ARIZONA SUPREME COURT

CITY OF PHOENIX, et. al, *Plaintiffs/Appellees/Cross-Appellants*, v. ORBITZ WORLDWIDE INC., et. al, *Defendants/Appellants/Cross-Appellees*.	No. _____ No. 1 CA-TX 16-0016 Maricopa County Superior Court No. TX2014-000470 TX2014-000471 TX2014-000472 TX2014-000473 TX2014-000474 TX2014-000475 (Consolidated)

PETITION FOR REVIEW

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I. INTRODUCTION

This Court should review the Court of Appeals' decision ("the Decision") because it creates tremendous uncertainty as to the rights and expectations of those doing business in Arizona. It specifically raises important issues concerning the rights and obligations of online travel companies ("OTCs") that facilitate travel worth hundreds of millions—even billions—of dollars to Arizona's economy.[1] And generally the Decision threatens to reach large numbers of others who do business in Arizona. This Court should restore stability and predictability to Arizona's tax law.

First, and troublingly, the Court of Appeals reasoned that the definition of a "broker" in Arizona's Model City Tax Code ("MCTC") extends privilege tax obligations beyond those engaged in operating a taxable business—here a hotel—to include others who provide services to customers of that taxable business. This broad imposition of "broker" tax liability severs the longstanding statutory connection between exercising a taxable privilege and imposing the privilege tax only on those who do so. If let to stand, the Decision will cause serious disruption to commerce—Arizona has dozens of privilege taxes levied on "person[s]" engaged in various businesses.[2] Thus, the Decision exposes countless persons to sudden, unanticipated tax liabilities that will cause unfair surprise.

Second, and equally concerning, the Decision deprives taxpayers of the full protection bestowed against retroactive tax changes by MCTC §-542(b)&(c). The

[1] In 2016, 43 million people visited Arizona, spending $21.2 billion and generating 184,200 jobs. Ct.-App.-ASTA-*Amicus-Brief*-19-n.2.

[2] *E.g.*, advertising (§-405), amusements (§-410), printing (§-425), mining (§-432), renting real property (§-445), retailing (§-460), telecommunications (§-470), utility services (§-480), among others.

Decision saddles taxpayers with the burden to establish facts peculiarly within the knowledge of tax collectors: whether the tax authorities' current position or policy reflects change from prior policies, procedures, interpretations or applications. The Decision will encourage taxing authorities to cloak their interpretive positions in mystery rather than providing taxpayers appropriate guidance. This is the opposite of what Arizona law should be.

These questions easily satisfy the ARCAP 23 standards for review. Taxpayers and local governments deserve clarity about their rights and obligations. The Decision departs from well-established precedent governing statutory interpretation, construction of tax enactments, and the assignment of burdens of proof.

II. ISSUES PRESENTED

1. Many Arizona taxes are levied on "persons" engaged in operating taxable businesses. This includes MCTC §-444, which taxes only "*person[s]* engaging … in the business of operating a hotel …." Section -100, which provides "General … Definitions" applicable to Arizona's many privilege taxes, defines "person" to include an "individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate, [or] *broker*."

A. Does the applicable "person" in §-444, whether an "individual, firm, partnership … [or] broker," still have to be someone "in the business of operating a hotel," given that:

(i) the plain language of §-444 only applies to "persons engaging … in the business of operating a hotel";

(ii) the applicable regulation, §-100.1, illustrates a taxable "broker" as a "property manager," that is, a person "operating a hotel"; and, per that same regulation,

(iii) tax liability is imposed on "brokers" only when necessary to prevent principals from avoiding their liabilities?

B. Can the Cities use §-444 not only to tax hotel operators on sums the hotels receive for providing occupancy, but also to tax amounts that the OTCs retain for their own online travel services?

2. In 2013, the Cities first assessed the OTCs as "persons" subject to hotel tax.

A. Can the Cities use MCTC §-542 to tax the OTCs retroactively, given the requirement in §-542 to apply *prospectively* any "new interpretation or application of any provision?"

B. Does the burden of establishing that first-ever-assessments are subject to §-542's requirement of prospective application rest on the taxpayer or the tax assessing authority?

III. MATERIAL FACTS[3]

A. OTCs Publish Information And Assist Travelers With Reservations.

The OTCs are technology companies. Their websites allow travelers to research destinations, comparison shop, plan trips and request reservations from airlines, hotels and rental car companies.

[3] Citations are by number to paragraphs of summary judgment fact statements: the OTCs' Reply Statement of Facts ("RSOF") and Statement of Facts ("SOF"), and appear in the record within items R.46. Connected exhibit citations are omitted.

Each hotel is independent from, and operates at arms-length to, the OTCs. Hotels cannot direct how the OTCs operate their sites; how the OTCs present travel options on those sites; or how the OTCs conduct business with travelers.[4] The OTCs cannot issue reservations.[5] Hotels alone decide whether to accept reservation requests made through an OTC.[6] On the day of check-in, the hotel decides whether the traveler meets the hotel's terms and conditions for occupancy (*e.g.*, no pets, minimum age, maximum number of guests) and assigns a room if one is available.[7]

B. OTCs Do Not Own Or Operate Hotels.

The OTCs do not own, operate, or manage hotels. Hotels determine availability, unilaterally set rates, and determine the conditions governing each traveler's stay.[8]

C. Travelers Pay OTCs For Their Online-Facilitation Services.

Travelers—not hotels—compensate the OTCs.[9] OTC websites disclose applicable charges in two line-items: (1) the "Reservation Rate" or "Nightly Rate"; and (2) "Taxes and Fees" or "Tax Recovery Charge and Service Fees."[10] The "Reservation" or "Nightly" rate includes the room rate set by the hotel (sometimes called "net rate") plus a facilitation fee the OTC charges the traveler for facilitating the reservation. "Taxes and

[4] RSOF ¶1 n.20 (R.46)
[5] RSOF ¶1 n.8 (R.46) .
[6] RSOF ¶1 n.9 (R.46) .
[7] RSOF ¶1 n.10 (R.46).
[8] RSOF ¶1 n.10 (R.46).
[9] DSOF ¶16 (R.46).
[10] RSOF ¶1 nn.13, 15 (R.46).

Fees" comprise amounts sufficient to cover the privilege tax the hotel will owe on its room rate and, in addition, service fees retained by the OTC.[11]

D. Hotels Charge And Receive Amounts For Furnishing Rooms; All Taxes Owed On Those Amounts Have Been Remitted.

When the traveler arrives at the hotel, she is required to register as a guest, meet the hotel's terms and conditions for check-in, and provide a credit card for incidentals. Only then will the hotel assign a room. The hotel collects the net rate and taxes from the OTC and remits all taxes on its net rate to appropriate tax authorities.[12]

E. For the First Time—In 2013—Cities Assessed The OTCs For Hotel Taxes And Sought Sums Exceeding The Hotel Remittances.

For the first time—in 2013—the Cities assessed the OTCs for hotel taxes—under MCTC §§-444 & -447—on the basis that the OTCs operate hotels or, alternatively, are taxable "brokers." The Cities assessed taxes on the fees the OTCs received from travelers. Ct.-Ap-Appd'x-("App.")-005.

