Internet Tax Freedom Act and North Carolina's Amended Tax Code

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Contents

Ⅰ. Introduction

In recent years there have been many lawsuits filed in the United States of America between online travel companies(OTCs) and local governments across several states. These cities and counties have attempted to collect taxes on the amount made by OTCs who resell hotel rooms. The city of San Antonio among others has made progress in their fight to receive taxes from online travel companies.[1] Some have not.[2] Still other municipalities

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1) *In City of San Antonio v. Hotels.com*, No. SA-06-CA-381-OG, 2007 U.S. Dist. LEXIS 39757 (W.D. Tex. Mar. 16, 2007), a class-action law suit in federal court in San Antonio; the jury awarded the plaintiffs $20million. Massey, Michelle, "Houston Loses Tax Suit Against Online Travel Companies", *The Southeast Texas Record* (March 1, 2010) (available at http://www.setexasrecord.com/news/225069-houston-loses-tax-suit-against-online-travel-companies).

2) A lawsuit against online travel companies in Houston was dismissed by Judge

have decided that suing for these taxes would prove more detrimental to their tourist industry when weighed against any possible gain from taxes.[3] San Francisco was one city that attempted to sue for taxes. The OTCs that previous provided service within San Francisco halted their enterprises there. San Francisco subsequently dropped its lawsuit in response. It is not surprising that local governments are looking for different ways to raise revenue, considering the current state of the American economy. Most states have had their cases dismissed because the language of their tax codes did not allow them to collect from OTCs. The judges in these cases have found that OTCs are not hotel managers. In the cases that have been successful to this point in the litigation process, are prevailing because the statutes allow taxation on the amount paid for rooms, not on the entity renting the room. Two counties in North Carolina tried and failed to collect taxes because OTCs did not fit the definition of a hotel operator in their previous tax code.[4] As a result, the North Carolina legislature voted to amend their tax code in 2010, which went into effect in 2011.

Brent Gamble of Harris County Civil District court. Flood, Mary, "Judge Tosses Houston's Lawsuit over Hotel Tax," *Houston Chronicle*(Jan. 23, 2010) (available at http://www.chron.com/disp/story.mpl/business/6832203.html).

3) Clark County, where Las Vegas is located, decided not to sue online travel companies for taxes against the commissioner's request to do so. Wyland, Scott, "County Won't Sue Online Firms to Get Room Taxes," *Las Vegas Review-Journal*, (Nov. 18, 2009) (available at http://www.lvrj.com/news/county-wont-sue-online-firms-to-get-room-taxes-70353967.html).

4) In *Pitt County v. Hotels. com L.P.*, the court held that the defendant OTCs were not hotel operators under Pitt County's Room Occupancy Tax Ordnance. No. 4:06 CV-30-BO (E.D.N.C. Aug. 12, 2007). In *Wake County v. Hotels. com, LP*, the court dismissed some of the Plaintiffs' counts against the defendants, but the case is still ongoing. No. 06 CVS 16256, 2007 WL 4125456 (N.C.Super).

This paper examines some of the lawsuits against OTCs and the effect of the amendment to North Carolina's General Statute known as "Modernize Sales Tax on Accommodations."[5] The North Carolina legislature passed this amendment in order to renovate their tax structure for an internet age.[6] This new statute clearly made OTCs responsible for taxes on rooms rented by OTCs, creating a new class of taxpayer known as "facilitators".[7] A facilitator is "a person who is not a rental agent and who contracts with a provider of an accommodation to market the accommodation and to accept payment from the consumer for the accommodation."[8] Before January 1, 2011, only operators of hotels, motels and other such establishments were considered retailers under North Carolina law. Hoteliers were taxed on the gross receipts received from the rental of accommodations to transients.[9] The new law required facilitators to report the sales price paid by a consumer and, once the rental transaction was completed, the retailer must notify the facilitator.[10] The facilitator is then required to send the taxes owed by the facilitator to the retailer within three business days.[11] The North Carolina Department of Revenue also published a notice stating how the amendment would operate once in effect on January 1, 2011 so that the entities affected (OTCs) would be aware of what North Carolina expected of them.[12] North

5) Section 31.6 of N.C. Sess. Law 2010-31 (S.B. 897).

