

## **PUBLIC HEARING**

**August 15, 2012 – 4:30 p.m.**

Chairman Wood called the public hearing to order.

The Clerk read the Notice of Public Hearing on a proposed local law “A LOCAL LAW AMENDING LOCAL LAW NO. 7 OF 1977, AS LAST AMENDED BY LOCAL LAW NO. 5 OF 1978, TO REQUIRE ROOM REMARKETERS TO COLLECT AND PAY TAX ON THEIR SALES OF ROOM OCCUPANCY IN SARATOGA COUNTY”.

Chairman Wood told all in attendance the rules of the Public Hearing. He then called the speakers in the order they signed up.

Todd Garofano, 7 Fox Court Way, Ballston Spa & President of the Saratoga Convention & Tourism Bureau: “I want to thank you all very much for holding this public hearing and for your leadership in bringing this issue forward. At the Convention & Tourism Bureau, we represent 40 lodging partners throughout the County. We are proud to serve those folks. And some of which are here to speak today as well. We have several local hotel owners and industry professionals as well. I will keep my remarks brief. Simply put for us, this is an issue of fairness. We keep going back to the motto of how rooms are remarketed. OTC will purchase a room from a hotel say for \$80 and then resell it for say \$100. But they are only paying tax on the \$80. A couple of years back, New York State in their wisdom changed the legislation by passing a law and is now collecting sales tax on the full \$100. So we are asking for the same thing for occupancy tax. And that’s why we are here today. We encourage you to move forward with this change.”

Jan Marie Chesterton, 16 Hillcrest Lane, Saratoga Springs, President New York State Hospitality & Tourism Association: “Thank you and good afternoon. We are the state trade association representing the lodging industry here in New York and we are partners with the American Hotel & Lodging Association serving hotels nationwide. I’d like to start also by thanking the Law & Finance Committee for the opportunity to comment on the equal remittance of occupancy tax regardless of the methods used to book hotel rooms. By way of background, the New York State Hospitality and Tourism Association is the oldest State Association in the Country. We were formed here in Saratoga Springs in 1887. When discussing hotel occupancy taxes on the County level it is important to first recognize that legislation has already been passed at the State level. In 2010, Governor Patterson enacted an amendment to insure that State and local sales taxes, as Todd indicated, are paid on the full amount charged to the customers by businesses such as web based travel companies for hotel occupancy in New York State. While the 2010 State legislation also applies to occupancy tax imposed in New York City it does not apply to local bed tax. And your proposed amendment, ladies & gentlemen, in Saratoga County give you the opportunity to level the playing field. As a point of reference there are three types of models for booking hotel rooms: directly with the hotel, traditional travel agent booking and online travel companies (OTC). Only one of these models does not remit the full amount of the tax due and that’s the OTC. Fact: online travel companies such as Expedia, Orbitz, Travelocity charge customers the same retail price or sometimes more than hotel charge. Fact: On the 12<sup>th</sup> of the month Saratoga County hotels pay their fair share of hotel tax paid on the percentage designated. Fact: Hotels

benefit local governments through hotel tax. The intent of the tax is to provide marketing dollars to bring more people to the area, further increasing local business. Fact: This is not a new tax. The discussion is one of selective enforcement of current taxes. The industry believes local hotels should not be discriminated against. Online travel companies should be required to remit taxes on their retail rates just as hotels have always done, rather than try to beat the system to create their own loopholes. The industry believes the discussion is based on the equal remittance of local taxes. Despite the aggressive push back by the online travel companies to obtain tax preference, we applaud Saratoga County for demanding that these companies remit taxes based on the retail price, just as hotels have always done. Thank you again for the opportunity to present the statewide lodging industry.”

