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Online Travel Company Litigation Background and Status

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OTC Litigation - Background

- Agency Model
 - The OTC refers customers to hotels, and customers transact directly with the hotels
 - OTCs earn a commission on the referrals
- Merchant Model
 - Customers pay the OTC for a room
 - Hotels agree to accept a lower “net rate” from the OTC
 - OTCs pass on a portion of the price paid by the customer to the hotel (the net rate), along with applicable taxes, and retain the amount left over
 - OTCs pay no tax (sales or lodger’s) on the portion of the sale price they keep their “markup”
 - The OTC, not the hotel, sets the price paid by the customer (the user of the hotel room), and is the merchant of record for the credit card transaction

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OTC Litigation - Background

- Net Rate vs. Retail Rate
 - Under a merchant model transaction, hotels agree to accept an amount for rooms from the OTC at a price less than the hotel would charge directly
 - This is the “net” or wholesale rate
 - OTCs then have the discretion to advertise rooms on behalf of the hotels at a retail rate
 - The retail rate paid by the customer, although potentially different, is typically the same as the amount the customer would pay directly through the hotel
 - After the customer stays at the hotel, the hotel invoices the OTC, and the OTC transmits the net rate, along with a tax surcharge paid by the customer, to the hotel
 - The amount of tax surcharge remitted to the hotel, however, is calculated on the net rate, rather than the rate paid by the customer to the OTC

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OTC Litigation – Recent Decisions

- OTCs not subject to tax:
 - Alabama - City of Birmingham v. Orbitz, 93 So.3d 932 (Ala. 2012)
 - Florida - Alachua County v. Expedia 110 So.3d 941 (Fl. Ct. App. 2013)
 - Indiana - Orbitz v. Indiana Dep’t of State Revenue, 66 N.E.3d 1012 (Ind. T.C. 2016)
 - Missouri – St. Louis County v. Prestige Travel, 344 S.W.3d 708 (Mo. 2011)
 - North Carolina - Pitt County v. Hotels.com, 553 F.3d 308 (4th Cir. 2009)
 - Ohio - City of Columbus v. Hotels.com, 693 F.3d 642 (6th Cir. 2012)
 - Pennsylvania - City of Phila. v. Phila. Tax Review Bd., 37 A.3d 15 (Pa. Commw. Ct. 2012)

• Note: Almost all OTC tax litigation focuses on distinct code or ordinances at the municipal level, and OTCs may be liable for tax in some but not all municipalities in a state.

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OTC Litigation – Recent Decisions

- OTCs are subject to tax:
 - Wyoming - Travelocity v. Wyo., 329 P.3d 131 (Wyo. 2014)
 - Tennessee - City of Goodlettsville v. Priceline, 605 F.Supp.2d 982 (M.D. Tenn. 2009)
 - Georgia - Expedia v. City of Columbus, 681 S.E.2d 122 (Ga. 2009)
 - District of Columbia - Expedia v. District of Columbia, 120 A.3d 623 (D.C. Ct. App. 2015)
 - New York – Expedia v. New York Dept of Finance, 3 N.E.3d 121 (N.Y. Ct. App. 2013)

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OTC Litigation – Denver

- Denver assesses Lodger’s Tax on the purchase price of “lodging.” Denver Rev. Mun. Code § 53-171(b)
- Under Denver’s ordinance, tax must be collected from travelers and remitted to the City by “vendors.” *Id.* at § 53-167(b)
- Denver assessed Lodger’s Tax, interest, and penalties against OTCs

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OTC Litigation – Denver

- OTCs protested, joint hearing held before a lay hearing officer
 - Assessments upheld, with interest and a 15% penalty, but no 50% fraud penalties imposed
- Denver District Court largely upheld assessments
 - Hearing officer had not applied 3-year statute of limitations, judgment reduced accordingly

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7

OTC Litigation - Denver

- Colorado Court of Appeals reversed
 - Court held that the Lodger's Tax Ordinance was at least partially ambiguous, and should be strictly construed in favor of the taxpayer
 - Court examined definitions of "vendor" and "sale," and held that the OTCs do not furnish lodging, within the definition of a sale, and are therefore not vendors under the Code
 - Court also held that the Code was ambiguous as to whether the OTC fees above the wholesale rate were taxable, and construed the ambiguity in the OTCs' favor

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8

OTC Litigation - Denver

- Colorado Supreme Court reversed and remanded
 - Three justices (Marquez, Coats, Boatright) recognized an ambiguity and interpreted the ordinance in Denver's favor. A fourth justice (Hood) concurred on the basis that he saw no ambiguity. Three justices dissented (Gabriel, Rice, Eid).
 - The plurality held:
 - Ambiguous tax statutes should be construed in taxpayer's favor "only if, after utilizing the other relevant aids to statutory construction, the enacting body's intent remains obscured"
 - "Virtually every aspect of the merchant-model transaction objectively places an OTC in the role of 'vendor'"
 - The OTCs set the price of the room, collect payment for the room, and add amounts to the purchase price that the OTCs determine are sufficient for payment of taxes
 - Because the OTCs are the vendor, the taxable purchase price in the transaction is the entire price charged to the customer, including service fees and profit

City & Cty. of Denver v. Expedia, Inc., 2017 CO 32 (Colo. April 24, 2017)

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9

OTC Litigation – Denver (Continued)

- Colorado Supreme Court reversed and remanded (Cont'd)
 - Remanded to the Court of Appeals to determine remaining issues on appeal, including constitutional and other statutory challenges, statute of limitations issues, and alleged defects in the administrative hearing
 - The Court of Appeals has requested additional briefing from the Parties which is underway. Simultaneous briefs are due in September
 - Several issues remain, but they are unlikely to change the core outcome

City & Cty. of Denver v. Expedia, Inc., 2017 CO 32 (Colo. April 24, 2017)

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10

OTC Litigation – Breckenridge

- Filed as putative class action against OTCs
 - Proposed class included municipalities in Colorado with similarly-worded ordinances
- Colorado District Court Judge in Summit County denied class certification
- Judge also partially dismissed complaint on the basis of failure to exhaust administrative remedies (sales tax)
- Complaint for accommodations tax, conversion, civil conspiracy, and unjust enrichment survived

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11

OTC Litigation – Breckenridge

- Parties filed cross motions for summary judgment in December 2014
- April 2016, judge granted OTCs' motion, and denied Breckenridge's
 - Found that the OTCs are not 'lessors' or 'renters' under the Town Code because they do not acquire inventory, do not bear a risk of loss in case of cancellation, and do not act on behalf of hotels
 - Also found the 'price paid' for a hotel room in this context is the wholesale price, and does not include the OTC mark up
 - Because the Town's common law claims of conversion, civil conspiracy, and unjust enrichment were contingent on tax liability, the remaining claims were also dismissed

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12

OTC Litigation – Breckenridge

- Breckenridge appealed
 - Judge's order examined disputed issues of fact contained in the competing briefs, before deciding there were no disputed issues of fact
 - Also relied heavily on Court of Appeals' decision in Denver v. Expedia, which has since been reversed
- Briefing in the Breckenridge appeal will be completed this month

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13

OTC LITIGATION – What does this mean for you?

- Will denial of class certification in Breckenridge be reversed?
 - If not, only option is to go it alone
- How similar is your ordinance to the Denver ordinance?
 - If it uses similar or same terms, you may have a strong claim
- Is the Statute of Limitations applicable to your tax ordinance?
- How large is your claim?
 - OTCs have reviewed thousands of ordinances, few if any require them to pay – prepare to fight

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14

OTC Litigation - Questions

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15