

TRAVELOCITY.COM LP

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IN THE

vs.

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MARYLAND TAX COURT

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COMPTROLLER OF MARYLAND

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No. 12-SU-OO-1184

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FINAL MEMORANDUM AND ORDER

In the present case, the Petitioner, Travelocity.com LP (“Travelocity” or “Petitioner”) has appealed a sales and use tax assessment issued to it by the Comptroller of Maryland (“Comptroller”). The Comptroller claims that Travelocity failed to collect and remit sales and use tax from its customers upon the sale of hotel rooms and car rentals to those customers.

This appeal has been pending for a number of years and has involved numerous motions and appeals. In fact, the Maryland legislature has also addressed the subject matter of this case by amending certain statutory definitions. In order to avoid voluminous evidentiary hearings, the parties and the Court have agreed that the appeal can be resolved by partial summary judgment.

Travelocity initially asserted that the Comptroller is expanding the scope of the sales and use tax to reach Travelocity and the amounts it retained for its online services. Although the State of Maryland is clearly entitled to sales and use tax on the amounts hotels and rental car companies received for rentals, the issue is whether or not Travelocity is the entity/person responsible for collecting and remitting sales and use tax. If Travelocity is responsible, the next issue is whether Travelocity is entitled to receive a

credit for sales tax paid by hotels and rental car companies to the Comptroller.

During the audit period of 2003-2011, Travelocity was an online travel company (“OTC”). Its website provided an online marketplace where travelers could research destinations, compare airlines, hotels and rental car companies, and request reservations from those third-party providers. If a traveler wished to make a hotel reservation, for example, Travelocity forwarded the traveler’s request to the hotel and awaited confirmation or denial, all in real time. If the hotel issued a reservation, Travelocity provided the hotel’s confirmation number to the traveler and charged the traveler a total reservation amount that included the hotel’s room rental rate, a tax recovery charge based on the hotel’s room rate, and fees to be retained by Travelocity for its online services.

Hotels in Maryland give Travelocity and other online travel companies access to databases that describe rooms that are available for rental in their hotels. The hotels enter into contracts with Travelocity that explicitly give Travelocity the right to sell rooms that are listed on their databases to Travelocity’s customers. Travelocity would receive the “net rate” that the hotels would ultimately charge Travelocity for the room and a “tax recovery charge” which was the hotel’s estimate of the state and local taxes that would apply to the sale of the room to Travelocity. These charges comprised the amount that the hotel would eventually bill Travelocity for the room. Travelocity added a “facilitation fee” and a “service fee” to the charge in made to customers for the room. Once a customer selected a hotel room and/or a car rental from Travelocity’s website, Travelocity charged the customer’s credit card for the total amount of the sale. The customer could then use the room and/or car rental with no contract with or payment to the hotel or car rental company. After the customer used the room and/or car rental, the hotel or car rental

company billed Travelocity for the hotel and/or car rental.

During the audit period, Travelocity failed to collect and remit sales and use tax on the sales of hotel rooms and car rentals it made to its customers. The Comptroller calculated Travelocity's tax liability by applying the appropriate tax rate to the full amount charged by Travelocity to its customers. If liable for its failure to collect and remit the tax, Travelocity is claiming a credit against its tax liability for the sales and use tax it paid to hotels and car rental companies when those entities billed Travelocity for the hotel rooms and car rentals Travelocity sold to its customers.

The primary claim of Travelocity is that only "vendors" of hotel rooms and/or rental cars are required to collect and remit sales and use tax. Travelocity argues that during the audit a vendor was defined as a person who sells or delivers "the right to occupy a room or lodging" or transfers "title or possession" of rental cars. Travelocity contends it was a technology company that provided services over the internet and it had no rooms in which it could provide a right of occupancy, and no rental cars for which it could transfer title or possession.

A secondary issue raised by the Petitioner is how much of the payment, if any, is subject to the tax. Taxable price is defined as the "value in money...delivered, payable or deliverable by buyer to a *vendor*." Because the amounts Travelocity retains for its own online services are never paid to a "vendor," they are not subject to sales and use tax. Travelocity relies on recent legislative history to support its position that it is not a "vendor." In 2015, the Maryland General Assembly amended the statute by "altering" the definition of a "vendor" for the express purpose of adding OTCs as an entirely new category of vendor – an "Accommodations Intermediary." The 2015 amendments also

added a new definition of “taxable price” intended to capture the fees charged by OTCs for merchant model transactions like those at issue here.

Travelocity also relies on two cases, *Western Maryland Railway Company v. Comptroller*, 1986 WL 9565 (Md. Tax) and *Comptroller v. Rockhill*, 205 Md. 226 (1954) to support its contention that only hotel operators are obligated to collect taxes on room rentals. However, the *Rockhill* case involved tax imposed by the state on a private beach which had bathing facilities, a bath house, residences and fishing and docking facilities for rowboats and sailboats. The *Western Maryland Railway* case involved the definition of the word “transient” with respect to the tax on hotel rentals. The statute in effect at the time, Annotated Code, Article 81 § 324(f)(5), defined a retail sale as: “the sale or charges for any room, or rooms, lodgings, or accommodations to transient guests.” The Court concluded that the rooms were rented by the motel to the Railroad, and the Railroad could not be regarded as a transient; therefore, the tax did not apply. This Court finds that the facts and holdings in *Rockhill* and *Western Maryland Railway* have no bearing on Travelocity’s contention that only hotel operators are obligated to collect tax on room rentals.