6) Sales and Use Tax Division, North Carolina Department of Revenue, "Important Notice: Tax on Accommodations," (Dec. 2010), 1 (available at http://www.dornc.com/taxes/sales/impnotice1210.pdf).

7) N.C. Gen. Stat. Section 105-164.4(a) (3).

8) *Id.*

9) N.C. Gen. Stat. Section 105-164.4(a) (3) (repealed Jan. 1, 2011).

10) N.C. Gen. Stat. Section 105-164.4(a) (3).

11) *Id.*

12) Sales and Use Tax Division, North Carolina Department of Revenue, "Important

Carolina made sure that OTCs understood clearly that the new tax law was directed at them.

Ⅱ. Overview of Lawsuits against OTCs

Following is a discussion of some prominent cases where state and local governments were unable to collect taxes from OTCs.

1. Cases Where Local Governments were Unsuccessful

Before North Carolina amended its tax law in 2011, Wake County and Pitt County, North Carolina local governments, made two attempts at collecting taxes from OTCs. In *Wake County v. Hotels.com, LP*, the court decided that it would not follow the decision in Pitt and would entertain the argument that even though OTCs were not operators of hotels, they were collecting money that was subject to taxation.[13] The court denied the OTCs' motion to dismiss the claim based on whether they were collecting taxes, but granted the OTCs' motion to dismiss Cumberland County's Complaint, who was a party to this case, because Cumberland County had not exhausted all of its available administrative remedies.[14] This decision was not a clear loss for North Carolina. It is possible that the court would have found in favor of the state on the issue that the money collected by OTCs was taxable. However, prior to the court rendering their final decision, a second case

Notice: Tax on Accommodations."

13) 2007 WL 4125456 (N.C.Super.), at *2.

14) *Id.* at *3.

was brought in Pitt County that complicated matters.

In 2009, the court in *Pitt County v. Hotels.com, L.P., etal.* denied Pitt County's appeal arising from a decision dismissing Pitt County's punitive class action suit brought against OTCs in order to collect taxes on their reselling fees.[15] The circuit court disagreed with the district court's determination that it lacked subject matter jurisdiction to hear Pitt County's claim, but affirmed the dismissal of the claim because it failed to state a claim on which relief could be granted.[16] They agreed with the district court's finding that OTCs are not "retailers" within the meaning of the statutory definition because they are not businesses that are "of a type similar to a hotel, motel, tourist home, or tourist camp".[17] OTCs are a service provider. The service they provide are finding available hotel rooms and providing them to customers at a wholesale price. Because they did not fall under the definition of a "retailer" under North Carolina's statute, the North Carolina legislature amended their tax code to create a new class, "facilitators," so that OTC services could be taxed by the state.

In the Sixth Circuit Court of Appeals, the court found that OTCs did not fall within the definition of the local tax statute.[18] In *Louisville/Jefferson County Metro Government v. Hotels. com, L.P.*, like *Pitt*, the local government lost be cause the court found that OTCs did not fit the definition of a taxpayer under the existing tax statute. OTCs were not like "motor courts, hotels, motels or inns."[19] They provided a service related to rental, but they did

15) 553 F.3d 308 (4th Cir. N.C. 2009).

16) *Id.* at 315.

17) *Id.* at 310.

18) *Louisville/Jefferson County Metro Government v. Hotels. com, L.P.*, 590 F.3d 381, 61 A.L.R.6th 727 (6th Cir. Ky. 2009).

19) *Id.* at 383.

not rent property. The court refused to read into the Louisville and Jefferson county ordinances that OTCs fell into the "like or similar accommodations businesses" category.[20] OTCs were too different from hotels, motels and inns to fall into the catch-all phrase. OTCs were not similar to those rental businesses.

