No. 180

Expedia, Inc., et al.,
Respondents,
Priceline.com Incorporated, et al.,
Plaintiffs,
v.
The City of New York Department of Finance, et al.,
Appellants.

Andrew G. Lipkin, for appellants.
Todd R. Geremia, for respondents.

RIVERA, J.:

The City of New York appeals from an order of the Appellate Division holding Local Law 43, a hotel room occupancy tax applicable to online travel companies, unconstitutional (Expedia, Inc. v City of N.Y. Dept. of Fin., 89 AD3d 640 [1st

Dept 2011]). Plaintiffs are a group of travel companies that enable customers to make online travel arrangements, including hotel reservations. Plaintiffs claim that the City lacks authority to tax the fees they collect from their customers. The City contends that the State Legislature authorized Local Law 43 through enabling legislation.

We hold that the City had the authority to enact the tax, and the Appellate Division erred when it declared the tax unconstitutional.

I.

State law authorizes New York City to tax the "rent or charge" for hotel room occupancy. The enabling statute provides:

> "Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax in addition to any tax authorized and imposed pursuant to article twenty-nine of the tax law such as the legislature has or would have the power and authority to impose on persons occupying hotel rooms in such city."

(CLS Uncons Laws of NY, ch 288-C, § 1 [1]). This statute allows the City to tax up to six percent "of the rent or charge per day" for each hotel room (CLS Uncons Laws of NY, ch 288-c, § 1 [1-a]). The statute authorizes the City to collect these taxes from the hotel operator or any "person entitled to be paid the rent or charge for the hotel room" (CLS Uncons Laws of NY, ch 288-c, § 1 [3]). Under this enabling statute, the City has taxed hotel rent

since 1970, charging hotel operators based on the daily rent charged (see Local Law No. 15 [1970] of City of New York § 1).

In 2009, the New York City Council amended its hotel occupancy tax to capture revenue from fees charged to customers as rent by third party travel companies, known under the law as "room remarketers" (Local Law No. 43 [2009] of City of New York § 1). Local Law 43 defined "rent" as:

> "[t]he consideration received for occupancy valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property or services of any kind or nature, *including any service and/or booking fees that are a condition of occupancy*[.]"

(id. [emphasis added]). Thus, Local Law 43 taxed the total rent or charge paid by a hotel occupant, including sums paid directly to third parties.[1]

Plaintiffs are travel companies taxed as "room remarketers" under Local Law 43. They brought a declaratory judgment action in Supreme Court challenging the constitutionality of the tax. Alternatively, plaintiffs argued that the law did not apply to them because their service fees are not "rent" within the meaning of the state enabling legislation.

Supreme Court granted the City's motion to dismiss the first cause of action challenging the facial constitutionality of

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[1]Local Law 43 also defined as "net rent" the portion of rent paid directly to a hotel operator (Local Law No. 43 [2009] of City of New York § 2). It defined as "additional rent" the portion of rent paid to the room remarketer (id.).

the law. The court determined that the plain language of the state statute authorized the City's tax.

Plaintiffs appealed, and the Appellate Division reversed. According to the Appellate Division, the enabling legislation did not "clearly and unambiguously provide the City with broad taxation powers" to tax the plaintiffs' fees (Expedia, 89 AD3d at 641). Construing the enabling statute narrowly, the Appellate Division concluded that taxing remarketers' fees was beyond its scope, and held that the City's tax was unconstitutional (id.).

The City sought leave to appeal to this Court, which we denied because an appeal lay as of right under CPLR 5601 (b) (1) (20 NY3d 904). While the case was pending before the Appellate Division, the State Legislature's 2010 budget law explicitly authorized the City's tax on hotel remarketers (L 2010 ch 57, pt AA, §§ 6-11). Thus, the current appeal, like the case before the Appellate Division, concerns only the City's power to tax during the period between the 2009 enactment of Local Law 43 and the 2010 budget legislation.

