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COURT OF APPEALS

STATE OF NEW YORK

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EXPEDIA, INC., et al.,

Respondents,

-against-

No. 180

THE CITY OF NEW YORK  
DEPARTMENT OF FINANCE AND  
THE CITY OF NEW YORK,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
October 9, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 180, Expedia.  
2 Counsel, you want any rebuttal time?

3 MR. LIPKIN: Yes, two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go  
5 ahead. You're up.

6 MR. LIPKIN: May it please the Court, I'm Andrew  
7 Lipkin. I represent the City of New York.

8 This is a facial challenge to a city tax on the  
9 hotel room - - -

10 CHIEF JUDGE LIPPMAN: Counselor, does this deal  
11 with only one year really, basically - - -

12 MR. LIPKIN: Well, it deals with only one year  
13 of tax.

14 CHIEF JUDGE LIPPMAN: - - - because the  
15 legislature has changed the state statute?

16 MR. LIPKIN: That's correct. The legislature -  
17 - -

18 CHIEF JUDGE LIPPMAN: And we're talking about  
19 what year? 2009?

20 MR. LIPKIN: 2009.

21 CHIEF JUDGE LIPPMAN: Okay. Continue.

22 MR. LIPKIN: But in addition to just the year,  
23 we're also talking about the language in the enabling act  
24 which gave the City the same authority as the State had to  
25 impose the tax, subject to the limitations printed in the

1 enabling act itself.

2 CHIEF JUDGE LIPPMAN: What's the policy view  
3 behind this imposing of this tax on the -- whatever you  
4 want to call it - - - the remarketer or whatever you call  
5 them technically?

6 MR. LIPKIN: Well --

7 CHIEF JUDGE LIPPMAN: What's the purpose of it -  
8 - -

9 MR. LIPKIN: The purpose of the tax --

10 CHIEF JUDGE LIPPMAN: -- from a policy?

11 MR. LIPKIN: Well, the tax policy is clearly the  
12 revenue raiser.

13 CHIEF JUDGE LIPPMAN: I understand that, but  
14 what's the logic?

15 MR. LIPKIN: The logic is this. When the City  
16 first enacted the Hotel Room Occupancy Tax, it did not  
17 extend the tax to the full extent that the legislature  
18 allowed it to. Legislature allowed the tax to be imposed  
19 upon the occupant and collected by the owner, the operator  
20 or the person entitled to be paid the rent. The City tax  
21 before 2009 only required the owner or operator to collect  
22 the rent.

23 CHIEF JUDGE LIPPMAN: All right.

24 MR. LIPKIN: When online travel companies  
25 started to become prevalent in the travel industry, it

1 occurred to the City that what's happening here is they  
2 are paying a much lower amount of rent to the hotel  
3 operator. They are then - - - I'll use the phrase, which  
4 I'm sure counsel would disagree with, they then retail it  
5 to the public at a much higher rate.

6 Now, there's nothing - - -

7 CHIEF JUDGE LIPPMAN: You want the tax on the  
8 full amount rather than on the amount that - - - that's  
9 paid - - -

10 MR. LIPKIN: Exactly.

11 CHIEF JUDGE LIPPMAN: - - - exclusive of the - -  
12 - an outfit like Expedia?

13 MR. LIPKIN: That's exactly right.

14 JUDGE PIGOTT: Mr. Lipkin, you describe that on  
15 page 14 of your brief in that footnote, and I'm not sure I  
16 understand exactly the mechanics of this thing. If  
17 somebody goes in - - - as you point out here, if somebody  
18 goes in and rents a room for a hundred dollars, they pay -  
19 - - I'm going to round it up to six percent, so there'd be  
20 a bill for a hundred plus six, 106, right?

21 MR. LIPKIN: Yes.

22 JUDGE PIGOTT: Expedia or hotels.com or any of  
23 these, what do they do that you think makes them subject  
24 to the tax? They do more than just - - - when you go  
25 online to one of these and reserve a room, I assume I'm

1 going to be paying a bill when I get to the hotel at the  
2 end, right? I'm going to pay the 106. But there's  
3 something in between where they buy the room?

