

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 53

Index Number : 650761/2009  
EXPEDIA, INC., HOTELS.COM

vs  
THE CITY OF NEW YORK

Sequence Number : 003  
DISMISS ACTION

E-FILE

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with  
accompanying memorandum decision and order.

Dated: 10/21/2010

CHARLES E. RAMOS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X  
EXPEDIA, INC., HOTELS.COM, L.P, HOTWIRE,  
INC., ORBITZ, LLC, TRIP NETWORK, INC. (D/B/A  
CHEAPTICKETS.COM), TRAVELOCITY.COM LP,  
PRICELINE.COM INCORPORATED, AMERICAN SOCIETY  
OF TRAVEL AGENTS, INC., and UNITED STATES  
TOUR OPERATORS ASSOCIATION,

Index No.  
650761/09

Plaintiffs,

-against-

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

Defendants.  
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**Charles Edward Ramos, J.S.C.:**

In motion sequence 003, the defendants the City of New York Department of Finance and the City of New York (the "City") move to dismiss the plaintiffs Expedia, Inc., Hotels.com, L.P., Hotwire, Inc., Orbitz, LLC, Trip Network, Inc. d/b/a Cheaptickets.com, Travelocity.com LP, Priceline.com Incorporated, American Society of Travel Agents, Inc., and United States Tour Operators Association's (the "Remarketers") first cause of action for declaratory judgment.

**Background**

According to the pleadings, the Remarketers consist of businesses that are essentially travel intermediaries. Instead of booking a hotel room through the hotel establishment itself, a consumer can contact one of the Remarketers to retrieve

information on nearby hotels with room availability and pricing information. If the consumer decides to book a hotel room through the Remarketers, the consumer is charged a single price, which consists of the rent for the hotel room and the service fee for the Remarketers.

The Remarketers challenge the constitutionality of Local Law 43 of the Laws of 2009 ("LL43"), an amendment to the Hotel Room Occupancy Tax (the "HROT").

*Hotel Room Occupancy Tax*

The HROT imposes:

"a tax for every occupancy<sup>1</sup> of each room in a hotel in the city of New York... (D) at the rate of five and seven-eighths percent of the rent or charge per day for each such room on and after March first, two thousand nine and before December first, two thousand eleven..." (NY ADC § 11-2502 [a] [3]).

Prior to the enactment of LL43 the HROT was calculated based upon the price the consumer pays for the hotel room, excluding any service fees imposed by travel intermediaries. Additionally,

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<sup>1</sup> Occupancy is defined as "[t]he use or possession, or the right to the use or possession of any room or rooms in a hotel, or the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of the room or rooms" (NY ADC § 11-2501 [4]).

the HROT only obligated the operators<sup>2</sup> to collect the taxes, providing that:

"[w]here an occupant<sup>3</sup> rents a room directly from an operator, the tax shall be paid by the occupant to the operator as trustee for and on account of the city, and the operator shall be liable for the collection of the tax on the rent and for the payment of the tax on the rent" (*Id.* at [f] [1]).

#### *Local Law 43*

However, after the enactment of LL43, which took effect on September 1, 2009, the HROT is now imposed on the entire amount paid by a consumer for a hotel room, including service fees paid to travel intermediaries. In addition, LL43 creates a new taxable class of entities, "room remarketers"<sup>4</sup>, to encompass travel intermediaries such as the Remarketers.

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<sup>2</sup> Operator is defined as "[a]ny person operating a hotel in the city of New York, including, but not limited to, the owner or proprietor of such premises, lessee, sublessee, mortgage in possession, licensee or any other person otherwise operating such hotel (NY ADC § 11-2501 [2]).

<sup>3</sup> Occupant is defined as "[a] person who, for a consideration, uses, possesses, or has the right to use or possess, any room or rooms in a hotel under any lease, concession, permit, right of access, license to use or other agreement, or otherwise" (NY ADC § 11-2501 [3]).

<sup>4</sup> Room remarketer is defined as "[a]ny person, excluding the operator, having any right, access ability or authority, through an internet transaction or any other means whatsoever, to offer, reserve, book, arrange for, remarket, distribute, broker, resell, or facilitate the transfer of rooms the occupancy of which is subject to the tax under this chapter (NY ADC § 11-2501 [12]).