The OTCs tried to strengthen their argument that they do not fall under the ordinance's definition by pointing out that "in 2009 the Kentucky General Assembly rejected a proposed bill that would have extended the category of entities subject to the transient room tax to include 'other entities that may broker or facilitate the transaction.'"[21] The court did not find this argument persuasive. They pointed out that the legislative action did not help in defining the exact meaning of the ordinance, but ended by saying that "more likely, though, is the legislature's recognition that the express language of the statute as it is written does not reach the OTCs."[22] The court decided that OTCs were not similar enough to "motor courts, motels, hotels, and inns," so they could not be taxed under the ordinance.[23] The court agreed with the finding of the court in *Expedia, Inc. v. City of Columbus*,[24] but realized that the language in the Kentucky cities' ordinances did not allow for the same conclusion as found by the Georgia court.[25] The local governments lost. The court found they could not collect taxes from OTCs under the ordinance.

The wording of the tax ordinances remained a problem for Kentucky cities

20) *Id.* at 385.

21) *Id.* at 386 *quoting* H.B. 482, 2009 Gen. Assem., Reg. Sess. (Ky.2009).

22) *Id.*

23) *Id.* at 388.

24) 285 Ga. 684, 681 S.E.2d 122 (2009).

25) *Louisville/Jefferson County v. Hotels.com, L.P.* at 389.

when the City of Bowling Green attempted to sue for taxes in 2011. The Court of Appeals of Kentucky again found that OTCs were not responsible for taxes under the local ordinance of the City of Bowling Green.[26] The OTCs won because, under the law, they were not physically within the state and were not present in the state where the lodgings were provided.[27] There was a strict reading of the local laws and the city trying to collect taxes from OTCs lost.

In Texas the local governments have also not been successful against OTCs. The City of Anaheim attempted to collect taxes from OTCs and, in response the OTCs sought mandamus and declaratory relief against the city before actually paying taxes that the city demanded.[28] The court found that OTCs did not have to pay taxes before they could ask for such relief.[29] The City of Anaheim decided in 2007 that OTCs should be responsible for taxes on the total amount collected from transients, rather than the amount that OTCs paid hotels.[30] In 2009, Expedia filed a petition for a writ of mandate and complaint for declaratory relief, but the city said Expedia and the other OTCs involved must pay first.[31] The court agreed with the OTCs. OTCs did not have to pay first in order for their motions to be considered.[32] The case was handed back down to the lower courts to decide the matter based on the appellate court's decision.

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26) *City of Bowling Green v. Hotels.com, LP*, …S.W.3d…, 2011 WL 1600505 (Ky.App.).

27) *Id.* at *2.

28) *City of Anaheim v. Superior Court of Los Angeles County*, 179 Cal.App.4th 825, 102 Cal.Rptr.3d 171 (2009).

29) *Id.*

30) *Id.* at 829, 174.

31) *Id.* at 829–830, 174–175.

32) *Id.* at 832, 177.

Often OTCs have been victorious in the taxation fight between OTCs and local governments. The decision seems to come down the fact that OTCs are not rental agents and should not have to pay taxes under rental taxation statutes. Also, OTCs have been told they can seek declaratory relief on whether they owe taxes after a state tries to collect taxes. The courts have consistently looked at the local statutes to see if OTCs fit into the definition of the entry that is taxed. When the taxation is on rental agents, OTCs cannot be taxed. But where the transaction itself is taxed, that's a different story.

2. Cases Where Local Governments were Successful

Cities were successful against the OTCs when the courts found that OTCs were taxable under the language of the cities' tax ordinances. In the *City of Charleston v. Hotels.com, LP*, a neighboring South Carolina court denied the defendants' motion to dismiss all claims by the plaintiffs. South Carolina's statute stated: "Local accommodations tax" means a tax on the gross proceeds derived from the rental or charges for accommodations furnished to transient s…and *which is imposed on every person engaged or continuing with in the jurisdiction of the imposing local governmental body in the business of furnishing accommodations to transients for consideration*.[33)]

The defendants (OTCs) were in the business of furnishing accommodations for transients. They furnished accommodations within Charleston's jurisdiction. The defendants claimed they operated outside of the city's jurisdiction and should not be liable for taxes.[34)] This is another ongoing

33) 520 F.Supp.2d 757, 767 (D.S.C. 2007) (*quoting* S.C.Code Ann. § 6-1-510(1) (2006) (emphasis in quoted text)).

