure for the companies. But the risk runs deeper than this, as tax authorities in Texas and New York have begun to issue rulings that stretch the concept of "operating" or "controlling" a hotel to include an internet reservation service company's mere exercise of a degree of control over a block of rooms at a hotel. While the reasoning in these rulings is strained (since it seems obvious that the companies do not "control" or "operate" the hotel in any standard sense of those words), the adverse position does draw on its own intuitive logic: that is, once one accepts the fact that the rental charges received from the customer by the companies are taxable, it seems strange – and arguably bad tax policy -- that the hotel operator should be required to collect taxes on rental charges that it never receives, if only because the hotel operator may not have adequate information about the full price charged to the customer for the room (which is needed for the hotel operator to know how much tax to collect from the guest). For these reasons, we expect that taxing authorities in Texas,

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[2] There are two other possible defenses to occupancy tax assessments potentially available to the companies: (1) a claim that the companies lack nexus with the various jurisdictions and thus cannot, consistent with the Commerce Clause and/or the state and local ordinances, be required to collect and remit occupancy taxes in those jurisdictions; and (2) a claim that in any jurisdiction where other similarly situated providers of hotel rooms (such as tour packagers, hotel consolidators, etc) have not and would be similarly assessed, tax assessments against the companies violate applicable principles of Equal Protection, uniformity of taxation, and/or selective enforcement. We have not had time to fully explore these claims, but – as a matter of first impression – we think that they are unlikely to succeed.

With respect to nexus, the Texas and New York taxing authorities have based their claim of sufficient nexus on the fact that the hotel rooms for which the companies obtain and grant licenses of use are located in that state. Where a tax is imposed in connection with the renting of rooms in a given jurisdictions, this seems to satisfy the requirement of the seminal Court case, Complete Auto Transit v. Brady, 430 U.S. 274 (1977), that the tax must be "applied to an activity [that has] a substantial nexus with the taxing State." (With more time, though, one might explore the suggestion that the Commerce Clause requires that in the taxing jurisdiction there be some physical presence of the taxpayer (as opposed to property in which the taxpayer holds and conveys some interest), but even this proposition, if accepted, will likely be defeated by regular in-state visits of Expedia/Hotels.com employees for the purpose of entering into supplier contracts or for other related business reasons. Cf Scripto, Inc. v. Carson, (holding that remote seller, with no employees, offices, or other places of business in Florida, subject to tax collection obligation in Florida, where salespersons, even though independent contractors, engaged in "continuous local solicitation" of orders from Florida customers),

The second claim would require additional inquiry into whether the assessing tax jurisdiction has ever held other similar providers of hotel rooms responsible for collection of occupancy taxes. Even if it has not, a claim of disparate treatment presumably could presumably be defeated by the state's election to do so uniformly on a going-forward basis.

Therefore, for present purposes, it is reasonable to assume that these defenses will be unavailable.

• NEXUS
• EQUAL PROTECTION

EXP. REASONABLE

HOTELS. LIKELY

Florida

Introduction

According to a recent New York Times article, the Florida Department of Revenue ("the Department) has begun to examine the question of whether internet sellers of hotel rooms, like Expedia and Hotels.com, should be collecting and remitting sales tax in connection with the retail price charged to the consumer.

Expedia in preliminary analysis has determined that it has a high risk of exposure to state and local taxes in Florida. We further understand that PWC and Expedia are considering whether to enter into a Voluntary Disclosure Agreement in Florida.

The Deloitte memo finds that is "reasonable to expect" that Florida would look to Hotels.com for tax on its mark-up, and the Jones Day memo determines that it is likely that Hotels.com has occupancy tax collection responsibilities in Florida.

As discussed below, we think that is very likely that the Department will determine, and courts would affirm, that the companies should collect and remit transient accommodations taxes on the full retail price charged for Florida hotel rooms. We also think it very likely that localities will follow suit, as the state and local tax provisions in Florida appear to track one another.

State Tax

Florida law provides that "every person is exercising a taxable privilege who engages in the **business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel** . . . " Sec. 212.03(1), F.S. (emphasis added). The tax is levied in an amount equal to 6 percent of "the total rental charged" for the accommodations – defined in the regulations as "the total consideration" received for the rental, Rule 12A-1.061(2)(e), F.A.C. -- and shall be charged by "the lessor or person receiving the rent" to the person paying the rent. Section 212.03(2), F.S.. The "owner, lessor, or person" receiving the rent is required to remit the tax to the Florida Department of Revenue.

