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.*,

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

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

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ORAL ARGUMENT REQUESTED (15 minutes)

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ARGUMENT

I. THE OTCS MISCONSTRUE THE MEALS AND ROOMS TAX LAW.

Throughout their brief, the OTCs mischaracterize the M&R Tax as being a tax on operators. Under the M&R Tax law, however, the taxpayer is the consumer – the occupant of the hotel room. RSA 78-A:7, I(b) ("The occupant, purchaser or renter shall pay the tax to the operator.").[1] Thus, unlike some hotel-related taxes in other jurisdictions, the M&R Tax is not levied upon hotels or any other market intermediary, but upon the occupants who acquire the rights to occupy hotel rooms. The M&R Tax law must be viewed through the eyes of the tax paying occupant.

The taxable transaction is the payment by the consumer to the OTC, not the OTC's payment of a wholesale room rate to the hotel: the M&R Tax is levied upon the total amount paid by the occupant to obtain the room. RSA 78-A:3, VIII(a) ("'Rent' means ... [t]he consideration received for occupancy ... without any deduction of any kind."). The OTCs admit that they collect the M&R Tax from the occupants. By collecting the M&R Tax from the occupants, OTCs are acting as operators. *See* RSA 78-A:7, I(b) ("The operator shall demand and collect the tax from the occupant, purchaser or renter."); RSA 78-A:6, III ("The operator shall collect the taxes imposed by this section."); RSA 21-J:39, II(l) ("No person shall ...

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[1] Occupant, in turn, "means any person who, for rent paid, uses, possesses, or has a right to use or possess any room in a hotel." RSA 78-A:3, V.

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."). The law is not applied to the labels used by the OTCs, such as "facilitation" and "tax recovery charge," but rather to the undisputed facts,[2] which show that the OTCs completely control the taxable transaction, collecting the payment the consumer is required to make to obtain the room and collecting the M&R Tax on that payment. In fact, the hotels do not transact directly with consumers for the room rental, do not know the total amount the consumer paid the OTC for the room, and are contractually prohibited by the OTCs from collecting taxes. *See* Tr., May 1, 2017 at 112:15-20; Tr., May 3, 2016 at 442:2-443:3; Tr., May 4, 2017 at 530:18-531:2, 567:22-568:16; Tr., May 5, 2017 at 649:3-653:15, 773:9-21.

II. THE DEPARTMENT HAS CONSISTENTLY STATED THAT THE M&R TAX IS DUE ON THE TOTAL AMOUNT PAID, WITHOUT ANY DEDUCTIONS.

The OTCs argue that only the wholesale room rate that the OTCs pay the hotels is subject to the M&R Tax, not the retail room rate that the consumers pay the OTCs to obtain the room. The Department, however, has consistently interpreted the M&R Tax law as assessing the tax on the total amount the consumer pays to obtain the room. The OTCs point to

[2] As the OTCs point out, the State is not appealing the trial court's factual findings. However, the OTCs have likely confused the trial court's conclusions of law with findings of fact. *See*, *e.g.*, Appellees' Brief at 3 ("The OTCs are not operators of hotels. Jdgmt. 22").

various State actions that they claim are inconsistent with that interpretation. But when put in context, these actions show the Department has consistently adhered to the law, the regulations, and its administrative position that M&R Tax is due on the full amount paid by an occupant—regardless of who collects the payments and taxes.

A. The Department's Technical Information Releases consistently state that the entire amount the occupant pays to an OTC for a hotel room is the amount subject to M&R Tax.

The Department issued two Technical Information Releases ("TIR"), one in late November 2007 and one in April 2008. TIR 2007-008, dated November 29, 2007, was titled *Guidelines for Hotel Operators Using On-Line Booking Companies*, and was superseded within months. TIR 2007-008 stated that "the Department considers on-line booking companies as the agents of the hotel operators with whom they contract," but that "[o]n-line booking companies are not 'operators' within the meaning of the M&R statute" and "[t]hey do not have an independent responsibility to collect and remit M&R taxes to New Hampshire." State's Brief at Appendix at 55. Instead, the 2007 TIR placed the remittance of the correct amount of tax on the hotel operators. Id. More importantly, the 2007 TIR stated that "RSA 78-A requires the tax to be calculated on the room rate paid for the occupancy by the end user, regardless of the hotel's going rate for the room and *regardless of the contract amount between the operator and the on-line*

booking company, and that "the amount the occupant pays to the on-line booking company for the room is the amount subject to M&R tax." Id. at 56 (emphasis added). Thus, while this TIR was based upon a misunderstanding of the role of the OTCs in collecting the room payment and M&R Tax from the consumer, it clearly stated that tax was due on the entire amount paid to the OTC.