4 MR. LIPKIN: Well, it doesn't quite work that  
5 way.

6 JUDGE PIGOTT: Okay.

7 MR. LIPKIN: If you rent the room directly from  
8 the hotel, you will pay the 106 dollars. If you rent the  
9 room from Expedia for, let's say, eighty dollars, because  
10 otherwise you might as well rent it from the hotel, okay,  
11 and Expedia pays the hotel forty dollars, the six percent  
12 is going to be imposed upon the 40 dollars. The next  
13 forty that makes up the eighty is not going to be taxed.  
14 That's essentially a loophole which the City closed when  
15 it added the person entitled to be paid the rent or charge  
16 for the tax.

17 Now, let me point out, we're talking about rent  
18 - - -

19 JUDGE GRAFFEO: Which is this, rent or charge,  
20 what we're talking about in this case?

21 MR. LIPKIN: Well - - -

22 JUDGE GRAFFEO: Would it come under the charge  
23 as opposed to the rent?

24 MR. LIPKIN: I'm glad you asked that, Judge,  
25 because that's the problem with the Appellate Division's

1 decision, which is they concluded that it was a fee, that  
2 it was neither a rent nor a charge. There's nothing in  
3 the record to support - - -

4 JUDGE SMITH: Which do you say it is?

5 MR. LIPKIN: Well, first of all, whatever it is  
6 it's a payment that's - - -

7 JUDGE SMITH: I understand it doesn't matter,  
8 but Judge Graffeo's question is which one is it.

9 JUDGE GRAFFEO: I mean, that's the statutory  
10 language. It has to fall under one of those two  
11 categories, doesn't it?

12 MR. LIPKIN: Certainly. We don't know what it  
13 is, and the reason we don't know what it is is because  
14 this is a facial challenge to the constitution. There is  
15 - - - to the statute rather under the constitution.  
16 There's nothing in the record for us to know whether it's  
17 a rent, a charge, a booking fee or anything else.

18 JUDGE SMITH: But you say if it's not a rent  
19 it's a charge and it doesn't matter.

20 MR. LIPKIN: It's a rent or a charge, but it - -  
21 -

22 JUDGE RIVERA: But isn't it a mix of both?  
23 Aren't they charging whatever the rent is in the sense of  
24 the rent that the hotel would have charged, as you've  
25 already commented - - -

1 MR. LIPKIN: Yes.

2 JUDGE RIVERA: - - - plus whatever this  
3 differential is?

4 MR. LIPKIN: Yes. And it doesn't matter,  
5 because - - -

6 JUDGE ABDUS-SALAAM: Counsel, what would prevent  
7 a hotel from discounting its own rooms without a  
8 remarketer or whatever Expedia is and only collecting the  
9 tax on the discounted amount? Would there be anything to  
10 prevent a hotel from doing that?

11 MR. LIPKIN: No. A hotel is perfectly entitled  
12 to do that, and the tax would then be imposed upon the  
13 reduced charge. The same way anybody that's acquiring  
14 something and then selling it for a greater price doesn't  
15 have to sell it - - -

16 JUDGE SMITH: In theory, the taxpayer is the  
17 hotel guest; is that right?

18 MR. LIPKIN: Absolutely. This is a - - -

19 JUDGE SMITH: So if the hotel - - - your theory  
20 is if the hotel guest only pays eighty, you collect six  
21 percent of eighty, but if he or she pays a hundred, you  
22 want six percent of a hundred?

23 MR. LIPKIN: Correct.

24 CHIEF JUDGE LIPPMAN: Doesn't matter how the  
25 hundred is whacked up?

1 MR. LIPKIN: It does not matter how the hundred  
2 is whacked up.

3 JUDGE RIVERA: I take it your point is whatever  
4 the occupant pays, it is what they must pay to be able to  
5 occupy the hotel --

6 MR. LIPKIN: Correct.

7 JUDGE RIVERA: - - - whether they're paying  
8 Expedia, Orbitz, whoever they are - - -

9 MR. LIPKIN: Correct.

10 JUDGE RIVERA: - - - remarketers - - - sorry  
11 about that - - - or the hotel directly.

12 MR. LIPKIN: That's correct.

13 JUDGE RIVERA: They cannot - - - they cannot  
14 occupy that room without this payment being made.

15 MR. LIPKIN: Exactly.

16 JUDGE PIGOTT: And what it is not is a tax on  
17 whatever - - - I'll use hotels.com. If they somehow are  
18 extracting a fee for doing that, however they would do it,  
19 you're not looking for a tax on that?