On appeal, the City argues that the original enabling legislation provided ample authority for taxing the room remarketers. According to the City, the statute granted the full scope of the State's tax power for the purposes of taxing any hotel "rent or charge." The City claims that remarketers' booking fees, defined in Local Law 43 as a "condition of

occupancy," fall squarely within this authority. Moreover, the City argues that the enabling act authorizes it to collect the tax from the plaintiffs. The City maintains that the plaintiffs are "person[s] entitled to be paid the rent or charge for the hotel room," and that the statute accordingly allows the City to tax them.

The City also argues that the enabling statute grants the City the authority to fill gaps in the statutory language. This authority allows the City to define novel terms such as "remarketer," "net rent," and "additional rent."

Plaintiffs counter that the City lacks the statutory authority to tax their fees and that Local Law 43 is thus unconstitutional. They argue that Local Law 43 attempted to tax a service fee under the guise of a tax on hotel rent, and the enabling statute does not support such a broad tax. They contend that the State's definition of "rent" for the purposes of the sales tax constrains the City's authority to enact a hotel occupancy tax and prohibits a tax on third-party fees.

Further, plaintiffs argue that the City can only collect the occupancy tax from a hotel operator, not from third parties. According to plaintiffs, decades of taxation practice have established that only hotel operators must pay the tax, and the City cannot now change this practice without the State Legislature's approval.

Finally, plaintiffs argue that legislative history

supports their case. In 2007, the State Legislature rejected a bill that would have authorized the taxation of hotel booking fees. In 2010, after the plaintiffs brought this declaratory judgment action, the Legislature passed such an act. According to the plaintiffs, this sequence of events establishes that the Legislature did not believe the City had authorization to tax those fees under the original enabling legislation.

II.

The plaintiffs' facial constitutional challenge to Local Law 43 is without merit. The plain language of the 1970 enabling statute authorizes the City to impose "a tax . . . such as the Legislature has or would have the power and authority to impose on persons occupying hotel rooms in [the] city" (CLS Uncons Laws of NY, ch 288-c, § 1 [1]). The City properly exercised this broad authority when it enacted Local Law 43.

In New York, local governments lack an independent power to tax. The State Constitution vests the taxing power in the State Legislature and authorizes the Legislature to delegate that power to local governments (NY Const, art XVI, § 1; City of New York v State of New York, 94 NY2d 577, 591 [2000]; Castle Oil Corp. v City of New York, 89 NY2d 334, 338-339 [1996]; Sonmax, Inc. v City of New York, 43 NY2d 253, 257 [1977]; County Sec. v Seacord, 278 NY 34, 47 [1934]). The State Constitution places fundamental limitations on such delegations. The Legislature must describe with specificity the taxes authorized by any

enabling statute. (NY Const, art XVI, § 1; Castle Oil Corp., 89 NY2d at 339). In turn, local governments can only levy and collect taxes within the expressed limitations of specific enabling legislation (NY Const, art IX, § 2 [c] [8]; Matter of United States Steel Corp. v Gerosa, 7 NY2d 454, 459 [1960]).

As a general rule, tax statutes should be strictly construed and limited to their terms, which should not be extended by implication (1605 Book Center, Inc v Tax Appeals Tribunal, 83 NY2d 240, 244 [1994]; Matter of American Cyanamid & Chem. Corp. v Joseph, 308 NY 259, 263 [1955]; Dun & Bradstreet, Inc. v City of New York, 276 NY 198, 204 [1937]; McKinney's Cons Laws of NY, Book 1, Statutes § 313 [b]). Any ambiguity in a tax law should be resolved in favor of the taxpayer and against the taxing authority (Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 661 [1993]).

Here, the Legislature granted the City broad authority to enact an occupancy tax, and the City properly exercised that authority. The enabling statute extended to the City a taxing power coextensive with that of the State (CLS Uncons Laws of NY, ch 288-c, § 1 [1]; cf. People v Cook, 34 NY2d 100, 111-112 [1974]). Moreover, the statute authorized a broad range of taxation. Under the statute, the City may tax a "rent or charge," and it may collect the tax from a hotel "owner . . . or . . . person entitled to be paid the rent or charge" (CLS Uncons Laws of NY, ch 288-c, § 1 [3] [emphasis added]). Nonetheless,

the Legislature set constitutionally appropriate limitations on the enabling grant: the City may only tax the "rent or charge" paid for hotel occupancy (id.). Although not defined in the enabling act, hotel "rent" generally means "the consideration received for occupancy" (Tax Law § 1101 [c] [6]), and, following noscitur a sociis, "charge" must also refer to a fee paid for occupancy. Under the enabling grant, the City enacted a tax on third-party fees that are made "a condition of occupancy" (Local Law No. 43 [2009] of City of New York § 1). In other words, the City enacted a tax on a hotel rent or charge.[2]