When the Department issued TIR 2007-008 it had not yet discovered the details of the OTCs' merchant model. For example, the Department did not have any of the OTCs' contracts. Tr., May 4, 2017 at 479:2-5, 481:18-482:1. Those contracts would have informed DRA that in merchant model transactions, the OTCs assume all responsibility for the collection of taxes and prohibit the hotels from collecting taxes. *See* Tr., May 1, 2017 at 112:15-20; Tr., May 3, 2016 at 442:2-443:3; Tr., May 4, 2017 at 530:18-531:2, 567:22-568:16; Tr., May 5, 2017 at 649:3-653:15, 773:9-21. The Department likewise did not have any of the formulas that generate the OTCs' taxes and fees line. Tr., May 4, 2017 at 479:11-16. Those formulas would have shown that the OTCs collect from consumers an amount equal to the M&R Tax on the wholesale rate plus an amount equal to the M&R Tax on the markup from the wholesale rate to the retail rate, and that, in effect, the OTCs are collecting the M&R Tax rate on the full retail amount paid by consumers. Tr., May 3, 2017 at 399:4-401:1; Tr., May 10, 2017 at 1306:11-1307:17. While the lack of information about the OTCs' merchant

model led the Department to conclude at the time that the OTCs were not "operators," the Department correctly stated that M&R Tax is due on the entire amount the consumer pays to obtain the room, regardless of the contract amount between the OTC and the hotel.

For reasons now obvious, TIR 2007-008 quickly proved unworkable. Since hotels do not know how much consumers pay OTCs for the room, they lack the information necessary to calculate the M&R Tax due. Further, the OTCs' contracts state that the OTCs will collect all taxes and actually prohibit the hotels from collecting tax. *See* Tr., May 1, 2017 at 112:15-20; Tr., May 3, 2016 at 442:2-443:3; Tr., May 4, 2017 at 530:18-531:2, 567:22-568:16; Tr., May 5, 2017 at 649:3-653:15, 773:9-21.

On April 22, 2008, the Department issued TIR 2008-002, titled *Revised Guidelines for Hotel Operators Using On-Line Booking Companies*, stating, "This Technical Information Release supersedes TIR 2007-008."[3] State's Brief at Appendix at 57 (emphasis added). TIR 2008-002 omitted the language in the superseded TIR that stated the on-line booking companies are not "operators" who must collect and remit M&R Tax, and also recognized that "[t]he hotel may not know the amount charged to the prospective guest by the on-line booking company." Id. at

[3] The State is puzzled by the OTCs' reliance on an expressly superseded policy statement, particularly one that was in effect for less than five months. The State notes that trial court likewise appears to have relied on the superseded TIR. *See* Court's Order dated Oct. 18, 2017 at 20 n.11.

57. The Department again stated that "RSA 78-A requires the tax to be calculated on the room rate paid for the occupancy by the end user, regardless of the hotel's going rate for the room and regardless of the contract amount between the operator and the on-line booking company." Id. at 58. TIR 2008-002 went on to state that "as the hotel operator may be unaware of the rent charged to a guest by the on-line booking company, the hotel operator is only responsible to remit the amount of tax it receives from the on-line booking company." Id. at 58. The TIR nevertheless concluded that "the amount the occupant pays to the on-line booking company for the room is the amount subject to M&R tax." Id. at 58. Unfortunately, despite TIR 2008-002, the OTCs refused to register as operators and file M&R Tax returns or remit M&R Tax on the difference between the wholesale and retail room rates. Tr., May 3, 2017 at 358:21-360:8; Tr., May 5, 2017 at 632:14-633:1.