20 MR. LIPKIN: If the fee is a condition of  
21 occupancy, then it's taxable, because what's rent? Rent  
22 is what you pay to occupy. If you don't have to pay it to  
23 occupy the room, then it's not rent. If you rent a hotel  
24 room and you then spend money at the restaurant in the  
25 hotel, you clearly did not have to spend the money in the

1 restaurant to occupy the room; they're independent  
2 charges.

3 JUDGE ABDUS-SALAAM: So if I were to book a room  
4 through hotels.com or any one of these and not the hotel  
5 itself, then how is that rent to the hotel? Wouldn't that  
6 be a fee of some sort to hotels.com or Expedia for making  
7 it easier for me to do it?

8 MR. LIPKIN: It might be, but it also might be a  
9 situation where hotels.com agreed with the hotel; you rent  
10 us a block of rooms at fifty dollars a room, let us charge  
11 whatever the market will bear for them, and we'll keep the  
12 difference. That's fine with the hotel; they've got a  
13 guaranteed booking. That's fine with the customer;  
14 they've got a room. But what they're do - - - all they're  
15 doing is marking up the price. They are the person then  
16 actually entitled to occupy the room, and they're just  
17 transferring that right to occupy the room to the  
18 customer.

19 JUDGE ABDUS-SALAAM: Couldn't they also argue  
20 that they're providing a service both to the hotel and to  
21 those who would want to stay at the hotel?

22 MR. LIPKIN: They do argue that, but there's  
23 nothing in the record to support that. And that's the  
24 problem with the Appellate Division's decision. The  
25 Appellate Division basically decided a summary judgment

1 motion on our motion to dismiss. They basically applied  
2 an as-applied test, which we're not there yet. That's the  
3 second cause of action in the complaint. The first cause  
4 of action in the complaint was facial invalidity of the  
5 statute. And all we have to do, and I just did, was  
6 demonstrate that there was one set of circumstances under  
7 which this statute is valid, and then their claim must  
8 fail.

9 JUDGE GRAFFEO: Let me ask you a different  
10 question. What's the language in the enabling statute  
11 that allows you to require the remarketer to have to  
12 collect and remit the tax?

13 MR. LIPKIN: "Remarketer" is just another phrase  
14 that means the same thing in the enabling act as the  
15 person entitled to collect the rent or charge: the owner,  
16 the operator, or the person entitled to collect the rent  
17 or charge. We are - - -

18 JUDGE PIGOTT: It's like the corner store. I  
19 mean, they have to collect sales tax whether they like it  
20 or not.

21 MR. LIPKIN: Correct.

22 JUDGE RIVERA: It also makes it possible for the  
23 hotel not to have a vacancy.

24 MR. LIPKIN: Certainly.

25 JUDGE RIVERA: This ensures either I am renting

1 directly myself or these rooms are being rented through  
2 Expedia, Orbitz, whichever one you name.

3 MR. LIPKIN: Yes, it's certainly a useful  
4 marketing tool for the hotels, and it's a way that the  
5 online travel companies make money, except we don't know  
6 what their deal is with the hotel companies. We don't  
7 know if their - - - if they are buying a right to  
8 occupancy and then retailing it or if they're doing  
9 something else.

10 The plaintiffs in this case spend a lot of time  
11 talking about what happened before 2009, and none of  
12 that's relevant. The legislative history which was the  
13 executive budget that did not pass has absolutely no  
14 bearing on this case, nor does anything the legislature  
15 did after 2009 have any bearing on this case.

