New York State Department of Taxation and Finance
Office of Counsel

TSB-A-15(43)S
Sales Tax
November 13, 2015

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S131022A

The Department of Taxation and Finance received Petitions for Advisory Opinions from [redacted] (Petitioner 1) and [redacted] (Petitioner 2). Petitioners ask whether they qualify as room remarketers for sales tax purposes.

We conclude that Petitioners are not required to collect State and local sales and use taxes because the Petitioners do not meet the definition of "hotel operator" or "room remarketer" under the New York Tax Law.

Facts

Petitioners 1 and 2 are both located outside of the United States and run similar services of booking hotel rooms for travelers, including many rooms in New York State. Neither Petitioner operates or maintains an inventory of rooms on its own behalf. Similarly, Petitioners do not directly purchase hotel rooms in New York State for resale. However, Petitioners' employees meet with employees of larger hotels at their locations within New York State.

Through its website, Petitioner 1 facilitates the online purchase and reservation of hotel rooms by third party customers (travelers). Petitioner 1 enters into a standard license agreement with hotel operators to provide information technology and advertising services, including listing rooms on its website. Occasionally, Petitioner 1 licenses property management software, only available electronically, to the hotel operators free of charge. At the time of booking, Petitioner 1 collects a non-refundable deposit at a fixed percentage of the reservation, typically 10% of the total value of the online reservation. This reservation deposit is retained by Petitioner 1 as a charge for IT and advertising services. Prior to December 2013, when reservations were booked through its website, Petitioner 1 also collected a flat, non-refundable reservation fee, usually in the amount of $2 per reservation. Alternatively, the traveler could purchase a "gold card" for $10, which would cover all of the reservation fees within a 12-month period. The traveler also had the option of paying a cancellation protection fee. In the event that a traveler who purchased this fee cancelled a reservation, the traveler could apply his or her deposit to a future booking.

Beginning in December 2013, Petitioner 1 ceased charging the $2 reservation fee and no longer offered the gold card for sale. The cancellation protection fee was also replaced with two types of bookings – non-flexible and standard flexible. If a traveler cancels a non-flexible

booking, his or her deposit is forfeited. If a traveler cancels a standard flexible booking, the deposit may be credited toward another booking within 6 months after cancellation.

Petitioner 2 enters into contracts with hotel operators to act as a booking agent. The hotel operators determine the price of the rooms and Petitioner 2 markets the rooms on its website and allows travelers to make reservations there. At the time of the booking, Petitioner 2 collects from the traveler a non-refundable deposit at a fixed percentage of the total value of the reservation, typically set at 10%. The deposit is retained by Petitioner 2 as its charge for the services it provides to the hotel room operators. The traveler also has the option of paying a payment protection fee, which is either a fixed amount or a percentage of the deposit. In the event the traveler who pays this fee cancels a reservation, the deposit is refunded in the form it was originally made (e.g., credit card).

Neither Petitioner determines the cost of the hotel reservations; these are set by the hotel operators. All other costs associated with the traveler's stay are paid directly to the hotel operators. After collecting the deposit, Petitioners have no further obligation with respect to the traveler and cancelations must be made by contacting the hotel operator directly.

Analysis

With certain exceptions not relevant here, Tax Law § 1105(e)(1) imposes sales tax on "the rent for every occupancy of a room or rooms in a hotel in this state." In addition, occupancy of a unit within a hotel located in New York City is subject to a fee of $1.50 per day, unless the occupant is a permanent resident or the rent is less than $2.00 per day. *See* Tax Law § 1104. A "unit" is a room or a suite of rooms that is normally rented to the same occupant(s) at the same time and billed as a single unit. *See* TSB-M-05(2)S.

"Persons required to collect tax" include "every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel." Tax Law § 1131(1). An "operator" of a hotel is "[a]ny person operating a hotel" and includes "a room remarketer and such room remarketer shall be deemed to operate a hotel or portion thereof, with respect to which such person has the rights of a room remarketer." Tax Law § 1101(c)(3).

Tax Law § 1101(c)(8) defines a "room remarketer" as "[a] person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by the room remarketer, directly or indirectly, whether pursuant to a written or other agreement. Such person's ability or authority to reserve, arrange for, convey, or furnish occupancy, directly or indirectly, and to determine rent therefor, shall be the "rights of a room remarketer."

"Businesses, such as travel agencies, that reserve rooms on behalf of their customers and do not have the right to determine the amount of rent that their customer pays for the room (i.e., the rent is fixed and determined by the hotel, and is not allowed to be marked-up by the business that reserves the room on behalf of its customer), are not room remarketers . . . ." TSB-M-10(10)S

Petitioners charge the hotels a fee for their booking services and the full charge for the occupancy of a room is determined by and paid to the hotel operator. Petitioners do not have the right to determine the rent for occupancy, either directly or indirectly. The fact that Petitioners set the amount of the deposit and Petitioner 1 sets the amount of the reservation fee does not constitute determining rent for the purposes of the room remarketer definition. *See* TSB-A-04(6)S. Accordingly, Petitioners are not room remarketers under the Tax Law. Neither are Petitioners hotel operators, because they are not operating a building or portion thereof for the lodging of guests. Therefore, Petitioners are not required to collect the sales tax imposed by § 1105(e), or the unit fee for hotel occupancy within New York City.

Under these circumstances, the hotel operator and the occupant remain jointly liable for the sales tax on the full amount of rent for any occupancies in New York State that are arranged through Petitioners, and on the unit fee, if the occupancy is within New York City, unless some exemption applies. *See* Tax Law §§ 1104, 1105(e).

Finally, we note that this opinion does not address Petitioners' liability under any locally imposed and administered hotel occupancy tax.

/S/
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DATE: November 13, 2015

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.