34) *Id.*

case. In South Carolina, OTCs were found to fit under the existing tax code because the courts found that the OTCs were "in the business of furnishing accommodations."[35] The court did not view the statute as requiring the *furnisher* of the accommodations to be with in South Carolina's jurisdiction.[36] Instead, the statute was read to mean that the accommodations must be within the jurisdiction and that it did not matter where the furnisher of the accommodations was located.[37] The defendants' request for dismissal based on the ground that South Carolina could not apply this ordinance against out-of-state businesses was denied.[38] South Carolina could apply the ordinance to anyone furnishing rooms within the state borders.

South Carolina courts again found that OTCs were taxable under the local taxation ordinance and that they furnished accommodations to transients in *Travelscape, LLC v. South Carolina Department of Revenue*.[39] The South Carolina Sales and Use Tax Act defined the gross proceeds of sale as "'the value proceeding or accruing from the sale, lease or *rental of tangible personal property*.'"[40] Anyone renting personal property can be taxed and everyone renting property is taxed the same. The court found that the taxation of the Appellant did not violate the American Constitution under the Dormant Commerce Clause. The court considered the four-part test created by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*.[41] A state tax does not violate the Dormant Commerce Clause as long as the

35) *Id*.

36) *Id*.

37) *Id*.

38) *Id*.

39) 391 S.C. 89, 705 S.E.2d 28 (2011).

40) *Id*. at 97–98, 32 quoting S.C.Code Ann. § 12–36–90(1) (b) (ii) (Supp. 2009) (emphasis in quoted text).

41) 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

tax (1) “is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.”[42)] The Appellant had a substantial nexus with South Carolina because agents of the Appellant visited the state to build relationships with hotels and because the hotel rooms that the Appellant provided were located within South Carolina.[43)] The tax passed the “fairly apportioned” prong test because if the tax were enacted in each state, it would not result in multiple taxation.[44)] South Carolina would only tax on commerce within its borders and other states could tax on commerce within their borders. The court did not rule on the third and fourth prongs of the text because those issues were not preserved for appellate review.[45)] Once again, the South Carolina courts found in favor of the local governments. South Carolina will most likely continue to find that transactions by OTCs are taxable.

The Supreme Court of Georgia ruled that the city was entitled to injunctive relief and should be allowed to collect taxes on the amount that OTCs collected from consumers in *Expedia, Inc. v. City of Columbus*.[46)] The court decided that an injunction was allowable as long as it was not oppressive.[47)] OTCs collected the taxes that hotels owed to the state and remitted the hotels' taxes and the amount OTCs owed the hotels. The court decided that since OTCs already collected taxes, they could continue to do so. They would collect taxes on what the OTCs charged consumers rather than the wholesale

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42) *Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079.

43) *Travelscape, LLC v. SCDOR,* S.C. at 106, S.E.2d at 37.

44) *Id.* at 107, 38.

45) *Id.* at 109, 39.

46) 285 Ga. 648, 691 S.E.2d 122 (2009).

47) *Id.* at 691, 129.

amount they bought the rooms for.[48] Here was another win for the municipalities.