16 JUDGE PIGOTT: This is probably the wrong  
17 question, but let's assume that there's going to be a  
18 Super Bowl in the city of New York and let's assume that  
19 the NFL says we want all of these rooms and we're going to  
20 pay - - - we're going to pay you fifty dollars a night for  
21 all of these rooms for six nights, or whatever, and they  
22 get a reduced rate for that. Do you expect that the tax  
23 you're going to get is for what the NFL pays for those  
24 rooms so they can save them for the Buffalo Bills when  
25 they get down there or do you think that if they are then

1 sold to the Buffalo Bills so that they can stay there,  
2 they got to pay the higher amount?

3 MR. LIPKIN: If the rooms - - - well, first of  
4 all, clearly the hotel has to collect the tax in the  
5 consideration that it receives.

6 JUDGE PIGOTT: When they buy it.

7 MR. LIPKIN: When the NF - - -

8 JUDGE PIGOTT: The NFL.

9 MR. LIPKIN: Right, when the team buys the  
10 rooms. If the team then resells the rooms, they have to  
11 collect the tax on the difference. If they give the rooms  
12 away, that's a whole different story because now they're  
13 giving it to people that have an interest, it's the reason  
14 why they acquired the rooms. So basically, they were just  
15 acting on behalf of the proposed occupants who they  
16 basically already identified.

17 JUDGE SMITH: If they resell - - - well, it's  
18 not just if they resell, they have to resell at a markup  
19 for you to get anything, right?

20 MR. LIPKIN: Yes.

21 JUDGE GRAFFEO: So two different entities would  
22 be paying the tax in that scenario?

23 MR. LIPKIN: But only one total tax would be  
24 paid. The hotel operator would collect the tax on the  
25 amount that the online travel company pays it. The online

1 travel companies would collect a tax on the difference  
2 between what the online travel company paid the hotel and  
3 what the customer is paying the online travel company.

4 CHIEF JUDGE LIPPMAN: Okay, counselor. You'll  
5 have your rebuttal time.

6 MR. LIPKIN: Okay. Thank you very much.

7 CHIEF JUDGE LIPPMAN: Thank you.

8 MR. GEREMIA: May it please the Court, Todd  
9 Geremia for Expedia and its affiliated entities, and  
10 presenting argument for all the respondents.

11 CHIEF JUDGE LIPPMAN: Counselor, what - - -  
12 what's wrong with the framework that your adversary has  
13 laid out that whoever - - - whoever is collecting it, the  
14 City gets their take, whether you go through the hotel or  
15 they go through Expedia. What's not fair about that?

16 MR. GEREMIA: The City, Judge Lippman, only has  
17 the authority under the enabling legislation to impose a  
18 tax on the basis of the rent or charge for the room.

19 CHIEF JUDGE LIPPMAN: Why isn't this a part of  
20 the rent, what you get - - -

21 MR. GEREMIA: Because it - - - the rent - - -

22 CHIEF JUDGE LIPPMAN: - - - the charge or  
23 whatever you want to call it?

24 MR. GEREMIA: This is actually also why it's an  
25 appropriate facial challenge. The City's main argument is

1 that this is really an as-applied challenge, not a facial  
2 challenge. I think it was Judge Graffeo that asked which  
3 provision do you rely upon, the rent or charge. The  
4 answer is that the Local Law 43 expanded the definition of  
5 rent, and it did so by saying that there were two  
6 components. There was something called the "net rent"  
7 which is really the real rent, the fee for the room that  
8 is transmitted to the hotel.

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. GEREMIA: And then the city defined  
11 something else called the "additional rent". That is not  
12 rent. That was the portion of - - -

13 JUDGE SMITH: Well, if it's not rent, why isn't  
14 it a charge?

15 MR. GEREMIA: Well, it has to be, Judge Smith, a  
16 charge for the room; that's important.

17 JUDGE SMITH: So you acknowledge that it's a  
18 charge. You say it's not a charge for the room?

19 MR. GEREMIA: Exactly. It's a charge; it's just  
20 not a charge for the room.

21 JUDGE SMITH: What's the guest paying for?

22 MR. GEREMIA: The guest is paying for the fee of  
23 facilitating a reservation at the hotel, not necessarily  
24 even for a specific room, but just for the reservation at  
25 the - - - for facilitating the reservation, and I think it

1 was Judge Abdus-Salaam that noted that it's also for  
2 providing information about the hotel.