Joseph Rubin, Washington DC, President of the Interactive Travel Association: “We are the trade association in Washington for the online travel companies. I appreciate the opportunity to come here to testify before you today. It’s a member’s hope to promote travel to every corner of the Country. That’s one of the things the online travel companies do. We help market destination such as Saratoga and particularly independent hotels to destinations around the world to consumers around the world. And that’s true here in Saratoga as well. With the regards to the proposal before you today we believe there has been a lot of misinformation generated about the authority of Saratoga to enact this proposed legislation without the underlying business model and how it works and the potential negative impact such legislation could have on tourism in Saratoga. A lot of this misinformation has been generated whether intentionally or not by outside agitators who travel across the country to try to get state and localities to try to enact legislation like this and in 2012 they tried in 10 different states and failed in every single one of them. States like Texas, Massachusetts, Connecticut, Oregon, Tennessee, across the political spectrum, across the country, every state has declined to enact these kinds of taxes. And now they are starting to look at smaller jurisdictions where they can start to creep in and make some progress, like cities like Saratoga. But over and over other small cities and counties have seen through this and have rejected these taxes as well. Therefore we would like to request that they Board take some time, table this motion, and take some time to look at some of the facts that the record has generated around the country. Here are some of the...there have been administrative audits, there have been court decisions, there have been other hearings around the country all of which have pointed to a few basic facts that I think all of you need to be award of. First of all, online travel companies do not collect and fail to remit taxes. That’s been disproved in cases around the country. Online travel companies do not buy and resell hotel rooms. There were courts in Tennessee and Florida that explicitly found that and put that in their record. And based on 2011 numbers its combined additional tax revenue that Saratoga Springs and Saratoga County would collect from the online travel companies is less than \$45,000. We think the litigation costs that you would encounter would be significantly higher than that. And let me just briefly address the fairness issue. Hotels around the country overall have about 40% rate of vacancy, so they often look for ways to fill those rooms. One of those ways they do that is by offering discounts, triple A discounts for example, or they may offer free breakfast or free parking or things like that and those are not calculated as overall costs”... (at this time, time was up)

Justin Wright, 1277 Burden Lake Road, Averill Park: “I am testifying today on behalf of the Independent Lodging Industry Association and the American Society of Travel Agents. On behalf of the Independent Lodging Association over 3,000 independent hotel agents nationwide

we respectfully urge you to oppose Saratoga online travel taxes. These are nothing more than new taxes on Saratoga County's travel & tourism. These new taxes will be harmful to independent hotels, travel agents and online travel companies. If adopted, online travel companies and travel agents will be required to calculate and remit a new tax for the services of aiding hotel bookings. As you heard from Mr. Rubin, NYC proposed similar attempts to impose such taxes and the legislation was rendered unconstitutional. Saratoga County is obviously a tourism destination. Independent hotels rely on travel companies to promote Saratoga County as a tourist destination through marketing partnerships, online advertising and other methods, online travel companies help boost hotel bookings. The lodging industry is not united on this issue. The independent lodging association is the only association not controlled, dominated or owned by corporate hotel chains. This effort creates a new tax on the service customers' use to book rooms in Saratoga County increasing the cost on tourism. Independent hotel owners rely on travel agents and online travel companies to help sell hotel rooms that would otherwise go unsold. Simply put, OTC's assist hotel operators to put heads in beds. Let's turn now to the testimony of the ASTA, the testimony of Eben Peck. He thanks the Board for the opportunity to present. You may have heard today that the proposed occupancy tax simply closes a loophole that allows big online travel agencies like Expedia and Orbitz to shortchange the County on occupancy tax and would have no impact on traditional "brick and mortar" travel agents. I want you to know that this is simply not the case. The bill's definition of a "room remarketer" clearly captures traditional travel agents and thus any fees agents charge their customers for hotel bookings. As the industry evolves, travel agents are relying less on commissions from travel suppliers and more on service fees charged to customers. In fact, in 2010 44% of agents nationwide charged a service fee averaging \$22 for hotel bookings and 50% of agents charged a fee averaging \$40 for an air, hotel and car package. These fees are charged for a service saving customers time and money by helping them navigate a marketplace that offers an overwhelming number of options and choices. And this income, subject today by both the federal and state income taxes, would be taxed a third time under this bill. If this bill passes, agents will be forced to choose between passing the tax on to the customer"....(at this time, time was up)

Todd Geremia, 222 E. 41<sup>st</sup> Street, New York City, Partner in the law firm Jones Day: "I represented Expedia in the litigation against the NYC Department of Finance that Mr. Wright and Mr. Rubin mentioned. I thank you for the chance to speak with you today and would like to explain why, in our view, the NYC litigation shows that Saratoga County does not have the authority under the New York State Constitution to enact the proposed local law currently before the Board. NYC enacted a local law in 2009, like the proposed local law before you now, attempted to impose a tax on the amounts charged by travel service providers for their online services under the guise of a legislative enactment that allows the city to impose a hotel room occupancy tax. Expedia along with other travel service providers commenced a lawsuit seeking a declaration that the City lacked the authority under the New York State Constitution to unilaterally impose such a tax with authority from the legislature. The Appellate Division, First Department, agreed with the travel companies and held that the City did not have the authority to impose a tax on the service and booking fees earned by online travel service providers. The pertinent legislation gave the City authority to impose a hotel room occupancy tax on the basis of the charge for each hotel room. A tax on fees for facilitating a reservation is not, however, a tax on the charge for the room. When the lawsuit against NYC was pending, the legislature invoked its authority to directly amend the City's code and expressly gave it authority to impose an