In a different case in Georgia, the Supreme Court of Georgia again found in favor of the local government. In *City of Atlanta v. Hotels.com et al.*, the court focused on the language of the ordinance and found that the City of Atlanta could tax the amount charged by OTCs to consumers instead of only taxing the amount OTCs paid for the room. The Georgia statute stated that taxation is based on the amount actually collected, and the taxes should be paid by the occupant of the room, not an OTC paying wholesale prices to the hotel operators.[49] Though the court found that the OTCs did have to pay taxes on the amount they charged consumers for the hotel rooms, the OTCs did win on one point. The city was not allowed to collect back taxes because they could not prove unjust enrichment, nor could they prove "money had and received" because the city could not prove that they had ever demanded these taxes in the past and then been denied.[50] This would have resulted in a lot of money for the state, but the courts decided that Atlanta could only attempt to collect taxes going forward.

Overall, it appears that these cases have come down to how the courts interpreted the meaning of the tax ordinances at issue. In North Carolina and Kentucky, the courts found that OTCs are not taxpayers under the law and therefore could not be forced to collect taxes on the profits made by reselling hotel rooms. The Texas case was a bit different in that OTCs were not forced to pay taxes first before they could fight the legitimacy of the taxes. South Carolina and Georgia have been successful in their attempts

48) *Id.*

49) *City of Atlanta v. Hotels.com et al.*,…S.E.2d…, 2011 WL 1836236 (Ga.), Slip Copy *2.

50) *Id.* at *4.

to collect taxes. The courts found that OTCs did fall under the taxation laws and could be asked to collect the taxes at issue. It seems clear that the only way for local governments to be successful in their suits is if the state is taxing the transaction, not the entity. Because it was the tax statute that was standing in the way of North Carolina being able to collect taxes from OTCs, North Carolina decided to amend their tax laws, removing their biggest obstacle.

Ⅲ. Amendments to the Laws of Taxation

North Carolina was not the first state to amend its taxation laws so that OTCs clearly would be liable for taxes on the gross amount OTCs received on the sale of accommodations to consumers. Two major cities amended their tax laws so that OTCs could be taxed on the amount they make as "facilitators", New York City and San Francisco.[51] The results were not good for San Francisco. OTCs responded to San Francisco's suit by removing San Francisco as a destination from their web site. This would have had a major affect on San Francisco's tourism and the city stopped its attempt to collect taxes on OTCs.[52] The OTCs bullied San Francisco into stopping any actions to tax OTC transactions. New York City's law is being challenged on state constitutional grounds.[53] At the time this paper was written, the

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51) Henchman, Joseph, "Cities Pursue Discriminatory Taxation of Online Travel Services", *Tax Foundation.org: Special Report* No.175, 4(Feb. 2010) (available at http://www.taxfoundation.org/files/sr175.pdf).

52) *Id.*

53) *Id.* Most recent decision in this case is *County of Nassau, NY v. Hotels.com, LP*, No. 07-3919 (2nd Cir. 2009).

New York City case was in litigation. In response to North Carolina amending its taxation laws, the OTCs filed a complaint against the state in order to determine whether the new law was valid. In the past, OTCs were mainly defending themselves against attempts at collecting taxes, but with North Carolina, they acted preemptively to prove the amendment was unconstitutional.

On February 4, 2011, Orbitz, LLC, Trip Network, Inc. (d/b/a Cheaptickets.com), Travelocity.com LP, Travelscape, LLC, Hotels.com L.P., and Hotwire, Inc. (hereinafter "OTCs" or "Plaintiffs") filed a complaint and action for declaratory judgment against the state of North Carolina, naming David Hoyle in his capacity as Secretary of Revenue of the State of North Carolina. These OTCs wanted the court to find that the law is not valid and therefore cannot be applied to them.[54] The plaintiffs requested a declaratory judgment from the court to determine how the amendments affected their rights and duties and to "determine whether the Amendments are legal and proper."[55] The OTCs felt that the amendments were unconstitutional and should not be applied to them.

The OTCs cited eight counts[56] against the State of North Carolina. This

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54) Complaint and Action for Declaratory Judgment, *Orbitz, LLC, et al. v. David Hoyle, Secretary of Revenue of the State of North Carolina, et al.*, No.11CV001857 (Gen. Ct. of Justice 2011).

55) *Id.* at ¶19.