3 JUDGE SMITH: If a hotel employee did the same  
4 thing the remarketer did, then the cost of that service  
5 would be built into the room, right?

6 MR. GEREMIA: If the hotel employee were to - -  
7 - well, as initial matter, it's just a factual matter, the  
8 City is wrong that the online travel companies don't buy  
9 the rooms and resell them; they facilitate the  
10 transaction. So there's never more - - -

11 CHIEF JUDGE LIPPMAN: What exactly does that  
12 mean? What is the understanding that you normally have  
13 with the hotel? How does it work exactly?

14 MR. GEREMIA: It's like a travel agent, for  
15 example. In many instances, the travel agent doesn't  
16 actually buy a stock of rooms and resell them; it just  
17 acts as an intermediary broker.

18 CHIEF JUDGE LIPPMAN: You're the in-between  
19 person between the buyer and the hotel?

20 MR. GEREMIA: Yes.

21 JUDGE GRAFFEO: So there's no payment that goes  
22 from your client to the hotel before any reservation is  
23 made?

24 MR. GEREMIA: That is correct. It's afterwards,  
25 and actually the statute contemplates this as well and is

1 why it's a proper facial challenge that the - - -

2 JUDGE GRAFFEO: But you must reserve a certain  
3 number of rooms, otherwise how do you know what to put on  
4 your Web site?

5 MR. GEREMIA: I don't know if that's the case.  
6 Maybe there - - - there are contractual arrangements with  
7 all the - - - with the various hotels. But the statute  
8 contemplates that the real rent is what is transmitted to  
9 the hotel operator. That's all the City had the authority  
10 to tax.

11 JUDGE RIVERA: But if I go online to reserve a  
12 room through one of your clients, I cannot walk into the  
13 hotel if I haven't paid that amount; is that not correct?  
14 I mean, aren't you the gatekeeper?

15 MR. GEREMIA: Yes, you - - -

16 JUDGE RIVERA: You have to pay your amount,  
17 whatever you put on that Web site. I don't have to do it  
18 - - -

19 MR. GEREMIA: Right.

20 JUDGE RIVERA: - - - but if I choose to do it,  
21 that's what gives me then the right to occupy the room.

22 MR. GEREMIA: Yes. And you - - - for example,  
23 Judge, you - - - Judge Rivera, you also may, as part of a  
24 transaction, purchase a rental car or some other services.  
25 Those are not fees for the room.

1 JUDGE RIVERA: And then there are no taxes on  
2 that.

3 MR. GEREMIA: And it's true that the fee would  
4 have to be paid up front, yes, in order for you to get to  
5 the room, but those are not charges or rent for the room -  
6 - -

7 JUDGE RIVERA: And they're - - -

8 MR. GEREMIA: - - - and that's where the City -  
9 - -

10 JUDGE RIVERA: - - - but they're not taxing you  
11 on that.

12 MR. GEREMIA: I'm sorry?

13 JUDGE RIVERA: But they're not taxing you on  
14 that. That's not what the case is about.

15 MR. GEREMIA: Well, it's - - - they're doing  
16 something similar in that the statute says that they're  
17 permit - - - the local law tries to stretch rent to  
18 include also booking and service fees that are - - -

19 JUDGE SMITH: So you - - -

20 JUDGE RIVERA: It's a charge.

21 MR. GEREMIA: They're a condition of occupancy.  
22 And many things can be made a condition of occupancy in  
23 connection with the transaction.

24 JUDGE RIVERA: And why isn't paying one of your  
25 clients so that I can walk into that hotel and sleep in

1           that room that night one of those charges?

2                   MR. GEREMIA:   Just because it's not a renter  
3 charge for the room.  That's the scope of their authority.