F. The Hearing Officer Sustains Protests To City Assessments.

The hearing officer sustained the OTC protests against the tax assessments because, "[u]nder the plain language of MCTC §-444, [the OTCs] are not engaged in the business of operating a hotel," App.-7, and they do not qualify as "brokers," App.-9. The officer deemed it "questionable whether [the OTCs are] brokers for the hotels in the conduct of the hotels' taxable business activity of operating a hotel." *Ibid.* The officer recognized that "a broker may be treated as a taxpayer … to prevent evasion of taxes

[11] RSOF ¶1 nn.13, 15 (R.46).
[12] RSOF ¶1 nn.16-17 (R.46).

imposed on the activity … of the principal" but that tax is levied "on the activity of operating a hotel, not on the activity of being a broker." App.-7-8. Thus, when effective tax enforcement requires "broker" liability, that liability is *for taxes the hotel owes*; here, it is undisputed that the hotels have already paid all taxes on amounts they received for occupancy. The hearing officer therefore concluded that the Cities "have not shown that treating [OTCs] as broker[s] was necessary for … proper administration … or to prevent the evasion of taxes … by the hotels." App.-9-10.

G. The Tax Court Differs: Cities May Prospectively Apply Their New Interpretation That The OTCs Are Taxable "Brokers."

The tax court held that the OTCs "do not own or operate hotels" and—for that reason—are not "persons" subject to tax under §§-444 and -447, App.-17-18. But the court decided that the §-100's "broker" definition extends hotel tax liability beyond those who operate hotels. App.-17. The court thought OTCs "clearly and unambiguously fall within the definition of a 'broker'" because "the hotel uses the OTC as its agent to obtain business — in short, as a broker." App.-18.[13] The court recognized this was a "new interpretation or application," meaning it could only be applied prospectively. MCTC §-542(b)&(c); App.-19.

[13] The court subjected OTCs to tax under §§-444 *and -447* even though §-447 links tax liability to "hotels" not "person[s]."

H. The Court Of Appeals Subjects The OTCs To *Retrospective* Tax Liability As "Brokers" For Hotels.

The Court of Appeals agreed that the OTCs are not taxable as hotel operators but decided they are "brokers," subject to liability only under §-444. Op.-¶¶15-20.[14] The court defined "broker" to include anyone rendering a service that benefits hotel operations, ¶21, and viewed OTCs as assisting hotels with advertising, booking, payment processing and customer service. Op.-¶¶15-16. The court treated as taxable amounts the OTCs collect as service fees because "each consumer must pay the total amount of the OTC charges, including service fees, to rent the room." ¶23. Then, reversing the tax court, the Court of Appeals held this first-time-assessment of the OTCs did not arise from "a new interpretation or application" of §-444 or "broker" liability, meaning §-542(b)&(c) did not limit the tax to prospective application only. ¶¶29-31. The court treated the Cities' long-timefailure to tax the OTCs as immaterial. The court also assigned to the OTCs the burden to establish that tax assessments must be prospective only, based on §-542(b)&(c).

IV. REASONS TO GRANT REVIEW

A. Review Is Warranted To Correct The Novel And Untenable Interpretations Of The Terms "Person" And "Broker" That Apply To Section -444 Hotel Taxes And To Many Other Privilege Taxes.

Arizona municipalities levy taxes only on "person[s]" engaged in certain businesses (including operating a hotel, §-444). In these situations, §-100's definition of

[14] The court reversed imposition of liability under §-447 because the OTCs do not operate hotels; the definitions of "person" and "broker" are irrelevant under §-447. Op.-¶¶27-28. This upends the Cities' longstanding guidance that taxes under ¶¶-444 and -447 run together and are imposed on the same persons. *See* Section IV B, *post*.

"person" governs. These privilege tax statutes provide that, to be taxable, a "person" must engage in the taxable activity, *i.e.*, "operating a hotel," §-444, not lesser conduct, like rendering services that might benefit the "person[s]" engaged in the taxable activity.

By deciding the OTCs must pay hotel taxes as "brokers" for hotels, the Court of Appeals has dramatically expanded the scope of liability under the tax laws in conflict with the plain language of governing statutes and rules of interpretation.

First, a statute's plain meaning governs. *State v. Harris*, 232 Ariz. 76, ¶8 (2014). In plain terms, §-444 levies hotel tax on a "person engaging … in the business of operating a hotel." Each adjudicator in this case has agreed the OTCs do not own, manage or operate hotels. App.-005, 017, Op.-¶27. While a taxable "person" includes a "broker," the "broker" still must be "engaging … in the business of operating a hotel."

Second, tax statutes must be clear and unambiguous before they can be construed against taxpayers. The Court of Appeals paid lip service to this principle, mentioning a rule of liberal construction favoring taxpayers (Op.-¶13), but never grappling with that rule when adopting expansive interpretations that favored taxation, not taxpayers.[15]

Third, the §-100 definitions of "person" and "broker" do not unambiguously broaden §-444 liability beyond those "operating a hotel." The term "broker" has no universally accepted meaning. *E.g.*, A.R.S. §32-2101, 8 ("broker" is a person who "is licensed ….") While the definition of "person" includes "broker," the entire definition

[15] The correctly stated rule is broader than "liberal construction": "An act which imposes a tax must be certain, clear and unambiguous, especially as to the subject of taxation and the amount of the tax. The legislature must fix the mode of determining the amount of tax 'with such a degree of precision as to leave no uncertainty that cannot be removed by mere computation.'" *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 272 (1947).

and its context must be examined. "Broker" must be interpreted so that it fits with the other types of codified "person[s]," *i.e.*, "corporations," "partnerships," "receivers," and others capable of operating a hotel. *See Wilderness World v. Department of Revenue*, 182 Ariz. 196, 199 (1995). Nothing suggests "broker" was defined as a "person" in order to extend tax liability beyond those "operating a hotel." This is confirmed by the regulation that equates "broker" to "property manager," Reg.-100.1(b)(2). The same regulation states that broker liability only applies when necessary to obtain taxes owed by the broker's principal. §-100.1(a). Where—as here—the hotels fully paid their taxes, broker liability is inapplicable.

Fourth, the Court of Appeals leapt to conclude OTCs are "brokers" *for hotels*, Op.-¶17, without support in the record. In reality, the OTCs are paid by travelers for services that benefit travelers. If the "broker" category is at all relevant—it shouldn't be—the OTCs are "brokers" *for travelers*. But a *traveler's broker has no hotel tax liability* because that broker's principal—the traveler—has none. Reg.-§-100.1(b)(2).

Fifth, the Court of Appeals erred by concluding that OTC fees are taxable simply because such fees are combined with the hotel's net rate when displayed to travelers in the combined "Reservation" or "Nightly" rate. Op-¶23. This reasoning has no mooring in the statute and the evidence is uncontroverted that the OTCs explain to travelers that the "Reservation" or "Nightly" rate consists of two components—the net rate paid to the hotel for the room plus the separate facilitation fee retained by the OTC. RSOF ¶¶1, 13 (R.46). If a traveler is not interested in OTC services—or unwilling to pay for them—she may book a reservation directly with the hotel and pay nothing to an OTC. OTC-fee

payments are only necessary to obtain OTC services, including comparison shopping, destination guides, loyalty programs and the ability to package different reservations.

Furthermore, OTC fees should not be taxable because §-444 taxes are levied on "person[s] … operating a hotel charging for lodging." Moreover, the MCTC specifically excludes from taxation "[g]ross proceeds of sales or gross income from commissions received from a person providing service or property to the customer of a hotel." §-444(b)(5). And while the "broker" regulation doesn't envision deductions for commissions, Reg.-§-100.1(a), Op.-¶24, it illustrates taxable "brokers" as property managers facing liability only when necessary to assure tax payments by principals.