NOT LIMITED TO JUST OWNERS

While this statute is not entirely consistent in its use of the word "person," what is most significant is that the initial definition of the class of those exercising a taxable privilege extends to "every person" – which is broadly defined in Section 212 to include any "individual, firm, corporation," etc (sec. 212.02(12)) – and is not limited to "owners," which term is used later in the provision as just one example of those receiving rent, in addition to any "lessor" or "person," who are required to remit taxes to the Department. The best plain reading of the statute,[3] then, is that <u>anyone</u> engaged in the

[3] Further support for this view is found in the Florida Administrative Code, which consistently describes the class of person obliged to remit accommodations taxes, and perform related administrative obligations, in broad "any person" terms" <u>See, e.g.</u>, Rules 12A-1.061(7)(a); 12A-1.061(8)(a), and 12A-106(19).

Further supporting this conclusion is a 1994 Technical Assistance Advisement issued by the Florida Department of Revenue (TAA 94A-044). That TAA concerned a seller of tour packages ("the Vendor") who acquired rights to attraction tickets, hotel rooms, and other goods and services at discounted prices by contract with the operators, and then, in exchange for payment, issued vouchers to customers to authorize their admission to attractions and use of hotel rooms, among other things. With respect to hotel rooms, the Vendor charged the customer a price for the hotel room based on the price (including tax) charged to the Vendor by the hotel, plus a service charge for the Vendor's service in arranging the transaction. In the portion of the TAA that most directly relates to the issue at hand, the Department considered Vendor's sales tax obligations when the only transaction entered into between the Vendor and the customer was the acquiring of hotel accommodations. The Department, citing Section 212.03, concluded as follows:

> Vendor is required to charge sales tax on the total taxable sales price billed to its customer(s) since the amount shown on the voucher exclusively represents the charge made for the hotel accommodations.

The Department further stated that the Vendor has two options for remitting the sales tax due on the sale of the hotel room to the customer: (1) continue to pay to the hotel operator the applicable sales tax due on the initial lease of the hotel room; collect sales tax from its customer on the total sales price paid for the accommodation; and then take a credit on its sales tax return for the tax paid to the hotel operator; or (2) issue a properly executed resale certificate to the hotel operator in lieu of paying tax on those rooms, on the theory that the rooms are acquired solely for the purpose of re-rental.[5]

It is difficult to distinguish the companies from the Vendor above. One possible distinction that the companies may be inclined to urge is that -- although it is not clear on the facts set forth in the TAA – it appears that the Vendor prepaid for the hotel rooms it offered to the customer, and thus bore the inventory risk; whereas, Expedia and Hotels.com, in their similar advance contracts with hotel suppliers, do not prepay for the rooms and obtain simply a right or option to obtain a specific quantity of rooms as a given price (or within a given price range), which option is exercised only once a customer agrees to book a room. It is hard to see the relevance of this to the sales tax question. If the claim is that the companies simply act as a distribution channel or pass through for the hotels, never themselves gaining any relevant ownership or property interest in the rooms,[6] the distinction seems hard to sustain, especially when considering that under the supplier contracts rooms are committed to Expedia and Hotels.com and cannot be pulled back without the company's consent, not to mention that Expedia and

EXPEDIA CONTRACT – ROOMS MAY BE PULLED BACK

?

[5] Florida allows for a resale tax exemption when the property is "[p]urchased exclusively for resale or re-rental . . ." Rule 12A-1.061(4)(b), F.A.C. See also Rule 12A-106(8)(a).

[6] Cf. Deloitte memo, p. 2 n.1 (suggesting that "HRN could assert that only the Hotel Operator has the ability to grant occupancy . . . [and that HRN] sell[s] the right to use occupancy rather than occupancy itself," which it acknowledges to be a "subtle distinction").

making the transaction between the hotel and each company tax exempt and requiring each company to remit the total sales collected from the customer to the State.

It follows that Florida will very likely seek to collect back taxes. Given dealings so far with New York and Texas, it is seems that, as part of a negotiated settlement, Florida would similarly allow a credit for taxes previously paid to the hotel operator upon proper proof that such taxes had indeed been paid to the hotels and remitted to the State. Therefore, the company's tax exposure is likely limited to the unpaid tax on each company's mark-up over the past three years.

