

The NetChoice Coalition

Promoting Convenience, Choice, and Commerce on The Net
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January 13, 2010

Streamlined Sales Tax Governing Board, Inc.
4205 Hillsboro Pike, Suite 305
Nashville, Tennessee 37215

Re: **Definitions and Sourcing of Travel Intermediary Services Under The SSUTA**

Members of the Governing Board:

Many states and localities impose taxes (*i.e.*, “Hotel Taxes”) on hotel operators and other local transient accommodation providers. Hotel Taxes have existed for decades and are traditionally assessed on the amount received by the local Hotel operator (the “Hotel”) for renting a room to a guest. This document offers background on hotel reservation services provided by online travel companies (“OTCs”), and proposes definitions and sourcing rules that are consistent with the Streamlined Sales and Use Tax Agreement (“SSUTA”).

BACKGROUND

An OTC contracts with Hotels for the ability to offer room reservation services to OTC customers. Using an OTC’s online services, customers are able to search for available rooms at multiple hotels, compare rates and amenities, and ultimately make a reservation. Before OTCs made these facilitation services available, a traveler looking for a hotel room either had to enlist the help of a travel agent or had to use a map and/or telephone book to determine hotels in the area, contact each hotel or bring up its website to compare rates, amenities, and availability, and then make a reservation. The services of an OTC offer travelers a more convenient way to research and reserve hotel rooms.

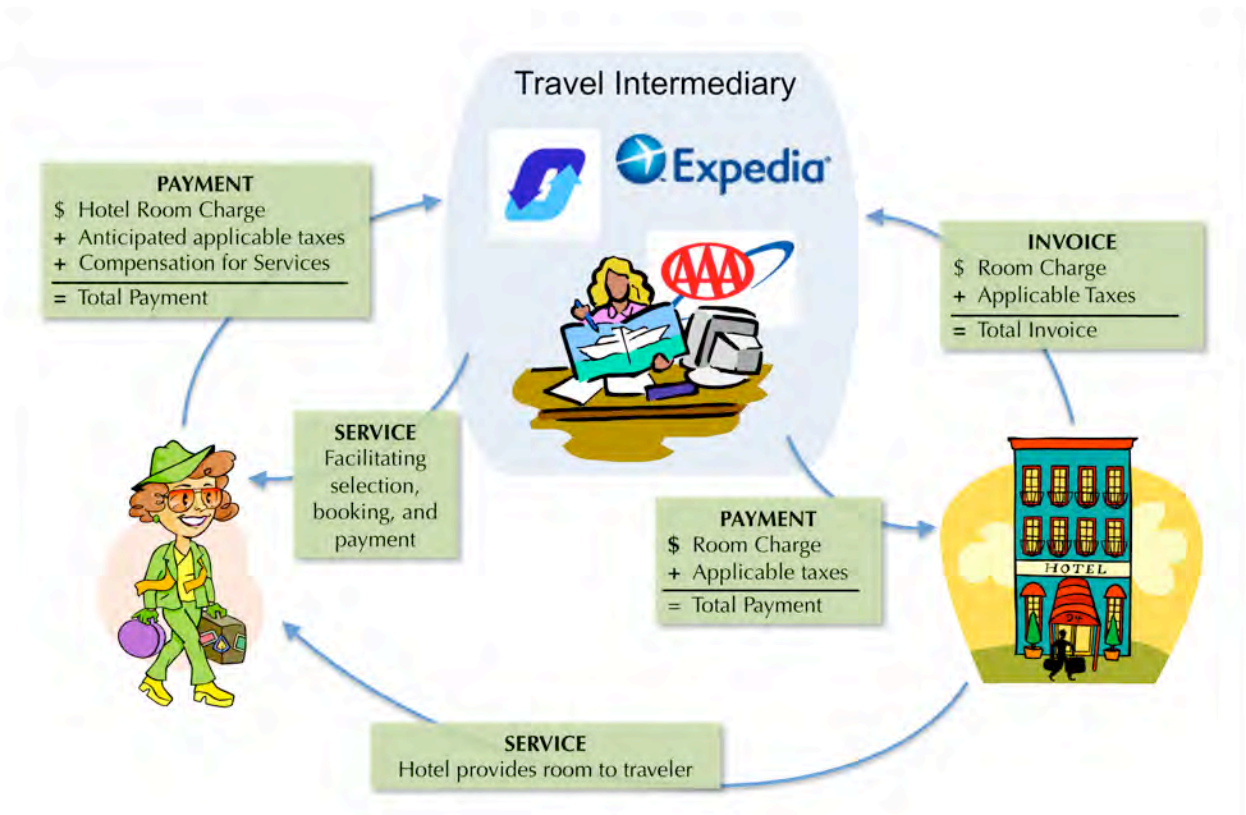
While some tour packagers maintain an inventory of hotel rooms for resale, an OTC does not buy, rent, or license rooms from hotel operators for subsequent re-rental. A traveler typically visits an OTC website, selects accommodations offered by a particular Hotel, and requests a reservation at the Hotel. The OTC then forwards the guest’s information to the Hotel, which acknowledges the reservation and provides a confirmation number. The OTC then charges the guest’s credit card the amount due to the Hotel for the desired stay, plus a service fee to compensate the OTC for its facilitation of the reservation.

