

SENATE OF VIRGINIA



MARY MARGARET WHIPPLE
31ST SENATORIAL DISTRICT
ALL OF THE CITY OF FALLS CHURCH, AND
PART OF ARLINGTON AND FAIRFAX COUNTIES
3556 NORTH VALLEY STREET
ARLINGTON, VIRGINIA 22207

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October 1, 2010

Mr. Mark Haskins
Director of Policy Development
Virginia Department of Taxation
600 East Main Street
Richmond, Virginia 23219

Dear Mark,

Thank you for the opportunity to comment on the study of SB 452. I appreciate all the work that has gone into the report, but do have some additional comments. Please acknowledge and include the following points in the final draft.

1. As you may recall, I have been concerned about the consumer receiving adequate information. However, the Department's draft lacks any discussion of truth-in-selling or truth-in-advertising laws. On-line travel intermediaries generally bundle together their mark-up fees and government taxes on customer statements. The customer purchasing a room on-line is not provided a separate line item stating the amount taxes imposed on his purchase. Thus, the customer cannot determine the amount of taxes actually paid on the transaction. In addition to depriving consumers of information, the lack of this tax information makes a tax audit or verification effort impossible. The report should analyze the applicability of truth-in-selling and truth-in-advertising laws to the bundling of service charges and taxes. (See attached OTC computer receipts for Virginia hotel bookings.)
2. The nexus issue is particularly important and should take prior litigation and court decisions into account. On page 21 of the draft, the Department notes that "[w]hile the nexus argument has yet to reach the courts, the issue has surfaced as part of the debate as to the taxability of online intermediary fees." In fact, the nexus issue has been ruled on in several cases. In Expedia, Inc. v. City of Columbus, 285 Ga. 684 (2009), the Supreme Court of Georgia did undertake a constitutional nexus analysis. The court noted that Expedia provided in its contracts with hotels that Expedia would collect all applicable taxes from its customers. The court held that the City of Columbus was not imposing a tax on Expedia. Rather, Expedia by its contracts with Columbus hotels to collect all applicable taxes made itself accountable to the City for the collection and remission of taxes.

The City has not imposed and does not purport to impose any tax on Expedia. Expedia, of its own accord, has contracted with hotels to collect taxes belonging to the City and, having done so, it has rendered itself accountable to the City's tax authorities for remission of taxes it has actually collected. Thus, Quill Corp. v.

North Dakota, 504 U. S. 298 (112 SC 1904, 119 LE2d 91) (1992) is distinguishable because, in that case, the state was seeking to force the out-of-state retailer, which had never collected the state's taxes, to collect and remit state use taxes as a matter of law. In the case sub judice, but for the fact that Expedia has willingly inserted itself as a matter of contract into the local taxation scheme designed for hotels and their guests, there would be no dispute. Accordingly, the trial court did not err when it rejected Expedia's constitutional claims.

It would appear that the holding in this case is particularly relevant to any discussion of constitutional nexus and should be included in detail in the final report.

There is also an extensive legal discussion of the nexus issue in the holding in the case of Travelscope LLC v. S. Carolina Dept. of Revenue. The nexus issue was also ruled on in City of San Antonio v. Hotels.com (2007). I would appreciate your review of these decisions.

3. On page 23 of the draft there is a discussion of whether on-line travel intermediaries are performing a service that is independent of the sale of the hotel room. The Department notes on page 24 that including services in the sales tax base would not be a departure from current Virginia sales tax policy. More emphasis might be given to the fact that any good purchased by a consumer has some service element built into the price of the good. For example, a person purchasing a pre-assembled lawn mower is also paying for the cost of assembly in the final purchase price. It is a slippery slope to argue that Virginia does not impose a sales tax on accompanying services. If this were true, in the lawn mower example the consumer would be allowed a deduction for the cost of assembly of the lawn mower. No such deduction is currently allowed under Virginia's sales tax laws.
4. Arguments have been made that SB 452 imposes a "new tax" on online travel intermediaries. On October 24, 2006, the Department of Taxation issued a ruling (Public Document 06-139) concluding that Virginia's sales tax laws only apply to the sale or charge for rooms or accommodation made by hotels, motels, inns, tourist camps, tourist cabins, camping grounds, clubs, or other similar places. In other words, Virginia's sales tax laws do not reach sales or charges for rooms or accommodations made by on-line travel companies. The Department relied upon the following language in Code of Virginia § 58.1-602:

The terms "retail sale" and a "sale at retail" shall specifically include the . . . sale or charges for any room or rooms, lodgings, or accommodations **furnished** to transients for less than 90 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration . . . (emphasis added).