occupancy tax on the basis of a room remarketer's service fees. As the Appellate Division noted, the City required this type of express authority by the legislature before the City would have the authority to impose a tax based on an online travel service providers' fees. The legislature here has not given Saratoga County and Saratoga Springs analogous authority. Rather, as with NYC before the legislature acted to revise the City's code, Saratoga County and Saratoga Springs have the authority to impose a hotel room occupancy tax only on the basis of the charge for the hotel room. That the proposed local law before this Board is similar to and perhaps modeled on NYC's current code as modified by the legislature only underscores that Saratoga County and Saratoga Springs do not have the authority to impose a tax on travel intermediaries. The legislature has not acted to give Saratoga County and Saratoga Springs authority to impose such a tax. This Board could petition the legislature to give Saratoga County and Saratoga Springs such authority, but in the absence of such legislative action the litigation against NYC pretty clearly establishes that Saratoga County and Saratoga Springs do not have the authority".....(at this time, time is up)

Mike Hoffman, 36 High Rock Avenue, 6K, Saratoga Springs: "I am president of a local hotel management company in Colonie. I am one of the owners of the Hampton Inn Suites in Saratoga as well as two hotels in Albany County and one in Warren County. I have been in the hotel business the past 37 years and everything about me is fairness. The hotel business like every business is a tough business and we always need a level playing field. With that being said, I am certainly in favor of the online travel agencies remitting taxes on the retail price of a hotel room. Why should they be treated any differently than I and not have to pay occupancy taxes. The facts are that the hotel and motel occupancy tax benefits the local community and the industry. While I do not love taxes I do know that the occupancy tax paid today are my future tomorrow. Fair is fair and the OTC's have to pay their fair share. Thank you."

Peggy Coleman, 1 W. Water Street, Elmira, NY: "Good afternoon. I am here representing the New York State Association of Destination Marketing Organizations. We are a 16 member organization of which the Saratoga Convention & Tourism Bureau is a member. We have helped generate over \$5.5B in combined state and local taxes through promoting our local destinations to visitors. I am here to strongly encourage you to pass this law. It is about fairness. The visitors whether they reserve a room in a hotel, a motel, an independent property, a bed & breakfast or an inn, they pay 100% of the taxes, the sales and the occupancy tax. Those occupancy tax dollars are then used to promote the destinations to further improve the economic economy of these destinations. It's only fair. I ask you to please pass this law. And on behalf of our members, we are watching very closely and are very proud Saratoga County and what you are attempting to do. Thank you for listening."

Cynthia Hollowood, 144 5<sup>th</sup> Avenue, Saratoga Springs: "I am the General Manager of the Holiday Inn in Saratoga Springs. I have been at that property for over 30 years and I am an invested partner in that business. I am also Chairman of the Board, currently, of the NYS Hospitality & Tourism Association. This is the trade association for the hospitality and the attraction industries in NYS. It is in my capacity as Chair that I became aware of this tax loophole, while attending the annual legislative summit of the American Hotel & Lodging Association. I brought this information back to the City and County Officials as well as other organizations that benefit from lodging taxes, the Convention Bureau and the City Center. And I

am pleased to see that you are taking action on this matter. Upfront, I want to tell you all that my business participates in third party websites and we do benefit from this relationship. Additionally I have purchased advertising campaigns from both Orbitz and Expedia. That being said I really had no idea that these businesses were tax evaders. Their service is a benefit but they need to pay their share just as any other business doing business in our county. In no way does any consumer believe that we imposing an additional tax. We are simply asking that these businesses remit what they collect from the consumers and what they owe. I consider myself to be a very visible and active member of our greater community. I have been to the races ten times this season and have attended at least twelve community events and fundraisers this summer. Not once has any resident asked me about the ads from the ITSA or the editorial published either for or against. I have not heard from any hotel or motel owner who has expressed concern about your proposed action. But finally and most importantly, these third party websites are doing themselves an injustice by not remitting the tax. The more lodging taxes we are able to collect, the more marketing opportunities that the Convention Bureau, the County and the City Center will have to further promote and operate their organizations bringing more recognition to our great destination and that's more business for the hotels and the website travel businesses. And I wanted to advise you of a State District Court action that happened on 10/22/10. The State District Court in NYS rejected as baseless and contrary to the plain language as enabling legislation the claims that OTC's that NYC had illegally passed legislation".....(at this time, time is up)

