STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0674

State of New Hampshire

v.

Priceline.com, Incorporated n/k/a The Priceline Group, Inc., *et al.*

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

OPENING BRIEF FOR THE STATE OF NEW HAMPSHIRE

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ORAL ARGUMENT REQUESTED (15 minutes)

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by failing to properly construe and apply the plain language of the Meals and Rooms Tax Law, RSA chapter 78-A, which:

   A. provides that the taxpayer is the occupant (*see* Tr., May 2, 2017 at 250:6-14; Tr., May 4, 2017 at 468:16-469:25, 474:3-9; Court's Order dated Oct. 18, 2018 at 5-6; State's Closing Br. dated June 30, 2017 at 1-2);

   B. specifies that the tax basis is the total consideration that the occupant must pay, "without deduction of any kind" (*see* Tr., May 2, 2017 at 252:22-253:16; Tr., May 3, 2017 at 468:16-469:25; Tr., May 4, 2017 at 688:22-689:3; State's Closing Br. dated June 30, 2017 at 3-4, 7, 13-14);

   C. defines the tax collectors (*i.e.*, "operators") to include "any person operating a hotel . . . whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise" and defines "person" to include "any individual, combination of individuals, firm, partnership, society, association, joint stock company, corporation, or any of the foregoing acting in a fiduciary or representative capacity, whether appointed by court or otherwise" (*see* Tr., May 5, 2017 at 897:23-89:23; Court's Order dated Oct. 18, 2017 at 20-21; State's Closing Br. dated June 30, 2017 at 8-9, 15); and

   D. does not alter the tax basis depending on the identity of the tax collector. (*See* Tr., May 2, 2017 at 299:1-300:22; Tr., May 4, 2017 at 492:15-23; State's Closing Br. dated June 30, 2017 at 13).

2. Whether the trial court erred by failing to give proper weight to N.H. Admin. R., Rev 701.15, and/or the resulting administrative gloss, in determining that the OTCs are not "persons" or "operators" subject to the Meals and Rooms Tax Law. *See* Court's Order dated Oct. 18, 2017 at 16-22; Tr., May 5, 2017 at 897:23-899:23; Tr., May 1, 2017 at 50:1-4; State's Closing Br. dated June 30, 2017 at 8-13.

3. Whether the trial court erred in its application of *ejusdem generis*, and even assuming arguendo that the use of *ejusdem generis* was appropriate, whether it erred when it determined that "possession" was the relevant common attribute of the examples listed in RSA 78-

A:3, IV, or, in fact, that "possession" was a common attribute at all. *See* Court's Order dated Oct. 18, 2017 at 16-17; Tr., May 3, 2017 at 468:23-469:15; Tr., May 5, 2017 at 887:20-888:13.

4. Whether the trial court erred by failing to find either a violation of the Meals and Rooms Tax Law or the Consumer Protection Act, given the OTCs' bundling of taxes with other costs and refusing to state such taxes separately. *See* Court's Order dated Oct. 18, 2017 at 24-28; Tr., May 2, 2017 at 329:17-330:8, 409:10-20; Tr., May 4, 2017 at 629:4-631:16; Tr., May 9, 2017 at 1284:9-1285:15; State's Closing Brief dated June 30, 2017 at 22-25.

5. Whether the trial court erred in failing to give deference to the Department's longstanding interpretation and practice of requiring that all hotel customers pay taxes on the total consideration they paid to obtain the rights to their room, regardless of whether they paid a hotel, an offline travel agent, or an online travel agent. *See* Court's Order dated Oct. 18, 2017 at 20; Tr., May 2, 2017 at 295:20-296:20; Tr., May 3, 2017 at 468:23-469:25; Tr., 889:24-892:22; State's Closing Br. dated June 30, 2017 at 14-20.

STATEMENT OF FACTS AND OF THE CASE

On October 16, 2013, the State of New Hampshire Department of Revenue Administration ("State" or "Department") filed suit against the following online travel companies ("OTCs"): priceline.com Incorporated (now known as The Priceline Group, Inc.), priceline.com LLC; Travelweb LLC; Travelocity.com LP (now known as TVL LP); Site59.com LLC; Hotels.com, L.P.; Expedia, Inc.; Hotwire, Inc.; Egencia, LLC; Orbitz, LLC; Internetwork Publishing Corp. d/b/a Lodging.com; and Trip Network, Inc. d/b/a CheapTickets.com. The complaint alleged that the OTCs violated the Meals and Rooms Tax Law ("M&R Tax Law") by failing to pay the full amount of tax due on their transactions with consumers, and violated the Consumer Protection Act ("CPA") by engaging in the deceptive business practices of bundling amounts collected as taxes with other amounts and refusing to state such taxes separately. The OTCs jointly defended the

case. On May 17, 2016, the Merrimack County Superior Court (McNamara, J.) denied the parties' cross-motions for summary judgment. The court held a bench trial on liability from May 1 to 12, 2017, and issued its order on liability in favor of the OTCs on October 18, 2017. Tr., May 1-12, 2017; Court's Order dated Oct. 18, 2017 (attached to this brief). This appeal follows.

New Hampshire has a relatively straightforward M&R Tax Law that has three simple features. First, it simply and plainly taxes hotel *occupants*, RSA 78-A:7, I(b), and therefore, any analysis of the M&R tax statutes must begin from the perspective of an occupant. Occupants need not ever be physically present in New Hampshire or in physical possession of a New Hampshire hotel room, to be taxed. N.H. Admin. R., Rev 701.14. Instead, New Hampshire law defines "occupants" as those paying for the right to stay in a New Hampshire hotel room, not the physical act of staying in a room.[1]

Second, "occupants" must pay taxes on the amount of "rent" paid, *i.e.*, the total amount they pay for the right to stay in a New Hampshire hotel—defined plainly by the Legislature as *the total amount of consideration without any deduction.*[2] This is the tax basis, and again, it is not based upon physical possession because transactions are taxable at the time of the purchase of the right to occupy, not the actual act of physically occupying a room. Nor is it affected by the identity of the tax collector or by the number of individuals or companies that coordinate to provide all of the services that go into a hotel booking.

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[1] "'Occupant' means any person who, for rent paid, uses, possesses, or has a right to use or possess any room in a hotel under any lease, concession, permit, right of access, license, or agreement. The term does not include a permanent resident." RSA 78-A:3, V. "Occupancy" is defined as "the use or possession, *or the right to the use or possession*, of any room in a hotel for any purpose, or the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of a room." RSA 78-A:3, VI(a) (emphasis added). *See also* N.H. Admin. R., Rev 701.14 ("Occupant" includes "a person who pays for sleeping accommodations even though he or she does not use them.").

[2] "Rent" is defined as "the consideration received for occupancy valued in money, whether received in money or otherwise, *including all receipts, cash, credits, and property, or services of any kind or nature, and also any amount for which the occupant is liable for the occupancy without any deduction of any kind.*" RSA 78-A:3, VIII(a) (emphasis added).

Third, the M&R Tax Law plainly requires that any person collecting the tax must be an "operator," and must be licensed by the Department to do so.[3] Therefore, any person collecting M&R tax dollars must be an operator in the first instance, or must be working in combination with an operator, or must be authorized by an operator or otherwise working in a representative capacity, such that they themselves are "operators" under the law.

This basic "1-2-3" framework— coupled with numerous provisions that, properly construed and harmonized, further reinforce and elaborate this framework—is why the applicable New Hampshire law has been applied without controversy for decades. When hotel occupants have chosen to obtain their occupancy rights directly from hotels, they have been required to pay taxes on the total charges without deduction of any kind.[4] Similarly, the occupants who have purchased their rights with the help of travel agents have also been required to pay taxes on their total charges, without deduction of any kind.[5] These hotels and travel agents receive no tax deduction for marketing, reservation services, payment/credit card processing services, or customer service.[6] Even though the hotel and the travel agent had some division of labor for the transaction and each provided only some of the services to the occupant, the tax basis remained on the total amount paid by the occupant, not the net amount retained by any of the service providers,

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[3] RSA 78-A:7, I(b) ("The operator shall demand and collect the tax from the occupant, purchaser, or renter. The occupant, purchaser, or renter shall pay the tax to the operator."). "Operator" is defined as "*any* person operating a hotel … or receiving gross rental receipts, *whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise.*" RSA 78-A:3, IV (emphasis added). The Legislature at the same time defined "person" broadly as "any individual, *combination of individuals, firm, partnership, society, association, joint stock company, corporation, or any of the foregoing acting in a fiduciary or representative capacity*, whether appointed by court or otherwise." RSA 78-A:3, II (emphasis added). *See also* N.H. Admin. R., Rev 701.15 (further defining "operator" as including a "person" as one "[o]ffering sleeping accommodations for rent to the general public, including owners of private homes who offer sleeping accommodations for rent to the general public … or … [w]ho acts in the capacity of an agent, whether as lessee, sublessee, mortgagee, licensee or otherwise, for an owner in renting sleeping accommodations….").