Based on information available to me at this time, I expect that treatment would be the same for local accommodations taxes.

New York

Introduction

Expedia is under audit by New York State, which has taken the position that it is a hotel "operator" required to collect and remit sales tax on the full retail price charged for hotel rooms in the State. PWC assesses a high level of risk for Expedia in New York.

Jones Day (which apparently is unaware of New York's audit position relating to Expedia) believes that the hotels, not Hotels.com, are primarily responsible for occupancy tax collection in New York State or New York City; however, it suggests that the company may be held jointly responsible, with the hotels, for New York State sales tax collection based on a State co-vendor statute.

BELIEVES CO-VENDOR STATUTE WILL GET US

We agree with Jones Day that the New York courts will probably not sustain a tax assessment made on the basis that either company is a hotel "operator"; however, we think the possibility of co-vendor liability is even greater than Jones Day allows. Additionally, we believe that both companies may be subject to assessment for unpaid New York City occupancy tax for taxable periods before June 1, 2002.

HOW FAR BACK

State Tax

New York State imposes a state sales and use tax on various goods and services, including "[t]he rent for every occupancy of a room or rooms in a hotel in this state" (subject to limited exceptions not relevant here). N.Y. Tax Law sec. 1105(e).[8] Rent is defined as "the consideration received for occupancy[9] valued in money, whether received

[8] Such tax is imposed at the combined statewide and local sales tax rate in effect at the site of the hotel. 20 NYCRR sec. 527.9 (2003).

[9] "Occupancy," in turn, is defined as "[t]he use or possession, or the right to the use or possession, of any room in a hotel." Section 1101(c)(2).

Notably, the audit letter's analysis proceeds on a false equation between "merchant" and "operator" -- suggesting that a "merchant" selling rooms in a hotel is ipso facto an "operator" of the hotel – even though the notion of "operating" a hotel in plain meaning, and in the various statutes we have reviewed, incorporates the notion of actually running and controlling the operations of the hotel.

Assuming that DOTF does not change its view (and the audit letter indicates that the auditor has already reexamined the matter and not changed his position), the question is whether the auditor's position would be sustained in a New York court. The Jones Day memo (while not addressing the New York auditor's position, of which the firm presumably is unaware) opines that, because Hotels.com is not an "operator" under a "plain, fair, and ordinary" reading of the statute, a "New York court would likely hold that the responsibility to collect state sales and use tax on occupancy rests solely on the hotel operator." Memo, p. 24. We do not disagree, especially when considering that courts are bound by the plain meaning of an unambiguous statute. We do note, however, that there is at least some risk of a contrary result, because there is something incongruous about a statutory reading that would place tax collection responsibilities on a hotel that does not collect the taxable amounts. The companies would have to present the following picture to the court: (1) sales taxes admittedly are due on the total consideration charged the customer for occupancy; (2) the company (not the hotel) collects these charges from the customer; and (3) the customer may pay nothing to the hotel at checkout; (unless the customer incurs separate hotel charges) and yet (4) the responsibility falls on the hotel to collect sales taxes from the customer with respect to charges the hotel never received and may not even be fully aware.[13]

While we think that the companies would probably prevail in court on the question of whether they are hotel operators, the companies are significantly more likely to be held responsible for occupancy tax collection on the basis of "co-vendor" liability. Under New York State's sales tax law, the Commissioner of DOTF may "in his discretion" decide to hold a vendor jointly or severally responsible for tax collection "when in the opinion of the commissioner it is necessary for the efficient administration of the sales tax law," in the following situations. Sec 1101(b)(8)(ii)(A). Specifically, the Commissioner may "treat any salesman, representative, peddler, or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him, or for whom he solicits business . . . as

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[13] The Jones Day memo downplays the seeming awkwardness of a statutory reading that would impose tax collection responsibilities on the hotel even when it does not collect the taxable amounts, saying that it is in line with New York State Publication TSB-M-92, concerning providers of bed and breakfast services. See Jones Day Memo, p. 12. Jones Day somewhat overstates the parallel. The publication discusses the situation of a bed and breakfast "registry" selling space on behalf of bed and breakfasts, collecting all charges from the customer and passing the money collected (less fees and/or commission) to the establishment. The publication states that the establishment must collect the taxes, and must do so on the entire amount collected by the registry, including fees/commissions retained by the registry. However, the DOTF could easily argue (and indeed does in its audit letter) that this publication is inapposite, because the registry was acting as a traditional common-law agent (and typical travel agent), making it less odd to require the principal, on whose behalf the transaction was conducted, to collect taxes due on the transaction.

argument is not persuasive, where the companies – more than fulfilling orders for the hotels – hold themselves out as having a stock of discounted inventory; obtain contractual commitments to secure such inventory; determine the amount to be charged to the consumer for the rooms; and collect and received payment as the merchant of record.

