

# PUBLICATION

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## **SPOTLIGHT ON GEORGIA: Expedia Ordered to Collect and Remit Hotel Occupancy Taxes on the Full Amount Charged to Customers for Hotel Rooms**

**September 25, 2008**

This week the Superior Court of Muscogee County, Georgia, released Columbus, *Georgia v. Expedia, Inc.*, which is a case of significant importance to on-line travel companies (OTCs) and hotel operators regarding the collection and remittance of hotel occupancy taxes. As in other cases filed by various cities, counties and other local jurisdictions around the country, this Georgia case arises from a dispute over Expedia's calculation of hotel occupancy taxes. Expedia computed and collected the hotel occupancy tax on the wholesale rate paid to the hotel for the room. The City of Columbus asserted that the appropriate taxable base is the marked-up rate charged to the consumer. The Superior Court resolved the dispute in favor of the City and ordered Expedia to collect and remit hotel occupancy taxes to the City based on the room rate charged to consumers instead of the wholesale rate paid to the hotel.

By way of background, Georgia statutes permit a municipality to impose a hotel occupancy tax on both the hotel operator and the guest. When that guest books a room through traditional travel agent channels, the guest pays the hotel both a commissionable rate that includes the commission the hotel will pay to the travel agent and a separate charge for the occupancy taxes. The hotel calculates the occupancy taxes on the gross, commissionable room rate and remits the tax collected from the guest to the municipality. In contrast, Expedia utilized a popular business practice known as the "merchant" sales model. In this sales model, the hotel agrees to sell rooms to Expedia at a wholesale, or net, noncommissionable rate. Expedia marks up the room rate to cover taxes and its spread, rents the room directly to a consumer and collects the full price from the consumer, and remits the net room rate and taxes on that net amount to the hotel. The hotel then pays the occupancy tax.

In this recently released decision, the Superior Court first addressed Expedia's threshold argument that it is not subject to the hotel occupancy tax statute because it does not sell hotel rooms or furnish hotel rooms for value. The Court ruled that Expedia "stepped into the shoes of the hotels as the collecting agent for hotel occupancy taxes," finding that Expedia contractually assumed responsibility for collecting all applicable taxes in its contracts with the hotels, charged its customers for taxes and service fees, and forwarded funds to the hotels for payments of hotel occupancy taxes. As a result, the Court determined that Expedia was legally required to collect and remit the Columbus hotel occupancy tax as a collection agent for the tax imposed on guests.

The Court then turned to Expedia's argument that the hotel occupancy taxes are based on the wholesale rate it pays to the hotel, not the rate that Expedia charges its customers for renting the rooms. The Court held that the plain meaning of both Columbus ordinance imposing a hotel occupancy tax on the "charge to the public" for accommodations and the Georgia statute authorizing Columbus to impose a hotel occupancy tax on "lodging charges actually collected" is the amount a guest pays for a room. The Court rejected Expedia's claim that its mark-up or facilitation fee included in the rate charged to consumers could not be taxed because, if such fee was for a separate service as alleged by Expedia, such fee was not separately stated and was included in the cost quoted to a guest for renting a room.

In a separate Order, the Court denied Expedia's Motion for Summary Judgment which alleged that the City failed to exhaust administrative remedies before bringing this lawsuit. The Court found both that the City of Columbus complied with an assessment process in a timely manner, and, separately, even if it had not, such process in this case would be futile because the issues were narrowed and the parties' positions hardened.

That finding distinguished a recent Georgia Court of Appeals decision, *City of Atlanta v. Hotels.com, L.P.*, which is currently on appeal to the Georgia Supreme Court and which held that Georgia courts do not have subject matter jurisdiction over a suit by a governmental agency that fails to estimate and assess the tax liability being sought by the governmental agency before filing suit unless such process would be futile.

Cities, counties and other local jurisdictions, nationally, have been keen to tax the full, marked-up rates of the OTCs in the same way that they have taxed the full commissionable rates of hotel rooms rented through the traditional travel agent channel. The City of Columbus has prevailed, for now, in this Georgia skirmish in a serious setback for OTCs. We expect this case will move to the appellate level. In the meantime, hotel operators and OTCs doing business in Georgia should ensure they are prepared with appropriate contractual language and accounting processes should the Superior Court's holding be affirmed.