Sixth, imposing taxes for remote facilitation of a taxable privilege is unprecedented and contrary to statutory requirements. For example, the Decision overlooks licensing requirements applicable to those who must pay a privilege tax. No license is required unless a person is engaged in the "business activities … upon which a Transaction Privilege Tax is imposed"; and that is true for "principal(s) or broker(s) …." MCTC §-300. Thus, the imposition of tax liability based on the OTCs' supposed "broker" status cannot be reconciled with the MCTC's related, licensing requirements.

This Court should review the Decision and eliminate the confusion it engenders.

B. Review Is Warranted To Address The Showing Needed To Trigger Section -542's Prospective Tax Enforcement Requirements And Who Has The Burden Of Establishing That Section -542 Applies.

Section -542 protects taxpayers from the unfairness of retroactively applying newly-enacted tax laws, subdiv.(a). But it goes much further. It broadly applies to *any* "new interpretation or application" of a privilege tax, including taxation of new or

additional types of business, subdiv.(b), even if accomplished via policies and procedures that taxing authorities employ or change, subdiv.(c). The Court of Appeals assigned to the OTCs the burden of establishing that assessments never before levied against them must be prospective only. Op.-¶30. The court also decided that the Cities' longstanding practices not to treat the OTCs as "brokers"—or otherwise subject to tax—was insufficient to trigger §-542(b)&(c)'s protections. Op.-¶¶31-32.

These novel interpretations of broadly applicable taxpayer protections are not rooted in precedent, conflict with well-established principles, and deserve review because of the important taxpayer rights at stake.

First, this Court should evaluate whether taxpayers have the burden of establishing that §-542(b) & (c) applies. None of the authorities cited in the Decision sanctions assigning the burden to taxpayers.[16] The text of §-542(b) & (c) imposes *on tax collectors* the burden to refrain from retrospectively applying new or different policies, practices, applications or interpretations of the tax laws they administer. With that affirmative duty should come the burden to show the statutory protections do not apply. Tax collectors

[16] The court cited (Op.-¶30) *Valencia Energy Co. v. Arizona Dep't of Revenue*, 191 Ariz. 565, 582, ¶55 (1998), but the taxpayer there sought to prove equitable estoppel—a well-established affirmative defense. Section -542(b) & (c) does not articulate equitable estoppel requirements or create an affirmative defense, something legislators have expressly done in other statutes when they intended to place burdens on taxpayers, §-460(b).
The court also cited two inapposite statutes. MCTC §-370(a) states "deductions, exclusions, exemptions, and credits are conditional upon adequate proof…." Section -572 is an affirmative restriction on what tax collectors may promulgate, not a "deduction, etc." Section -400(c) states that, in order to prevent tax evasion, all gross income is presumptively taxable unless the taxpayer establishes otherwise. This has nothing to do with burdens associated with first-time-assessments against never-before-assessed persons under a statute limiting retrospective levies.

are uniquely equipped to establish their past interpretations and applications of the laws they administer. Burdens of proof are typically assigned to those who possess—or are best able to adduce—relevant evidence. Relatedly, changes in codified enactments—a concern of §-542— presumptively apply prospectively, with the burden of proof on the party seeking retrospective application. *Herndon v. Hammons*, 33 Ariz. 88, 92 (1927). The Court of Appeals did not consider any of these principles involving assignment of burdens of proof—mistakenly thinking the issue resolved by the inapposite authorities it cited.

Second, this Court should consider the trigger-point for the taxpayer rights codified in §-542(b)&(c). The Court of Appeals held that failure to collect a tax in past years does not preclude future governmental enforcement. Op.-¶30, citing *Miami Copper Co. v. State Tax Comm'n*, 121 Ariz. 150, 153 (App. 1978).

By discrediting evidence of tax collector inaction, or acquiescence in past taxpaying practices, the Court of Appeals departed from precedent. Such evidence has long been recognized as showing an administrative interpretation of what the tax laws require in the view of those charged with administering them. *E.g., Alvord v. State Tax Comm'n*, 69 Ariz. 287, 292 (1950) ("[f]or twelve years the administrative officers enforced this law as now contended …"); *Arizona Lotus Corp. v. Phoenix*, 136 Ariz. 22, 24 (1983) (City's auditing history indicated "a practice of not taxing" but court applied unambiguous statute to find liability). As for the *Miami* case (cited Op.-¶30), the tax authority there had an established policy, contrary to the rule the taxpayer sought, 121 Ariz. at 153, so that case is distinguishable.

In addition, this is not a case of mere lax prior enforcement. The Court of Appeals overlooked evidence showing that city-issued instructions about hotel tax obligations never suggested "broker" status was relevant. Resp.-Post-J-Motion-filed-8.10.16-p.11, n.8. Likewise, city-issued guidance instructed that tax liability under §§-444 and -447 runs together and applies to the same persons. *Ibid*. The Decision here repudiates that notion by broadening tax liability under §-444 and applying it to persons who are not subject to taxation under §-447. A taxpayer relying on the Cities' written tax instructions would be legitimately startled, and unfairly prejudiced.

Furthermore, whatever the evidence necessary to trigger other Arizona taxpayer protections, the rights in §-542(b)&(c) are distinctive. They need to be compared and differentiated from other taxpayer protections laws. Subdvs. (b) & (c) do not envision or require evidence establishing equitable estoppel. They create rights separate from laws protecting taxpayers from legislative changes, subd. (a), and erroneous written advice provided by tax authorities, §-541. Their protections do not require evidence of governmental "rules or regulations," §-500, or taxpayer-requested rulings by tax authorities, §-597. Subdvs. (b) & (c) apply more broadly and informally to protect taxpayers from new or changed "policies and procedures."

This Court should address the important matter of when §-542(b)&(c) apply and how the burden of proof operates.

V. CONCLUSION

This Court should grant review, as other high courts have done across the country.[17]

[17] Many state high courts have granted discretionary review to consider the application of local occupancy taxes to reservations facilitated by OTCs. App.-006 (citing a few such cases).

RESPECTFULLY SUBMITTED this 5th day of October, 2018.

SNELL & WILMER L.L.P.

By */s/ Andrew M. Jacobs*

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief

__X__ Uses proportionately spaced type of 14 points or more, is double-spaced using a Times New Roman font and contains 3,451 words or

_____ Uses monospaced type of no more than 10.5 characters per inch and

_____ Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs).

_____

/s/ Andrew M. Jacobs
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of October, 2018, a copy of the foregoing **PETITION FOR REVIEW** was sent via email, addressed to the following:

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APPENDIX

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DECISION OF MUNICIPAL TAX HEARING OFFICER

May 28, 2014

Barbara J. Dawson
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Expedia, Inc.
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Dear Ms. Dawson:

We have reviewed the evidence submitted for redetermination by Expedia, Inc. (Taxpayer) and the cities of Apache Junction, Chandler, Flagstaff, Glendale, Mesa, Nogales, Peoria, Phoenix, Prescott, Scottsdale, Tempe and Tucson (collectively Tax Collectors or Cities). The review period covered was from June 2001 through April 2009. Taxpayer's protests, Tax Collectors' responses and our findings and ruling follow.