4                   JUDGE SMITH:   You say it's like the rent-a-car  
5 fee?

6                   MR. GEREMIA:   It's - - - it can be - - - it's  
7 analogous, Judge, in the sense - - - in the sense that - -  
8 -

9                   JUDGE SMITH:   But the customer gets a car for  
10 his rent-a-car fee.

11                   MR. GEREMIA:   The right.

12                   JUDGE SMITH:   All he's getting for your service  
13 is the hotel room.

14                   MR. GEREMIA:   Well, he's getting the service of  
15 facilitating the reservation through an online transaction  
16 that makes it far easier to do.

17                   JUDGE SMITH:   So when you pay - - - suppose if  
18 you pay directly to the hotel, you pay - - - give them  
19 your credit card at the desk, some of that money that  
20 you're paying him is going for something other than the  
21 room, isn't it?  It's going to pay the desk clerk who  
22 takes your card; it's going to pay the woman who cleans  
23 the room, whatever.

24                   MR. GEREMIA:   And that's actually an important  
25 distinction or something that's part of the record as

1 well, Judge. There is - - - the State and the City's  
2 prior guidance before Local Law 43 was enacted made very  
3 clear distinctions about what sorts of charges are for the  
4 room and what are not. And most tellingly, the City  
5 itself said that if you pay for a safe, for example, the  
6 safe could be in the room, it could be in the lobby behind  
7 the front desk. If the safe is in the room, then the  
8 charge for the safe is properly taxable as part of the  
9 occupancy tax. It's a charge - - - rent or charge "for  
10 the room."

11 JUDGE SMITH: And that's a separate - - -

12 MR. GEREMIA: If it's at the front desk, it's  
13 not taxable.

14 JUDGE SMITH: That's if there's a separately  
15 stated charge for the safe.

16 MR. GEREMIA: That's in the event that it's a  
17 safe with a separately stated charge.

18 JUDGE SMITH: Suppose the hotel offers the safe  
19 as an accommodation to its guests, a safe that's behind  
20 the desk. You don't reduce the base for the tax for that  
21 reason, do you?

22 MR. GEREMIA: No. I think in that instance - -  
23 - I'm sort of hypothesizing here that it's really not an  
24 additional charge; it's just something that's wrapped into  
25 the service.

1           JUDGE SMITH: Well, it's not a separately stated  
2 charge, but yours isn't either, is it? You don't itemize  
3 to the customer you're paying us five dollars and the  
4 hotel thirty-five dollars; you bill them forty dollars.

5           MR. GEREMIA: We do, however, transmit a  
6 specific amount to the hotel provider, and that's the  
7 rent. And it is itemized in that sense, not itemized to  
8 the customer, but it's very clear to the taxing authority  
9 and to the hotels what exactly is the rent for the room,  
10 and that's the basis on which - - - at least prior to the  
11 2010 enactment, that's the only source of the City's  
12 authority to tax.

13          JUDGE SMITH: Tell me again, the language you  
14 rely on in the enabling act as forbidding this legislation  
15 is basically the words "for the room"?

16          MR. GEREMIA: Yes, it has to be a rent or charge  
17 for the room and - - -

18          JUDGE SMITH: You're not saying it's not a rent  
19 or charge; you're saying it's not for the room?

20          MR. GEREMIA: Exactly.

21          JUDGE GRAFFEO: Doesn't the consumer think that  
22 the amount they're paying on the Web site is for the room?

23          MR. GEREMIA: The consumer is - - -

24          JUDGE GRAFFEO: You're looking at different  
25 hotels and there's different charges. I've always thought

1 I was paying for the room.

2 MR. GEREMIA: The consumer is, in many  
3 instances, probably looking at some sort of a bottom line.  
4 The consumer is told, in connection with this, that the  
5 amounts include taxes and that the room fee is transmitted  
6 to the hotel provider.

7 JUDGE RIVERA: But again, they - - - the  
8 prospective occupant cannot occupy - - - if they use your  
9 online hotel booking service, unless they pay you whatever  
10 amount it is you've set up.