Besides creating a new class of taxable entities, the room remarketers, LL43 further amends the HROT by redefining the term "rent"<sup>5</sup> and including the new terms of "room remarketer", "net rent"<sup>6</sup>, and "additional rent"<sup>7</sup> (NY ADC § 11-2501 [7], [12-14]).

LL43, in essence, places three obligations on the Remarketers. First, it requires the Remarketers to inform the occupant of:

"the tax to be collected on and the portion of the tax attributable to the rent, the net rent and any additional rent shall be stated separately on any bill or statement or charge made for said occupancy issued or delivered by the room marketer to the occupant..." (NY ADC § 11-2502 [f] [2]).

Secondly, it provides that the:

"Tax on the net rent shall be paid by the occupant to the room remarketer and paid by the room remarketer to the operator as a

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<sup>5</sup> Rent is defined 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, and also any amount for which credit is allowed by the operator or room remarketer to the occupant, without any deduction therefrom whatsoever" (NY ADC § 11-2501 [7]).

<sup>6</sup> Net rent is defined as "[t]he rent received by an operator from a room remarketer" (NY ADC § 11-2501 [13]).

<sup>7</sup> Additional rent is defined as "[t]he excess of the rent received from an occupant by a room remarketer over the net rent" (NY ADC § 11-2501 [14]).

trustee for and on account of the city" (*id.*).

Lastly, it provides that the:

"[t]ax on any additional rent charged to the occupant by the room remarketer shall be paid by the occupant to the room remarketer as trustee for and on account of the city..." (*id.*).

Therefore, the Remarketers are now liable for informing the consumer of the breakdown of the HROT between the rent and service fees, and for the collection of the HROT on the net rent and the additional rent.

On December 21, 2009, the Remarketers commenced this action seeking a declaration that LL43 is unconstitutional.

#### **Discussion**

The City moves to dismiss the Remarketers' first cause of action for declaratory judgment in the complaint on the basis that NY Unconsol Ch 288-C § 1 (the "Enabling Legislation") unambiguously grants the City the authority to enact LL43 (Pl. Memo, p. 10).

The City argues that the Enabling Legislation unambiguously provides that the City may impose a tax on the entire amount paid by the consumer for the occupancy in a hotel room, regardless of whether a fraction of that amount is ultimately received by the Remarketers. Furthermore, the Enabling Legislation does not distinguish between operators and room remarketers when imposing

the HROT, and focuses only on what is being paid by the consumer. Thus, in rendering its decision, the Court needs to look only to the plain language of the statute.

*The Enabling Legislation*

There is no dispute that the exclusive power of taxation is held by the New York State Legislature (the "State") (NY Const, art XVI, § 1). However, the State may delegate that power to municipalities, such as the City, which have no inherent taxing power (NY Const, art IX, § 2 [c] [8]). This delegation of the State's taxing power to a municipality must be made in express terms by enabling legislation (NY Const, art XVI, § 1).

Moreover, the courts have held that any imposition of a tax by a municipality must be within the express limitations of the enabling legislation, otherwise the tax is unconstitutional (*Castle Oil Corp. v City of New York*, 89 NY2d 334, 338 [1996]).

The relevant portions of the Enabling Legislation provide that:

"[n]otwithstanding 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" (NY Unconsol Ch 288-C § 1 [1]).

On its face, the statute provides the City with the power to impose a tax "such as the legislature has or would have the power and authority to impose on persons occupying hotel rooms in such city" (*id.*).

The Enabling Legislation further states that:

"[s]uch local laws may provide that any tax imposed shall be paid by the person liable therefor to the owner of the hotel room occupied or to the person entitled to be paid the rent or charge for the hotel room occupied for and on account of the city imposing the tax and that such owner or person entitled to be paid the rent or charge shall be liable for the collection and payment of the tax; and that such owner or person entitled to be paid the rent or charge shall have the same right in respect to collecting the tax from the person occupying the hotel room, or in respect to nonpayment of the tax by the person occupying the hotel room, as if the tax were a part of the rent or charge and payable at the same time as the rent or charge; provided, however, that the finance administrator or other fiscal officers of such city, specified in such local law, shall be joined as a party in any action or proceeding brought to collect the tax by the owner or by the person entitled to be paid the rent or charge" (*Id.* at [3]).

The Enabling Legislation clearly provides that "any tax imposed shall be paid by the person liable therefor to the owner of the hotel room occupied or to the person entitled to be paid the rent or charge for the hotel room..." (*id.*).

