

Travel Cos. Ordered To Pay \$55M In Texas Hotel Tax Case

By **Jess Davis**

Law360, Dallas (April 05, 2013, 8:25 PM ET) -- A Texas federal judge on Thursday ordered Expedia Inc., Hotels.com LP, Hotwire Inc. and other online travel companies to pay more than \$55 million to 173 Texas cities in a class action to recover allegedly underpaid hotel occupancy taxes.

U.S. District Judge Orlando Garcia said the booking companies must pay hotel occupancy taxes to the cities based on the full retail amount charged to customers, not the discounted wholesale room rate they pay participating hotels, and ordered the companies to immediately change their business practices to pay the proper tax amount to the cities. The companies say the judgment is inconsistent with state law and will raise travel costs in Texas, and are planning an appeal to the Fifth Circuit.

Steven D. Wolens of McKool Smith PC, who represented San Antonio, said Friday the judgment is a victory for the 173 cities owed back taxes after a very long road of fighting for full payment, and said the booking companies' position on the taxes is "sort of a slap in the face of the state of Texas," because they pay more taxes in Georgia and other states.

Wolens said he expects the booking companies to aggressively fight the ruling, but said he thinks the cities will prevail on appeal.

"We're going to stress the fact Texas law is clear the tax is owed on the price the customer pays for the room," Wolens said.

San Antonio sued 11 online travel companies, including Priceline.com Inc., Orbitz LLC and Travelocity.com LP, in 2006, alleging they failed to remit the full amount of hotel occupancy tax owed to the cities under local ordinances. The booking companies argued they were essentially a conduit for consumers to compare and book rooms and were required to collect and pay tax only on the rates charged by hotels for the rooms, not the "mark up" charged to consumers, according to court filings.

After an October 2009 trial, a jury said the companies should have paid \$20.5 million in tax to the cities but underpaid by \$17.9 million. With the years since the judgment, interest and a one-time, 15 percent penalty applicable under city ordinances, the judgment tripled to \$55.14 million.

It took about two years following the jury's verdict to resolve legal questions relating to whether the booking companies "controlled" the hotel rooms, triggering the tax, and the effect of separate, unsuccessful litigation in state court by the city of Houston, which opted out of the class action, against the companies for unpaid taxes.

The Travel Technology Association, a trade association representing online travel companies and global distribution systems, said in a statement Friday the ruling would significantly increase costs for travel companies and is “inconsistent with Texas law,” under the Houston appellate court ruling and expects the judgment to be overturned by the Fifth Circuit.

“The ordinances at issue were written decades ago, before the Internet existed,” said Robin Reck, a spokeswoman for Travel Tech. “Hotel occupancy taxes have never been charged on the fees charged by travel companies (online or offline) in Texas before. This case is about expanding taxes using the courts rather than the legislature.”

In January 2012, a trial court dismissed Houston’s case after finding that the city’s 7 percent occupancy tax did not apply to fees collected by the booking companies on behalf of hotels. That decision was upheld by the Fourteenth District Court of Appeals, and in November, the Texas Supreme Court declined to weigh in.

San Antonio is represented by Steven D. Wolens, Gary Cruciani and Michael P. Fritz of McKool Smith PC, Laura J. Baughman and Thomas M. Sims of Baron & Budd PC, its city attorney and others.

The booking companies are represented by Richard G. Cedillo, Leslie J. Strieber III and Mark W. Kiehne of Davis Cedillo & Mendoza Inc., James P. Karen, Deborah S. Sloan, W. Kelly Stewart and Emmanuel E. Ubinas of Jones Day, Stacy S. Russell and Brian S. Stagner of Kelly Hart Hallman LLP, Darrel J. Hieber, Celso M. Gonzalez-Falla and Karen L. Valihura of Skadden Arps Slate Meagher & Flom LLP and Aron J. Frakes, Joshua G. Herman, Elizabeth B. Herrington, Rachael L. Mamula, Lazar Pol Raynal and Jeffrey A. Rossman of McDermott Will & Emery LLP.

The case is city of San Antonio, Texas, et al. v. Hotels.com LP, et al., case number 5:06-cv-00381, in the U.S. District Court for the Western District of Texas.

--Additional reporting by Jeremy Heallen. Editing by Jeremy Barker.

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