[4] *See* Tr., May 3, 2017 at 297:1-299:10.

[5] *See* Tr., May 3, 2017 at 299:12-22.

[6] *See* Tr., May 3, 2017 at 295:24-296:24; 299:24-300:7; Tr., May 4, 2017 at 468:10-469:15; Tr., May 5, 2017 at 688:23-690:11.

including the brick-and-mortar hotel.[7] Put simply, New Hampshire law is indifferent to the number or identity of the actors/persons providing the bundle of services required to provide rights to occupancy and, thus, the tax basis remains unaltered.[8] In this manner, all occupants pay taxes on the total consideration they pay, regardless of the manner in which they obtain their occupancy rights.

If permitted to stand, the trial court's decision below would disrupt and destroy the simple "1-2-3" M&R tax framework. The OTCs' position—erroneously accepted by the trial court—is that they may: (1) provide hotel-related services, including marketing, reservation services, payment processing (including taxes), and customer service, (2) serve as the one and only merchant of record that appears on occupants' credit card bills, and (3) collect all taxes by virtue of their contracts with hotels; but still remain free from any tax responsibilities or liabilities of any kind.[9] In short, they have rights without responsibilities. Further, the OTCs take the position that, while the law states taxes "shall" be collected by "operators" only, they can collect taxes and still not be "operators." They posit that their ability to collect taxes from occupants emanates from their private contracts with hotels but that, nonetheless, they do not act in a representative or agency capacity for the hotels when they collect taxes pursuant to these contracts.[10] Finally, though New Hampshire law plainly mandates that amounts paid as "taxes" shall be separately stated for the

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[7] *See* Tr., May 2, 2017 at 222:23-223:3; Tr., May 3, 2017 at 300:13-22; Tr., May 4, 2017 at 467:1-10.

[8] *See also* RSA 78-A:21 ("Operator, in the case of corporations includes the president, treasurer, or any other person in a managerial capacity of said corporation. Operator, in the case of a limited liability company, includes members and any other person in a managerial capacity of the limited liability company.")

[9] *See, e.g.*, Court's Order dated Oct. 18, 2017 at 5-9; Tr., May 1, 2017 at 85:8-12, 112:4-20; Tr., May 4, 2017 at 575:11-21, 533:10-17; Tr., May 5, 2017 at 653:3-15, 673:5-6, 689:4-690:11, 750:21-25, 773:14-21; Tr., May 9, 2017 at 1074:13-1076:15.

[10] *See, e.g.*, Court's Order dated Oct. 18, 2017 at 16; Tr., May 8, 2017 at 900:5-7; Tr., May 9, 2017 at 1008:19-1009:23; Tr., May 10, 2017 at 1219:11-18.

taxpayer,[11] the OTCs claim they somehow have the right to charge occupants for rooms, collect taxes, and bundle the tax amounts, all while refusing to separately state the tax amounts to the taxpayers or state that the tax is included in the price of the occupancy, in clear violation of New Hampshire law.[12] These positions are unprecedented in New Hampshire and patently violate plain, mandatory provisions of state law.

The Department administers the M&R Tax Law, which imposes a 9% tax on the retail amounts consumers pay for hotel rooms. RSA 78-A:6, I. Although the OTCs have operated websites through which consumers can pay for hotel rooms since at least the early 2000s,[13] the OTCs have never filed M&R Tax returns[14] and never registered with the Department or obtained a license from it to collect taxes.[15]

The OTCs primarily use two business models, the agency model and the merchant model.[16] *See* Court's Order dated Oct. 18, 2017 at 4-5; Tr., May 1, 2017 at 88:25-7; Tr., May 2, 2017 at 332:18-22; Tr., May 3, 2017 at 596:5-8. Under the agency model, the OTCs act like a travel agent in facilitating bookings for hotel rooms between the consumer and the hotel. *See* Court's Order dated Oct. 18, 2017 at 5; Tr., May 3, 2017 at 592:25-593:6. Using the OTCs' internet platforms, the consumer chooses the hotel, is informed of the price the hotel charges for the room and the applicable M&R Tax, and pays the hotel the room and the applicable taxes. *See* Court's Order dated Oct. 18, 2017 at 5; Tr., May 3, 2017 at 592:25-593:6. In agency model transactions, the

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[11] *See* RSA 78-A:7, I(a).

[12] Indeed, as the OTCs' witnesses testified at trial, even if a consumer were to ask an OTC for disclosure of the actual amount the consumer paid in taxes (as opposed to a bundled amount for "taxes and fees"), the OTC would refuse to provide this information. *See, e.g.*, Tr., May 3, 2017 at 442:2-443:3; Tr., May 4, 2017 at 530:18-531:2.

[13] *See, e.g.*, Tr., May 4, 2017 at 571:10-16; Tr., May 5, 2017 at 637:15-638:10; Tr., May 10, 2017 at 1115:10-16; Tr., May 11, 2017 at 1420:23-25.

[14] *See, e.g.*, Tr., May 3, 2017 at 359:10-360:8; Tr., May 5, 2017 at 632:14-633:1.

[15] *See, e.g.*,Tr., May 3, 2017 at 358:21-359:17.

[16] One of the OTCs, Priceline, also uses a third business model called "Name Your Own Price" that is a variation of the merchant model. *See* Court's Order dated Oct. 18, 2017 at 10-11; Tr., May 4, 2017 at 736:3-737:6.

consumer pays the hotel, the OTC receives a commission, and the hotel pays the M&R Tax on the full amount paid by the consumer. *See* Court's Order dated Oct. 18, 2017 at 5; Tr., May 10, 2017 at 1159:2-7. The State does not allege that M&R Taxes are due from the OTCs on their agency model transactions with consumers as the taxes are fully paid by the hotels. *See* Court's Order dated Oct. 18, 2017 at 5.

Under the merchant model, however, OTCs contract for the right to rent a room from a hotel at a wholesale price. They then markup the discounted price to a retail rate and add a combined "taxes and fees" charge that is equal to—or within pennies of—the 9% M&R Tax rate on the gross retail price. *See, e.g.*, Tr., May 3, 2017 at 376:18-377:8; Tr., May 4, 2017 at 600:24-603:19, 614:20-616:1; Tr., May 5, 2017 at 849:1-20. The OTCs completely control the financial transaction with the consumer, and even the hotel is not permitted to know the retail amount paid by the occupant for the room. *See, e.g.*, Tr., May 1, 2017 86:8-12, 116:21-24; Tr., May 5, 2017 at 649:16-650:5, 652:5-653:15. Typically, the OTC pays to the hotel the wholesale room rate plus taxes on the wholesale room rate, not the total retail amount paid by the occupant. The hotel then remits the tax to the Department. *See* Court's Order dated Oct. 18, 2017 at 2-3. The OTC profits by keeping the difference between the "taxes and fees" on the full retail room rate that it collects from the occupant and the tax on the wholesale room rate that it turns over to the hotel.[17] *See* Court's Order dated Oct. 18, 2017 at 2-3, 5-6. Under the plain language of the M&R Tax Law, the OTCs owe to the State the difference between the tax on the wholesale room rate and the tax on the retail

[17] The added profit to the OTCs can be illustrated through the following hypothetical transaction using the 9% Meals and Rooms Tax. Expedia purchases a room from a hotel in New Hampshire at a wholesale rate of $60.00. Expedia then offers the hotel room at a retail price of $100.00. The consumer pays a total of $109.00 to Expedia ($100.00 for the room plus $9.00 in taxes and "fees"). Expedia, however, only remits $5.40 in taxes to the hotel based on the $60.00 wholesale rate (9% of $60.00 = $5.40), which the hotel then remits to the State. This results in a 40% underpayment of taxes to the State and a $3.60 windfall to Expedia. Given the hundreds of thousands of merchant model transactions between consumers and OTCs for hotel rooms in New Hampshire each year, the lost tax revenue to the State is significant. *See, e.g.*, Tr., May 3, 2017 at 375:13-23, 393:13-394:8.

rate the occupant paid the OTCs to obtain the room because tax is due on the full amount the occupant pays for the right to occupancy.[18]

The State receives less M&R Tax on hotel room rentals through the OTCs' merchant model than it receives through the agency model even though the occupant pays the same amount in each instance. Navigation through an OTC's website is identical up to the point at which the consumer is presented with the "pay now" option that is the merchant model or the "pay later" option that is the agency model. *See* Tr., May 10, 2017 at 1159:8-1160:4; Tr., May 12, 2017 at 1556:10-24. If a consumer chooses to "pay now," the State receives M&R Tax on the wholesale room rate only, as opposed to the retail amount the consumer paid the OTC to secure the room booking. In contrast, if a consumer chooses to "pay later," the State receives M&R tax on the full retail amount paid by the consumer for an identical room. Paul Tomasiello, a Senior Director with Expedia, admitted at trial that Expedia remitted less in taxes simply based simply upon whether the consumer chooses to "pay now" or "pay later."[19] This same incongruity holds true when comparing merchant model bookings made through the OTCs' websites with bookings made directly through a hotel website. Although the services and transactions are functionally equivalent and the amounts paid are typically the same, the State receives less tax revenue when the consumer chooses to prepay the OTC rather than the hotel directly.