B. The Department did not pursue legislation in 2009 to amend the M&R Tax, as the OTCs suggest in their brief.

As part of their claim that the Department changed its interpretation of the law over time, the OTCs point to a May 15, 2009 letter from the Department to the Governor, who had asked agencies for ideas on how to raise revenues during the budget crisis. The OTCs take a passage of this letter out of context. Contrary to the OTCs' suggestion in their brief, the letter is consistent with the Department's longstanding view that the M&R

Tax applies to the full amount an occupant pays to an OTC. Specifically, the letter pointed out that "[o]nline travel companies ("OTCs") are collecting hotel occupancy taxes from consumers, *but only pay a portion of the taxes collected to local and state governments*." Appendix to Brief of Appellees –Volume II at 20 (emphasis added); *see* Tr., May 3, 2017 at 443:19-23. While the letter went on to state that "[l]egislatively creating a new category of wholesalers and an associated rate within state statutes may provide the necessary vehicle for taxing this group of OTCs," Tr., May 3, 2017 at 444:1-3, nothing in the letter suggested that existing law did not already assess M&R Tax on the entire price paid by the consumer to an OTC or that an OTC did not qualify as an operator.

At bottom, the OTCs' argument is one "based on subsequent legislative history, [which] like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote." *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (Scalia, J., concurring) (subsequent legislative history "is a contradiction in terms ... used to smuggle into judicial consideration legislators' expressions not of what a bill currently under consideration means ... but of what a law previously enacted means, [which are] entitled to no more weight than the views of a judge concerning a statute not yet passed."); *see State v. Warren*, 147 N.H. 567, 572-73 (2001) (rejecting the use of subsequent legislative history); *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223, 260 (2011) (Sotomayor, J., dissenting) ("To be

sure, post enactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress … [and] justifiably given little or no weight.”). The letter simply noted the practice of the OTCs not to remit taxes that the Department had always claimed were due and owing to the State. In any event, no such legislation was filed or enacted and the proposal was not one the Department supported or wanted to go forward. Tr., May 3, 2017 at 449:1-6.

C. The Department of Resource and Economic Development's advertising contract is irrelevant.

The OTCs attempt to suggest the State itself was an OTC and that the Attorney General's Office approved of it. Appellee's Brief at 10. In actuality, the Department of Resources and Economic Development, as part of an advertising campaign by the Division of Travel and Tourism, contracted between 2006 and 2011 with Yankee Publishing, Inc. to enable travelers to find hotels through the website, visitnh.gov. *See*, Tr., May 12, 2017 at 1591:9-16, 1592:5-10, 1593:11-14. Yankee Publishing, in turn, subcontracted with Advanced Reservations Systems, Inc. to handle the hotel reservations. Tr., May 12, 2017 at 1593:17-19. These contracts, like thousands of others every year, were reviewed by the Office of Attorney General prior to being presented to Governor & Council for approval. Tr., May 12, 2017 at 1610:5-8. There was no investigation as to the business

model used by Advanced Reservations System or how it handled taxes. Tr., May 4, 2017 at 481:21-23, 488:17-21; Tr., May 12, 2017 at 1614:11-23. The OTCs' highlighting of this irrelevant issue is a distraction from the issue actually litigated in this case, which is their *own* liability for M&R Taxes collected from occupants and not remitted by them to the State.

D. The Department opposed an amendment to the M&R Tax in 2017 proposed by the short-term rental and vacation industry.

In 2017, years after the commencement of this litigation in 2013, certain vacation and short-term rental companies proposed legislation to change RSA chapter 78-A. Tr., May 4, 2017 at 491:2-5. The Department wrote a letter opposing the legislation, which would have made it easier for OTCs to avoid M&R Tax responsibilities. Appendix to Appellee's Brief – Volume II at 107 (emphasis added); *see* Tr., May 4, 2017 at 492:12-23. A second letter opposing the legislation further emphasized the Department's view that OTCs were operators responsible for collecting and remitting the entire amount due based on the retail rate paid by the occupant without hidden bundling. Appendix to Brief of Appellees – Volume II, at 50-51; *see* Tr., May 4, 2017 at 489:18-491:1.[4] Thus, the Department has consistently interpreted the fundamental tenets of the M&R Tax Law,

