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So, You Want to Be an Adjunct Law Professor?

The Processes, Perils, and Potential

by Catherine A. Lemmer and Michael J. Robak

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BY THOMAS A. DICKERSON AND SYLVIA O. HINDS-RADIX

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Taxing Internet Transactions: Airbnb and the Sharing Economy

The issue of taxing Internet transactions is, primarily, about how to fairly tax new and unfamiliar business models.[1] But it is also about trying to accommodate traditional and vested business interests threatened by the Internet. Then there is the explosive growth of the sharing economy,[2] particularly in New York City and San Francisco, and whether and how those transactions can be taxed.

New York Face-Off

Airbnb, a popular Internet apartment-sharing service, recently faced off with the New York Attorney General[3] over the scope of an investigatory subpoena[4] looking into this issue. The clash resulted in a one-year truce whereby both parties declared victory and agreed that Airbnb will provide the Attorney General with "the information he is seeking about Airbnb hosts in New York City, but it will be stripped of names and other personally identifiable information. That satisfies [Airbnb], which did not want its law-abiding hosts to be subjected to what it called a 'fishing expedition' by regulators. The attorney general will have a year to use the data to identify bad actors – hosts who are renting out large blocks of rooms in violation of local laws."[5]

Airbnb "Hosts" Versus Hotels

The legal face-off between Airbnb and the Attorney General involved much more than just seeking to identify potential tax evaders. It also pitted thousands of foreign tourists[6] and their local Airbnb "hosts," who may offer a "'very cute and cozy' room in a retired police detective's apartment in Kew Gardens ($35 a night) to a 'spacious mansion' on the Upper East Side ($10,000 a night, but it's pet friendly),"[7] against the Hotel Association of New York City, a spokeswoman for which noted that "Airbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws, but with the basics of the New York City real estate market."[8]

Smart Tourists Versus Genteel Locals

An example of how unreceptive "genteel locals" may be to the sharing concept[9] can be gleaned from the recent case *City of New York v. Smart Apartments LLC*.[10] There, New York City sought to enjoin the operation of an apartment-sharing website, claiming that the defendant's placement of tourists in residential apartments for "transient" stays of less than 30 days is illegal because it violates the Multiple Dwelling Laws, Housing Maintenance Codes and City Building Codes, and that the transients "bother the non-transient residents of the buildings because the transient occupants host loud, late night parties; vomit, dump garbage, and smoke in the hallways... and generally do not conduct themselves in the civilized, genteel manner of the locals." In granting a preliminary injunction the court noted that "placing unsuspecting tourists in illegal, dangerous accommodations constitutes irreparable injury, especially if there is a tragic fire."

Internet Taxing Methodologies

Certainly, Internet businesses should pay their fair share of taxes in those environments in which they sell their goods and services. It is also fair to subject Internet retailers and resellers to personal jurisdiction in the forums in which they transact business.[11] Developing fair and reasonable taxing methodologies for Internet businesses is a work in progress, which started some time ago with the taxing of Internet retailers or "resellers."

Taxing Internet Resellers

In *Overstock.com, Inc. v. New York State Department of Taxation and Finance*,[12] the New York Court of Appeals rejected the facial challenge of online retailers (including Amazon.com) to the newly created Internet tax as being unconstitutional "by subjecting online retailers, without a physical presence in the state, to New York sales and compensating use taxes." In so doing the Court noted, "The world has changed dramatically in the last two decades, and it may be that the physical pres-

ence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet." The implementation of this reseller taxing methodology has led to consumer class actions alleging overcharges and the imposition of phony taxes.[13]

New York City Hotel Taxes

The New York Court of Appeals rejected a challenge by online retailers to the imposition of a local hotel tax to the fees collected from their customers in *Expedia, Inc. v. City of New York Department of Finance*.[14] "This statute allows the City to tax up to six percent 'of the rent or charge per day' for each hotel room [and] authorizes the City to collect these taxes from the hotel operator or any 'person entitled to be paid the rent or charge for the hotel room.'" In finding the hotel tax constitutional the Court noted that "[o]nline travel companies . . . have successfully reshaped the way people book travel."

Nassau County's Hotel Tax

In *County of Nassau v. Expedia, Inc.*,[15] Nassau County brought a class action on behalf of itself and 55 other similar taxing authorities against many online travel retail sellers and "remarketers" of hotel accommodations, seeking to enforce "the Nassau County Hotel and Motel Occupancy Tax." The online retailers purchase blocks of rooms from hotels at discounted rates and then resell those rooms over the Internet. The dispute is that the county wants the tax calculated as a percentage of the price the occupants pay to the resellers, whereas the resellers want to pay tax based on the lower "wholesale" rate. In any event, the *Expedia* court certified this class action and found that Nassau County had standing to sue as a class representative on behalf of other counties.