Plaintiffs' argument that Local Law 43 improperly taxes service fees and not rent is without merit. By its terms, Local Law 43 applies only to fees required for occupancy. The City concedes that it cannot use Local Law 43 to tax fees or costs for goods or services that are separate and independent from occupancy or physically external to the hotel room.[3] However, the City may tax any service fee that is a "condition of

[2] The dissent mistakes Local Law 43 for a tax on the online companies' service fees, which, according to the dissent, are not a consideration for occupancy of a hotel room. Local Law 43 imposes a tax on monies paid as a requirement for occupancy, whether those funds are characterized as "rent" or as a "charge" (see CLS Uncons Laws of NY, ch 288-c, § 1 [3]). Indeed, shortly after the City passed Local Law 43, the State passed legislation taxing the very same charge (L 2010 ch 57, pt AA, §§ 6-11).

[3] For example, the City may tax the fee paid for using a safe located within the hotel room but not the fee paid for using a safe located in the hotel's lobby, unless the cost of using the lobby safe is included in the rent paid for room occupancy (see NY City Dept of Fin Memorandum 08-1).

occupancy." To the extent that the plaintiffs' fee is not a precondition for room occupancy, it would not fall under the taxing authority of Local Law 43. However, where the plaintiffs' charge is, indeed, "a condition for occupancy," it falls squarely within the category of payments subject to taxation as a "rent or charge." Furthermore, insofar as plaintiffs are "entitled to be paid the rent or charge for the hotel room," the City may collect the tax directly from plaintiffs.

Online travel companies like the plaintiffs have successfully reshaped the way people book travel. Now, a customer can conveniently and efficiently search the plaintiffs' websites for a hotel room and reserve it with the click of a button. While it may no longer seem novel to reserve a hotel room online, this innovation revamped the industry, and the industry players have reaped considerable profits. However, this innovation has not changed the main purpose of a hotel reservation process: selecting and paying for a room for future occupancy. Local Law 43 adheres to its enabling purpose, the taxation of hotel occupancy rent and charges, by taxing everything a hotel occupant actually pays for occupancy when booking online.

Contrary to plaintiffs' argument, the 2010 state law does not provide proof that the City lacked authority to enact Local Law 43. The fact that the State later endorsed the City's tax does not affect our analysis. As long as the City had

authority under the original enabling act to pass Local Law 43, the fact that the State later authorized the City to tax online service fees is irrelevant. The City either had or did not have the authority to tax hotel remarketers. We decide today that the City had the authority under the plain language of the 1970 enabling statute to tax hotel occupancy fees.

Local Law 43 is not unconstitutional because the State Legislature granted the City broad authority to impose a tax on hotel occupants, and Local Law 43 taxes only payments for the occupancy of a hotel room. Accordingly, the order of the Appellate Division should be reversed with costs, and the order of the Supreme Court reinstated.

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PIGOTT, J.(dissenting, in part):

Local Law No. 43 runs afoul of the enabling legislation (see CLS Uncons Laws of NY, ch 288-C § 1) to the extent that it imposes a tax on the fees earned by room remarketers, like plaintiffs, for assisting their customers in finding, and facilitating the rental of, a hotel room, as opposed to taxation on the room itself. Therefore, I respectfully dissent.

The enabling legislation provides, as relevant here, that:

> "Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax in addition to any tax authorized and imposed pursuant to [Tax Law article 29] such as the legislature has or would have the power and authority to impose on persons occupying hotel rooms in such city" (CLS Uncons Laws of NY, ch 288-C § 1 [1]).