In their contracts with hotels, the OTCs take sole responsibility for the collection of taxes. *See, e.g.*, Tr., May 4, 2017 at 567:22-568:16; Tr., May 5, 2017 at 649:3-652:4; Tr., May 10, 2017 at 1123:7-17. These contracts specifically provide that the OTCs—and not the hotels—shall collect all applicable taxes from the consumer. *See* Tr., May 1, 2017 at 112:15-20; Tr., May 3, 2017 at 442:2-443:3; Tr., May 4, 2017 567:22-568:16; Defs' Ex. PCLN-18 at 9. Also, per their contracts,

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[18] *See* RSA 78-A:3, VII(a) ("Rent" means "[t]he consideration received for occupancy ... without any deduction of any kind.").

[19] *See* Tr., May 12, 2017 at 1550:7-1556:15; Tr., May 12, 2017 at 1547:12-15, 1548:7-15, 1549:1-1550:16, 1556:10-20.

the hotels are not permitted to know the total amount paid by the consumer to the OTC. *See* Tr., May 3, 2017 at 442:2-443:3; Tr., May 4, 2017 at 530:18-531:2. Whether the OTCs label portions of the amount they collect from consumers as "tax recovery charges" or as "taxes and fees," the OTCs are the ones who collect the entire payment from the consumer, including the tax amounts that must be remitted to the State under RSA 78-A.

In their accounting of charges to the consumer, the OTCs provide a combined "taxes and fees" line that bundles taxes and fees into one amount. *See, e.g.*, Tr., May 1, 2017 at 89:17-22; Tr., May 4, 2017 at 548:24-549:3; Tr., May 3, 2017 at 391:15-396:11, 399:16-400:24; Pl's Ex. 631. The State alleges that this practice of bundling violates the M&R Tax Law, which requires that the operator either state the amount of tax or state that the tax is included in the cost.[20] Evidence at trial demonstrated that, even if a consumer asks an OTC for itemization of the exact amount of tax charged, as opposed to a combined amount for "taxes and fees," the OTC would refuse to provide this information. *See* Tr., May 4, 2017 at 1298:17-1299:11; Tr., May 4, 2017 at 537:19-438:23.

The OTCs use mathematical formulas to generate the bundled "taxes and fees" line item charged to consumers. These formulas in effect calculate an amount equivalent to the M&R Tax on the total sales price paid by the consumer; however, the OTCs term this amount as "taxes and fees," instead of "taxes." *See* Tr., May 1, 2017 at 89:17-22; Tr., May 4, 2017 at 548:24-549:3; Tr., May 3, 2017 at 391:15-396:11, 399:16-400:24; Pl's Ex. 631. Generally, the OTCs keep as their "fee" an amount that is equal to the tax rate on the difference between the wholesale and retail price. However, in situations referred to by the OTCs as "breakage," the OTCs keep all of the M&R Taxes they collect from consumers and remit nothing. *See, e.g.*, Court's Order dated Oct. 18, 2017 at 9-10; Tr., May 5, 2017 at 646:2-10, 744:3-745:15. In breakage transactions, a consumer prepays an OTC for the full retail price of a hotel room plus taxes calculated on the retail rate. *See*

[20] *See* RSA 78-A:7, I(a) ("[T]he operator shall either state the amount of the tax to each occupant ... or state that the tax is included in the price of the occupancy....").

Court's Order dated Oct. 18, 2017 at 9-10; Tr., May 9, 2017 at 1067:7-1068:3. When, either because of error or because the consumer was a no-show, the hotel does not invoice the OTC for payment of the wholesale price and concomitant taxes, the OTC keeps all of the taxes it collected. *See, e.g.*, Court's Order dated Oct. 18, 2017 at 9-10; Tr., May 5, 2017 at 646:2-648:25. The M&R Tax clearly prohibits this practice by providing that if an advance deposit that includes tax is forfeited by an occupant, the portion of the deposit that represents the M&R Tax must be remitted to the State.[21]

Lastly, the OTCs' contracts with hotels give them a degree of control over the product they are selling. For example, the OTCs inspect and rate properties and products, advertise, market, determine the consumer prices, access central reservation systems, provide reservation confirmation numbers, provide all customer service prior to the guest's arrival at the hotel, develop and enforce cancellation policies, and issue refunds.[22] The hotels are contractually required to honor room rentals made through OTC websites and to treat OTC guests the same or better than guests who rent directly from the hotel. *See* Court's Order dated Oct. 18, 2017 at 10; Tr., May 1, 2017 at 97:19-9:1, 114:2-11, 116:5-10; Tr., May 5, 2017 at 655:21-656:25; Tr., May 2017 at 1050:21-1051:21.

STANDARD OF REVIEW

Statutory interpretation is a question of law, which this Court reviews de novo. *Petition of Carrier*, 165 N.H. 719, 721 (2013).

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[21] RSA 78-A:6-a, I. *See also* N.H. Admin. R., Rev 707.02 ("Taxes collected shall be the property of the State of New Hampshire and conversion of them to the use of the operator or any other person shall constitute an offense").

[22] *See, e.g.*, Tr., May 5, 2017 at 689:4-7, 763:23-764:4; Tr., May 10, 2017 at 1256:15-1257:9; Tr., May 11, 2017 at 1345:9-14; Tr., May 11, 2017 at 1348:2-14; Tr., May 11, 2017 at 1375:9-19; Tr., May 11, 2017 at 1469:4-12; Tr., May 11, 2017 at 1467:14-1468:22; Tr., May 5, 2017 at 653:7-15; Tr., May 5, 2017 at 685:18-686:5; Tr., May 5, 2017 at 778:15-779:4; Tr., May 1, 2017 at 95:7-16; Tr., May 1, 2017 at 101:13-102:7; Tr., May 1, 2017 at 116:21-117:7; Tr., May 4, 2017 at 531:19-24; Tr., May 10, 2017 at 1315:2-1316:18; Tr., May 9, 2017 at 1052:5-17; Tr., May 9, 2017 at 1055:24-1056:25, 1061:6-1062:3.

SUMMARY OF THE ARGUMENT

First, the trial court erred by failing to properly construe and apply the plain language of the M&R Tax Law, RSA chapter 78-A. Per the law's plain language, the hotel room occupant is the taxpayer, and the tax is on the total consideration paid by the occupant for the right to occupy or possess the room, without deduction of any kind. Under the simple statutory scheme, the OTCs are the tax collectors, and they owe to the State the M&R Tax paid to them by occupants, which is calculated upon the total consideration the occupant paid. That they do not own the physical brick-and-mortar hotels does not alter the tax basis. If this were the case, hotels could simply evade or reduce their tax obligations by using third parties to "facilitate" their sales. As this creates an absurd result, the trial court's analysis of the statutory scheme is erroneous.

Second, the trial court erred by refusing to apply N.H. Admin. R., Rev. 701.15, which provides that "operator" includes "a person ... offering sleeping accommodations for rent to the general public" or acting "in the capacity of an agent, whether as lessee, sublessee, mortgagee, licensee or otherwise, for an owner in renting sleeping accommodations." Although Rule 701.15—enacted in 1982 and never before challenged—defines "operator" in a manner that would include OTCs, the trial court gave no credit to this longstanding administrative rule when interpreting the term "operator" in RSA 78-A:3, IV.

Third, the trial court erred in employing *ejusdem generis*, an archaic rule of statutory construction, to interpret the statutory definition of "operator" found in RSA 78-A:3, IV. While *ejusdem generis* is to be used only where ambiguity exists, the trial court explicitly stated in its decision that it "does not believe the statute is ambiguous." Generally, the trial court improperly relied exclusively on the doctrine of *ejusdem generis* to the complete exclusion of Rule 701.15, as well as other, more pertinent tools of statutory construction. The trial court erred in failing to give deference to the Department's longstanding interpretation and practice of requiring that all hotel

customers pay taxes on the total consideration they paid to obtain the rights to their room, regardless of whether they paid a hotel, an offline travel agent, or an online travel agent.