Airbnb: Taxing the Sharing Economy

While Expedia, Priceline and Hotwire are best defined as retailers or resellers and, as such, can be controlled and taxed accordingly, it is much more difficult to find a comparable taxing analogue for the Internet-sharing economy. In addition, and as noted above, travel sharing companies such as Airbnb threaten traditional businesses such as hotels and rental car companies and may annoy the owners and residents of apartment buildings in which, for example, many Airbnb "hosts" reside, "As services like Airbnb and Uber, the ride-sharing service, spread across the country, lawmakers and other officials in some cities have started seeking ways to curb their explosive growth and bring them into compliance with existing laws, written before the companies were ever imagined."[16]

Conclusion

The Internet and the new business models it has spawned are revolutionary and potentially of great benefit to the general public. The task of taxing such unfamiliar businesses fairly requires an understanding of how each business works and may require an awareness and consideration of competing interests in the local environment. ■

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1. *Overstock.com v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586 (2013) (Internet tax); *Expedia, Inc. v. City of N.Y. Dep't of Fin.*, 22 N.Y.3d 121, 124 (2013) (New York City hotel tax); *Cnty. of Nassau v. Expedia, Inc.*, 41 Misc. 3d 626 (Sup. Ct., Nassau Co. 2013) (class action by 56 counties seeking collection of hotel taxes).

2. *See* Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, Forbes (Feb. 11, 2013).

3. *See* Nick Wingfield, *A Victory for Airbnb in New York*, www.nytimes.com (May 13, 2014); Andrea Peterson, *Airbnb Is Facing Off Against New York's Attorney General. Here's Why*, Wash. Post (Apr. 22, 2014); David Streitfeld, *New York's Case Against Airbnb Is Argued in Albany*, N.Y. Times (Apr. 22, 2014).

4. The Attorney General's subpoena sought, *inter alia*, (1) "An Excel spreadsheet identifying all Hosts that rent accommodations(s) in New York State, including . . . (c) Address of the Accommodations(s) rented . . . (d) the dates of guest stay, and the rates charged for the rental . . . (e) method of payment to Host including account information and (f) total gross revenue per Host generated for the rental . . . through your website" and (2) "Documents sufficient to identify all tax-related communications your website has had with the Host."

5. David Streitfeld, *Airbnb Will Hand Over Host Data to New York*, www.nytimes.com (May 21, 2014).

6. *See* N.R. Kleinfield, *Airbnb Host Welcomes Travelers From All Over*, www.nytimes.com (Apr. 25, 2014) ("Over the past 10 months, Mr. [X] has had a parade of 72 strangers living with him, respondents to his overture of: 'Beautiful room for rent in Astoria' on the website Airbnb. They have drunk his beer and indulged in his muffins and dirtied his guest towels. They have come from Italy, Canada, India, South Korea, Belgium, France, New Zealand, the Czech Republic, Bulgaria. . . . Members of this international bazaar, usually in pairs, have stayed from two nights to a month. . . . This is life as a hyperactive New York City 'host' in that swelling substratum of the hospitality industry that unfolds in people's homes, all part of the modern world's sharing economy, spinning by with serial comings and goings").

7. Streitfeld, *supra* note 5.

8. *See id.* ("A spokeswoman for the Hotel Association of New York City hailed the deal. Liz Krueger, a state senator . . . is a determined Airbnb foe. . . . 'Despite today's settlement, Airbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws, but with the basics of the New York City real estate market,' Ms. Krueger said.").

9. *See* Geron, *supra* note 2 ("[A]n economic revolution that is quietly turning millions of people into part-time entrepreneurs, and disrupting old notions about consumption and ownership. Twelve days per month [X] rents his Marin County home on website [Airbnb] for $100 a night, of which he nets $97. Four nights a week he transforms his Prius into a de facto taxi via the ride-sharing service [Lyft], pocketing another $100 a night in the process. . . . What [X] finds himself in is . . . a share economy, where asset owners use digital clearinghouses to capitalize the unused capacity of things they already have and consumers rent from their peers rather than rent or buy from a company. . . . [O]ver the past four years at least 100 companies have sprouted up to offer owners a tiny income stream out of dozens of types of physical assets, without needing to buy anything themselves").

10. 39 Misc. 3d 221 (Sup. Ct., N.Y. Co. 2013),

11. *See* Thomas A. Dickerson, Cheryl E. Chambers & Jeffrey A. Cohen, *Personal Jurisdiction and the Marketing of Goods and Services on the Internet*, 41 Hofstra L.R. 31 (Fall 2012).

12. 20 N.Y.3d 586 (2013).

13. *Id.* at 595. *See, e.g., Chiste v. Hotels.com LP*, 756 F. Supp. 2d 382, 395–96 (S.D.N.Y. 2010) ("The crux of [the] allegations stem from what is not disclosed on this invoice [for the online purchase of hotel accommodations]. . . . Plaintiffs allege that Defendants are charging consumers a higher tax based on the Retail Rate consumers pay Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference between the tax collected and the amount remitted to the tax authorities . . . as a profit or fee without disclosing it."); *Sneddon v. Hotwire, Inc.*, 2005 WL 1593593 (N.D. Cal. 2005); *Marshall v. Priceline.com, Inc.*, 2010 WL 1068197 (Del. Sup. 2010); *Okland v. Travelocity.com, Inc.*, 2009 WL 1740076 (Tex. App. 2009); *Hotels.com v. Canales*, 195 S.W.3d 147 (Tex. App. 2006) ("By its own admission, Hotels.com neither charges nor collects taxes nor does it remit taxes directly to any taxing authority.").

14. 22 N.Y.3d 121, 124 (2013).

15. 41 Misc. 3d 626 (N.Y. Sup. 2013).

16. *See* Wingfield, *supra* note 3.