Taxpayer's Protests

Taxpayer operates a website and telephone call centers to allow travelers to use the Internet to research travel destinations and book reservations with hotels in the Cities. Taxpayer facilitates the booking of reservations with hotels by accessing databases of hotel rooms and rates made available by hotels. Taxpayer does not make the reservation but submits reservation requests to the hotel. Upon acceptance of the reservation by the hotel, Taxpayer charges the traveler's credit card the amount that will be paid to the hotel after the traveler's stay, the estimated privilege tax to be paid by the hotel on the amount received by the hotel and facilitation and service fees that are retained by Taxpayer. The Cities contend the fees retained by Taxpayer are subject to the Cities' privilege tax under the hotel classification or because Taxpayer is acting as a broker for hotels.

Taxpayer does not assign travelers to particular rooms or furnish actual lodging or lodging space to travelers. Taxpayer does not purchase lodging space in advance and resell such lodging to travelers. The hotels own and control their hotel rooms. Taxpayer does not own or operate any hotels or other transient lodging facilities within the Cities. Taxpayer is not authorized to act on behalf of hotels located in the Cities, as a broker or otherwise. Taxpayer is not subject to the Cities' privilege taxes. Even if Taxpayer were subject to the privilege tax, imposition of the tax would be unconstitutional and a violation of the Internet Tax Freedom Act.

Tax Collectors' Responses

The tax base under the hotels classification is the same whether hotels sell/rent their rooms directly, through travel agents or through online travel companies. The tax applies to gross income and applies to brokers of any person engaged in the business of operating a hotel.

Taxpayer is either engaged in the business of selling rooms or at least facilitating or assisting hotels in selling rooms and is thus a broker. Therefore the entire amount paid by the traveler, both the amount paid to the hotels and the amount retained by Taxpayer, are subject to the Cities' privilege tax under the Model City Tax Code (MCTC). [1]

Discussion

The primary question presented in this case is whether Taxpayer, an online travel company (OTC), is subject to the Cities' privilege taxes for its activity relating to hotel reservations at lodging facilities located in the Cities. Taxpayer enters into agreements with hotels whereby Taxpayer agrees to pay an agreed upon room rate to the hotel for each room that travelers book through Taxpayer. [2]

To make a hotel reservation, a traveler contacts Taxpayer by phone or through its website, selects accommodations based on the traveler's criteria and requests a reservation. Taxpayer forwards the traveler's information and request for a reservation to the hotel which acknowledges the reservation by sending a confirmation. Taxpayer then charges the traveler's credit card. The total amount charged the traveler includes the amount for the room rental to be paid by Taxpayer to the hotel, an amount estimated to be sufficient to pay the privilege taxes the hotel will be required to pay on the room rental and fees for Taxpayer's costs and services.

Taxpayer does not own or operate any hotels in the Cities. Taxpayer does not purchase, physically possess or reserve any specific room, does not perform direct oversight of day-to-day hotel operations such as housekeeping, maintenance, room service, front desk operations or building security, does not physically provide possession of any hotel room to the traveler and does not assign a particular room in which the traveler will stay. Those functions are performed by the hotel.

When the traveler arrives at the hotel for check-in, the traveler provides the hotel with identification and at that point the hotel assigns a specific room to the traveler. No payment is required by the hotel from the traveler for the use of the room. The traveler is required to pay the hotel directly for any additional incidental services such as room service, telephone or movie rentals.

After the guest checks out, the hotel bills Taxpayer the agreed room rate plus the estimated privilege taxes on that room rate. The hotel is responsible for paying privilege taxes on the amounts it received from Taxpayer. Taxpayer retains any difference between the amount paid to the hotel and the amount charged the traveler. The Cities contend the amount retained by Taxpayer is subject to the Cities' privilege tax. The Cities also contend that if the hotel does not bill Taxpayer, the amount retained by Taxpayer includes taxes that have to be paid to the Cities as excess taxes.

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[1] Each City has adopted the MCTC. Because there are twelve Cities involved, citations will be to the MCTC and not to the individual ordinances of each City.

[2] Taxpayer also assists travelers to obtain other components of travel packages such as airfare and car rental.

The Cities' privilege taxes under the MCTC are imposed on the privilege of engaging in certain businesses enumerated in Article IV of the MCTC. The Cities first contend that Taxpayer is subject to the Cities' privilege taxes on hotels under MCTC § -444 and to the additional tax imposed by MCTC § -447. The parties have cited numerous cases from other jurisdictions to support their positions. Those cases were decided based on the statutory language of the jurisdiction.

Cases holding OTCs taxable considered statutes whose language indicated an intention to levy a tax on the amount of money visitors to the municipality spent on their hotel rooms or other accommodations. What was relevant in those cases was not who actually performed the upkeep of the room, but rather who was accepting money in exchange for "supplying" the room. *See, e.g., Expedia, Inc. v. City of Columbus,* 285 Ga. 684, 681 S.E.2d 122 (2009) (the ordinance assessed a tax on "the charge to the public" for a room. The Court concluded the tax targeted the full rate paid by the customer); *Travelocity.com LP v. Wyo. Dep't of Revenue*, 2014 WY 43 (Wyo., 2014) (the taxpayer was the recipient of the service or hotel room and the tax was imposed on the sales price paid for living quarters in hotels, motels, tourist courts and similar establishments. The court concluded that the event to be taxed is the sale, *i.e.,* the retail customer's payment in exchange for taxable goods or services); *Travelscape LLC v. South Carolina Dep't of Revenue,* 391 S.C. 89, 705 S.E.2d 28 (S.C. 2011) (the tax is imposed on the gross proceeds derived from the rental or charges for any rooms or sleeping accommodations furnished to transients by any hotel or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration. The court concluded that the core purpose of the ordinances was to levy a tax on the amount of money visitors to the municipality spent on their hotel rooms or other accommodations. The OTC's activity of arranging for reservations was encompassed within the business of furnishing accommodations to transients for consideration.)

Cases holding OTCs not taxable considered statutes that taxed persons engaged in the business of operating hotels. What was relevant in those cases was who actually engaged in the activity of operating a hotel. *See, e.g., St. Louis Cnty. v. Prestige Travel, Inc.,*344 S.W.3d 708, 714 (Mo. 2011) (the taxpayer was not engaged in the business of operating a hotel or motel. The taxpayer did not provide sleeping rooms, and the money it retained as compensation was for facilitating a reservation, not providing a room); *Pitt Cnty. v. Hotels.com,* 553 F.3d 308, 313 (4 Cir. 2009) (the phrase "operators of hotels, motels, tourist homes, tourist camps, and similar type businesses" in the statute did not apply to OTCs because they were not operators of the hotels whose rooms they offered to the public on the Internet. The OTCs had no role in the day-to-day operation or management of the hotels); *City of Columbus v. Hotels.com, Inc.,* 693 F.3d 642 (6 Cir. 2012) (the obligation to collect and remit occupancy taxes was imposed only on "vendors," meaning owners or operators of hotels who furnished lodging. The OTCs did not meet the definition of "vendors," and were therefore not covered by the ordinances or regulations.)