Fourth, the trial court erred by failing to find either a violation of the M&R Tax Law or the CPA, given the OTCs' practice of bundling taxes with other amounts and refusing to state tax amounts separately. This practice stands in plain violation of RSA 78-A:7, I(a), which provides:"[T]he operator shall either state the amount of the tax to each occupant ... or state that the tax is included in the price of the occupancy...." Further, the OTCs' practice of bundling the room rate with fees, and then also bundling taxes and fees, misleads consumers, in violation of the CPA.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO PROPERLY CONSTRUE AND APPLY THE PLAIN LANGUAGE OF THE MEALS AND ROOMS TAX LAW.

Decades ago, the Legislature enacted the M&R Tax Law, a relatively simple law with the clear and express intent of taxing consumers' payments for the right to occupy or use hotel rooms in New Hampshire to raise needed revenue for education, infrastructure, tourism, and government assistance. In fact, as the Department's Director of Audit, Katherine Sher, testified at trial, the M&R Tax makes up a large portion of the overall budget for the State. *See* Tr. May 3, 2017 at 265:6-22. The trial court's decision below in favor of the OTCs failed to appreciate or follow the plain language of the M&R Tax Law. If not reversed, the decision erroneously, and contrary to legislative intent, would allow operators such as the OTCs to contract around their tax obligations and, in fact, legally keep as private profit tax monies paid to them by hotel room consumers that rightfully belong to the State. *See* N.H. Admin. R., Rev 707.02 ("Taxes collected shall be the property of the state...."). This practice would defeat the statutory scheme's simple "1-2-3" structure that begins with the occupant and ends with payment to the State based on the total tax basis, *i.e.*, all money paid for a room.

A. The taxpayer is the "occupant."

To accomplish its purpose of raising needed revenue for the people of New Hampshire, the Legislature placed the M&R Tax squarely upon the consumers who book hotel rooms (described in the law as "occupants"). Thus, unlike some hotel-related taxes in other locations, the M&R Tax is levied not upon buildings or hotels, or any other middleman in the stream of commerce, but upon the occupants who acquire the rights to occupy hotel rooms. Because of the M&R Tax Law's express language to tax the consumer, its provisions and accompanying regulations must be viewed accordingly. The M&R Tax is imposed on consumers, and it is the consumer's economic burden, debt, and obligation to pay. *See Cagan's, Inc. v. Dep't of Rev. Admin.*, 126 N.H. 239, 245 (1985) (the sale of a meal, *i.e.*, the consumer's payment, constitutes the taxable transaction).

Thus, this Court must first decide whether *a consumer booked a hotel room from an OTC such that they have the right to use or possess the room.* If the answer is "yes," then taxability has been triggered. As the evidence showed at trial, each OTC operates websites through which consumers prepay the OTC for the right to occupy a hotel room at a date certain in the future. *See, e.g.*, Tr., May 1, 2017 at 109:23-110:20; Tr., May 10, 2017 at 1290:17-1292:4; Tr., May 11, 2017 at 1467:14-1468:22. Further, the law of New Hampshire is clear: a consumer does not have to actually physically possess a hotel room for there to have been a taxable event. As demonstrated at trial, hundreds of thousands of these taxable events have occurred through the OTCs' websites, and they continue to occur. *See* Tr., May 3, 2017 at 311:13-18. Once the right to occupy the room has been purchased by the consumer, the taxable event has occurred. The trial court's focus on who hands out keys or runs the front desk is beside the point. *Accord* RSA 78-A:21 (persons liable for unpaid tax include the president and treasurer of a corporation and members of an LLC).

B. The tax basis is the total consideration that the occupant must pay, "without deduction of any kind."

Because it is clear that taxable events have occurred, the main question before this Court is: What is the total tax amount for which the consumer is liable for the right to the occupancy, *without any deduction of any kind*?[23] In other words, what is the total amount the consumer had to pay to secure the room? The State submits that, per the plain statutory language, M&R Taxes are due on the full, retail amount paid by the consumer. On the other hand, according to the trial court, taxes are due only on the net rate agreed to by the OTC and the hotel or rental company (an amount that the consumer—the taxpayer—is never allowed to know) and that the taxable amount does not include fees paid for the OTCs' services. However, the statutory scheme is clear that taxes must be paid on the full price paid by the consumer, "without any deduction of any kind." RSA 78-A:3, VIII(a). *See also* Tr., May 3, 2017 at 288:13-290:18. The OTCs cannot unilaterally turn New Hampshire's "without deduction" retail rate tax scheme into a net rate tax that improperly excludes the OTCs' "services" and "service fees." If this were the case, it would nullify the Legislature's definition of "rent"—"the consideration received for occupancy valued in money, whether received in money or otherwise, *including all receipts, cash, credits, and property, or services of any kind or nature....*" *Id.* (emphasis added).

Other provisions of the Legislature's carefully crafted statutory tax scheme confirm that the OTCs' various "service fees" and "tax recovery charges" are included in the total consideration for the price of the room and are not deductible from the gross taxable amount paid by the consumer because the consumer cannot rent the room without paying these fees and charges. RSA 78-A:6-a, VI states:

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[23] "Rent" is defined as "the consideration received for occupancy valued in money, whether received in money or otherwise, *including all receipts, cash, credits, and property, or services of any kind or nature, and also any amount for which the occupant is liable for the occupancy without any deduction of any kind.*" RSA 78-A:3, VIII(a) (emphasis added).

> Any auxiliary charges, not including gratuity charges, such as, but not limited to, service charges, house charges, management fees, or housekeeping charges, added to the charge for a taxable meal or taxable room, shall not be taxed under this chapter if: (a) The taxable meal or *taxable room rental may be purchased without such auxiliary charges at the option of the purchaser or occupant*; and (b) The amount of the auxiliary charge is separately stated on the contract or receipt.

(Emphasis added). RSA 78-A:6-a, I, adds:

> Advance deposits which are forfeited by a prospective occupant shall not be taxed under this chapter. *However, if such advance deposit is a payment in full for a room rent, including tax, and is retained by the operator, the operator shall remit that portion of the payment which represents the meals and rooms tax to the state.*

(Emphasis added); *see also* Rule 703.05(a) ("Items, exclusive of gratuities, not customarily associated with a taxable room shall not be taxable if … [i]t is possible to purchase the taxable room without the additional charge…."). As shown at trial, the OTCs' fees and charges are not optional – a consumer cannot rent a room through an OTC without paying the total purchase price quoted by the OTC, a price that includes these mandatory additional charges. The OTCs' position claims a tax loophole for their so-called services, fees, and charges that does not exist in RSA chapter 78-A.

In sum, the plain meaning of the M&R Tax Law is abundantly clear and it was an error of law for the trial court to ignore it. New Hampshire does not tax the entity or entities selling hotel rooms; it taxes the consumer for hotel room *transactions*. In applying the evidence in this case to the law, it is apparent that the trial court erred by allowing the State to be denied taxes on the full value of the hotel room transactions implemented through the OTCs' websites or, in the case of "breakage," any taxes at all. The law does not permit the OTCs to subtract from the full, taxable amounts of these transactions by contracting with hotels and labeling as "services" or "fees" a portion of the gross amounts paid by consumers.

C. The tax collectors are the "operators."

In enacting the M&R Tax Law, the Legislature was not concerned about the nuts and bolts of the hotel industry. It cared about the State receiving the full amount of tax revenues on consumers' expenditures. To this end, the Legislature defined "operator" as "*any* person operating a hotel ... or receiving gross rental receipts, *whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise.*" RSA 78-A:3, IV (emphasis added). The Legislature at the same time defined "person" broadly as "any individual, *combination of individuals, firm, partnership, society, association, joint stock company, corporation, or any of the foregoing acting in a fiduciary or representative capacity*, whether appointed by court or otherwise." RSA 78-A:3, II (emphasis added); *see also* Rule 701.15 (further defining "operator" as including a "person" as one "[o]ffering sleeping accommodations for rent to the general public ... or ... [w]ho acts in the capacity of an agent, whether as lessee, sublessee, mortgagee, licensee or otherwise, for an owner in renting sleeping accommodations...."). Similarly, the Legislature defined operator in the case of a corporation as including the president and treasurer of the entity, and in the case of a limited liability company, its members. RSA 78-A:21. In other words, the Legislature made sure it closed any potential loophole with an eye to maximizing tax recovery. The law clearly covers individual companies, as well as those acting in combination or partnership or through third-party representatives or agents. In addition, and in clear contrast to the trial court's views, the law is intended to apply regardless of physical possession or the active management of a property.