We do note, however, that DOTF has not raised the possibility of co-vendor liability in the audit letter that we reviewed.

Local Tax

New York City imposes two separate taxes on hotel accommodations: a sales tax (N.Y.C. Adm. Code, Sec 11-2001 et seq) and a hotel room occupancy tax (N.Y.C. Adm. Code, Sec.11-2501 et seq.).

The provisions of the New York City sales tax law are very similar to those of the New York State sales tax law, including the requirement that tax be collected by the "operator" of a hotel. Sec. 11-2015(a). Therefore, no separate discussion is required of this law.

By contrast, the New York City Hotel Room Occupancy Tax law requires separate attention, because the companies apparently thereunder have tax liability for taxable periods preceding June 1, 2002.[15] The law imposes a tax (at the rate of $2 per day for each room rented out for more than $40 per day, plus an additional 5% of the rent charge) for every "occupancy" of a New York City hotel room. Sec 11-2502(a). The tax must be paid "by the occupant to the operator as trustee for and on account of the city." Sec. 11-2502(g). The term operator is defined as "[a]ny person operating a hotel in the city of New York, including, but not limited to, the owner of proprietor of such premises, lessee, sublessee, mortage in possession, licensee, or any other person otherwise operating such hotel." Sec. 11-2501.3. However, the City of New York Department of Finance ("the City DOF") promulgated "Rules Relating to the New York City Hotel Room Occupancy Tax," which, for taxable periods prior to June 1, 2002, provided that "any person who contracts away the use of a room or rooms in a hotel is an 'operator,'" and makes the taxable occupancy the occupancy of the sublessee of the room. Rule Sec. – 12.01. This provision seems squarely to govern the companies' situation.[16] Indeed, a City DOF Statement of Audit Procedure, applicable to the pre-June

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[15] The Jones Day and Deloitte memos include no mention or discussion of this statute. The PWC memo mentions it briefly, stating the view of "its New York tax experts" that such occupancy taxes are not imposed on the resale value of a room. Memo, p. 5. Such experts apparently refer to the revised Rules in effect for taxable periods after June 1, 2002 (see following discussion in text), although they may be further opining that there is no likelihood of audit assessment for the pre-June 2002 period. This should be clarified with PWC.

[16] We do note something curious about the pre-June 2002 Rules. With respect to subleasing of room, the Rules provided:

> (1) If the original occupant is himself an operator . . . and subleases the occupancy to another, the taxable occupancy shall be the occupancy by the sublessee. In such

Conclusion:

We think that a court is likely to reject a DOTF tax assessment based on a claim that either company is a hotel "operator." However, we think that it is distinctly possible that the DOTF, if it fails in its current attempt to treat Expedia as a "hotel operator" directly responsible for collecting taxes on total customer charges, would seek to hold the companies responsible as "co-vendors" and would succeed in the courts. We also think that it is possible that the companies will be held responsible for New York City occupancy taxes for rooms booked prior to June 1, 2002.

Texas

Introduction

Texas's Tax Policy Division has recently issued several no-name letter rulings regarding the applicability of its State hotel occupancy tax to internet-based hotel reservation services, including a December 2002 letter to PWC on Expedia's behalf. In these letters, the Division has indicated that internet companies are required to collect State occupancy tax on fact patterns applicable to both companies: i.e., if the company contracts in advance for access to a block of rooms; sets the price to the consumer for such rooms; sets cancellation policies; and controls which customers will occupy the rooms. These rulings, however, are in tension with the State occupancy tax code, which, by its terms, limits collection responsibilities to those who operate, manage or control hotels, and, until these no-name rulings, seems to have been understood to be limited to those who actually run hotels.

PWC has determined that there is a medium level of risk for Expedia associated with the state and local taxes imposed in Texas.