Mark E. Maker, 522 Broadway, Saratoga Springs: "I happen to serve on the Saratoga County Tourism Advisory Board although I am not representing them in my opinion. I am also President of the Saratoga Springs City Center. I think the facts are fairly simple and I would ask for your support of this proposed legislation. Me, you, the community, and County are walking away from a source of funds that could clearly serve us all well in continued promotional marketing of our County and of our communities. I think there has been a great deal of misinformation, inaccurate information, shared by the opponents of this from threatened litigation to legal opinion regarding of how this will result in a loss of bookings. Clearly, and it is obvious to anyone who has been involved with our community, all involved, opponents and proponents, clearly state that tourism and hospitality is a huge part of our economy. This is a huge part of our year round offering along with our agricultural and industrial base. That said, third party marketers are not our primary marketing promotion agencies. Our primary marketing and promoting agencies happen to rest with the Saratoga County Tourism Advisory Board and administered through the Saratoga County Chamber of Commerce and to the Saratoga Tourism Bureau. These are the agencies that are continuing to market our community to year round guests, conventioners, attendees of special events, summer events or year round snowmobile events, emergency services events. That said, there is money on the table that I have not brought up but was shared with you earlier is \$45,000. Why would we walk away from the potential and legal collection of monies that will help promote one of our primary industries. I encourage you and ask you to support this legislation."

Todd Shimkus, Saratoga Chamber of Commerce: "Before I speak on this issue, a quick plug. Tuesday, August 28<sup>th</sup> at 8:00 at the Waterford Visitor's Center will be the premier of "On the Water" promotion of Saratoga County and I wanted to invite you. The fact is as a couple of speakers have mentioned, we have the honor of working with you, partnering with you, to

promote Saratoga County across the world. Mark just made the comment about the \$45,000 and I've seen other studies that have said it might be a little more money. But the fact is as you all know we need every penny in revenue that we can possibly get to help market Saratoga County. This past year because of the difficult budget situation the County was in, we have had some reductions in the amount of money that is appropriated for marketing. So if we can recoup so of that by creating a fair and equal remittance it makes sense. It would benefit all of us and we certainly support that. I would point out that Todd Garofano and I did a lot outreach. Did we talk to every hotel locally, probably not. But we talked to many of them - Locally owned, independently owned and the chains. Not a single one said to me or to Todd that they would oppose this. They all support it. Several offered, especially the independents, that the fees that they already pay to the OTC's are extraordinary and excessive in their minds. In fact they believe they pay more than the chain hotels because they buy in bulk as opposed to the independent. I spoke with one local travel agent from Clifton Park who also said there is no negative impact to his business here in Saratoga County to moving forward. I am not going to say that everybody is unanimous support, but at least the folks that we talked to support this. This really comes down to we are all battling at the local level, its retailers against internet shopping or local hoteliers against the online travel agencies, to figure out how we benefit local businesses. How do we help them to compete. This legislation that you are moving forward would help us to do that. It puts everybody on an equal playing field and we urge you to support it as the Chamber of Commerce.

Chairman Wood asked if any written communications were received. Being none, the public hearing adjourned at 4:58 p.m.

Respectfully submitted,

Pamela A. Hargrave, Clerk



August 15, 2012

**Law & Finance Committee Meeting: Board of Supervisors**  
County Complex, Bldg 1, 40 McMaster Street, Ballston Spa, NY  
Testimony – August 15, 2012 - 4:00pm - 4:30pm

**Re: Testimony on Proposed Amendments to Hotel Occupancy Tax Local Law**

Dear Members of the Committee:

Good afternoon everyone, I am Jan Marie Chesterton, President of the New York State Hospitality & Tourism Association. We are the state trade association representing the lodging industry in New York, and are partners with the American Hotel & Lodging Association serving hotels nationwide.

I would like to start by saying thank you to the Law & Finance Committee for the opportunity to comment on the equal remittance of occupancy tax regardless of the methods used to book hotel rooms.

By way of background, the New York State Hospitality & Tourism Association (NYSH&TA) is the oldest state hotel Association in the country—founded in Saratoga Springs in 1887. We have nearly 1,400 members, representing hotels, motels, B&B's and country Inns, as well as amusement parks and attractions. We currently represent 72% of the total lodging room inventory in the state.

Our industry reaches far beyond just providing our guests with comfortable rooms or convenient meeting spaces — we are interlinked with many other industries, such as retail, restaurants, agriculture, manufacturing, and recreations.

The hotel motel occupancy tax benefits the local community and the industry. The tax is used to bring more travelers and people to this destination. Once here, they eat in Saratoga County restaurants, shop in Saratoga County businesses, and generate positive economic growth, creating and sustaining Saratoga County jobs.

As a point of reference, there are three models for booking rooms. Direct Hotel Booking - Traditional Travel Agent Booking- Online Travel Company Booking.  
Only one of those models does not remit the full amount of the tax due - the online travel company.