The M&R Tax Law is intended to apply and does apply to the total "consideration" paid by consumers for their bookings, regardless of whether one company handles all aspects of the transactions, as in direct hotel bookings, or whether two or more parties are involved, as in travel agent or OTC bookings. The Legislature covered all possibilities when it defined "person" and

"operator" broadly. Whether a hotel is a one-stop shop or, as in the present case, acts in concert with another company, it does not change who the taxpayer is or alter the applicable tax basis.

As touched upon above, the trial court erred in accepting much of the OTCs' defense in this case, which was based on the false premise that the OTCs do not offer sleeping accommodations for rent to the general public because they merely assist the hotels as "facilitators." The problem with the trial court's legal conclusion is both legal and factual. Legally, as explained above, if two companies—one a principal and the other a supposed secondary "facilitator"—work in combination to accomplish a rental, the tax due is still tax on the retail amount paid by the consumer to secure the rental. Factually, as shown at trial, the OTCs' claims and suggestions that they have limited discretion or control over the subject transactions are belied by the evidence. The record at trial showed that the OTCs exert significant control over many aspects of day-to-day hotel operations. For example, the OTCs inspect and rate properties and products, advertise, market, determine the consumer prices, access central reservation systems, calculate and collect taxes, collect payments, provide reservation confirmation numbers, provide customer service, develop and enforce cancellation policies, dictate certain standards in their contracts with hotels, and issue refunds.[24] No matter what terminology the OTCs choose to describe their transactions, the reality is that they rent hotel rooms to consumers. *See City and County of Denver v. Expedia, Inc.*, 405 P.3d 1128, 1135 (Colo. Apr. 24, 2017) ("Although the OTCs maintain that even in merchant-model transactions they do not sell, or furnish for consideration, a right to occupy or use the hotel rooms in question, no matter what terminology they may choose to use in describing their transactions, as a functional matter that is precisely what they do.")

Notably, the trial evidence also established that the OTCs receive inventory and in turn sell that inventory to consumers. For example, the OTCs' sworn statements to the Securities and

[24] *See supra* n.22.

Exchange Commission provided: "In the merchant business model, Expedia acquires inventory at discounted wholesale prices from preferred suppliers and then determines retail price."[25] Further, as the evidence at trial demonstrated, the OTCs' contracts with rental car companies and hotels provide for the OTCs' acquisition of allotments and blocks of room inventory.[26] Moreover, the OTCs' own documents confirm that they obtain room inventory, allotments, and blocks.[27] This mixed question of law and fact should be set aside where it is clearly based on an improper interpretation of the M&R Tax Law.

Additionally, the OTCs often refer to themselves and the hotels with whom they contract as "partners," and they refer to their relationships with these companies as "partnerships."[28] These partnerships are also demonstrated in other ways. For instance, the OTCs and their partner hotels share customer data, jointly market their rooms, jointly hire relationship managers and account managers, consider the customers to be mutual and/or joint customers, and often include tiered override payment structures in their contracts.[29] It matters not that the OTCs disclaim terms like

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[25] *See* Plaintiff's ("Pl's") Ex. 287, SEC Statement at 2313 and 2347; Pl's Ex. 288, SEC Statement at 3071 and 3090; Pl's Ex. 310 at 1132 -33. *See also* Pl's Ex. 218, ORB SEC Statement at 1904; Pl's Ex. 537, PCLN SEC Statement at 244794; Pl's Ex. 539, PCLN SEC Statement at 245200; Pl's Ex. 540, PCLN SEC Statement at 245222; Pl's Ex. 542, PCLN SEC Statement at 246060; Pl's Ex. 648, TVL SEC Statement at 1841; Pl's Ex. 649, TVL SEC Statement at 1874; Pl's Ex. 651, TVL SEC Statement at 1968; Pl's Ex. 652, TVL SEC Statement at 2162.

[26] *See, e.g.,* Tr., May 11, 2017 at 1345:3-1346:12; Tr., May 11, 2017 at 1472:18-1473:6; Tr., May 11, 2017 at 1475:1-18; Tr., May 5, 2017 at 657:8-658:20, 659:10-19; Tr., May 11, 2017 at 1341:16-1342:15; Tr., May 10, 2017 at 1157:10-1152:7; Tr., May 10, 2017 at 1319:5-13; Pl's Ex. 318, Expedia Hotel Contract ("Baymont will provide Hotwire with net rates, availability, refunding and booking policies on inventory no less favorable than it provides to other entity for sales of hotel rooms."); Pl's Ex. 544, Priceline Hotel Contract ("BWI and Travelweb wish to enter into an agreement under which Travelweb shall...promote and market Best Western brand hotels and such hotels' net rate inventory by booking reservations for Best Western brand hotels.").

[27] *See, e.g.,* Tr., May 5, 2017 at 764:5-14.Pl's Ex. 234, PCLN Hotel Partnership Procedures at 18; Pl's Ex. 521, Travelweb Board Meeting Minutes at 2.

[28] *See, e.g.,*Tr., May 9, 2017 at 1043:5-13, 1084:14-1085:5, 1096:20-1097:14; Tr., May 12, 2017 at 1529:7-1530:1; Tr., May 9, 2017 at 1048:1-13; Tr., May 10, 2017 at 1019:24-1020:8, 1121:6-12.

[29] *See, e.g.,* Tr., May 1, 2017 at 100:14-21; Tr., May 11, 2017 at 1348:15-1350:3, 1356:16-1357:17; Tr., May 11, 2017 at 1367:8-1368:12, 1369:8-1370:10; Tr., May 9, 2017 at 1101:10-15;

"partner" and "joint venture" in their contracts or what their relationship may be considered for other purposes; when it comes to the M&R Tax Law, it matters what they actually do. *Cf. Dent v. Exeter Hosp., Inc.*, 155 N.H. 787, 792 (2007) ("An agency relationship, or lack thereof, does not turn solely upon the parties' belief that they have or have not created one.").

The OTCs' merchant business model, as described through testimony and evidence at trial, is clearly subject to the M&R Tax. As explained, the M&R Tax covers far more than simply brick-and-mortar hotels. The Legislature's statutory scheme covers *all* individuals or corporations, or combinations of individuals, corporations firms, partnerships, *etc.*, including those acting in a fiduciary or representative capacity, that collect payment from a consumer for the consumer's right to occupy a hotel room. That the OTCs do not own hotels in the traditional sense of handing out keys and arranging for maid service is simply irrelevant under the M&R Tax's consumer-based statutory scheme. *See City and County of Denver*, 405 P.3d at 1135 ("[T]o the extent the purchaser of lodging acquires rights from the hotel, it is at most as a third-party beneficiary of the contractual arrangement between the hotel and the OTC. Whoever may actually hand the purchaser the key, the lodger is the purchaser in a transaction of sale with the OTC.").

D. Nowhere does the Meals and Rooms Tax Law state that the identity of the tax collector alters the tax basis.

In their agreements with hotels, the OTCs assume the sole responsibility for collecting taxes.[30] These contracts specifically provide that the OTCs—and not the hotels—*shall* collect *all* applicable taxes from the consumers. Some contracts even go so far as to specifically prohibit hotels from collecting taxes from the consumer.[31] Thus, even if the OTCs permitted hotels to know the gross retail amount paid by the consumer, the hotels could not collect from the consumer the

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Tr., May 11, 2017 at 1476:10-1477:6; Tr., May 12, 2017 at 1498:23-1499:20; Tr., May 12, 2017 at 1568:9-13; Tr. May 12, 2017 at 1573:21-23; Tr., May 4, 2017 at 533:10-17.

[30] *See, e.g.*, Tr., May 5, 2017 at 773:9-21.

[31] *See* Tr., May 9, 2017 at 1074:13-18; Defendants' Ex. PCLN-18 at 9.

requisite amount of M&R Taxes. Whether the OTCs label portions of the gross amount collected from consumers as a "tax recovery charge" or "taxes and fees," the OTCs are the ones who collect the entire payment from the consumer, including the tax amounts that by law must be remitted to the State.