11 MR. GEREMIA: Yes, Your Honor, but nevertheless  
12 it has to be - - - and then there's the one thing that we  
13 should not overlook and that the City does overlook in its  
14 brief is that a very important principle of construction  
15 that when concerning a statute or an ordinance that levies  
16 a tax, this court has announced in the Debevoise case and  
17 elsewhere that the statute has to be narrowly construed.  
18 And if there's any doubt about the locality's authority to  
19 impose the tax, that doubt has to be resolved in favor of  
20 the taxpayer and against the government. At a bare  
21 minimum, for all the reasons we've laid out in our brief,  
22 there is doubt here as to whether rent or charge for the  
23 room can stretch to reach service fees in connection with  
24 facilitating a reservation for the room.

25 JUDGE ABDUS-SALAAM: Counsel, speaking of doubt,

1 your adversary says that what the State did in 2010 in, I  
2 guess, amending the administrative law of New York City to  
3 essentially adopt this tax that the City had already  
4 imposed is irrelevant. Is that what we're - - -

5 MR. GEREMIA: We disagree strongly with that. I  
6 think it's actually - - - it goes to - - -

7 JUDGE ABDUS-SALAAM: Doesn't that show - - -

8 MR. GEREMIA: - - - there being at least doubt,  
9 because it's not only 2010, but in 2007, the legislature  
10 considered and ultimately rejected doing the exact same  
11 thing that the City later did in 2009; that is that in  
12 2007 the State legislature said that we want to be able to  
13 extend these taxes, the sales tax and the City - - - and  
14 the City hotel occupancy tax to reach service fees that  
15 are charged by intermediaries. That legislation was not  
16 enacted.

17 JUDGE SMITH: But the fact that they thought  
18 about doing it and didn't - - - and didn't do it doesn't  
19 by itself prove that the enabling act didn't authorize the  
20 City to do it.

21 MR. GEREMIA: I think here it's at least a  
22 strong indication, Judge. It's sort of we have the  
23 sandwich, meaning we have the 2007, they tried it, they  
24 proposed it, the legislature didn't do it. In '09, the  
25 City steps in and unilaterally does it on its own, we say

1 without authority.

2 JUDGE SMITH: And you sued, I assume.

3 MR. GEREMIA: And we sued in 2010, at the end of  
4 2010. And then in 2010, while the case was pending, the  
5 legislature then enacts the amendments to the sales tax  
6 and the occupancy tax and - - -

7 JUDGE SMITH: Well, why wasn't - - - I mean, why  
8 couldn't the later enactment have been a reaction to your  
9 lawsuit? These guys say they don't have to pay it. Let's  
10 make sure it gets paid; we'll pass a new bill.

11 MR. GEREMIA: Well, the 2010 legislation, what  
12 the legislature did was stepped in and amended the City's  
13 code, which is, to us, an indication that the legislature  
14 thought the City didn't have this authority beforehand,  
15 that it had to provide it.

16 CHIEF JUDGE LIPPMAN: Is that the only  
17 conclusion that you could draw from that action - - -

18 MR. GEREMIA: Maybe not - - -

19 CHIEF JUDGE LIPPMAN: - - - from the legislative  
20 action?

21 MR. GEREMIA: Maybe not, Judge, but at a bare  
22 minimum, the legislature's activity here - - - it's not  
23 inactivity, it's a lot of activity. I mean, you have 2007  
24 proposing legislation, drafting it, ultimately rejecting  
25 it; 2010 going through the whole process again and

1           enacting legislation. At a bare minimum, it shows there  
2           was doubt.

3                   CHIEF JUDGE LIPPMAN: Well, maybe they thought -  
4           - - they saw that people were going to make an issue about  
5           it, not that they had any serious doubt. I'm just  
6           hypothesizing. You could - - -

7                   MR. GEREMIA: Yes.

8                   CHIEF JUDGE LIPPMAN: - - - view it either way,  
9           I mean - - -

10                  MR. GEREMIA: Yes, but I think that the rule of  
11           construction in this instance urges the court to actually  
12           construe it to say there was doubt.

13                  CHIEF JUDGE LIPPMAN: It could still be - - -  
14           and again, I'm not saying that's the way we're going to  
15           find. It could still be clear since people were objecting  
16           to it, they wanted to make clear what they're saying, and  
17           so they dotted the Is and crossed the T, but that doesn't  
18           mean it wasn't clear to begin with, necessarily.