However, it seems to me that this language does no more than set forth a laundry list of rooms or places the rental of which will trigger the imposition of sales tax. Thus, rooms, lodgings, or accommodations that are **furnished** by hotels, motels, etc. will be subject to

sales tax upon the rental of the same. The language does not distinguish between sales made by a hotel directly or made by an on-line travel intermediary for purposes of sales tax liability. Sales of lodging made by a hotel business directly or made by an on-line travel company both trigger sales tax liability, the only requirement being that the room, lodging, or accommodation be **furnished** by a hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients.

Virginia's sales tax has always reached on-line intermediaries selling lodging on behalf of hotel businesses. Unfortunately, what appears to be an incorrect analysis in Public Document 06-139 can be used by some to argue that SB 452 for the first time is attempting to make on-line intermediaries subject to Virginia's sales tax.

Although the Department's 2006 Opinion regarding OTCs liability for sales tax is cited on page 5 of the Study, it is not adequately described. The Opinion is based on a TAX Administrative Regulation, not on the statutory language of the Virginia Code. The Opinion did not examine the actual wording of Va. Code §58.1-612 defining "dealer" for sales and use tax purposes.

5. As to the fiscal impact analysis (page 30), it would be useful to know the source and year for the claim that only 10.3% of hotel room bookings in Virginia are via OTCs. The footnote for the OTC mark up of 25-40% is to a 2005 State Tax Notes article which means the figure is from an even earlier period. It should be updated or confirmed. If the 10.3% figure is also from 2005 or earlier, it too needs to be updated. It would be useful to list tax recoveries in recent litigation detailing the number of years and tax rates applicable. At least the basis for the New York and North Carolina fiscal impact statements should be examined and compared to Virginia tax rates and revenues.
6. It does seem to me that the litigation discussion on pages 10-14 should include the cases that have been decided or settled in favor of localities, states and consumers. For example, the San Antonio case resulted in a federal jury verdict of \$20.4 million to Texas cities; the Travelscope case resulted in a \$6.4 million recovery for the state; and City of San Diego v. Hotel.com ended in a judgment of \$21.1 million to the city.

Again, I want to thank the Department of Taxation for all the hard work and attention given to this topic. I ask that my letter be included as an appendix to the final report.

Sincerely,



Mary Margaret Whipple
District 31
Senate of Virginia

Attachment

4/12/2010

Print

From: donotreply@hotels.com (donotreply@hotels.com)
To: [REDACTED]
Date: Fri, February 15, 2008 12:39:50 PM
Cc:
Subject: Hotel booking confirmation

Hotels.com
 Receipt

YOUR RESERVATION HAS BEEN BOOKED!

Tazewell Hotel & Suites

1-757-623-6200
 245 Granby St
 Norfolk, VA 23510

Guest Rating

3.8

39 Reviews

Check-In: **Mon, Feb 25, 2008** | Check-Out: **Wed, Feb 27, 2008**

Guest: [REDACTED]
 Hotels.com Booking Number: **052959559**

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Condition	1	2	3	4	5
Comfort	1	2	3	4	5
Cleanliness	1	2	3	4	5
Convenience	1	2	3	4	5
Neighborhood	1	2	3	4	5
Price	1	2	3	4	5
Value	1	2	3	4	5
Overall Satisfaction	1	2	3	4	5
Would you recommend?	Yes		No		

Save Up to \$30!

YOUR RECEIPT

Tazewell Hotel & Suites

245 Granby St
 Norfolk, VA 23510
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4/12/2010

Priceline.com - hotel, hotel reservation,...

Total Charges*:

\$64.29

*Prices are in US dollars.