The OTCs, through their contracts, have intentionally inserted themselves into the tax scheme as a financial middleman between consumers and hotels. The OTCs choose to offer to consumers on their websites the rights to occupy hotel rooms in exchange for retail charges. Court's Order dated Oct. 18, 2017 at 5, 11. They are the ones who specifically contract to collect all of the money from consumers, including "all applicable taxes." *See, e.g.*, Tr., May 1, 2017 86:8-12, 116:21-24; Tr., May 5, 2017 at 649:16-650:5, 652:5-653:15. The OTCs, and only the OTCs, display, charge, and collect the total amounts from consumers for these transactions. *See, e.g.*, Tr., May 4, 2017 at 567:22-568:16; Tr., May 5, 2017 at 649:3-652:4; Tr., May 10, 2017 at 1123:7-17. Indeed, the hotels are never allowed to know the total amount paid by the consumer. *See* Tr., May 3, 2017 at 442:2-443:3; Tr., May 4, 2017 at 530:18-531:2. The hotels do not transact directly with consumers. In fact, they are prohibited from doing so (except for incidentals).

It was an error of law for the trial court to allow the OTCs, by virtue of private contracts, not to comply with the M&R Tax in a manner that every other tax collector must.[32] The OTCs are "persons" obligated to properly collect and remit M&R Taxes, including on their services and fees, "without deduction of any kind." Whether the OTCs acted alone as the only "person" in the transactions or as partners acting "in combination" with hotels, or whether they did so in a representative capacity as agents of the hotels, does not alter their tax liability because New

[32] The person collecting the tax from the consumer is the operator. RSA 78-A:7, I(b) ("The operator shall demand and collect the tax from the occupant, purchaser or renter. The occupant, purchaser or renter shall pay the tax to the operator."). *See also* RSA 78-A:6, III ("The operator shall collect the taxes imposed by this section...."); RSA 21-J:39, II(l) (No person shall ... collect any tax without ... obtaining the required license"); RSA 78-A:4, III ("No person shall engage in ... renting rooms ... without first obtaining the license required").

Hampshire's law was crafted broadly to cover all of these scenarios. The tax basis does not change when OTCs collect the tax.

The term for what the OTCs do (*i.e.*, sell or rent versus facilitate) is irrelevant to what taxes the OTCs' customers—the taxpayers—must pay, which are the taxes that must be collected and remitted. Quite simply, taxpaying consumers pay a gross amount as occupants of rooms, and the M&R Tax is assessed upon that gross payment amount, without any deduction of any kind. It matters not whether the entity taking the money calls it a "sale" or "facilitation" because consideration was paid by a traveler in exchange for the right of use, and that exchange is the taxable transaction. The OTCs argue that by facilitating the transactions, they are incurring costs for the services that they provide. These services, according to the OTCs, are of value but are not part of the total consideration for the price of the room.[33] However, brick-and-mortar hotels also provide customer service, marketing, and similar websites through which reservations can be booked, among other things that they bear the cost for, but they do not receive any deduction from the gross, taxable amount. Even more arbitrary, if a consumer books through an OTC via an agency model booking, as opposed to a prepaid merchant model booking, the tax amount remitted to the State is on the total amount paid.[34] Paul Tomasiello, a Senior Director with Expedia, admitted at trial that Expedia remitted less in taxes simply based on whether the consumer clicked the merchant model "pay now" option rather than the agency model "pay later" option.[35]

Accordingly, if this Court affirmed the trial court's decision below, the amount of taxes the State receives from a taxable transaction would depend on which website the consumer uses and which type of payment model they choose, *i.e.*, pay now (merchant model booking) or pay later

[33] *See, e.g.*, Tr., May 5, 2017 at 627:19-628:10; May 10, 2017 at 1143:22-1144:10.
[34] *See, e.g.*, Tr., May 10, 2017 at 1160:10-25, 1162:10-1163:21; Tr., May 12, 2017 at 1548:16-1550:3, 1550:11-1551:10, 1556:10-20, 1572:8-14.
[35] *See* Tr., May 12, 2017 at 1550:11-1156:23.

(agency model booking). Moreover, it would mean that hotels could simply evade or reduce tax obligations by using third parties to "facilitate" their sales. Clearly, such a construction of the statutory scheme leads to an absurd result and it was manifest error of law for the trial court to permit it.

II. THE TRIAL COURT ERRED BY REFUSING TO APPLY N.H. ADMIN. R., REV. 701.15, WHICH PROVIDES THAT "OPERATOR" INCLUDES "A PERSON ... OFFERING SLEEPING ACCOMMODATIONS FOR RENT TO THE GENERAL PUBLIC," OR "WHO ACTS IN THE CAPACITY OF AN AGENT, WHETHER AS LESSEE, SUBLESSEE, MORTGAGEE, LICENSEE OR OTHERWISE, FOR AN OWNER IN RENTING SLEEPING ACCOMMODATIONS."

Although Rule 701.15—enacted in 1982 and never before challenged—defines "operator" to include those "[o]ffering sleeping accommodations for rent to the general public" or acting "in the capacity of an agent, whether as lessee, sublessee, mortgagee licensee or otherwise, for an owner in renting sleeping accommodations," the trial court gave no credit to this longstanding administrative rule when interpreting the term "operator" in RSA 78-A:3, IV. *See* Court's Order dated Oct. 18, 2017 at 16-22. This was error. The trial court avoided application of the administrative rule and the doctrine of administrative gloss by finding that resort to the rule was unnecessary because the language of the M&R Tax statutory scheme was *unambiguous*. *See* Court's Order dated Oct. 18, 2017 at 20. Although the trial court held that the administrative rule was not entitled to deference because the M&R Tax statutory scheme was otherwise unambiguous, the trial court largely premised its decision in favor of the OTCs on *ejusdem generis,* a tool of statutory construction that may only be employed when there is *ambiguity* (discussed in Argument § III, below). This is incongruous and constitutes error.

This Court has "long taken the view that *substantial* deference is due to the interpretation placed on a statute of doubtful meaning by the agency charged with its implementation." *Frost v. Commissioner*, 163 N.H. 365, 382 (2012) (Lynn, J., dissenting on other grounds) (emphasis in original). When that interpretation is longstanding, it not only receives deference but also

demonstrates the intent of the Legislature through administrative gloss:

> Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate *legislative intent.*

Petition of State Employees' Assoc. of N.H., 161 N.H. 476, 482 (2011) (brackets and quotation omitted) (emphasis added). "[T]he long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent." *Hamby v. Adams*, 117 N.H. 606, 609 (1977) (emphasis added); *see also New Hampshire Retirement Sys. v. Sununu*, 126 N.H. 104, 109 (1985).

Even though Rule 701.15 further defines "operator," a definition need not be codified in an administrative rule to be definitive; a mere agency interpretation will suffice. *Petition of State Employees Assoc. of N.H.*, 161 N.H. at 482. Nevertheless, JLCAR has reviewed and approved the rule periodically for over three decades.[36] "If the legislature had disagreed with the DRA's longstanding interpretation, it could have altered the language of the [ ] Law accordingly. Such a change did not occur." *Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755, 762 (2014). As such, the administrative rule manifests legislative intent.

If, on the other hand, the M&R Tax contained no ambiguity as to the meaning of the term "operator," the trial court could not resort to any rules of statutory construction, and certainly not to one as esoteric as *ejusdem generis*. *See Franklin v. Town of Newport*, 151 N.H. 508, 509 (2004) ("When the language of a statute is plain and unambiguous, we do not look beyond it for further indications of legislative intent."). *Accord United States v. Turkette*, 452 U.S. 576, 581 (1981)

[36] JLCAR was formed in 1983, and has readopted N.H. Admin. R., Rev 701.15 every time the rule has come before it since the rule was adopted by the DRA in 1982. *See* N.H. Admin. R., Rev 701.15; http://www.gencourt.state.nh.us/rules/jlcar/description_members.htm.

("The rule of *ejusdem generis* is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute."). Under New Hampshire law, the statutory definition of "operator" and the administrative definition of "operator" are synonymous, with the administrative rule appropriately adding clarifying detail. "The authority to promulgate rules and regulations is designed ... to permit the [agency] to fill in the details to effectuate the purpose of the statute." *Appeal of Anderson*, 147 N.H. 181, 183 (2001) (internal citations and quotations omitted). This is exactly what administrative rules are supposed to do. *See* RSA 78-A:2, II (stating that the "commissioner shall adopt rules . . . relative to carrying out the intent and purpose of this chapter").