Even though the cases cited by the parties do not involve the precise statutory language at issue here or involve the application of the Arizona Model City Tax Code, they are instructive. The cases make a distinction between taxes imposed on the activity of furnishing or occupying a hotel room (OTCs taxable) and taxes imposed on the activity of operating a hotel (OTCs not taxable.) In reviewing where the taxes imposed by the MCTC fall, we will review the language of the MCTC, consistent with the following guidelines:

- In tax cases, it is especially important to begin with the words of the operative statute. *Arizona State Tax Commission v. Staggs Realty Corp.,* 85 Ariz. 294, 337 P.2d 281 (1959).
- The tax cannot be imposed through strained construction or application. *City of Peoria v. Brink's Home Sec., Inc.* 226 Ariz. 332, 247 P.3d 1002 (2011).
- If the language of the statute is plain and unambiguous, a court will give the words their ordinary meaning and there is no occasion to interpret the statute. *Milner v. Colonial Trust Co.,* 198 Ariz. 24, 6 P.3d 329 (App. 2000); *US West Communications, Inc. v. City of Tucson,* 198 Ariz. 515, 11 P.3d 1054 (App. 2000),
- If there is ambiguity, in determining whether an activity falls within the scope of the privilege tax, the statute imposing the tax must be strongly construed against the government and in favor of the taxpayer. Any doubts as to its meaning are to be resolved against the tax authority. *Wilderness World v. Department of Revenue,* 182 Ariz. 196, 895 P.2d 108 (1995); *Wenner v. Dayton-Hudson Corp.*, 123 Ariz. 203, 598 P.2d 1022 (App. 1979).
- When words are defined by statute, the court is bound by the legislative definition and the statute must be read and applied in accordance with the statutory definitions. *Arizona State Tax Commission v. First Bank Bldg. Corp.*, 5 Ariz.App. 594, 429 P.2d 481 (1967); *Tobel v. State,* 189 Ariz. 168, 939 P.2d 801 (App. 1997).
- When interpreting a statute, no clause, sentence or word should be rendered superfluous, void, contradictory or insignificant. *State v. Superior Court for Maricopa County,* 113 Ariz. 248, 550 P.2d 626 (1976).

A. Taxpayer Is Not Taxable Under MCTC § -444

The Cities' privilege taxes are levied by MCTC § -400 on persons on account of their business activities, to the extent provided in Article IV, to be measured by the gross income of the person. MCTC § -444 imposes the Cities' privilege tax on every person engaging or continuing in the business of operating a hotel charging for lodging and/or lodging space furnished to any person or transient. The tax is measured by income from the taxable business activity. The tax is thus imposed on the person operating the hotel and is measured by the gross income derived from the operation of the hotel (the taxable business). The tax is not imposed on consumers or transients measured by the amount they paid for lodging.

MCTC § -100 defines "hotel" as any public or private hotel, inn, hostelry, tourist home, house, motel, rooming house, apartment house, trailer, or other lodging place within the City offering lodging, wherein the owner thereof, for compensation, furnishes lodging to any transient, with exceptions not relevant here.

Under the plain language of MCTC § -444, Taxpayer is not engaged in the business of operating a hotel. To be operating a hotel under the MCTC, the Taxpayer would have to be the entity furnishing the lodging to transients and performing oversight of day-to-day hotel operations such as housekeeping, maintenance, room service, front desk operations and building security. There has been no showing here that Taxpayer operates a hotel within any of the Cities and furnishes or provides the lodging to the transient. The money retained by Taxpayer is compensation for

facilitating reservations, not providing a room. *See, St. Louis Cnty. v. Prestige Travel, Inc., supra.* Taxpayer is therefore not engaged in a business taxable under MCTC § -444.

B. Taxpayer Is Not Taxable Under MCTC § -447

MCTC § -447 imposes an additional transient lodging tax, measured by the gross income from the business activity, on any hotel engaging or continuing within the City in the business of charging for lodging and/or lodging space furnished to any transient. The tax is imposed on any hotel. Taxpayer is not a hotel as defined by the MCTC. Taxpayer is therefore not subject to the additional tax imposed by MCTC § -447.[3]

C. Taxpayer Is Not Taxable As A Broker

The Cities contend that even if Taxpayer were not taxable under MCTC §§ -444 and -447, Taxpayer is taxable as a broker. Broker is defined by MCTC § -100 as:

> … any person engaged or continuing in business who acts for another for a consideration in the conduct of a business activity taxable under this Chapter, and who receives for his principal all or part of the gross income from the taxable activity.

Initially, the fact that a term is defined does not make the person included in the definition taxable. For example, just because an individual falls under the definition of a "person" in MCTC -100 does not make an individual taxable for all purposes. A tax would still have to be imposed on that individual's activity by Article IV of the MCTC. The status of being a broker, or being an individual, is not a taxable category under Article IV.

The Cities point to Regulation § -100.1. That regulation provides:

> (a) For the purposes of proper administration of this Chapter and to prevent evasion of taxes imposed, brokers shall be wherever necessary treated as taxpayers for all purposes, and shall file a return and remit the tax imposed on the activity on behalf of the principal. No deduction shall be allowed for any commissions or fees retained by such broker, except as provided in Section ___-405, relating to advertising commissions.
>
> (b) Brokers for vendors. A broker acting for a seller, lessor, or other similar person deriving gross income in a category upon which this Chapter imposes a tax shall be liable for such tax, even if his principal would not be subject to the

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[3] Taxpayer states that the City of Nogales has not adopted MCTC § -447. Some of the Cities however have enacted supplemental transient lodging taxes in provisions other than MCTC § -447 (*See, e.g.* Flagstaff City Code § 3-06-001-0001 (There is hereby levied against all hotels/motels/campgrounds, bars and restaurants a tax on the gross sales of that portion of all revenue defined as hotel/motel/ campgrounds); Nogales City Code § 9-77 (The city's transient rental tax is imposed on hotels, roominghouses, apartment houses and motels); Tucson City Code § 19-66 (Every person who operates or causes to be operated a hotel within the city.) Based on the language of those provisions, the reasoning regarding MCTC § -447 is also applicable to those provisions.

> tax if he conducted such activity in his own behalf, by reason of the activity being deemed a "casual" one. For example:
>
> (1) An auctioneer or other sales agent of tangible personal property is subject to the tax imposed upon retail sales, even if such sales would be deemed "casual" if his principal had sold such items himself.
>
> (2) A property manager is subject to the tax imposed upon rental, leasing, or licensing of real property, even if such rental, leasing, or licensing would be deemed "casual" if his principal managed such real property himself.
>
> (c) Brokers for vendees. A broker acting solely for a buyer, lessee, tenant, or other similar person who is a party to a transaction which may be subject to the tax, shall be liable for such tax and for filing a return in connection with such tax only to the extent his principal is subject to the tax.
>
> (d) The liability of a broker does not relieve the principal of liability except upon presentation to the Tax Collector of proof of payment of the tax, and only to the extent of the correct payment. The broker shall be relieved of the responsibility to file and pay taxes upon the filing and correct payment of such taxes by the principal.
>
> (e) (Reserved) (See Prescott city page)
>
> (f) Location of Business. Retail sales by brokers acting for another person shall be deemed to have occurred at the regular business location of the broker, in a manner similar to that used to determine "out-of-city sales"; provided, however, that an auctioneer is deemed to be engaged in business at the site of each auction.