The enabling statute delineates a formula for the calculation of the tax based upon the price of the room (id. at § 1 [a], [b]), and then goes a step farther, stating that, "[i]n addition to the tax imposed at the rates authorized in either [§ 1 (a) and (b)] . . ., any local law imposing such tax may impose an additional tax

on persons occupying hotel rooms in such city as provided for in subdivision one at a rate of up to six percent of the rent or charge per day for each such room" (id. at § 1 [1-a] [emphasis supplied]).

The local law plaintiffs challenge created a new class of individuals, i.e., "room remarketers," from whom a tax could be collected. A "room remarketer" is defined as "[a] person who reserves, arranges for, conveys, or furnishes occupancy . . . to an occupant for rent in an amount determined by such room remarketer . . . whether pursuant to a written or other agreement" (Local Law No. 43 [2009] of City of NY § 1).

Plaintiffs, who consist of online travel companies, fall squarely within the definition of "room remarketers." They challenge Local Law 43 on two grounds, namely, that it improperly requires the taxation of the fees that they earn while acting as a third-party intermediary between the hotel operator and the room occupant, and that it impermissibly requires them to collect and remit the taxes imposed on the rental of the room. In my view, only plaintiffs' first argument has merit.

Local Law 43 must be viewed through the prism of the enabling legislation because the City may not impose a tax outside the expressed limitations of the enabling statute (see Castle Oil Corp. v City of New York, 89 NY2d 334, 339 [1996]). As relevant here, the local law expanded the definition of "rent" – which previously had been defined as including, among other

things, "[t]he consideration received for occupancy valued in money, whether received in money or otherwise" (Administrative Code of City of NY § 11-2501 [7]) – to also include "any service and/or booking fees that are a condition of occupancy . . ." (Local Law No. 43 § 1 [emphasis supplied]). It also parsed the definition of rent into two subsections, "net rent" and "additional rent," the former being defined as "rent received by the operator from a room remarketer," and the latter defined as "[t]he excess of the rent received from an occupant by a room remarketer over the net rent" (Local Law No. 43 § 2).

Plaintiffs receive fees for their services in facilitating online hotel room rentals. The City claims that the enabling legislation permits it to tax these fees, the so-called "additional rent." I disagree. Affording the statute a narrow construction, as we must when examining legislation that imposes a tax (see Debevoise & Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 661 [1993]), it is my view that the City exceeded its authority by taxing the fees plaintiffs earned in facilitating hotel room rentals.

The majority relies on black letter law that tax statutes are to be strictly construed, and "should not be extended by application" (majority op, at 7), but then disregards these general principles and concludes that the enabling legislation granted the City "broad authority" to tax plaintiffs' fees (majority op, at 7-8). However, the enabling statute

permits the City to impose taxes only "on persons occupying hotel rooms in [the] City," and "at a rate of up to six percent of the rent or charge per day for each such room" (emphasis supplied), and, therefore, the City does not possess the additional authority to tax the fees earned by online travel companies that facilitate the transaction itself.[4] Nor does the City have the excess authority "to tax any service fee that is a 'condition of occupancy'" (majority op, at 8), since the enabling legislation is directed at "persons occupying hotel rooms" and the tax is based on "the rent or charge for each such room." The payment of the fee does not constitute consideration "for each such room," but, rather constitutes a consideration between the operator and the third-party intermediaries like plaintiffs who assist the hotel operator in bookings. Therefore, in my view, Local Law 43 plainly exceeded the scope of the enabling statute.

[4] Notably, the Legislature understood that the enabling legislation did not require travel companies to collect sales tax on their charges to customers, and thus proposed legislation in 2007, two years before Local Law 43 was passed, to "require travel companies that rent hotel rooms online or by telephone to collect the sales tax on markups and service fees charged to customers"(2007 NY Senate-Assembly Bill S2110, A4310). That legislation eventually passed in 2010, and thus the Local Law enacted in 2009 plainly exceeded the enabling statute at that time.

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Order reversed, with costs, and the order of Supreme Court, New York County, reinstated. Opinion by Judge Rivera. Chief Judge Lippman and Judges Graffeo, Read and Smith concur. Judge Pigott dissents in part in an opinion in which Judge Abdus-Salaam concurs.

Decided November 21, 2013