In this case, Rule 701.15 "fills in the details" with respect to the phrase "or otherwise." *See Anderson*, 147 N.H. at 183; *see also Found. for Seacoast Health v. Hosp. Corp. of Am.*, 165 N.H. 168, 177 (2013) (finding that the phrase "or otherwise" created an ambiguity). Based on the trial court's own findings, application of the administrative rule would have resulted in a ruling against the OTCs. Even the trial court seemed to acknowledge in its decision below that such language, if considered, would make the OTCs "operators" and subject the OTCs to tax liability.[37]

To undermine the administrative rule and its resultant gloss, the trial court erroneously relied on the doctrine of *ejusdem generis*. However, the doctrine of *ejusdem generis* cannot be used to "defeat [Legislative] intent." *See In the Matter of Regan & Regan*, 164 N.H 1, 9 (2012) (declining to employ *ejusdem generis* to defeat the legislature's intent). Neither can it be used to develop "a different legislative purpose." *See id.* ("[G]eneral words will not be used in a restricted

[37] In its Order, the trial court discusses and acquiesces to the opposite result reached by the court in *Mayor of Baltimore v. Priceline.com Inc.*, Civil Action No. MJE-08-43319, 2011 U.S. Dist. LEXIS 156906 (D. Md. Aug. 2, 2011), explaining that, in the *Baltimore* decision, the OTCs were "owners or operators" of hotels given the broad definition of those terms, which included "brokers" and "other intermediaries. *See* Court's Order dated Oct. 18, 2017 at 18 n.10.

sense if the act as a whole demonstrates a different legislative purpose in view of the objectives to be obtained....") (quotation omitted). Instead, the doctrine must cede to the strong indication of legislative intent that is evidenced by the Legislature's acceptance of Rule 701.15 for over 30 years.

The trial court's tangential attempt to rely on plain meaning similarly fails as the court resorts to this analysis only "to the extent the statute itself is not clear." Court's Order dated Oct. 18, 2017 at 18. However, plain meaning is only definitive when a statute lacks ambiguity. *Compare* Court's Order dated Oct. 18, 2017 at 18 (emphasis added) *with Phetteplace v. Town of Lyme*, 144 N.H. 621, 624 (2000). Thus, while the trial court purported to base its decision on a "plain meaning" analysis, it somehow found the statutory terms simultaneously both ambiguous *and* decisively clear. Whenever a statute "is not clear," legislative intent governs. *Appeal of Naswa Motor Inn, Inc.*, 144 N.H. 89, 90 (1999); *see also State v. Beckert*, 144 N.H. 315, 316-17 (1999). Here, the administrative gloss and the longstanding rule manifest that intent.[38]

The court's further attempt to eviscerate the statutory purpose and the administrative rule by employing a predisposition against taxing statutes similarly fails. Court's Order dated Oct. 18, 2017 at 20. The trial court used a presumption against taxing statutes to strictly construe the M&R Tax. However, New Hampshire, unlike every jurisdiction cited by the trial court, does not strictly construe taxing statutes. *First Berkshire Bus. Trust v. Comm'r, N.H. Dep't of Revenue Admin.*, 161 N.H. 176, 180 (2010) ("we do not strictly construe statutes that impose taxes"). In addition, the limited presumption against taxing authorities is employed only when an ambiguity remains after other avenues for interpretation have been exhausted. *Expedia, Inc. v. District of Columbia*, 120 A.3d 623, 631 (D.C. App. 2015). In fact, numerous cases resolve ambiguities in favor of the

[38] Moreover, plain meaning is used "[w]here a statute fails to define a disputed term." *State v. Beckert*, 144 N.H. at 316-17. *See also State v. Woods*, 139 N.H. 399, 400 (1995). Here, the disputed term "operator" is defined twice – once in statute and once with greater detail in N.H. Admin. R., Rev 701.15.

taxing authority if the legislative purpose is satisfied thereby. *Kimball v. Potter*, 89 N.H. 234, 235 (1938); *Appeal of Town of Pelham (N.H. Bd. of Tax & Land Appeals)*, 143 N.H. 536, 538 (1999) (quoting *Gilford v. State Tax Commission*, 108 N.H. 167, 168-69 (1967)).

Administrative gloss in this case goes beyond just the administrative rule. The evidence at trial included a Department Technical Information Release ("TIR") entitled *Revised Guidelines for Hotel Operators Using On-Line Booking Companies* and dated April 22, 2008.[39] That TIR plainly states that the OTCs are liable for tax on the total amount they collect from the customer: "Given this statutory structure and the applicable case law, *the amount the occupant pays to the on-line booking company for the room is the amount subject to M&R tax*."[40] Thus, the Department has consistently adhered to the law, the regulations, and its administrative position that M&R Taxes are due on the full amount paid by an occupant—regardless of who collects the payments and taxes. The trial court's decision to undermine that longstanding application was error.

The trial court's decision below, if permitted to stand, would lead to disparate tax treatment of equivalent transactions, depending on whether a hotel room consumer paid a hotel, an offline travel agent, or an online travel agent. However, the tax obligation should not differ based on whether one consumer used American Express travel as his travel agent (and thus paid full taxes) and the other used Expedia (and would only have net-rate taxes, or in the case of "breakage" no taxes at all, transmitted by Expedia). *See Morrison v. Manchester*, 58 N.H. 538, 549-50 (1879) (Doe, C.J.) ("What each is bound to contribute [is] a debt of constitutional origin and obligation . . . . And as any one's payment of less than his fair share leaves more than their shares to be paid by his neighbors, his non-payment of his full share is a violation of their constitutional right. . . ."). The DRA's longstanding interpretation does not lead to such an illogical and absurd result.

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[39] *See* Trial Exhibit DEF0063. Even the short-lived predecessor, TIR 2007-008, stated that tax was on the total amount the consumer paid. That TIR, which was issued when DRA was less informed about the OTCs' business model, was superseded by the April 22, 2008 TIR.

[40] *Id.* at 2 (emphasis added).

In sum, the evidence adduced at trial demonstrates that the OTCs both "[offer] sleeping accommodations for rent to the general public," and do so either for themselves or as partners with or agents of the hotels with which they contract. A correct application of the law, including Rule 701.15, requires reversal of the trial court's decision below and a finding that, as a matter of law, the OTCs are operators that are liable for the M&R Tax upon the gross amount received from the consumer.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF *EJUSDEM GENERIS.*

The trial court improperly relied on the doctrine of *ejusdem generis*[41] to interpret the statutory definition of "operator" found in RSA 78-A:3, IV. Again RSA 78-A:3, IV defines "operator" as "any person operating a hotel ... or receiving gross rental receipts, *whether as owner or proprietor or lessee, sublessee, mortgagee, licensee, or otherwise.*" RSA 78-A:3, IV (emphasis added). Rule 701.15 adds detail to this definition. It should also be noted that RSA 78-A:21 defines operator in the case of a corporation to include the president and treasurer of an entity and in the case of a limited liability company to include its members. These definitions are determinative without resort to *ejusdem generis*. Nevertheless, even the trial court's method of applying *ejusdem generis* was flawed.

First and foremost, *ejusdem generis* is to be employed only where ambiguity exists. *See Franklin*, 151 N.H. at 509 ("When the language of a statute is plain and unambiguous, we do not look beyond it for further indications of legislative intent."); *Turkette*, 452 U.S. at 581 ("The rule of *ejusdem generis* is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in the statute."). Here, the trial court

[41] "Th[e] doctrine [of ejusdem generis] provides that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned." *State v. Beckert*, 144 N.H. 315, 318 (1999) (quoting BLACK'S LAW DICTIONARY 517 (6th ed. 1990)).

explicitly stated in its decision that it "does not believe the statute is ambiguous." *See* Court's Order dated Oct. 18, 2017 at 20. It was therefore error for the trial court to resort to *ejusdem generis* to interpret the statutory definition of "operator."

Even if its application of *ejusdem* generis has been proper, the trial court improperly relied exclusively on the doctrine to the complete detriment of Rule 701.15. As Chief Justice Kenison held in *State v. Small*,

> [I]t is well established that the rule of *ejusdem generis* is neither final nor exclusive and is always subject to the qualification that general words will not be used in a restricted sense if the act as a whole indicates a different legislative purpose in view of the objectives to be attained. As a general rule the use of Latin phrases to solve problems of statutory construction has not been a marked success. . . . The crux of the matter is that the rule of *ejusdem generis* is only a constructionary crutch and not a judicial ukase in the ascertainment of legislative intention.

State v. Small, 99 N.H. 349, 351 (1955) (citation omitted). *See also In the Matter of Regan & Regan*, 164 N.H. 1, 9 (2012).

Simply put, in New Hampshire, "[t]he rule *ejusdem generis* . . . is not conclusive." *Sumner v. Blakslee*, 59 N.H. 242, 243 (1879). *Ejusdem generis* provides "only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument...." *United States v. Mescall*, 215 U.S. 26, 31 (1909). *Ejusdem generis* is not dispositive, and "it does not require a court to give it unthinking reliance." *United States v. Amato*, 540 F.3d 153, 160 (2d Cir. 2008). In fact, at times, *ejusdem generis* must be cast aside, for example, when "the statutory scheme demonstrates an intent to comprehensively address" a subject matter, the Court will "decline to employ *ejusdem generis* to defeat that intent." *Regan*, 164 N.H. at 9. *See also Crowley v. Frazier*, 147 N.H. 48, 51 (2001) ("The doctrine of *ejusdem generis* does not require us to ignore legislative intent."). Thus, in *State v. Beckert*, 144 N.H. 315, 318 (1999), this Court cautioned against using the doctrine "with

blinders."