56) The other counts in support of declaratory judgment are: "the amendments unconstitutionally impair the plaintiffs' contracts with hotel operators" (*Id.* at ¶106–117), "the amendments violate the nexus requirements of the commerce clause of the United States Constitution"(*Id.* at ¶118–135), "the amendments violate the fair apportionment requirement of the Commerce Clause of the United States Constitution" (*Id.* at ¶136–154), "the amendments violate the prohibition of discrimination against interstate commerce requirement of the Commerce Clause of the United States Constitution" (*Id.* at ¶155–162), "the amendments violate the fairly related requirements of

paper examines Count 1: "the amendments violate the Internet Tax Freedom Act."57) Count 1 appears to be the strongest argument the OTCs have against the new law. The amended law will allow the state to tax the gross receipts received by the OTCs as long as the law is constitutional. The plaintiffs argued that the law is unconstitutional under the Internet Tax Freedom Act. They stated in their Complaint that "the Internet Tax Freedom Act, Pub. L. 105-277, as amended, prohibits 'multiple or discriminatory taxes on electronic commerce.' Internet Tax Freedom Act, as amended, section 1101(a) (2) (codified at 47 U.S.C. section 151 note)."58) Plaintiffs believed that they are being taxed on services that are provided by others within the State who are not being similarly taxed.59) This would be completely unconstitutional if true. They also argue that their transactions were being taxed at a "higher effective tax rate when compared to similar or identical transactions that are not provided online."60) Lastly, they believed North Carolina's actions violate the Internet Tax Freedom Act because the obligation to collect taxes is placed on the plaintiffs who are facilitators, while offline, only the retailer is required to collect and remit those taxes to the state.61) They believe there are offline facilitators who are not being taxed in the same manner.

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the Commerce Clause of the United States Constitution" (*Id.* at ¶163–172), "the amendments violate the Uniformity Clause of the North Carolina Constitution and the Equal Protection Clauses of the United States and North Carolina Constitutions by creating an unreasonable classification" (*Id.* at ¶173–194), and "the amendments are void for vagueness" (*Id.* at ¶195–203).

57) *Id.* at ¶94–105.

58) *Id.* at ¶96.

59) *Id.* at ¶99.

60) *Id.*

61) *Id.* at ¶102.

The Internet Tax Freedom Act makes it illegal for States to apply "multiple or discriminatory taxes on electronic commerce."[62] A discriminatory tax is defined by the Tax Freedom Act in Section 1105(2) (A). Subsection (i) states that a discriminatory tax "is not generally imposed and legally collectible by such State… on transactions involving similar property, goods, services or information accomplished through other means."[63] The plaintiffs argued that the amended law treated them differently from other entities providing the same services the OTCs provide. If North Carolina decides to fight the claim, they will state that the law is constitutional. There are no cases directly on point, so the courts will need to examine other court decisions dealing the Internet Tax Freedom Act. There have been a few cases dealing with the Internet Tax Freedom Act in regards to companies that provide services via the internet. There was a case in Pennsylvania dealing with a different section of the Internet Tax Freedom Act and a lawsuit in Illinois dealing with taxation of online ticket sales.

In *Concentric Network Corporation v. Commonwealth of Pennsylvania*, the court pointed out that the Internet Tax Freedom Act prohibited discriminatory taxes, including "a state tax that 'establishes a classification of Internet access service providers … for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means.'"[64] The court concluded in *Concentric Network Corporation v.*

62) Internet Tax Freedom Act, as amended, section 1101(a) (2) (codified at 47 U.S.C. section 151 note).

63) *Id.*, section 1105(2) (A) (i) (codified at 47 U.S.C. section 151 note).

64) 897 A.2d 6 (Pa. Commw. Ct., 2005) (*quoting* Section 1104(2) (A) (iv) of the Internet Tax Freedom Act, Pub. Law No. 105-277, Div. C, Title XI, § 1104(2) (A) (iv), 112 Stat. 2681-719 (1998) (current version at 47 U.S.C. § 151 note)),

Commonwealth of Pennsylvania that the only reason the plaintiff was being taxed was because of the plaintiff's business model, not become of discriminatory taxes.[65] If the plaintiff changed its business model, they would be taxed at a lower rate. Therefore, the tax was not discriminatory.