First, it is questionable whether Taxpayer is acting for the hotels in the conduct of the hotels taxable business activity of operating a hotel. For example, in *City of Columbus v. Hotels.com, L.P., supra,* the court held OTCs not subject to a tax on proprietors or managing agents because the OTCs did not perform the functions of an operator or proprietor of a hotel. Similarly here, Taxpayer does not act for the hotel in the operation of the hotel. Interpreting this provision strictly against the Cities, we hold that Taxpayer is not a broker as defined in MCTC § -100.[4]

Second, giving meaning to all of the language of Regulation § -100.1(a), a broker may be treated as a taxpayer when necessary for the purposes of proper administration of the tax and to prevent evasion of taxes imposed on the activity on behalf of the principal. By its terms, the regulation does not impose an independent tax but may be utilized to prevent the evasion of a tax otherwise imposed by Article IV. The tax imposed by Article IV is on the activity of operating a hotel, not on the activity of being a broker.

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[4] Contrast this with Baltimore City Code Art. 28 § 21-2 (2007) that was specifically amended to included brokers within the definition of "Owners or operators of hotels". *See, Mayor & City Council of Baltimore v. Priceline.com, Inc.,* Case No. MJG-08-3319, 2011 WL 9961251, *7 (D. Md. Aug. 2, 2011)

The Cities have not shown that treating Taxpayer as a broker was necessary for the proper administration of the MCTC or to prevent the evasion of taxes otherwise imposed. The MCTC taxes the business activity of operating a hotel measured by the income from that business. Not all activities are taxed by the MCTC and therefore not all income is taxable. The fact there may be income on which tax is not paid is not an explicit indicator of an evasion of the tax. There is no indication that the taxes imposed on the hotels are being evaded. [5]

D, Excess Taxes Were Not Collected By Taxpayer

The Cities contend that Taxpayer is liable, at a minimum, for taxes it collected that were not paid to the Cities. The agreements between Taxpayer and the hotels provide that if the hotel does not charge Taxpayer within 30 days after a guest's departure then Taxpayer is not obligated to pay the hotel any amount for the room. This is referred to as "breakage". The Cities contend that in the event of breakage, since the total amount collected from the guest by Taxpayer included a component for taxes estimated to be due by the hotel, the amount collected as tax must be paid to the Cities under MCTC § -250.

MCTC § -250 provides in relevant part:

> (a) When tax is separately charged and/or collected. The total amount of gross income shall be exclusive of combined taxes only when the person upon whom the tax is imposed shall establish to the satisfaction of the Tax Collector that such tax has been added to the total price of the transaction. The taxpayer must provide to his customer and also keep a reliable record of the actual tax charged or collected, shown by cash register tapes, sales tickets, or other accurate record, separating net transaction price and combined tax....
>
> (1) Remittance of all tax charged and/or collected. When an added charge is made to cover City (or combined) Privilege and Use Taxes, the person upon whom the tax is imposed shall pay the full amount of the City taxes due, whether collected by him or not, and in the event he collects more than the amount due he shall remit the excess to the Tax Collector. In the event the Tax Collector cannot ascertain from the records kept by the taxpayer the total or amounts of taxes collected by him, and the Tax Collector is satisfied that the taxpayer has collected taxes in an amount in excess of the tax assessed under this Chapter, the Tax Collector may determine the amount collected and collect the tax so determined in the manner provided in this Chapter.
>
> * * * *

Regulation § -250.1 provides:

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[5] The broker provision might come into play if no tax is paid by the hotel on monies collected by Taxpayer that are paid or to be paid to the hotel for the guest's stay. While the parties discussed "breakage" where the hotel does not timely bill Taxpayer and Taxpayer may retain all monies collected from the guest, we do not find where specific occurrences of breakage were identified or resulting amounts of income were quantified,

> If a taxpayer collects taxes in excess of the combined tax rate from any customer in any transaction, all such excess tax shall be paid to the taxing jurisdictions in proportion to their effective rates. The right of the taxpayer to charge his customer for his own liability for tax does not allow the taxpayer to enrich himself at the cost of his customers. Tax paid on an activity that is not subject to tax or that qualifies for an exemption, deduction, exclusion or credit is not excess tax collected.

First, MCTC § -250(a)(1) requires the remittance of amounts added by the person upon whom the tax is imposed to cover privilege taxes. Consistent with the language of MCTC § -250(a)(1) that it applies to the person upon whom the tax is imposed, Regulation § -250.1 provides that tax paid on an activity that is not subject to tax is not excess tax collected. Because we have held that Taxpayer's activity is not subject to the Cities' privilege tax, even if there were breakage, Taxpayer would not have collected excess taxes under MCTC § -250.

Second, the Cities have not established whether and in what amounts Taxpayer has collected fees separately denominated as taxes without the monies collected being remitted to the taxing authorities. A portion of the monies Taxpayer collected were remitted to the hotels to cover the hotels' privilege tax liability. While the Cities contend that in breakage situations Taxpayer would not be remitting amounts that were collected to cover the hotel's privilege tax liability, there is no evidence that breakage actually occurred or quantifying the amount of taxes not remitted in breakage situations. The potential for the existence of breakage situations is insufficient to establish the amount of taxes collected and not remitted or to support an estimate under MCTC § -545. *See, City of Columbus v. Hotels.com, L.P., supra.*

Based on the forgoing, the Cities' privilege tax assessments to Taxpayer are reversed. Because we hold that Taxpayer's activity does not fall within the scope of the Cities' privilege tax, it is not necessary to address the other arguments raised by the parties.

Findings of Fact

1. Taxpayer provides an internet based service whereby travelers are able to arrange for hotel lodging, transportation and other services using Taxpayer's internet website.
2. Taxpayer does not own or operate hotels or other transient lodging facilities within any of the Cities.
3. Taxpayer enters into agreements with hotels whereby Taxpayer agrees to pay an agreed upon room rate to the hotel for each room that travelers book through Taxpayer.
4. To make a reservation, a traveler contacts Taxpayer by phone or through its website, selects accommodations based on the traveler's criteria and requests a reservation. Taxpayer forwards the traveler's information and request for a reservation to the hotel which acknowledges the reservation by sending a confirmation.
5. Taxpayer then charges the traveler's credit card. The total amount charged the traveler is comprised of the amount for the room rental to be paid by Taxpayer to the hotel, an amount estimated to be sufficient to pay the privilege taxes the hotel will be required to pay on the room rental and fees for Taxpayer's costs and services.

6. Taxpayer does not purchase, physically possess or reserve any specific rooms, does not perform direct oversight of day-to-day hotel operations such as housekeeping, maintenance, room service, front desk operations, or building security, does not physically provide possession of any hotel room to the traveler and does not assign a particular room in which the traveler will stay. Those functions are performed by the hotel.

7. When the traveler arrives at the hotel for check-in, the traveler provides the hotel with identification and at that point the hotel assigns a specific room to the traveler. No payment is required by the hotel from the traveler for the use of the room. The traveler is required to pay the hotel directly for any additional incidental services such as room service, telephone or movie rentals.

8. After the guest checks out, the hotel bills Taxpayer the agreed room rate plus the estimated privilege taxes on that room rate. The hotel is responsible for paying privilege taxes on the amounts it received from Taxpayer.

9. Taxpayer retains any difference between the amount paid to the hotel and the amount charged the traveler.

10. Under their agreement, if a hotel does not bill Taxpayer within 30 days after a guest's departure then Taxpayer is not obligated to pay the hotel any amount for the room. This is referred to as "breakage".

11. The Cities issued assessments to Taxpayer measured by the amounts Taxpayer retained for Taxpayer's costs and services.