Nevertheless, the trial court erroneously relied solely on *ejusdem generis* to conclusively determine that the clause "or otherwise" in RSA 78-A:3, IV's definition of "operator" limits tax liability to entities with present physical possessory interests in rental accommodations, *i.e.*, brick-and-mortar hotels only. The trial court held:

> The common law doctrine of *ejusdem generis* provides that "where specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words." Since the foregoing categories laid out in the statute relate to persons with a possessory interest in a hotel, the phrase "otherwise" could only relate to people with a similar possessory interest.

Court's Order dated Oct. 18, 2017 at 23-24 (internal citations omitted). However, the trial court's determination that "possessory interest" is a common element among the types of operators listed in RSA 78-A:3, IV is simply wrong. *See* Court's Order dated Oct. 18, 2017 at 16 ("It appears that in order to be liable as an 'operator,' a person must have possession or control of the physical structure of the hotel."). The term "mortgagee" does not signify a possessory interest requirement. *See Wells Fargo Bank v. Schultz*, 164 N.H. 608, 611 (2013) (finding that a mortgagee may "recover possession" of property after a default, thereby indicating that the mortgagee did not have possession already simply by virtue of its status as mortgagee); *McKay v. Walker*, 369 P.3d 926, 930 (Idaho 2016) ("A mortgage creates only a security interest in real estate *and confers no right to possession of that real estate on the mortgagee*." (quotation omitted; emphasis in original); *In re Michigan Ave. Nat'l Bank*, 2 B.R. 171, 182 (1980) (finding that a mortgagee could not receive rents from mortgaged property because it did not have a possessory interest); *accord* Restatement (Third) of Property (Mortgages) § 4.1(a) (1997).

Similarly, the term "licensee" does not signify a possessory interest requirement. BLACK'S LAW DICTIONARY provides: "[A] license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein." BLACK'S LAW DICTIONARY (10th Ed.)

(*citing* 2 James Kent, *Commentaries on American Law* 452-53 (George Comstock ed., 11th ed. 1866)). Although license agreements can be complicated, and may include rights to control property, nothing in the term inherently leads to an unavoidable association with possession.

In *Town of Ossipee v. Whittier Lifts Trust*, 149 N.H. 680 (2003), this Court used the distinction between a licensee and a party with a possessory interest to defeat the claims of the taxing authority. In *Whittier*, the defendant-licensee argued that it was not liable for property taxes for a communications tower that it did not own. *Id.* at 680. This Court agreed that the lease at issue "expressly recognize[d] that Whittier Communications will have a license interest to operate and maintain a portion of [a] tower," but went on to note that "Whittier Trust has no ownership or possessory interest in, or control over the tower." *Id.* at 686-87. *See also Tarin's Inc. v. Tinley*, 3 P.3d 680, 688 (N.M. 1999) ("[A license] may be revoked without notice and without cause, because ... a licensee has no possessory interest in the property") (quoting 25 AM. JUR. 2d *Easements & Licenses* § 143 (1996)). Tellingly, in *Whittier*, this Court determined that the defendant was an "operat[or]" and a "licensee" but was not an owner or an entity with a "possessory interest." *Whittier*, 149 N.H. at 686-87.

Finally, the trial court's interpretation goes against the statutory scheme's effort to ensure that even those passively involved in an operator are liable. RSA 78-A:21 shows clearly that the Legislature wanted to ensure that even those not involved in day-to-day operation of a property, such as LLC members and corporate officers, would be liable as operators to collect and remit M&R Tax nonetheless. *See* RSA 78-A:21 ("For the purposes of this section, operator in the case of corporations includes the president, treasurer, or any other person in a managerial capacity of said corporation. Operator, in the case of a limited liability company, includes members and any other person in a managerial capacity of the limited liability company.").

Although according to the trial court's own analysis there was no ambiguity in the statutory

scheme or the statutory definition of "operator," the court erroneously relied almost exclusively on the doctrine of *ejusdem generis* to impose a present physical possession requirement for liability under the M&R tax law. For the reasons above, this was error.

IV. THE TRIAL COURT ERRED BY FAILING TO FIND EITHER A VIOLATION OF THE MEALS AND ROOMS TAX LAW OR A VIOLATION OF THE CPA, GIVEN THE OTCS' BUNDLING OF TAXES WITH OTHER AMOUNTS AND REFUSAL TO STATE SUCH TAXES SEPARATELY.

That the OTCs bundle their taxes and fees is not in dispute. In fact, the OTCs have admitted this practice in their answers,[42] booking paths,[43] and in other documents describing their business model.[44] The OTCs even admit that they would refuse to inform a consumer of the actual tax amount paid by the consumer, even if a consumer asked.[45] By purposely bundling the taxes and fees displayed to consumers and not itemizing the tax amount being charged to and paid by the consumer, the OTCs conceal the actual amount of taxes they are collecting, misleading consumers to believe that all taxes collected by the OTC are remitted to the State. Thus, the OTCs purposely hide from consumers and the State the tax amounts collected, and they improperly retain as profit a portion of taxes owed to the State.

As touched upon above, the OTCs' practice of combining taxes and fees into a single line item violates RSA 78-A:7, I(a), which provides:"[T]he operator shall either state the amount of the tax to each occupant ... or state that the tax is included in the price of the occupancy...." The trial court erred below in failing to reconcile the OTCs "bundling" practices with the plain language of the M&R Tax Law, which prohibits such a practice.

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[42] *See, e.g.*, Tr., May 1, 2017 at 89:17-22; Tr., May 4, 2017 at 548:24-549:3; Tr., May 3, 2017 at 391:15-396:11, 399:16-400:24; Pl's Ex. 631.

[43] *See* Pl's Ex. 861, PCLN Booking Path at 243405; Defs' Ex. EXP-1, EXP Booking Path at 30704; and Defs' Ex. EXP-4, ORB Booking Path at 1050.

[44] *See, e.g.,* Tr., May 4, 2017 at 537:4–538:9; Tr., May 8, 2017 at 803:3-11; Tr., May 11, 2017 at 1393:16–1394:9.

[45] *See* Tr., May 4, 2017 at 183:5-185:9.

Consequently, the trial court erred in failing to determine that the OTCs' "bundling" practices violate the CPA. "The [CPA] is a comprehensive statute designed to regulate business practices for consumer protection by making it unlawful for persons engaged in trade or commerce to use various methods of unfair competition and deceptive business practices." *Gilmore v. Bradgate Assocs.*, 135 N.H. 234, 238 (1992) (internal punctuation and citation omitted) "The very words contained in the statute indicate that the act's proscriptions are to be broadly applied. 'It shall be unlawful for any person to use *any* unfair method of competition or *any* unfair or deceptive act or practice in the conduct of any trade or commerce within this state.'" *Id.* (quoting RSA 358-A:2) (emphasis in original). As noted by the trial court, even if one of the specifically enumerated provisions of RSA chapter 358-A has not been violated, the court must inquire: "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes...." *State v. Moran*, 151 N.H. 450, 453 (2004); *see also* Order at 25. For the reasons stated above, the bundling practices of the OTCs violate both the specific terms and the public policy the Legislature set forth in RSA chapter 78-A.

CONCLUSION

For the reasons set forth herein, the State respectfully requests that this honorable Court reverse the trial court's decision below and, instead, declare as a matter of law that (1) the OTCs are liable under the Meals and Rooms Tax Law for taxes based upon the gross amounts they receive from hotel room consumers, without deduction of any kind, and (2) the OTCs are liable under the Consumer Protection Act due to their admitted longstanding and ongoing practice of unlawfully bundling taxes with other amounts and refusing to state such taxes separately.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully requests that the Court schedule this matter for full-court oral argument, with Senior Assistant Attorney General K. Allen Brooks to argue on behalf of the State.

The appealed decision is in writing and attached hereto following the Certificate of Service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing were sent this 7th day of August, 2018, by first class mail, postage prepaid to Richard W. Head, Esq., Michael S. Lewis, Esq. and Christopher J. Sullivan, Esq., Rath, Young & Pignatelli, P.C., One Capital Plaza, Concord, NH 03302-1500, and that I have emailed a copy of the same to the counsel listed above and also to the following counsel who have been admitted *pro hac vice*:

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