



October 1, 2010

Mr. Mark Haskins  
Virginia Department of Taxation  
P.O. Box 2475  
Richmond, Virginia 23218

Re: TAX Draft Study of Senate Bill 452

Dear Mr. Haskins

The time and effort you and TAX staff have put into the draft Study of Senate Bill 452 is greatly appreciated as is the opportunity to submit these comments.

Arlington staff has identified three general concerns about the study:

- Constitutional nexus is presented as a serious concern with no countervailing discussion of the actual court holdings on the issue, all of which seem to have held against the OTCs;
- The OTC's business model is presented as fact with no caveat that the actual cost, fees, and taxes collected by OTCs are unverifiable at this time because the Industry does not disclose this information to the hotels, customers, or tax authorities; and.
- The Study's financial analysis seems to be based on very old information as to the percentage of hotel rentals booked on line and the percentage of markups by OTCs.

More specific issues and suggestions follow:

**Page iii**, 3<sup>rd</sup>-paragraph:

To date, New York and North Carolina are the only states that have enacted legislation taxing the OTCs mark-up fees, and neither of these bills has taken effect.

Needs to be revised to state that New York law took effect on September 1, 2010. See also Page 15, 2<sup>nd</sup> paragraph, regarding North Carolina and New York enactments: add New York's revenue projection of \$20 million a year.

**Page 1**, next to last sentence: Suggest the following changes to more accurately reflect our lack of knowledge as to what is taking place:

The OTC collects ~~the required~~ state and local taxes on the room rate and associated charges, but ~~does it has not been clear whether or not the OTCs charge or collect tax on the separate charge for providing the online reservations.~~

It is not clear to the on-line customer what tax is being collected by the OTC and to what amount(s) the tax is being applied. See \$184 million settlement of consumer class action suit In re Expedia Hotel Taxes and Fees, Superior Court of Washington & King Co., File #05-2-02060-1SEA, Dec. 1, 2009. Add this cite to **Page 38 -39** discussion of transparency

**Page 6**, 2<sup>nd</sup> line. An important part of SB 452 is the requirement that both accommodation providers (A-1, lines 187 & 188) and accommodation intermediaries (A-1, Lines 544 & 545) separately state the amount of the tax/charges so that the consumer is fully informed, so change line 2 to read:

... would have required accommodations providers and intermediaries ...

And on **Page 9**, last paragraph, change to:

Finally each bill ~~would have sets~~ forth the same requirements for collecting, ~~and~~ remitting, and separately stating local transient taxes ...

**Pages 10-14.** The litigation discussion does not reflect the scope of cases as it omits any mention of the cases decided or settled in favor of localities, states, and consumers even though preliminary rulings in some of the cases are cited, i.e. City of San Antonio v. Hotels.com(2007) has ended in a federal jury verdict of \$20.4 million for the 175 Texas cities who participated. Similarly, Travelscope LLC (aka Expedia) v. S. Carolina Dept. of Revenue, resulted in a \$6.4 million recovery for the State, and City of San Diego v. Hotels.com, et al ended in a judgment of \$21.1 million for the city for 6 years of back taxes.

**Page 14.** The cites to the Texas Policy Letter Rulings from 2002/3 may be superseded by the San Antonio case cited above.

**Page 21**, 2<sup>nd</sup> paragraph and **Page 38**, 1<sup>st</sup> paragraph. Contrary to what is stated in the draft Study, the nexus issue has been raised by the OTCs and addressed by the courts in several cases. In South Carolina, the court ruled in favor of localities and found that a substantial nexus existed between OTCs and the taxing jurisdictions. See City of Charleston, 586 F. Supp. 2d at 544; see also Travelscope LLC (aka Expedia) v. S. Carolina Dept. of Revenue, 2008-ALJ-17-0076-CC. Attempts to raise the nexus issue in other jurisdictions have resulted in the issue being dismissed as irrelevant. See, e.g. City of San Antonio v. Hotels.com, Civil No. SA-06-CA-391-G, 2008 U.S. Dist. LEXIS 58793, \*55(W.D. TX 2008)

... this argument is a red herring because the occupant of the room (who is the taxpayer) is already being taxed, and the Defendants [OTCs] have already been collecting and remitting taxes on the rooms they sell... If Defendants believed that they had no obligation whatsoever to collect and remit occupancy taxes, they would not have been doing so.

In City of Goodlettsville v. Priceline.com, 267 F.R.D. 523, 534 (M.D.Tenn. 2010), the court addressed Priceline's nexus argument and stated "the court is not convinced." The court went on to quote the ruling in City of San Antonio, rejected the Defendant's nexus argument and certified the class. Similarly, in County of Monroe v. Priceline.com, 265 F.R.D. 659, 671 (S.D. Fla. 2010), the court dismissed Priceline's nexus argument as "irrelevant." There is an extensive legal discussion of the nexus issue in the Travelscope LLC case mentioned above which relies on the nexus holding in the City of Charleston case.

Additionally, in actions by localities for the collection of taxes owed, the courts have held that when an OTC purports to be collecting taxes from consumers, it cannot raise the defense that it is not subject to the locality's tax law. See e.g. Expedia v. City of Columbus. 285 Ga. 684 (Ga. 2009)

Having contracted with City hotels to collect hotel occupancy taxes, Expedia has rendered itself duty-bound to remit the taxes it has collected to the City's taxing authority.

In City of Findlay v. Hotels.com, 441 F. Supp. 2d 856, 861 (N.D. Oh 2006) the court said

... even when a taxing statute fixes no liability, the collector is responsible for its payment to the [responsible] authority so long as the collection *purports* to be a collection of a tax.

It appears that so long as OTCs continue to charge consumers in Virginia a "tax recovery fee," or any fee which purports to be a tax or related to tax collection on behalf of the Commonwealth, they are liable to the Commonwealth (and its localities) for taxes collected.

To date, OTCs have never prevailed on the constitutional nexus issue. Furthermore, at least one jurisdiction (South Carolina) has found that a substantial nexus does exist between OTCs and the jurisdictions in which OTCs book hotel accommodations.

**Page 25.** The airline meals example does not fit the OTC case, as the OTCs are selling the hotel rooms and the charges are solely related to that, not to the sale of other goods or services. There would be no question of taxes if the OTCs were only charging the customer a “facilitation fee” and not also selling and collecting payment for their own accounts of the hotel rooms.

**Page 32.** 1<sup>st</sup> paragraph. The OTCs already collect and pay to the hotels taxes in all state and local jurisdictions in which they choose to purchase and book rooms. This legislation would not change their current administrative process – just change the amount of money sent to tax authorities.

If you wish to discuss any of our comments on the Draft Study, please contact Pat Carroll ([pcarroll@arlingtonva.us](mailto:pcarroll@arlingtonva.us)) or 703-228-3101.

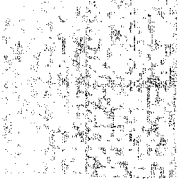
Sincerely,

A handwritten signature in black ink, appearing to read "Barbara M. Donnellan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Barbara M. Donnellan  
County Manager

ARLINGTON COUNTY, VIRGINIA  
OFFICE OF THE COUNTY MANAGER  
#1 COURTHOUSE PLAZA, SUITE 302  
2100 CLARENDON BOULEVARD  
ARLINGTON, VIRGINIA 22201

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Mr. Mark Haskins  
Virginia Department of Taxation  
PO Box 2475  
Richmond, VA 23218

HASKINS 23218