12. The primary question presented in this case is whether Taxpayer is subject to the Cities' privilege tax for its activity relating to hotel reservations at facilities located in the Cities.

13. Taxpayer timely protested the assessments.

Conclusions of Law

1. In tax cases, it is especially important to begin with the words of the operative statute. *Arizona State Tax Commission v. Staggs Realty Corp.*, 85 Ariz. 294, 337 P.2d 281 (1959).

2. City charters and ordinances are to be construed by same rules and principles which govern construction of statutes. *Rollo v. City of Tempe,* 120 Ariz. 473, 586 P.2d 1285 (1978)

3. The tax cannot be imposed through strained construction or application. *City of Peoria v. Brink's Home Sec., Inc.* 226 Ariz. 332, 247 P.3d 1002 (2011).

4. If the language of the statute is plain and unambiguous, a court will give the words their ordinary meaning and there is no occasion to interpret the statute. *Milner v. Colonial Trust Co.*, 198 Ariz. 24, 6 P.3d 329 (App. 2000); *US West Communications, Inc. v. City of Tucson*, 198 Ariz. 515, 11 P.3d 1054 (App. 2000),

5. If there is ambiguity, in determining whether an activity falls within the scope of the privilege tax, the statute imposing the tax must be strongly construed against the government and in favor of the taxpayer. Any doubts as to its meaning are to be resolved against the tax authority. *Wilderness World v. Department of Revenue,* 182 Ariz. 196, 895 P.2d 108 (1995); *Wenner v. Dayton-Hudson Corp.* 123 Ariz. 203, 598 P.2d 1022 (App. 1979).

6. When words are defined by statute, the court is bound by the legislative definition in all cases where rights of parties are based upon the statute. *Arizona State Tax Commission v. First Bank Bldg. Corp.* 5 Ariz.App. 594, 429 P.2d 481 (1967).

7. A statute is to be read and applied in accordance with any special statutory definitions of the terms that it uses. *Tobel v. State,* 189 Ariz. 168, 939 P.2d 801 (App. 1997).

8. When interpreting a statute, no clause, sentence, or word should be rendered superfluous, void, contradictory or insignificant. *State v. Superior Court for Maricopa County*, 113 Ariz. 248, 550 P.2d 626 (1976).

9. MCTC § -400 levies a privilege tax on persons on account of their business activities specified in Article IV of the MCTC measured by the gross income of persons, whether derived from residents of the City or not, or whether derived from within the City or from without.

10. The privilege tax on a person's business activity in the city is a tax on and paid by the business providing the service and is not a tax upon the sale itself. *See, Ariz. Dep't of Revenue v. Mountain States Tel. & Tel. Co.,* 113 Ariz. 467, 468, 556 P.2d 1129, 1130 (1976).

11. MCTC § -444 in Article IV imposes a privilege tax, measured by income from the taxable business activity, on every person engaging or continuing in the business of operating a hotel charging for lodging and/or lodging space furnished to any person or transient.

12. MCTC § -447 levies an additional tax, measured by income from the business, on the business activity of any hotel engaging or continuing within the City in the business of charging for lodging and/or lodging space furnished to any transient.

13. MCTC -100 defines "hotel" as any public or private hotel, inn, hostelry, tourist home, house, motel, rooming house, apartment house, trailer, or other lodging place within the City offering lodging, wherein the owner thereof, for compensation, furnishes lodging to any transient, with certain exceptions not relevant here.

14. The privilege taxes imposed by MCTC §§ -444 and -447 are on the business of operating a hotel as defined in MCTC -100.

15. Taxpayer is not a hotel as defined in MCTC § -100, is not engaged in business of operating a hotel and is therefore not subject to the Cities' privilege taxes imposed under MCTC §§ -444 and -447.

16. MCTC § -100 defines "broker" as any person engaged or continuing in business who acts for another for a consideration in the conduct of a business activity taxable under the code, and who receives for his principal all or part of the gross income from the taxable activity.

17. MCTC Regulation § -100.1(a) provides that for the purposes of proper administration of this Chapter and to prevent evasion of taxes imposed, brokers shall be wherever necessary treated as taxpayers for all purposes, and shall file a return and remit the tax imposed on the activity on behalf of the principal. No deduction shall be allowed for any commissions or fees retained by such broker

18. Taxpayer is not subject to the privilege tax as a broker for the hotels. The activity of Taxpayer is to facilitate travelers to obtain hotel reservations as well as other components of travel packages such as airfare and car rental.

19. A taxpayer who adds a separate charge to the total price of a transaction to cover the taxpayer's privilege tax liability is required to pay the full amount of the City taxes due, whether collected by him or not, and if he collects more than the amount due he shall remit the excess to the Tax Collector. MCTC § -250(a)(1).

20. In the event the Tax Collector cannot ascertain from the records kept by the taxpayer the total or amounts of taxes collected by him, and the Tax Collector is satisfied that the taxpayer has collected taxes in an amount in excess of the tax assessed under this Chapter, the Tax Collector may determine the amount collected and collect the tax so determined in the manner provided in this Chapter. MCTC § -250(a)(1).

21. Tax paid on an activity that is not subject to tax or that qualifies for an exemption, deduction, exclusion or credit is not excess tax collected. Regulation § -250.1.

22. An estimate by the Tax Collector used in an assessment is required to be made on a reasonable basis. MCTC § -545(b).

23. The Tax Collectors have not shown that Taxpayer has collected excess taxes or established an estimate made on a reasonable basis to calculate any tax due on potential breakage situations.

24. The Cities' proposed assessments issued to Taxpayer are reversed. The Tax Collectors shall abate the assessments.

Ruling

The protests by Taxpayer of the Cities' assessments for the review period covered from June 2001 through "April 2009 are granted.

The Tax Collectors shall abate the assessments.

The parties have timely rights of appeal to the Arizona Tax Court pursuant to Model City Tax Code Section –575.

Sincerely,

Frank L. Migray
Municipal Tax Hearing Officer

HO/7100.doc/10/03

c: Bridget McBryde, Assistant City Attorney
Municipal Tax Hearing Office

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/20/2016 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2014-000470 04/11/2016

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
H. Bell
Deputy

CITY OF PHOENIX, et al.

MICHAEL C MCKAY

v.

ORBITZ WORLDWIDE INC, et al.

ROBERT SCHWIMMER
BARBARA J DAWSON
COURT REPORTER ADMINISTRATOR
ELECTRONIC RECORD SERVICES

MINUTE ENTRY

Courtroom 201-OCH

10:11 a.m. This is the time set for Oral Argument re: Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. Plaintiffs are represented by counsel, Scott G. Anderson, Michael McKay, Robert Finnell, John Crongeyer, *Pro Hac Vice,* and Alex Cash. Defendants, Orbitz, LLC, Trip Network, Inc., Internetwork Publishing Corp., Priceline.Com, Inc., and Travelweb, LLC are represented by counsel, Robert Schwimmer, *Pro Hac Vice* and Barbara Dawson. Defendants, Expedia, Inc., Hotwire, Inc., and Hotels.Com, LP, are represented by counsel, Deborah Sloan, *Pro Hac Vice.* Defendant, Travelocity.Com, LP, is represented by counsel, Bryan Davis, *Pro Hac Vice.*

Court reporter, Terry Masciola, makes a record of the proceedings.