Deloitte has concluded that it is reasonable to expect that Texas will seek tax on Hotels.com's mark-up, though interposing some possible defenses that Hotels.com might offer. Jones Day believes that Hotels.com will likely receive an audit assessment in Texas, but that the Texas courts will conclude that hotel operators, not Hotels.com, has tax collection responsibilities in Texas.

We generally agree with Jones Day.

Statute

The Texas Tax Code imposes an occupancy tax on "any 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 use or possession of a room or space in a hotel costing $2 or more each day." Texas Code Sec. 156.051. Responsibility falls on any "person owning, operating, managing, or controlling a hotel" to collect the tax for the State, which tax is set at 6% of "the amount paid for a room in the hotel," and periodically to file reports setting forth the total amount of room payments and taxes collected during the

Basis for tax Dar

to making them available to the public," (4) control who occupies the room; and (5) set cancellation policies. The Department concludes that such taxes must be remitted "only on the difference between the taxes collected and the taxes paid the hotel." Id; see also id., p. 2 ("The company is required under Section 156.053, Tax Code, to collect and remit hotel taxes on the amount paid for the room (i.e. the difference paid hotels and collected from guests").[17]

On December 12, 2002, PWC requested a no-name letter ruling on behalf of Expedia, which letter ruling the Division issued on December 19, 2002. Therein, the Division restated the facts presented by PWC as follows: the company "contracts with hotels for a specified room rate rather than for a block of rooms;" the hotel has the right to change, on a daily basis, the rate the company pays for the room and the number of rooms available; the company bears no inventory risk and pays only for rooms that are actually occupied by the guest or not cancelled prior to the hotel's deadline; the company sets rooms prices and has a separate cancellation policy from that of the hotel. Letter from Donald S. Dillard, dated December 19, 2002 (Star # 200212648L). On these (mistaken – see below) facts, the Division concluded that that the company was required to collect occupancy tax on the price paid for the rooms and remit to the State the difference between the tax collected and the tax that the company pays to the hotel. In reaching its conclusion, the Division made reference to its prior ruling that the hotel occupancy tax question comes down to whether the company is acting as an agent for guests or "acting as a hotel that rents rooms to guests." The Division noted that "[a]gents may only reserve the number of rooms requested and room cancellation policies must be those of the hotel and not the agent." The Division concluded that the company "is not merely an agent because they have set their own cancellation policy."

While the basis for the Division's conclusion is thin – resting on the single fact that Expedia sets its own cancellation policy – the Division's ruling is based on a misapprehension of critical facts,[18] and it is plain that the Division, had it considered the actual facts, would have based its ruling on certain additional facts. Contrary to the Division's restatement of the facts, Expedia – like Hotels.com -- does contract for a block of rooms to be kept available for the company, albeit that that company does not prepay for the room and is not committed to purchasing it from the hotel. Further, the hotel does not maintain the right to change the number of rooms available. Expedia's standard contract with hotel suppliers states that the "Hotel shall hold and commit to [Expedia] for booking by [Expedia] the number and category of rooms . . . set forth in the Hotel Rates and Information Sheet" (para 4), which sheet contains an entry for

[17] In an apparently related letter, the Division rules that there was sufficient nexus between Texas and the internet company because "[t]he location of the rented rooms is a factor in determining nexus for hotel occupancy tax. . . . Your client, per the description, has a contractual right to control occupancy of hotel rooms located in Texas that it rents to the public." Letter from Donald S. Dillard, dated September 12, 2002 (Star # 20020942L).

[18] I have reviewed the December 12, 2002 request for a letter ruling submitted by PWC to the Division, and it is clear that the Division's incorrect recital of facts is based on a combination of its misreading of the PWC letter and misinformation supplied by PWC.

affixes upon "[t]he owner or operator of a hotel" the responsibility to report and send the taxes to the County, or suffer penalties. Sec.352.004. Therefore, while we have not had the time to review any County tax ordinances enacted pursuant to this authorization, they properly cannot exceed the enabling statute's authorization to collect taxes from hotel owners and operators, and therefore, should not be read to extend to the companies. There is apparently no such restriction in the law authorizing municipal hotel taxes (Texas Code Sec, 351 et seq.) – or indeed any definition of the class of persons or entities required to collect the tax; therefore, without examining all applicable local statutes (which we have not been able to do), we cannot assess the likelihood that the companies will have obligations thereunder.