19                  MR. GEREMIA: Right. Necessarily, I think  
20           you're right in this context. I think it was perfectly  
21           clear beforehand. Forty years of prior practice, both the  
22           State and the City made clear that rent is the charge for  
23           the room and doesn't include things for services provided  
24           outside the room like linen service. Linen service, maid  
25           service, those are things in the room. Things provided

1 outside the room such as tickets, food and drink, parking,  
2 all those things the City and the State both made clear  
3 are not part of rent.

4 CHIEF JUDGE LIPPMAN: Okay, counselor. Let's  
5 hear rebuttal. Thank you.

6 Counselor, rebuttal.

7 MR. LIPKIN: Thank you, Your Honor.

8 CHIEF JUDGE LIPPMAN: What did the legislature's  
9 action mean?

10 MR. LIPKIN: In 2010, all the legislature did  
11 was amend the administrative process of the Hotel Room  
12 Occupancy Tax to conform to the sales tax. Once the State  
13 did that, that legislation also included a direction to  
14 the City to construe the Hotel Room Occupancy Tax in pari  
15 materia with the sales tax. Prior to that time, it was  
16 not necessary to construe it in pari materia with the  
17 sales tax; it had nothing to do with the sales tax. There  
18 was the enabling legislation, the City's legislation, and  
19 no interaction from the State legislature.

20 So the prior guide, 2007 - - - first of all,  
21 that was an executive's budget bill, and it didn't pass.  
22 If we're going to require local jurisdictions to look at  
23 every bill that does not pass the legislature, we're not  
24 going to have time to do anything else, because the  
25 legislature does not pass an awful lot of bills.

1                   Yes, tax statutes are to be given a narrow  
2                   construction, but they're not to be so narrowly construed  
3                   as to eliminate any tax at all from them. Also, the  
4                   business model which counsel described, that's fine, maybe  
5                   that's Expedia's business model, maybe it's not. Maybe  
6                   it's one of the other plaintiffs' business model, maybe  
7                   it's not. Nothing is in the record to demonstrate that  
8                   that is or is not - - -

9                   JUDGE SMITH: Would the case be different if the  
10                  remarketers stated separately their fee in their bill to  
11                  the customer?

12                  MR. LIPKIN: If the fee were a condition of  
13                  occupancy, it would not be different. If the fee were  
14                  separately stated and payable separately, then yes - - -

15                  JUDGE SMITH: Then would - - -

16                  MR. LIPKIN: Yes, that would change the result.  
17                  But it has to not be a condition of occupancy.

18                  JUDGE RIVERA: You mean, in other words, if, as  
19                  Judge Smith says, they broke down what I'm actually paying  
20                  when I go online and I pay the amount that's designated as  
21                  "the rent" but I don't pay their fee, that would not fall  
22                  within this law?

23                  MR. LIPKIN: If you can still occupy the room,  
24                  that - - -

25                  JUDGE RIVERA: As long as I could occupy the

1 room. As long as they don't stand as the gatekeeper  
2 between me and the hotel room.

3 MR. LIPKIN: Correct, that's our view.

4 JUDGE SMITH: But if you - - - if they say  
5 there's a separate charge for parking - - - the hotel  
6 charges you for parking but you've got to pay it even if  
7 you don't have a car, you say then you can tax it?

8 MR. LIPKIN: If the hotel charges a separately  
9 stated charge and it's for parking - - -

10 JUDGE SMITH: Yeah.

11 MR. LIPKIN: - - - it's not a - - -

12 JUDGE SMITH: But all guests have to pay it,  
13 even the ones that don't drive.

14 MR. LIPKIN: Then it's an all-inclusive charge  
15 for the room and - - -

16 JUDGE SMITH: So then it's taxable?

17 MR. LIPKIN: Yes, and the regulations support  
18 that.

19 CHIEF JUDGE LIPPMAN: Okay. Thanks. Appreciate  
20 it.

21 Thank you both.

22 (Court is adjourned)

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I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of Expedia, Inc., et al. v. The City of New York Department of Finance, et al., No. 180 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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