

# Online Travel Companies Are Not Liable For San Diego Transient Occupancy Tax

12.22.2016

As provided in the City of San Diego's transient occupancy tax ordinance, a hotel operator is liable for the City's transient occupancy tax and an online travel company, such as Hotels.com, Expedia, or Travelocity, is not a hotel operator.

A number of lawsuits throughout California challenged how transient occupancy taxes are calculated when a room is rented by an online travel company, or OTC. This issue arises for rooms rented through an OTC, where the OTC contracts with a hotel to advertise and rent its rooms, and the hotel charges the OTC a wholesale price for each room rented by the OTC. The OTC agrees to quote and charge the customer a marked-up room price. This mark-up is added to the wholesale price to create parity with the room price that a hotel directly charges to its customers, when no OTC is involved.

A class action suit brought on behalf of various California cities, including the City of San Diego, against various OTCs alleged that each OTC was liable for the tax as the hotel operator, based on the total price that a customer pays for a room, and not just the wholesale price. The City of San Diego's transient occupancy tax ordinance, which is similar to the ordinances of the other class action cities, imposes the tax on the "rent charged by the Operator" of the hotel, and an "Operator means the Person who is the proprietor of the Hotel..." On December 12, 2016, the California Supreme Court ruled that the hotels, and not the OTCs, are the hotel operators within the meaning of the ordinance.

This decision means that the hotel operator and not the OTC is obligated to pay the tax to the City. Further, to the extent that a customer pays a mark-up required by the hotel operator, the hotel effectively charges that price to the customer, and the mark-up is subject to the tax. Therefore, the City's tax is based on the wholesale price paid by the OTC to the hotel, plus the mark-up that the OTC charges the customer, as required by the hotel. Any portion of the mark-up within the exclusive control of the OTC above that is set by the hotel is not subject to the tax. However, the California Supreme Court noted that market forces likely prevent an OTC from charging its customers a price that is significantly higher than the marked-up price set by the hotel.

For more information regarding this decision or any information regarding city taxes in general, please contact Trisha Ortiz or any member of the Firm's **Public Law Department**.