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[4] The legislative record attached to the proposed bill also demonstrates that real estate rental agents who have no possessory interest in the buildings they rent to the public for owners collect and remit the M&R Tax due on the rental transactions. Appendix to Brief of Appellees – Volume II at 78; *see* Tr., May 4, 2017 at 491:6-16.

merely correcting its understanding of the role played by OTCs once it was able to finally shed light on the OTCs "opaque" contractual arrangements.[5]

III. THE OTCS' REFUSAL TO SEPARATELY STATE THE AMOUNT OF TAX VIOLATES THE M&R TAX LAW AND THE CONSUMER PROTECTION ACT.

The OTCs' brief supports the State's claim that the OTCs improperly bundle taxes with fees. As previously stated, the OTCs unlawfully even refuse to inform the taxpayer exactly how much tax is being paid.[6] The trial court's decision, therefore, allows the OTCs to violate the M&R Tax law's requirement that amounts paid as "taxes" shall be separately stated for the taxpayer or included in the price of occupancy. RSA 78-A:7, I(a) ("The 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").

This practice of bundling also violates the Consumer Protection Act ("CPA"). The OTCs precisely engineered the bundled taxes and fees line to equal the M&R Tax on the bundled retail room rate. They used

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[5] The trial court apparently accepted uncritically that the opacity was necessary so the hotels could "sell distressed inventory without compromising their retail rates." Court's Order dated Oct. 18, 2017 at 9. However, the OTCs could still remit the M&R Tax due on the total amount of the room simply by stating both the total price of the room and the amount of the tax without divulging the wholesale price or the OTCs' markup. *See* Tr., May 10, 2017 at 1284:1-1285:11. The wholesale price and the markup can be bundled; taxes cannot be bundled with fees.

[6] If a consumer asked an OTC for 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.

mathematical formulas to generate the bundled "taxes and fees" line item charged to consumers that essentially applied the tax rate to the wholesale rate and the tax rate to the markup from the retail rate. *See* Tr., May 1, 2017 at 89:17-22; Tr., May 3, 2017 at 391:15-396:11, 399:16-400:24; Tr., May 4, 2017 at 548:24-549:3; Tr., May 10, 2017 at 1306:11-1307:17; Pl's Ex. 631. Since the bundled taxes and fees line was exactly or within pennies of the 9% M&R Tax due on the bundled room rate, it appeared to consumers that they paid the 9% M&R Tax on the retail room rate and that their State and local governments would receive that tax. *See* RSA 78-A:26 (dividing M&R Tax among State and local governments). Given the OTCs' vague disclosures and refusal to state the amount of taxes, consumers could not know that the OTCs are not remitting the M&R Tax for which consumers were liable.

CONCLUSION

The M&R Tax Law requires remittance based on the total amount paid by the consumer, a requirement consistently reiterated by the Department. The trial court's narrow interpretation and application of the term "operator" eviscerates the statutory scheme, creates limitations where none were intended, and frees the OTCs from meeting basic tax administration responsibilities, a result that is especially troublesome given that the OTCs, and only the OTCs, perform the tax collection function – something only an "operator" can do. The OTCs' practice of hiding the

actual taxes and fees collected exacerbates, rather than mitigates, the OTCs' unlawful conduct by violating both the M&R Tax Law and the CPA.

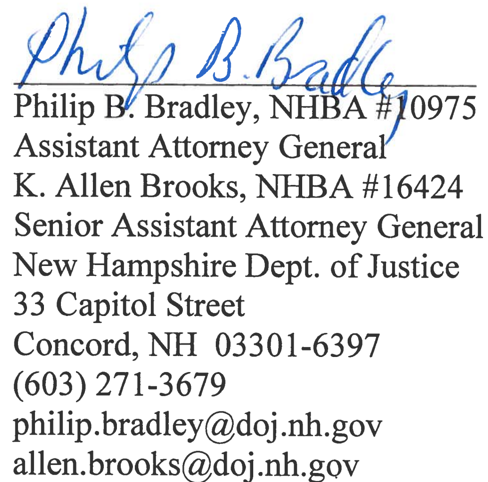
Respectfully submitted,

State of New Hampshire

By its attorney,

Gordon J. MacDonald
Attorney General

October 29, 2018



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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing were sent this 29th day of October, 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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