As example of a Direct Hotel Booking, when a guest books a room directly through a hotel, the tax reflects the jurisdiction's rate where the hotel is located. For example, assume John Q. Public books a room in "Anytown", Saratoga County, online through a hotel's own website. The room rate is \$100 and Anytown, Saratoga County has a 10% occupancy tax on rooms, so the amount charged Mr. Public is \$110. If a traditional travel agent is involved, the hotel pays that agent out of the \$100 room rate. The hotel then remits the \$10 occupancy tax to Anytown.

With the Online Travel Company or OTCs Booking, if John Q. Public instead books the room through Expedia, Travelocity, Orbitz or the likes, he sees the same room rate of \$100 and is charged the same \$110. This amount covers the room charge plus the OTC's "taxes and fees."

However, instead of remitting \$10 in hotel taxes, the OTC chooses to calculate the occupancy tax based its wholesale cost (for this example, \$80 is what it pays the hotel) rather than the advertised rate it charged the customer. So, when a customer pays \$110 for the room through an OTC, the OTC remits \$80 to the hotel and keeping \$20 as per the contract, plus only \$8 for the occupancy taxes. The OTC retains the remaining \$2 from the transaction claiming it as a "fee."

The hotel provides to the taxing jurisdiction the taxes it received for the room. In the OTC example, the hotel passes through to the jurisdiction the \$8 provided by the OTC—as opposed to the \$10 the hotel would remit if the room was booked directly through its own website, or through a traditional travel agent commission model transaction.

The OTCs claim that the resulting difference between their tax calculations based on the wholesale cost and the final price charged (the \$2 difference in this example) is part of their "service fee." The OTC, not only here in Saratoga County but nationally, are opposing legislation to protect this controversial practice.

New York City and New York State, have clarified their laws to ensure that those written well before the creation of the Internet, cannot be used to cloud the issue of whether taxes should be paid equally by those engaging in identical transactions.

**FACT** -Online Travel Companies like Expedia, Orbitz, and Travelocity charge customers the same retail price or more for rooms as hotels charge.

**FACT** -On the twentieth of the month Saratoga County hotels pay their fair share of the hotel tax, based on the percentage established.

**FACT**-Hotels benefit local governments through the hotel tax. The intent of the tax is to provide marketing dollars for bringing more people to the area, further increasing local business.

**FACT** -This is not a new tax on anyone. The discussion is one of selective enforcement of current taxes.

**INDUSTRY BELIEVES:** Local hotels should not be discriminated against. Online Travel Companies should be required to remit taxes on their retail rates just as hotels have always done, rather than try to beat the system to create their own special loophole

**INDUSTRY BELIEVES:** This discussion is based on the equal remittance of local taxes collected.

**INDUSTRY BELIEVES:** There should not be two different tax treatments for identical transactions involving the same room and the same rental rate paid by the guest.

You may hear that it is not possible for the travel companies to calculate the different tax rates around the state, and in different counties. But that is already happening, since the tax is being paid on the wholesale rate.

We could fill this room many times over with New York hoteliers who are in support of the OTC's remitting the full amount of occupancy tax that they are collecting.

