

# **TRAVEL LAW: INTERNET TRAVEL TRANSACTIONS: HERE COMES THE TAX MAN**

April 29, 2014

By Thomas A. Dickerson

It has been said that death and taxes are inevitable, the only uncertainty being how long before each event occurs and, of course, how much pain will be involved. To the extent that taxing authorities have some discretion in deciding when and how to tax new types of businesses such as those that have sprouted from the Internet, it would seem to make sense to wait and see if the goose lives long enough to lay a continual stream of golden and, hence, taxable eggs.

## **Local Online Sales Force**

In *Overstock.Com v. New York State Department of Taxation* (Overstock 2013) the New York Court of Appeals rejected the facial challenge of online retailers (including Amazon.com) to the newly created Internet Tax as being unconstitutional "by subjecting online retailers, without a physical presence in the state, to New York sales and compensating use taxes. In so doing

the Court noted that "The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet". In analyzing the constitutionality of the Internet tax the Court first noted that "The dormant Commerce Clause has been interpreted to prohibit states from imposing an undue tax burden on interstate commerce... However, in the absence of an improper burden entities participating in interstate commerce will not be excused from the obligation to pay their fair share of state taxes". Importantly, the Court also noted that the Internet tax at issue was not being imposed upon Internet retailers in the absence of physical presence since Amazon's affiliation agreement with local website owners "urging their local constituents to support them by making purchases through their Amazon links...Essentially, through these types of affiliation agreements, a vendor (such as Amazon) is deemed to have established an in-state sales force". Lastly, the Court noted "it also merits notice that vendors are not required to pay these taxes out-of-pocket. Rather, they are collecting taxes that are unquestionably due, which are exceedingly difficult to collect from the individual purchasers themselves, and as to which there is no risk of multiple taxation". In this particular type of Internet transaction where the vendor "is paying New York

residents to actively solicit business in this state, there is no reason why the vendor should not shoulder the appropriate tax burden”.

### **New York City Hotel Taxes**

In *Expedia, Inc. v. City of New York Department of Finance* (Expedia) the New York Court of Appeals rejected a challenge by online retailers to the imposition of a local hotel tax to the fees collected from their customers. “This statute allows the City to tax up to six percent ‘of the rent or charge per day’ for each hotel room (and) 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’...Under this enabling statute, the City has taxed rent since 1970, charging hotel operators based on the daily rent charged...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’...Plaintiffs are ‘room remarketers’ (and challenge the) constitutionality of the tax”. In finding the hotel tax constitutional the Court noted that “Online travel companies...have successfully reshaped the way people book travel...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 (and) the taxation of hotel occupancy rent and charges, by taxing everything a hotel occupant actually pays for occupancy when booking online".

### **Nassau County's Hotel Tax**

In *County of Nassau v. Expedia, Inc.* The plaintiff, Nassau County, brought a class action on behalf of 51 other similar taxing authorities against many online travel retail sellers and "remarketers" of hotel accommodations seeking to enforce "the Nassau County Hotel and Motel Occupancy Tax which provides that the 3% tax 'shall be paid by the person liable therefor to the owner of the hotel or motel room occupied or to the person entitled to be paid or charge for the hotel or motel room occupied". The online retailers purchase blocks of rooms from hotels at discounted rates and then resell those rooms over the Internet. The dispute between the County and online resellers is that the County wants the tax calculated as a percentage of the price the occupants pay to the resellers whereas the resellers only pay the tax based on the lower "wholesale" rate. In any event the Expedia Court certified this class action and found

that Nassau County had standing to sue as a class representative on behalf of other counties [see Dickerson, *Class Actions: The Law of 50 States*, § 2.02]. Of course, online travel sellers have been the subject of many lawsuits brought by taxing authorities throughout the country [see *Travel Law* § 5.05[1][see also: *City of Charleston, South Carolina v. Hotels.com* (2007); *City of San Antonio v. Hotels.com* (2008); *Louisville/Jefferson County v. Hotels.com LP* (2009); *Village of Rosemont v. Priceline.com, Inc.* (2011); *Brevard County v. Priceline.com, Inc.* (2010) (“case is nearly identical to twelve other suits that have been brought by Florida municipalities...and is similar to some forty-five other cases that have been filed against Defendants and other online travel companies throughout the country”)].

### **Consumer Lawsuits**

In a curious variation of the dispute between Nassau County and Expedia and other online hotel room resellers, several class actions were brought by consumers seeking damages for being overcharged for taxes. As noted in *Christe v. Hotels.com LP* (2010) “The crux of (the) allegations stem from what is not disclosed on this invoice [for the online purchase of hotel accommodations]...Plaintiffs allege that defendants are charging consumers a higher tax on the Retail Rate consumers pay

Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference the tax collected and the amount remitted to the tax authorities...as a profit or fee without disclosing it" [see also *Sneddon v. Hotwire, Inc.* (2005); *Marshall v. Priceline.com, Inc.* (2009); *Oakland v. Travelocity.com, Inc.* (2009); *Hotels. Com v. Canales* (2006) ("By its own admission, Hotels.com neither charges nor collects taxes nor does it remit taxes directly to any taxing authority"; class certification denied)].

### **Airbnb**

Certainly, Airbnb has had and will continue to have a significant impact upon the developing "Share Economy" [see Geron, *Airbnb And The Unstoppable Rise Of The Share Economy*, *Forbes* (2013) ("an economic revolution that is quietly turning millions of people into part-time entrepreneurs, and disrupting old notions about consumption and ownership...while Airbnb is the best-known example of this phenomenon...over the past four years at least 100 companies have sprouted up offer owners a tiny income stream out of dozens of types of physical assets, without needing to buy anything themselves (including) two car sharing sites, Relay rides and Sidecar")] how accommodations are provided

to travelers. In a recent article [Kleinfield, *Airbnb Host Welcomes Travelers From All Over*, N.Y. Times (4/25/2014)] a Airbnb host waxed eloquent "Over the past 10 months, Mr. X had had a parade pf 72 strangers living with him, respondents to his overture of: 'Beautiful room for rent in Astoria' on the website Airbnb. They have drunk his beer and indulged in his muffins and dirtied his guest towels. They have come from Italy, Canada, India, South Korea, Belgium, France, New Zealand, the Czech Republic, Bulgaria...Members of this international bazaar, usually in pairs, have stayed from two nights to a month...This is life as a hyperactive New York City 'host' in that swelling substratum of the hospitality industry that unfolds in people's homes all part of the modern world's sharing economy, spinning by with serial comings and goings".

## **Conclusion**

In a future article on taxing Internet transactions [and after the dust settles between Airbnb and New York State's Attorney General and, hopefully, a resolution is reached] [see Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. Times (November 30, 2012); Peterson, *Airbnb is facing off against New York's Attorney General. Here's why.*, Washington Post (April 22, 2014); Streitfeld, *New York's Case Against Airbnb Is Argued in*

*Albany*, N.Y. Times (April 22, 2014)] we shall continue an examination of how and in what manner online travel sellers, resellers and remarketers should be taxed by local taxing authorities.

Justice Dickerson been writing about *Travel Law* for 38 years including his annually updated law books, *Travel Law*, Law Journal Press (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2014), and over 300 legal articles many of which are available at [www.nycourts.gov/courts/9jd/taxcertatd.shtml](http://www.nycourts.gov/courts/9jd/taxcertatd.shtml).

This Article May Not Be Reproduced Without The Permission Of  
Thomas A. Dickerson