Conclusion:

We believe that it is highly likely that the Texas Tax Policy Division will adhere to its no-name ruling that Expedia – and by extension, Hotels.com – must collect and remit state occupancy taxes on their mark-up. However, we believe that the companies have a good chance of defeating such an assessment in court.

We believe that County-based hotel occupancy tax liability is unlikely because the State-authorizing is limited to hotel operators and owners. We have no opinion regarding municipal tax codes, which we have not reviewed.

Georgia

Introduction

In Georgia, the accommodations tax falls under the State's general Sales and Use Tax law. Even more than others of the statutes I have reviewed, it presupposes a traditional business model where the hotel both furnishes the room and charges for it. In part for this reason, and because of an apparent absence of any state released guidance relating to the instant fact pattern, it is quite difficult to predict with any confidence whether Georgia would impose upon the companies an obligation to collect sales tax. The PWC memo assigns a "high level of risk" that Expedia may be required to collect and remit sales taxes on its gross receipt. It does not discuss the risk of exposure to local taxes in Georgia. Neither the Deloitte memo nor the Jones Day memo discusses Georgia or its localities.

We believe that the Georgia statute does not clearly support imposition of tax liability upon the companies.

State Tax

The Georgia State Sales and Use Tax imposes a tax "on the retail purchase, retail sale, rental, storage, use, or consumption of tangible personal property . . . ." Code of Georgia, sec. 48-8-30. "Retail sale" is defined to include "the sale or charges for any room, lodging, or accommodation furnished to transients by any hotel, inn, ... or any

especially in the absence of any clarifying rules, regulations or other state-provided (none of which we have been able to find). In this respect, we disagree with PWC, who assesses a high level of risk under the statute. PWC focuses on the very broad definition of the term "dealer" in the Code – and, surely, that term is broadly defined – but it seems difficult to reconcile the statute's other provisions with imposition of collection and remittance responsibilities on the companies. Insofar as the statute is ambiguous, it is generally accepted that any such doubts are to be resolved in favor of the taxpayer. Especially under this standard, and in the absence of any state-released guidance, I believe that the companies would stand a fair chance of prevailing if they challenged in court an agency determination that they were required to collect and remit Georgia sales tax This seems especially so if the sales tax statute is read together with Georgia's Excise Tax Act, discussed below.

Local Taxes

Under the Georgia Code's "Excise Tax on Rooms, Lodgings, and Accommodations," (Georgia Code, Sec. 48-13-50 et seq), every county and municipality is authorized to levy and collect an excise tax in an amount up to 6% (and higher in some circumstances) "upon the furnishing for value to the public of any room or rooms, lodging or accommodations furnished by any person or legal entity licensed by, or required to pay business or occupation taxes to, the municipality for operating a hotel, motel, inn ... or any other place in which rooms, lodgings, or accommodations are regularly furnished for value." Georgia Code Sec, 48-13-51(a)(1)(A) (emphasis added). The excise tax shall be imposed on "any person or legal entity licensed by or required to pay a business or occupation tax to the governing authority imposing the tax for operating a hotel, motel, inn ...." 48-13-51(a)(1)(B)(i). The tax is also imposed on any hotel or motel guest, who must pay the tax "to the person or entity providing the room, lodging, or accommodation." 48-13-51(a)(1)(B)(ii)). Therefore, this enabling statute clearly intends for Georgia localities to place excise tax collection responsibilities on hotel operators (i.e. those licensed or required to pay taxes for "operating a hotel"). Indeed, in various other provisions falling under the same article, the tax burden and associated administrative responsibilities are repeatedly described as falling upon "Innkeepers," defined – similarly to the above -- as "any person who is subject to taxation under this article for furnishing for value to the public any room, lodgings, or accommodations." 48-13-50.2. See Secs. 48-13-53.1; 48-13-53.2; 48-13-53.4; 48-13-58; 48-13-59.

Consistent with the enabling statute, Atlanta imposes a 7% local lodging tax on persons occupying a guestroom in Atlanta, but only "operators" -- defined as "any person operating a hotel in the city, including but not limited to the owner or proprietor of the premises, lessee, sublessee, lender in possession, license to or any other person otherwise operating the hotel – are required to collect the tax. Atlanta Code of Ordinances 146-76, 80-81.