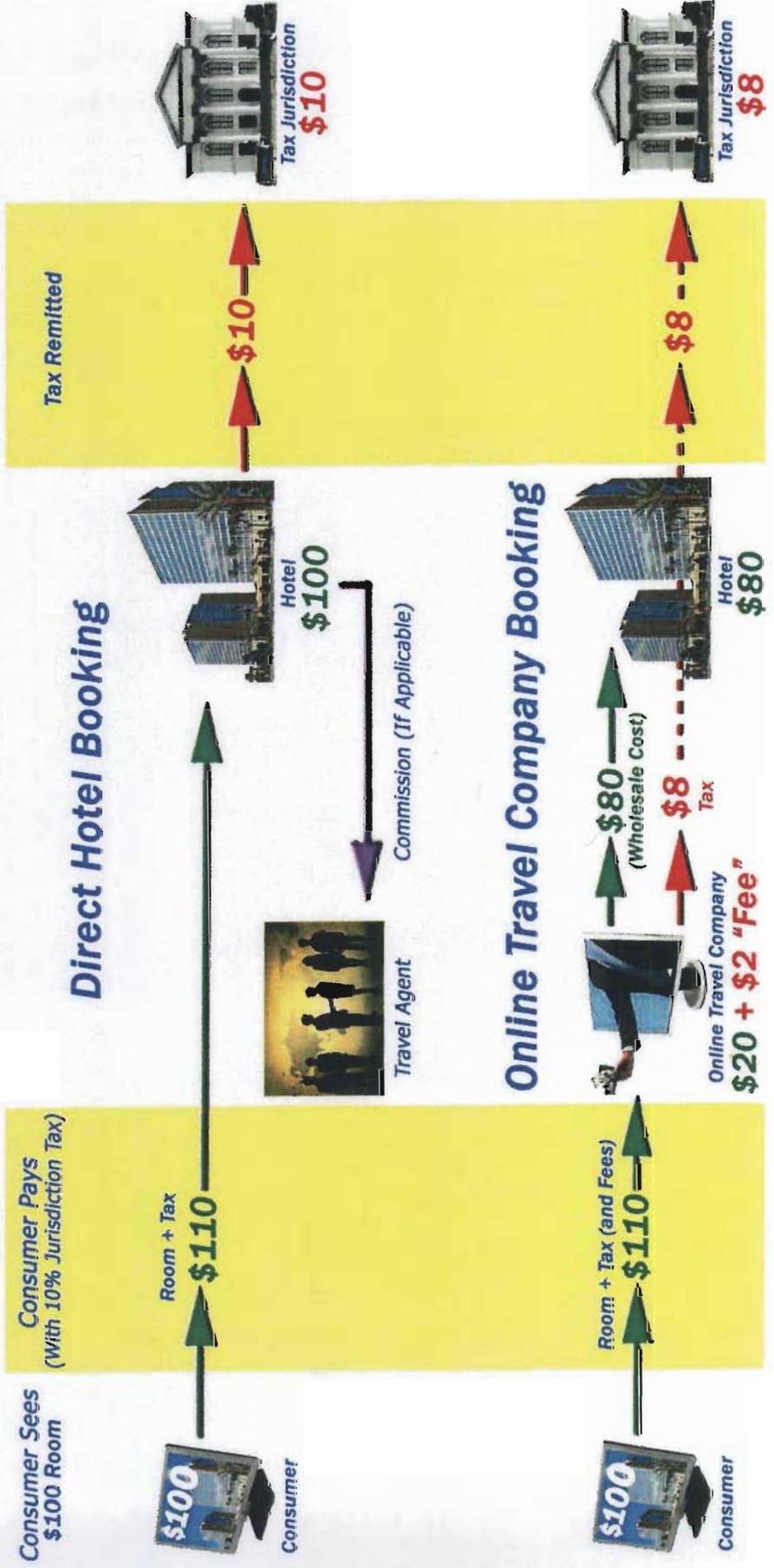
While we all support low taxes on travel and tourism, we also support equal tax treatment regardless of the channels used to book hotel rooms, as well as state and local autonomy over how those hotel room bookings are taxed.

Despite the aggressive pushback by the online travel companies to obtain a tax preference, we applaud Saratoga County for demanding that these companies remit taxes based on the retail price, just as the hotels have always done.

Thank you again for the opportunity to present on behalf of the statewide lodging industry.

Respectfully submitted,

Jan Marie Chesterton, President  
New York State Hospitality & Tourism Association



# Legislation & Litigation

# Legislation Requiring OTCs to Remit Tax

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- New York
  - Enforces sales tax on hotel rooms sold by OTCs
  - Requires dual-remittance, making OTCs report their own tax.
  - Effective 9/1/10.
- North Carolina (SB 897)
  - Requires OTCs to report the total room price to the hotel, and
  - Hotel remits the total tax on the sale price reported by the OTC.
  - Single remittance.
  - Effective 1/1/11.
- South Carolina
  - Requires OTCs charge tax on the total room price, and
  - Remit all tax directly to the DOR, and
  - Provide hotels a resale certificate (Effective 11/1/11)

## Legislation Requiring OTCs to Remit Tax

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- Minnesota –
  - Minn. Stat. § 297A.61 clarifies that an OTC is required to collect sales tax on services provided in connection with selling lodging located in the state.
- District of Columbia
  - An amendment passed at the end of 2010 requiring OTCs to pay hotel occupancy taxes on the full price of the room paid by consumers making reservations through the OTCs' websites.
  - Effective 4/8/11.
- San Francisco
  - Hotels must require OTCs to collect & remit tax on full amount paid by guests.
  - If OTCs fail to remit the full tax, the City will hold the hotels responsible.



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# Litigation

# Litigation

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- Many tax jurisdictions have sought clarification through litigation.
- Court decisions are mixed because outcome turns on a host of factors:
  - Judicial interpretation of applicable statutes and ordinances,
  - Whether the locality complied with mandatory administrative tax assessment procedures prior to bringing suit against the taxpayers, and
  - The degree of control the OTC exercises with respect to the room rentals.
- Statutes and ordinances are vague on the issue.
  - Expanding interpretation of existing statutes & ordinances to encompass a new way of doing business
  - Merchant model wasn't contemplated when the statutes & ordinances were originally drafted.