Concentric Network Corporation v. Commonwealth of Pennsylvania offers some insight into how state courts view the Internet Tax Freedom Act. As long as different tax rates are not applied to those that provide internet service, the tax code does not violate the Internet Tax Freedom Act. This case referred to a different part of the definition of discriminatory tax than in *Orbitz, LLC v. Hoyle*, but it is useful to view how previous court shave interpreted discriminatory taxes under the Internet Tax Freedom Act. In *Orbitz, LLC v. Hoyle*, the plaintiffs do not argue that the tax is discriminatory under subsection(iv) of Section 1105(2) (A) of the Internet Tax Freedom Act, but that they are being taxed while "transactions involving similar or identical services accomplished by non-internet based means" are not.[66] The case in Concentric Network Corporation was concerned with whether online and offline providers of a service were treated equally under the tax law. The OTCs in Orbitz, LLC v. Hoyle are also concerned with how the amended tax law affects them in regards to other providers of hotel accommodations.

City of Chicago v. StubHub!, Inc. involved the issue of taxation on online ticket reselling. In Chicago, ticket brokers were allowed to resell tickets at a premium if they registered with the state and collected local taxes.[67] The state added a law that internet providers of such services must either collect

at 10.

65) *Id.* at 15.

66) *Orbitz, LLC v. Hoyle*, ¶ 99.

67) 624 F.3d 363 (7th Cir. 2010) at 364.

the taxes themselves or inform the buyers that the buyer may be liable for taxes on the tickets they purchased.[68] Chicago Municipal Code § 4-156-010 disregarded whether the reseller operated online or in a physical store.[69] The law did not appear to discriminate against online providers of a service that was also offered offline. What mattered under the law was if intermediaries took an active role in "staging an auction and exchanging good for money, as StubHub! does."[70] The court's concern was whether the city ordinance applied equally to sales at physical locations as it did to internet sales. In this case, the court found that it did and that the "tax is not 'discriminatory' under § 1105(2) (B) (ii)."[71] The court declined to make a final decision on whether the intermediaries (the online company acting as a broker for sellers and buyers) could be forced to collect the taxes. They left it up to the Supreme Court of Illinois to decide whether "municipalities may require electronic intermediaries to collect and remit amusement taxes on resold tickets."[72] The city was taxing on- and offline ticket sales the same, but they were attempting to force a broker to collect the taxes when the broker had no duty to do so.

Though the Supreme Court of Illinois has yet to decide the issue, it does not seem like such a stretch to force StubHub! to collect taxes on transactions they facilitate. They are in the best position to collect those taxes. Also, they are in a similar position as OTCs who provide hotel room rentals. It seems probable that online ticket resellers and OTCs will either both be taxes or both not be taxed. Considering the decision in *StubHub!* lies with

68) *Id*. at 365.
69) *Id*. at 366.
70) *Id*. at 366-367.
71) *Id*. at 367.
72) *Id*. at 367-368.

the Supreme Court of Illinois, the author believes that the court will come down in favor of Chicago, not StubHub! The biggest factor that stands in Chicago's way is that the city has not made any big efforts to collect taxes from the individuals who resell tickets. It is much easier to ask a large organization who connects buyers to sellers to collect the taxes, but the city will need to prove that they are being fair.

In *Orbitz, LLC v. Hoyle*, the law requires that OTCs collect taxes on the gross amount they receive from consumers. It is the consumers that actually owe the taxes. OTCs had in the past collected taxes from consumers on the amount the OTCs paid for the room and gave those taxes to the hotel operators to remit to the state. In *Expedia, Inc. v. City of Columbus*, the court considered that since OTCs were already collecting taxes, they could continue to do so without creating a burden. The court in *StubHub!* appeared to be leaning towards declaring it oppressive to force the intermediaries to collect taxes, but they sent the case back down to the Supreme Court of Illinois. OTCs already collect taxes. If the Supreme Court of Illinois finds that it is not oppressive to direct StubHub! to collect taxes and the court involved in *Orbitz, LLC v. Hoyle* find StubHub! persuasive, North Carolina's position will be strengthened.