Typically, after the guest checks-in, the Hotel invoices the OTC for the room charge and applicable Hotel Taxes, at which point the OTC pays that invoice amount to the Hotel, retaining the balance as compensation for providing facilitation services. The amount retained by an OTC is similar to the fee that traditional travel agents charge their customers for booking travel arrangements. After receiving payment from the OTC, the Hotel is responsible for remitting the applicable Hotel Taxes to the appropriate state or local authority.

OTCs are not involved in the Hotel’s actual provision of accommodations to the guest. Only the Hotel has the ability to furnish a room to a guest. Upon check-in, the guest generally provides the Hotel with suitable identification, and at that point (and only at that point) the Hotel assigns a specific room to

the guest. No additional payment is generally required at check-in. The Hotel provides the guest with accommodations and related incidental services such as room cleaning and linen laundering. At check-out, the guest pays the Hotel directly for any incidental charges due.

The graphic below illustrates the transactions just described.



OTC SERVICES ARE DISTINCT FROM HOTEL SERVICES

Professor Walter Hellerstein has explained that an OTC's services are indisputably distinct from those provided by hotels:

While the facts of particular arrangements between travel intermediaries and hotel operators may vary, it is plain as a matter of common understanding that travel intermediaries generally do not provide hotel accommodations. They neither own nor operate hotels, and their function, to wit, facilitating consumers' booking of hotel accommodations, is distinct from the provision of the hotel lodging itself. Because sales taxation should reflect taxpayers' "common understanding" of the transactions in which they engage, sales tax policy supports the view that travel intermediaries' margin should be taxed as a service discrete from the provision of hotel accommodations.¹

¹ See Memorandum to NCSL (attached) (footnote omitted and emphasis added), 16-July-2009

Travel arrangements involving OTCs, travelers, and hotels are, therefore, comprised of two transactions:

- **Facilitation Services by the OTC:** On behalf of the traveler, the OTC facilitates the research, planning, and booking of a reservation by providing services to the traveler in exchange for amounts charged and retained for those services (*i.e.*, facilitation service fees). These services include: (i) facilitating search, comparison, and booking of hotel reservations on behalf of travelers, (ii) making payment arrangements with hotel suppliers on behalf of travelers, (iii) providing hotel ratings, (iv) providing access to proprietary search engine technology, (v) providing access to comparative pricing, and (vi) providing unique package offerings. The OTC's services are provided to the traveler, not to the Hotel. The OTC is paid by the traveler – not by the hotel – for these services.
- **Rental of Rooms by the Hotel:** The Hotel provides a room to the guest in exchange for payment of the total room charge, as determined by the Hotel, plus Hotel Taxes on the total room charge. The OTC pays the Hotel the total room charge, plus an amount to cover applicable Hotel Taxes on the room charge. The Hotel is responsible for paying Hotel Taxes to the state and locality in the jurisdiction where the hotel room is located.

Hotel operators – such as Marriott, Hilton, and Holiday Inn – already collect state and local Hotel Taxes on rooms they rent. Hotels invoice the OTCs for applicable taxes on the room charge and then remit the taxes, once collected, to the appropriate state and local jurisdictions.

SOURCING OF OTC SERVICES

If a jurisdiction adopting the SSUTA imposes a tax on an OTC's facilitation services, the SSUTA requires that the retail sale of the product (*i.e.*, the OTC's service) be sourced to where the traveler makes first use of the OTC services, generally at his/her residence or workplace. The pertinent sections of the SSUTA are shown below:

Section 309. APPLICATION OF GENERAL SOURCING RULES

Each member state shall agree to require sellers to source the retail sale of a product in accordance with Section 310. The provisions of Section 310 apply regardless of the characterization of a product as tangible personal property, a digital good, or a service.

Section 310. GENERAL SOURCING RULES

When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser ... occurs ...

Section 311. GENERAL SOURCING DEFINITIONS

For the purposes of Section 310, subsection (A), the terms "receive" and "receipt" mean:

- A. Taking possession of tangible personal property,
- B. Making first use of services ...

OTCs facilitate hotel room reservations. An OTC's customer uses the OTC's services to obtain a room reservation. A customer thus makes first use of the services at the location where he/she views the OTC's website and where the customer receives confirmation that a hotel reservation in the customer's name has been made. Professor Hellerstein has described a customer's first use of facilitation services as follows:

Under SSUTA's sourcing rules, which apply to all "products" (which include both goods and services), the sale is generally sourced to the purchaser's address, unless the purchaser "receives" the "product" at some other identifiable location. . . . [A] strong argument can be made that a consumer makes the "first use" of a travel intermediary's service when he or she enjoys the value of the time saved by the travel intermediary's facilitation of his or her hotel booking. This "first use" would normally be at the customer's location rather than at the location of the hotel. Moreover, if the place of first use cannot be determined . . . the SSUTA sourcing rule indisputably attributes the sale to the purchaser's address.²

Thus, as explained by Professor Hellerstein, the SSUTA sources an OTC's facilitation services to the customer's residence.

CONCLUSION

We urge the Governing Board to consider a definitional approach that distinguishes between facilitation services and room rental: Service Fees are amounts charged to customers and retained by OTCs and other travel intermediaries for facilitation services; Room Rent is the amount charged by hotel operators for the use of a hotel room.

We further urge the Governing Board to confirm the application of the SSUTA's provisions to source the services provided by OTCs and other travel intermediaries to the location of the customer.

We appreciate your consideration of our views, and please let me know if I can provide further information for your deliberations on these important issues.

Sincerely,



Steve DelBianco
Executive Director
NetChoice

² *Id.* (footnotes omitted).