Conclusion

While, in the absence of any state supplied guidance or court cases, it is rather difficult to predict how the Georgia Department of Revenue and Georgia courts would

Charles E. Chinnock, Executive Director of the Nevada Department of Taxation, as quoted in the New York Times article, that Nevada's taxes are due only on receipts to the hotel and not on mark-up by web sites.

One Nevada jurisdiction has taken a more expansive view, although we believe that the ordinance is probably ineffective. In 1997, Nevada enacted two separate, identically-worded statutes requiring counties (Nev. Rev. Stat. 244.33565) and cities (Nev. Rev. Stat. 268.0195) to "adopt an ordinance that defines the term 'transient lodging' for the purposes of all taxes imposed [by the governing body] on the rental of transient lodging." Each statute continued by prescribing that the definition adopted by the body may include rooms in one or more of a long list of accommodations, including "motels, hotels, apartments," etc. The statute directed to Nevada counties also specified that while different definitions may be enacted in different jurisdictions within the county, "each definition must be consistent with the past practices of the specific jurisdiction in which the taxes are collected" unless the governing body of the entity that collects the tax consents to a change by majority vote. Nev. Rev. Stat. 244.33565(3). County.

In 1999, Clark County, Nevada (which covers Las Vegas) enacted a provision entitled "Transient Lodging Broker," providing as follows:

> Any person buying one or more rooms from a transient lodging establishment for one or more nights and who resells the rooms to transient guests shall pay an annual fee of three hundred dollars. If the transient establishment has charged room tax to the broker, the broker must pay the room tax difference, exclusive of the tax already paid. If the establishment has not charged the room tax to the broker, the broker must pay the full amount of room tax for those rooms sold pursuant to Chapters 4.08. 4.09 and 4.10 of this code.[23]

(Ord. 2422 § 3 (part), 1999). This ordinance seems directly contradictory to the Nevada tax enabling statute, which limits the incidence of transient rental tax to "all persons in the business of providing lodging." Nor was the ordinance authorized by the Nevada legislature's request that counties define "transient lodging" by specifying the types of accommodations, as the 1999 ordinance is plainly not a mere definition of what sort of spaces constitute "transient lodging." Moreover, the enactment is contrary to all other similar tax provisions in the County, as well as current and past practices in the State, so far as we now, including the statement of Mr. Chinnock. Therefore, we think that this ordinance probably cannot be successfully used to require the companies to collect room tax.

[23] The incidence of each of these accommodations taxes falls only upon the operator of the transient lodging establishment.

Local Taxes

The Chicago hotel tax provisions that we have reviewed impose taxes only on hotel operators.

Conclusion

Hotels are responsible for occupancy tax collection in Illinois.

California

Introduction

Occupancy taxes in California are locally imposed. The Jones Day memo concludes that Hotels.com is likely not subject to such tax in Los Angeles but will be required to collect and remit occupancy tax in San Francisco. The PWC memo (apparently having missed an important provision) assigns only a medium level risk in San Francisco.

We conclude below (consistent with the Jones Day memo) that the companies will likely not be required to collect or remit occupancy taxes in Los Angeles or Monterey County, but will likely be required to do so in San Francisco.

California Local Occupancy Taxes

The State of California does not impose a tax on hotel occupancy; however, California counties and cities are broadly authorized to levy a tax on hotel or other transient occupancy. Cal Rev. & Tax. Cd. Sec. 7280. Therefore, the local ordinances of a particular county and municipality where the hotel is located will determine the specific occupancy tax implications. We have examined ordinances in the City of Los Angeles, Monterey County, and the City of San Francisco.

In the City of Los Angeles, tax is imposed "[f]or the privilege of occupancy in any hotel" in the amount of 14% of the rent charged by the operator." LA Mun.Code, Chap.2, Article 1.7, Section 21.7.3 (emphasis added). "Operator" is defined as follows:

> the person who is proprietor of the hotel, whether in the capacity of owner, lessee, mortagee in possession, licensee, or any other capacity. Where the operator performs his functions through a managing agent or any type or character other than an employee, the managing agent shall also be deemed an operator for the purposes of this article and shall have the same duties and liabilities as his principal.[25]

[25] The PWC Memo took no note of this additional "managing agent" language in its analysis. See PWC Memo, p. 2.

Conclusion

The companies will likely be found to have occupancy tax collection responsibilities in San Francisco, but not in Los Angeles or Monterey County.