LAW | REAL ESTATE | FINANCE
DailyBusinessReview.com
An ALM Publication JANUARY 12, 2014
DAILY BUSINESS REVIEW

BOARD OF CONTRIBUTORS

Online Travel Industry's Tax Victory a Big Win for Florida

by Marvin Kirsner

Sunset falls over the Florida Supreme Court building

Phil Sears

The Florida Supreme Court's recent decision in favor of online travel companies in a major hotel room tax case will likely lead to tax revenue losses for some local jurisdictions but is expected to have positive results for Florida's tourism industry and, by extension, the statewide economy.

Specifically, the decision in *Alachua County v. Expedia* addresses whether online travel companies, or OTCs, including Expedia, Hotels.com and the other major hotel booking company websites, must pay hotel room taxes on the amount of their markups.

For example, let's say that an OTC pays a hotel $100 for one room night, then its customer pays $150 for the room. The OTC pays the hotel tax on the $100 it pays for the room, at a combined state and county tax rate of about 12 percent (the rate varies from county to county), or $12 in this example. The issue decided by the court is when the OTC's customer pays $150 for the room, is the room tax due on the $50 markup, in this example, an additional $6 per night?

From the dawn of the Internet travel industry, OTCs have not paid the hotel room tax on their markup, on the theory that they are not selling a hotel room, but rather providing a travel agent type of service, which is not taxable.

Historically, states have never imposed sales tax on the markup that traditional travel agents made when they sold travel packages. Back in the pre-Internet days, there was not enough travel package booking business for this to make the radar screen of taxing authorities.

But based on the high volume of hotel bookings made through OTCs, taxing authorities began to see the industry as a target to derive additional tax revenue.

As a result, state and local governments began legal actions around the country about 10 years ago to recover back taxes on the OTCs' markup. Orange County sued the major OTCs in 2006, and many other Florida counties followed.

The stakes for the OTC industry around the country were high. But because Florida is such a large hotel market (there are more hotel rooms in the Greater Orlando area alone than in all of Hawaii) the stakes for the OTCs were much greater here in the Sunshine State.

Legislative Review

The case just decided by the Florida Supreme Court was brought against the OTCs by Florida counties, not by the Florida Department of Revenue. The tax is charged by both the DOR, which collects the state's portion of the tax, and the counties, which collect their local portion of the tax, known as the tourist development tax.

The DOR chose not to seek to enforce the state level tax on the OTC's markup because the DOR reasoned that if the Legislature intended this tax to be paid by the OTCs, the Legislature would have amended the law to clarify that they were subject to the tax. The Florida Legislature considered proposals to adopt legislation to clarify that the tax could be imposed on the OTCs, but no such action was ever taken.

The Florida Supreme Court decision reviewed the case against the OTCs brought by several Florida counties and found that the OTCs do not rent rooms to their customers, but rather provide a hotel room reservation facilitation service, and therefore their markup is not taxable.

It is important to keep in mind that the Florida legislature could, if it chooses to do so, amend the tax law to make it clear that the OTCs should pay tax on their markup. This is what happened in New York state when an appellate court ruled in 2011 that the OTCs were not required to pay New York tax on their markup. The New York Legislature responded by amending its law to explicitly require the OTCs to pay the tax.

Although the Florida Legislature could impose the tax on the OTCs, this might do more long-term harm than good to state and local finances. Taxes are not really paid by the OTCs; rather they merely collect the tax from their customers.

If the OTCs are required to collect tax by the Legislature, this would increase the room rates and areas that compete with destinations in nearby states likely would suffer.

A family in Valdosta, Georgia, looking for a beach vacation can easily drive to a beach resort in St. Simons Island, Georgia, instead of Jacksonville Beach (the same distance), so the additional cost in room taxes might impact their vacation choice, especially since Georgia imposes its room tax on the OTCs' markup.

The OTCs' ability to sell affordable vacations has helped fill hotel capacity throughout the state. The Legislature should allow that to continue by not taking action to tax the OTCs' markup. The counties will still benefit from their share of the hotel room taxes that are paid by the OTCs to the hotel (just not on the markup).

But not taxing the OTCs will result in more competitive hotel costs, which leads to more tourists and a concomitant increase in other streams of tax revenue, including sales tax on meals and car rentals and increased real estate tax assessments due to higher hotel occupancy rates.

The economic pie will be bigger, and the rising tide of tourists will continue to lift us to prosperity.

Marvin Kirsner is a shareholder in Greenberg Traurig's tax department in Boca Raton. He may be reached at kirsnerm@gtlaw.com.