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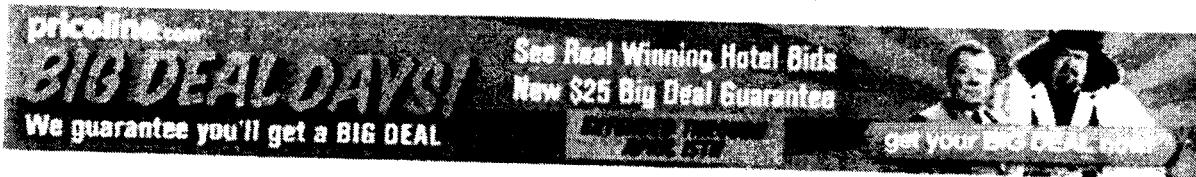
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Remember, your Priceline hotel reservation is non-refundable, non-transferable and non-changeable. If you have any questions or require further assistance, please visit our [Customer Service](#) area. You may also contact our Customer Service Department toll-free at 1-800-657-9168. Please have your priceline Request Number (683-199-881-01) and the phone number you used when you placed your request (703-915-7212) ready when you call.

All rooms will **accommodate 2 adults**. Bed type requests (King, Queen, 2 Doubles, etc.) or other special needs such as a non-smoking or smoking room should be requested through your confirmed hotel, can not be guaranteed and are based on availability.

Reservation is guaranteed for arrival on the confirmed check-in date only. If you do not check-in on the first day of your reservation and you do not alert the hotel in advance, the remaining portion of your reservation will be canceled and you will not be entitled to a refund.

When you check-in, please present the confirmation number(s) printed above (one for each room) and your photo ID at the Front Desk. In addition, the hotel will require a major credit card to guarantee incidental charges (phone calls, room service, parking, resort fees, energy charges, etc.) that you may incur while staying at the hotel. Should you have a special request, please contact your hotel directly at the number listed above to coordinate your arrangements.



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4/12/2010

Check-In: **Mon, Feb 25, 2008**
(check-in time: 3:00 PM)
Check-Out: **Wed, Feb 27, 2008**
(check-out time: 12:00 PM)

Print
1 Adults, 0 Children
Standard King


Rates per Room

(excluding tax recovery charges and our service fees)

Mon, Feb 25, 2008 — ~~\$ 92.00~~ \$ 82.80
Tue, Feb 26, 2008 — ~~\$ 92.00~~ \$ 82.80

Extra Person Fees \$ 0.00

 **Tax Recovery Charges & Service Fees** \$ 28.24

Total Charges \$ **193.84**

(includes tax recovery charges and our service fees.)

Payment Information

Payment Method: **Credit Card**
Card Number: ~~XXXXXXXXXXXX1234~~
Amount Charged: **\$ 193.84**
Balance Due: **\$ 0.00**
All Prices in USD.

Cancellation Policy

We understand that sometimes plans fall through. We do not charge a change or cancel fee. However, this property (Tazewell Hotel & Suites) imposes the following penalty to its customers that we are required to pass on: Cancellations or changes made after 12:00 AM (Eastern Standard Time (US & Canada)) on 02/24/2008 are subject to a 1 Night Room & Tax penalty. The property makes no refunds for no shows or early checkouts.

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Priceline.com Receipt

See your complete hotel itinerary for your trip below. Be sure to print out a copy of this page for your records and have it with you at check-in. If you have any questions, please visit our Customer Service Area.

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Doubletree Hotel Richmond Downtown ★ ★ ★ ½

Downtown Richmond
301 West Franklin Street
Richmond, Virginia 23220
804-644-9871

[See Hotel Website](#)
[View Map and Directions](#)

Check-In Date:
Sun, Feb 28, 2010 / After 03:00 PM

Check-Out Date:
Mon, Mar 1, 2010 / 12:00 PM

Amenities:

Reservation and Billing Information

Reservation Information

Reservation Name: [REDACTED]
Hotel Confirmation Number: 87332205
Hotel Request Number: 683-199-881-01

Payment Information

Billing Name: [REDACTED]
Payment Method: MasterCard ending in [REDACTED]

Your Offer Price Per Room, Per Night: \$50.00
Subtotal: \$50.00
Taxes & Fees: \$14.29