# Decisions in the Jurisdictions Favor

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- New York
  - State district judge rejected as “baseless” and contrary to the plain language of enabling legislation the claim by OTCs that NYC had illegally passed a law to require OTCs to collect hotel tax on the entire amount paid by consumers to occupy hotel rooms.
  - Requires the tax be **separately stated** on any bill, statement or charge for the room.  
*New York State Supreme Court, 10/22/10.*
- South Carolina
  - OTCs required to remit sales tax on the gross proceeds it received from providing hotel reservations in SC:
  - Engaged in the business of **furnishing accommodations**, and
  - Tax was constitutionally imposed since OTC used employees & representatives to enable the OTC to establish & maintain a market for selling rooms in the state. .  
*South Carolina State Supreme Court, January 18, 2011*
- Georgia
  - Found that OTCs had agreed to collect hotel taxes through their contracts with the hotels and **by virtue of these agreements were duty bound** to collect and remit hotel taxes to the appropriate government entity.  
*City of Columbus, GA (GA Supreme Court v. Expedia 6/15/09) & (GA Supreme Court v. Hotels.com 10/5/09)*

# Decisions in the Jurisdictions Favor

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## □ Georgia

- OTCs that book hotel rooms in Atlanta must pay the city more in occupancy taxes. However, the court held that the city does not have a remedy for recovering back taxes the companies have failed to pay. The ruling addresses a lawsuit filed by city in 2006 against 17 online companies, including Hotels.com, Expedia, Travelocity and Orbitz.

*GA Supreme Court, May 16, 2011.*

## □ Texas

- A jury entered a unanimous verdict that **OTCs control the rooms** they sell and that additional hotel taxes were due, finding in favor of over 170 Texas cities that have passed laws regarding hotel taxes with the same or similar language.

*In the matter of City of San Antonio v. Hotels.com, October 30, 2009*

# Decisions in the Jurisdictions Favor

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- ❑ Village of Rosemont, Illinois
  - Court ruled for the Village deciding that the OTCs had an obligation to collect and remit the village’s hotel tax.
  - “Because the customer cannot access his hotel room unless and until he pays the OTC’s entire charge, the OTCs are owners who receive ‘consideration for . . . rental[s],’ within the meaning of the Ordinance.”
  - In addition, the court held that the proper tax base was the full retail price charged by the OTCs “because the customer cannot occupy the hotel room unless he pays the additional [fees and markup charged by the OTCs].”
  - The court also rejected all of the federal and state constitutional challenges raised by the OTCs, including claims that
    1. OTCs did not have substantial nexus with the Village under the Commerce Clause, and
    2. The Internet Tax Freedom Act’s prohibition against discriminatory taxes would be violated if OTCs (following the merchant model) had to collect tax while travel agents who were (compensated through a commissionable travel agent model) were not.

*Village of Rosemont v. Priceline.com Inc.*, No. 1:09-cv-04438 (E.D. Ill., Oct. 14, 2011)



Testimony of Eben Peck,  
Vice President, Government Affairs, American Society of Travel Agents  
*before the*  
Saratoga County Board of Supervisors  
Wednesday, August 15, 2012

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Chairman Wood and members of the Board, thank you for the opportunity to provide our views on the County's proposed local law on hotel occupancy taxes.

You have heard today that the proposed occupancy tax law simply closes a "loophole" that allows big online travel agencies (OTAs) like Expedia and Orbitz to shortchange the County on occupancy tax and would have no impact on traditional "brick and mortar" travel agents. I want you to know that this is simply not the case. Here's why:

- **The bill's definition of a "room remarketer" clearly captures traditional travel agents and thus any fees agents charge their customers for hotel bookings (or a package with a hotel component) would be subject to the County's tax.** As the industry has evolved, travel agents are relying less on commissions from travel suppliers and more on service fees charged to customers. In fact, in 2010, 44 percent of agents nationwide charged a service fee (averaging \$22) for hotel bookings and 50 percent of agents charged a fee (averaging \$40) for an air, hotel and car package. These fees are charged for a service – saving consumers time and money by helping them navigate a marketplace that offers an overwhelming number of options and choices. And this income, subject today the both federal and state income taxes, would be taxed a third time under this bill. If this bill passes, agents will be forced to choose between passing the tax on to the customer, reducing their fee by a corresponding amount, or even urging the traveler to travel somewhere else.
- **The bill would require every travel agent who wants to book a hotel room for a customer in Saratoga County to register with the County Treasurer and be subject detailed accounting and recordkeeping measures for each and every transaction.** This paperwork burden would be substantial for our industry, the vast majority of whom are very small businesses. In New York state alone, 92 percent of travel agencies employ less than 10 people.