The tax on room rentals is governed by two sections, to wit: Tax-General Article § 11-101(h)(l) Retail sale – “Retail sale” means the sale of (i) tangible personal property; and Tax-General Article § 11-101(k)(l)(ii) Tangible personal property – “Tangible personal property” means... (ii) a right to occupy a room or lodgings as a transient guest. In 1989, Rule 61, which was intended to implement Maryland’s Retail Sales Tax Act, Code 1951, art. 81, sec. 320(f)(5), was replaced with COMAR 03.06.01.23 which clarifies that room rentals of four (4) months or less are subject to tax. The Court agrees with the Comptroller

that the statute and regulation that controls in the present case do not limit the obligation of Travelocity to collect room taxes to hotel operators. Travelocity's business includes making sales of tangible personal property located in Maryland. Those sales, as defined by Maryland law, include both short term vehicle rentals and sales of a right to occupy a room or lodgings as a transient guest. Accordingly, Travelocity is under the same obligation as every other vendor to collect and remit sales tax on the sales they make pursuant to Tax-General Article §§ 11-401 and 11-601.

The Court also agrees with the Comptroller that Travelocity is engaged in the business of a retail vendor and is required to be licensed in Maryland. Tax-General Article § 11-701 (c)(1) provides that to "engage in the business of a retail 'vendor' means to sell or deliver tangible personal property or a taxable service in the state." Travelocity sells the right to occupy a hotel room located in Maryland and, by definition, the right to occupy a room as a transient guest is tangible personal property. Travelocity sells vehicle rental reservations for vehicles that a customer will pick up at an agreed upon location in Maryland, and those vehicles are also tangible personal property. In both instances, the tangible personal property being sold is located in Maryland and falls within the definition of engaging in the business of a retail vendor.

Petitioner also contends that even if Travelocity is a vendor responsible for collecting and remitting sales and use tax, the term "taxable price" does not include the "tax recovery charge" that Travelocity collects from customers and forwards to hotels so the hotels can pay all applicable state and local taxes on their room rates. This issue was clarified by the General Assembly in 2016 through legislative amendments by confirming that the intent of the law was to not include taxes within the meaning of "taxable price."

Tax General Article § 11-101 (l)(5) states:

“Taxable price’ includes, for the sale of an accommodation facilitated by an accommodations intermediary, the full amount of the consideration paid by a buyer for the sale or use of an accommodation, *but not including any tax that is remitted to a taxing authority.*”

In addition, COMAR 03.06.01.08(D), states

“Each of the following items, if made in connection with the sale and clearly identified with the consideration stated separately from any other item by documentary evidence in existence and made known to the buyer at the time of sale, is not part of the ‘taxable price’ and is therefore deductible from the total consideration before computation of the tax:

- o (5) Any consumer excise taxes imposed by a governmental unit directly upon the buyer or act of purchase.”¹

The Court finds that a tax recovery charge collected by Travelocity but separately stated from the sales price for a hotel room complies with § 11-302 of the Tax General Article and the implementing regulations.

Although the sales and use tax statute on its face appears to apply to OTCs like Travelocity, the General Assembly in 2015 amended the statute for the express purpose of removing any doubt in the marketplace that OTCs are required to collect and remit taxes for their online services. The results of these amendments is the inclusion of several new defined terms, to wit: “Accommodation,” “Accommodations Intermediary,” and “Accommodations Provider,” as well as a modified definition of “Taxable Price.” The addition of an “Accommodations Intermediary” as a new category of vendor is defined to be distinct from the longstanding definition of vendor. The newly defined terms “Accommodations Provider” and “Accommodations Intermediary” distinguish between

¹ The (D)(5) deduction should encompass the specific exclusion added by the 2016 legislation that clarified § 11-101(l)(5).

hotel operators and travel intermediaries and the different roles they play in merchant model transactions, stating that an “Accommodations Intermediary” is “a person, ***other than an accommodations providers***, who facilitates the sale or use of an accommodations and charges a buyer the taxable price for the accommodations.” The modified definition of “taxable price” “includes, for the sale or use of an accommodation facilitated by an accommodations intermediary, the full amount of the consideration paid by a buyer for the sale or use of an accommodation, but not including any tax that is remitted to a taxing authority.” The legislature claims that the purpose of the amendments to the definition of “taxable price” was for clarification in that some ambiguity existed in the statute prior to amendment. The inclusion of newly defined terms of a vendor in the statute is in fact more substantive than a mere clarification.

There is a good faith dispute as to whether the tax applies to Travelocity, and the appeal was taken without any intent to avoid or delay the proper payment of any taxes which were owed to the government. Although the law supports the tax assessment by the Comptroller, reasonable cause exists to justify waiving penalties and interest and enforcing the four-year statute of limitations. Travelocity has demonstrated with affirmative evidence that reasonable cause exists that it was not grossly negligent in not paying any sales and use tax as a newly defined vendor. Moreover, the legislature’s efforts to clarify and alter the definition of a vendor suggest that substantial uncertainty exists as to the applicability of the law to Travelocity and similar OTCs.

As to the secondary issue, it is the Court’s understanding that the parties have agreed that Travelocity is entitled to receive credit for any sales taxes paid by the hotels and rental car companies to the Comptroller.

Accordingly, this *18th* day of *December*, 2017, for the foregoing reasons, this Court grants partial summary judgment in favor of the Comptroller with respect to the assessment of tax less the tax recovery charges separately stated for hotels for the limited period of October 11, 2007, through April 30, 2011, and abates all penalties and interest to the date of this Order. The Court further grants partial summary judgment in favor of Travelocity for all assessments of tax not within the four-year limitations period.

CC: Harry D. Shapiro, Esq.
Scott R. Wiehle, Esq.
Donald K. Krohn, Esq.

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.