Though it is difficult to speculate on how the court in North Carolina will decide the issues set forth by the OTCs, they will consider if the law is discriminatory under the Internet Tax Freedom Act. If the law is found discriminatory, this will be another win for OTCs in their fight against states trying to secure new sources of revenue.

Ⅳ. Conclusion

The current trend of American cities and states trying to secure a new tax base from online travel companies will undoubtedly continue. Laws must be challenged and evolve in response to an ever-changing technological business globalization. Many cities have failed in their quest to tax OTC's revenue related to language limitations in their tax laws. Cities won when courts found that OTCs fell under the definition of taxpayer in their states' ordinances. The language of North Carolina's amendment appears to be clear on its face that OTCs fall within its new legislative definition of a facilitator. North Carolina will not face future problems as it did in the *Pitt* and *Wake* cases. But now North Carolina has to fight to prove that its amended tax law is constitutional. The toughest hurdle appears to be showing that the law is nondiscriminatory under the Internet Tax Freedom Act. As discussed previously, it is difficult to predict which side the court will come down on. At the time of writing, the State of North Carolina has not responded to the OTCs' Complaint. The outcome of this case could largely influence how other states go about attempting to tax OTCs.

If North Carolina is successful, there will be other states amending their tax laws. The most successful cases focused on taxing the transaction, rather than the entity. North Carolina's amended law is unique in that it created a new class of taxpayer. The author contends that many states are feeling the effects of a shrinking tax base. It follows that other states and cities are watching North Carolina cases to see if they should follow suit. There is a flip side to this issue. States may not want to tax OTCs because they want to promote tourism, which usually means giving tax breaks. By taxing OTCs, the price of hotel rentals will increase because OTCs will make sure that consumers pay any taxes owed. States will need to carefully consider which option is most fiscally beneficial. North Carolina obviously believes that their state interests would be best served by taxing OTCs. While other states may feel differently, many cities across the United States have attempted to collect taxes from OTCs thus far. This will remain a hot topic until the some final decisions are made by the high courts. Until that time, it will be interesting to continue to watch how these fights between local governments and OTCs play out.

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Key Words : Online Travel Companies, North Carolina, North Carolina's Amended Law, Tax, Internet Tax Freedom Act

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[국문초록]

인터넷비과세법과 노스캐롤라이나의 세금법령개정안

Patricia Ruth McWilliam*

본 논문은 최근의 노스캐롤라이나 세금법령개정안이 노스캐롤라이나 주에 있는 온라인여행업체들에게 적용되는 것은 인터넷비과세법 위반이라는 주장에 대하여 모색하고자 한다. 현재 본 사안은 온라인여행업체와 주 정부 사이에 뜨거운 논쟁으로 부각되고 있다. 최근 주 및 지방정부에서는 온라인여행업체를 통하여 호텔을 예약하는 경우 더 많은 세금을 부과하는 경우가 많이 발생하였으며, 본 논문에서는 이와 같은 사례의 조사를 통하여 현재의 상황을 독자들에게 쉽게 이해시키고자 한다. 본 사안은 온라인여행업체에 대한 주 정부의 과세제도가 인터넷과세금지법에 따라 차별되었다고 주장하고 있는 최초의 사례이다. 과거의 인터넷비과세법에 관련된 소송을 살펴보고, 노스캐롤라이나 소송에서 제기된 문제점을 비교하고자 한다. 현재 소송의 결과는 예측하기 어려운 상황이다.

주제어 : 온라인 여행업체, 노스캐롤라이나, 노스캐롤라이나 개정법률, 세금, 인터넷비과세법

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