

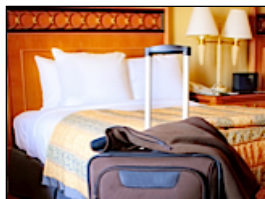
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194 DTR H-1

Oregon

OTCs Escape Attorneys' Fees in Oregon, but Tax Bill Pending



By Paul Shukovsky

Oct. 6 — Online travel companies (OTCs) won't have to pay attorneys' fees for their failed lawsuit to avoid Oregon transient lodging taxes, but the size of the tax bill they owe remains elusive.

An Oregon Tax Court judge denied on Sept. 29 the state revenue department's application for fees after OTC plaintiffs, including several Expedia Inc. units and Priceline.com Inc., voluntarily dismissed a lawsuit in May.

The state sought declaratory relief that the OTCs aren't "transient lodging tax collectors" as defined in H.B. 2656, which was signed into law in July 2013 (*Expedia, Inc. v. Dep't of Revenue, Or.*, Or. T.C., No. TC 5196, 9/29/15).

Although the case is closed, Oregon's Senior Assistant Attorney General Marilyn J. Harbur, who represented the revenue department, told Bloomberg BNA Oct. 1 that "there will be further action on the Department of Revenue's part" to collect taxes owed under H.B. 2656.

OTC lead attorney Robert T. Manicke of Stoel Rives' Portland office consulted his clients, then declined to comment.

Where's the Money?

H.B. 2656 amended the state transient lodging tax so that taxes owed by a transient lodging provider are owed by a "transient lodging tax collector." The lawmakers intended "to ensure that the Department of Revenue would assess the tax against the online travel companies," Harbur said.

While the dropped lawsuit questioned whether the lawmakers had such intentions, Harbur said: "The legislative history is really clear that the whole purpose of the amendment was to ensure that the online travel companies would pay the tax."

Oral arguments had been scheduled in the case for late 2014 when Harbur was contacted by plaintiffs seeking talks with the state. But after six months of meetings, "we were getting nowhere," she said. "They didn't really want to pay all of it. They thought that the lodging providers had been paying it for them" since the statutory amendments went into effect in October 2013. "There was no evidence that was true across the board."

"After the talking and talking, they wanted us to sign a settlement agreement that was unacceptable," Harbur said. "So finally, we asked the court to reset oral arguments on the briefs that had been filed." That's when they filed a notice of voluntary dismissal. "And they indicated that they would be paying," she said. "They did not say how much."

Taxes Still Due

However, all the taxes due since the amended statute went into effect haven't been paid. Asked how much revenue is in play, Harbur responded: "That's one of the problems: This is a self-reporting state tax lodging system. It's like an income tax return. But they hadn't filed returns, so the department had no information."

Harbur said the OTCs have started to follow through on meeting their tax obligations. But she added: "Is it complete, I don't think so. We have a ways to go. They are moving in the right direction."

Harbur said she was constrained from providing further details about how the department might hasten full collection, but promised "there will be further action on the Department of Revenue's part."

Asked if that meant an assessment or litigation, she said: "Well, the two go together many times. It's possible; there's no certainty at this point, no certainty as to the next step. Things are still up in the air."

Statutory Definitions Pivotal

That lack of resolution reflects the constant churn in the world of OTC tax cases. Roughly 250 cases involving OTCs across the nation have been litigated in the last several years, attorney Steven D. Wolens, a principal in the Dallas firm McKool Smith PC, told Bloomberg BNA Oct. 5.

Last month alone saw a settlement in a Puerto Rico case ; a stipulated judgment in a major case in Hawaii in which the OTCs escaped the lodging tax, but are on the hook for excise taxes ; and an order in a federal class action in Texas announcing that the court will soon rule on penalties in a case in which San Antonio is owed \$55 million, Wolens said (185 DTR K-3, 9/24/15).

Wolens, who has been litigating OTC tax cases for more than a decade, said that in the broadest sense, the cases hinge upon the statutory definitions of who is responsible for collecting and remitting the tax and upon what the tax must be collected.

OTCs have prevailed on summary judgments in many of these cases based on the wording of the underlying statute or ordinance, Wolens said. "If the ordinance defines the person responsible to pay the tax as the person who owns the hotel, then the OTCs don't own the hotel and they don't owe the money."

'Short-Sheeting the Government.'

There's not a global answer as to whether OTCs owe taxes, Wolens said. "It's whether the OTCs have got the duty to collect and remit to the government. And whether or not it's going to be collected on the retail price the customer pays for the room as opposed to the wholesale price. And, just to be clear, the taxpayer in all these cases is the customer—it's not the online travel companies."

Asked about how state legislators should craft statutory language to achieve their goals, Wolens said: "If the policy is that the customer is going to pay a tax based on the retail price of the room, then that should be what everybody does, even though the retailer in the case of the OTCs is paying a wholesale amount and marking it up to a retail amount."

"And that's what's really caused these lawsuits," he said. OTCs will get a room for \$150 and sell it to the customer for \$200. "The issue is: What's the bed tax?" In Wolens' view, "the bed tax is based on the amount the customer paid for his room, which is \$200. The tax should not be the amount the OTC pays for the room, which is the \$150."

"So I would tell a legislator to make certain what it is that they want to effect: They should look for consistency and then apply the law evenly to all entities selling hotel rooms, period. My judgment after studying this for over ten years is that the OTCs are getting away with an unfair tax scheme," he said. "The hotels collect and remit the tax based on the retail price the customers pay for the room. Why shouldn't the online travel companies do the same thing? They are short-sheeting the government on these bed taxes."

To contact the reporter on this story: Paul Shukovsky in Seattle at pshukovsky@bna.com

To contact the editor responsible for this story: Ryan Tuck at rtuck@bna.com

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