Contrary to the misimpression of the travel agent as a dying breed, travel agencies who have adapted to the internet era have not only survived but have thrived. Part and parcel of that evolution has been a shift in business model, from a commission-based model to one based on

fees. Like it or not, traditional travel agents do the things the big OTAs do and like it or not, they would be impacted by this bill.

This Board will have to ask itself whether it wants to voluntarily take a step that will make the County less competitive from a travel agent's perspective. If this bill goes through, agents may decide that booking rooms for their clients in Saratoga County is not worth the hassle when there are so many other locales where they don't have to deal with the administrative burdens and costs in this proposal.

While we are under no illusions about the budgetary challenges facing state and local governments across the country, including Saratoga County, we respectfully urge you to oppose this new tax on New York small businesses.

Thank you again for the opportunity to submit comments.

Eben Peck  
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Statement of Todd R. Geremia, Jones Day

Before The

Saratoga, NY Board of County Supervisors

Regarding

Hotel Occupancy Taxes

August 15, 2012

• 29 cases

• 22 won outright

• 4 of 7 others -  
no seek taxes;  
some under  
reconsideration  
or no judgment  
yet issued.

Members of the Board of Supervisors,

67 Penn. Ave., Crestwood, NY

I am Todd Geremia, a partner in the law firm Jones Day. I represented the online travel service provider Expedia, Inc. in litigation against the New York City Department of Finance that ~~Mr. Rubin mentioned in his remarks.~~

I thank you for the chance to speak with you today and would like to explain why, in our view, the New York City litigation shows that Saratoga County does not have the authority under the New York State Constitution to enact the proposed local law currently before the Board.

New York City enacted a Local Law in 2009 that, like the proposed Local Law before you now, attempted to impose a tax on the amounts charged by travel service providers for their online services under the guise of a legislative enactment that permitted



Permits  
allows

the City to impose a “hotel room occupancy tax.”

Expedia, along with other online travel service providers and the American Society of Travel Agents, commenced a lawsuit seeking a declaration that the City lacked the authority under the New York State Constitution to unilaterally impose such a tax without express authorization from the Legislature.

The Appellate Division, First Department, agreed with the travel intermediaries and held that the City did not have the authority to impose a tax on the service and booking fees earned by online travel services providers.

The pertinent legislation gave the City authority to impose a hotel room occupancy tax on the basis of the charge “for each hotel room.” A tax on fees for facilitating a reservation is not, however, a tax on the charge for the room. And, as the Appellate Division highlighted in its decision, there is a well-established principle in New York law that any doubts concerning the application of a statute that levies a tax must be construed in favor of the taxpayer, that is, *against* imposing the tax.

Delete

While the lawsuit against New York City was pending, the Legislature invoked its authority to directly amend the City’s code and expressly gave it authority to impose a tax on the basis of a room remarketer’s service fees. As the Appellate Division noted, the City required this type of *express action* by the Legislature before the City would have the authority to impose a tax on an online travel service providers’ fees.

an occupancy

authority

x

The Legislature has *not* given Saratoga County and Saratoga Springs analogous authority. Rather, as with New York City before the Legislature acted to revise the City’s code, Saratoga County

and Saratoga Springs have the authority to impose a hotel room occupancy tax only on the basis of the charge “for the hotel room.”

As the First Department held, that enabling legislation does not suffice to give a County or municipality authority to expand the hotel room occupancy tax to cover service and booking fees charged by online travel service providers.

That the proposed Local Law before this Board is similar to, and perhaps modeled on, New York City’s current Code as modified by the Legislature only underscores that Saratoga County and Saratoga Springs do not have the authority to impose a tax on travel intermediaries.

The Legislature has not acted to give Saratoga County and Saratoga Springs authority to impose such a tax. ~~Perhaps~~ this Board could petition the Legislature to give Saratoga County and Saratoga Springs such authority, but in the absence of such legislative action the litigation against New York City pretty clearly establishes that Saratoga County and Saratoga Springs do not have the authority under the New York State Constitution to act unilaterally to impose such a tax.

We therefore urge the Members of this Board not to accept this proposal. It is in everybody’s interest not to have to expend ~~the~~ considerable resources to litigate this issue, especially in light of the relatively small amount of revenue that this proposal would bring to the County. If this proposal were enacted and litigation were necessary, however, I believe that the precedent in the lawsuit against New York City shows that courts would quite likely rule that Saratoga County and Saratoga Springs do not—absent express action by the Legislature—have the authority to tax

Thank you, and I look forward to responding to any questions that the Board of Supervisors may have.