The Remarketers' argue in opposition that the City exceeded the authority provided by the Enabling Legislation because: (1)

budget proposals demonstrate that the expansion of the City's HROT base requires legislative action by the State, and (2) LL43 is not consistent with existing NY Tax Law § 1105(e) (the "Sales Tax") (Def. Opp., pp. 11, 13, 19).

*Budget Proposals*

The Remarketers argue that the State's budget proposals confirm that action by the State is required to expand the HROT base. As evidence that the City exceeded its authority in enacting LL43, the Remarketers submit budget proposals from 2007 and 2010, which proposed the imposition of sales taxes and the HROT on travel intermediaries (Margulies Aff., Exhibit F, G). The Remarketers contend that comments introducing the proposals and the mere fact that the State considered the budget proposals is proof that only it has the power to enact LL43 (Pl. Opp., p. 11).

While the Remarketers are accorded the benefit of every possible inference on a motion to dismiss, there is no basis whatsoever to infer that consideration of legislation similar to LL43 by the State establishes the City's inability to enact LL43. Similarly, it cannot be inferred that the failure of the State to enact LL43 has no bearing whatsoever on the City's ability to enact LL43.

It is well established that "[l]egislative inactivity is

inherently ambiguous and affords the most dubious foundation for drawing positive" inferences (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 287 [2009][internal quotations omitted]). Therefore, the Remarketers fail to persuade this Court that the budget proposals demonstrate any limitation in the City's power to enact LL43.

The Remarketers further argue that the City exceeded its authority by enacting LL43 because it is inconsistent with the Sales Tax. In support of its argument, the Remarketers reference Sales Tax provisions and publications issued by the Department of Finance.

#### *Tax Law*

The Remarketers contend that the HROT must be uniform with the Sales Tax because the "interconnected hotel taxes are parts of an overall legislative scheme" (Pl. Opp., p. 7). Thus, the definitions for the terms found in the Sales Tax and the HROT, such as "rent", must be identical because those terms held similar definitions in the past (Pl. Opp., 14).

However, the HROT does not incorporate by reference any provision of the Sales Tax, and the Remarketers have failed to cite to any authority that requires the two statutes to be uniform or interpreted consistently. The Enabling Legislation clearly states that the HROT is enacted "[n]otwithstanding any

other provision of law to the contrary" and "in addition to any tax authorized..." (NY Unconsol Ch 288-C § 1 [1]).

Similarly, this Court must reject as baseless the Remarketers contentions that the Enabling Legislation provides that the HROT may not be imposed on the room remarketer's service fees and that only the operator is obligated to collect the HROT. The Remarketers consistently argue that the Enabling Legislation "does not authorize a new tax on travel booking services...", but fail to cite to any language in the Enabling Legislation that supports that conclusion (Pl. Opp., p. 14).

#### *Publications*

The Remarketers reference numerous publications from the Department of Finance, which purportedly demonstrate the unconstitutionality of LL43 (Margulies Aff., Exhibits C, D, E, F, H). However, these publications pre-date the enactment of LL43, and thus, offer no guidance on the issue before this Court and must be considered irrelevant. In addition, the publications are advisory in nature and contain no authority to bind this Court (*Id.*, Exhibit C ["A publication is an informational document... subsequent changes...may affect the validity of the information presented in this publication]).

It is well established that "[w]hen the plain language of the statute is precise and unambiguous, it is determinative"

(*Washington Post Co. v New York State Ins. Dept*, 61 NY2d 557, 565 [1984]).

Neither the budget proposals, Sales Tax, or publications rebut the fact the plain language of the Enabling Legislation clearly and unambiguously provides the City with broad taxation powers to enact LL43. The Remarketers remaining arguments have been considered and are without merit.

Accordingly, it is

ORDERED that the defendants' motion to dismiss the first cause of action is granted thereby dismissing the first cause of action, and it is further

ORDERED that the defendants serve and file an answer to the complaint within 20 days of service of this order with notice of entry, and it is further

ORDERED, ADJUDGED, AND DECLARED that the plaintiffs are not entitled to the declaration that they seek with respect to the first cause of action.

This constitutes the decision and order of this court.

Dated: October 21, 2010

ENTER:



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J.S.C.

**CHARLES E. RAMOS**