Discussion is held regarding the procedure for requests to seal any portion of the record of today's hearing. A procedure is described on the record.

Oral argument is presented.

10:57 a.m. Court stands at recess.

10:59 a.m. Court reconvenes with respective counsel and parties present.

Court reporter, Terry Masciola, makes a record of the proceedings.

Oral argument continues.

IT IS ORDERED sealing the portion of the court proceeding held on April 11, 2016 between 10:25 a.m. and 10:36 a.m., not to be opened or transcribed without further order of the Court.

Based upon matters presented to the Court,

IT IS ORDERED taking this matter under advisement.

11:31 a.m. Matter concludes.

LATER:

The Court has considered Plaintiffs' Motion for Summary Judgment filed, August 31, 2015, Defendants' response and Cross-Motion for Summary Judgment, filed September 30, 2015, Plaintiffs' reply in support of their motion and response to the Cross-Motion for Summary Judgment, filed October 30, 2015, and Defendants' reply in support of the Cross-Motion for Summary Judgment, filed November 16, 2015. The well written briefing was very helpful to the Court, as was the intelligent and well organized oral argument on April 11, 2016.

In 2013 the Plaintiff cities issued business activity tax assessments to several online travel companies (OTC), some of which are defendants here, covering activity from April 2000 to April 2009. In May 2014 a hearing officer overturned the tax assessments, concluding that the OTCs are neither hotel operators nor brokers. Plaintiffs challenge that finding. This Court reviews the status of the OTCs *de novo*.

Each of the Plaintiffs has adopted the Model City Tax Code (MCTC) related to the taxation of hotel operations within its jurisdiction. Three sections of the MCTC are particularly relevant here. Sections -444 and -447 impose taxes related to hotels and section -100 extends liability for these taxes beyond owners and operators to brokers.

It is clear that the OTCs are not in the hotel business. They do not own or operate hotels. The OTCs own no buildings where weary travelers can sleep, they do not manage problems that

occur during hotel guests' stays, and they cannot set the rules guests must abide by during their stay or evict guests that are breaking those rules. A hotel guest in need of clean towels would never call one of the OTCs.

Their relationship to the hotels, however, is far more than just "pass[ing] information between travelers and hotels and help[ing] travelers make payment arrangements." The information flows only one way, and then in a heavily redacted form; it passes through a "black box" that prevents consumers from knowing the identity of (and thus from making a separate deal with) the hotel until payment of both the hotel's rent and the OTC's own fee, presented to the consumer as a single lump sum, has been made. The hotel, for its part, knows nothing about the potential customer until the OTC has collected the rent-plus-fee and committed the hotel to provide a room on the scheduled day. The hotel uses the OTC as its agent to obtain business – in short, as a broker.

Section -444 of the MCTC, titled "Hotels," states:

> The tax rate shall be at an amount equal to ____ percent (__%) of the gross income from the business activity upon every person engaging or continuing in the business of operating a hotel charging for lodging and/or lodging space furnished to any: (a) Person.

Section -447 of the MCTC provides:

> In addition to the taxes levied as provided in Section -444, there is hereby levied and shall be collected an additional tax in an amount equal to ____ percent (__%) of the gross income from the business activity of any hotel engaging or continuing within the City in the business of charging for lodging and/or lodging space furnished to any transient.

Certain sections of the MCTC address third parties engaged to conduct taxable business activity on behalf of a taxable entity. The MCTC calls such parties "brokers" and impose tax liability on them.

Section -100 of the MCTC, under "General definitions," states:

> "Broker" means any person engaged or continuing in business who acts for another for a consideration in the conduct of a business activity taxable under this Chapter, and who received

> for his principal all or part of the gross income from the taxable activity.

Defendants clearly and unambiguously fall within the definition of "broker." Defendants' proffered interpretation, that the broker must himself conduct every aspect of the taxable activity, defies common sense; it would make the only possible broker for a business the business itself, rendering the entire concept of a broker meaningless. The "conduct of a business activity" is not all or nothing. The tasks an OTC assumes – the solicitation of customers and receipt of their payments – plainly constitute an important part of the business activity of a hotel. It is sufficient to meet the definitional test.

There is no double taxation involved. The taxable transaction, the consumer's purchase of the right to occupy the hotel room, occurs in Arizona and nowhere else. That the OTC's residence for income tax purposes may be in another state is immaterial; there is no constitutional bar to different jurisdictions taxing transactions and business income, as long as each is taxed no more than once.

MCTC Section -542 states that if the cities adopt "a new interpretation or application" of any provision of the MCTC, "or determine[s] that any provision applies to a new or additional category or type of business," then the city "shall not assess any tax, penalty or interest retroactively based on the change in interpretation or application." MCTC Sec. -542(b). The OTC's have facilitated reservations at hotels in the cities for over a decade. The Defendants have never once attempted to apply or enforce the Hotel Privilege Taxes prior to the 2013 assessments at issue here. Therefore, the Cities are barred from now assessing any tax, penalty or interest retroactively before 2013.

None of the remaining arguments made by Defendants that they should not be taxed are persuasive.

Accordingly, Plaintiffs' Motion for Summary Judgment filed August 31, 2015, is granted in part (prospective application only) and denied in part (retroactive application) and Defendants' Cross-Motion for Summary Judgment, filed September 30, 2015, is denied.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CITY OF PHOENIX, et al., *Plaintiffs/Appellees/Cross-Appellants*,

v.

ORBITZ WORLDWIDE INC., et al., *Defendants/Appellants/Cross-Appellees*.

Nos. 1 CA-TX 16-0016; 1 CA-TX 16-0018
(Consolidated)
FILED 9-6-2018

Appeal from the Arizona Tax Court
Nos. TX2014-000470; TX2014-000471; TX2014-000472; TX2014-000473;
TX2014-000474; TX2014-000475
(Consolidated)
The Honorable Christopher T. Whitten, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Acting Presiding Judge Peter B. Swann and Judge Randall M. Howe joined.

B E E N E, Judge:

¶1 Orbitz Worldwide Inc. and other travel companies (collectively the "online travel companies," or "OTCs") appeal the superior court's partial grant of summary judgment to the City of Phoenix and other cities ("Cities"), holding the OTCs are brokers under the Phoenix City Code ("Code")[1] and, thus, subject to transaction privilege tax on their sales of hotel rooms. The Cities cross-appeal the court's partial denial of that summary judgment, which barred the Cities from assessing such taxes and penalties against the OTCs before 2013. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 The facts in this case are not in dispute. The OTCs operate websites that advertise travel services and allow customers to reserve and pay for hotel rooms. The OTCs do not own any hotels. Instead, they employ a merchant model, under which the OTCs contract with hotels to list rooms available for rent on their websites.

¶3 On an OTC's website, customers reserve hotel rooms by providing their personal information, length of stay, and payment information to the OTC. The OTC provides the customer with a total price, with two line items: the "Reservation Rate" or "Nightly Rate," and the "Taxes and Fees" or "Tax Recovery Charge and Service Fees." However, neither line item is further itemized. The "Reservation Rate"—effectively the retail rate of the room—consists of the room rental rate set by the hotel plus an additional amount the OTC retains for its services. The Reservation Rate does not delineate the amount the hotel retains versus the amount the OTC retains. The second line-item, the Taxes and Fees, includes the tax rate

[1] In their briefs, the Cities and Orbitz reference the Model City Tax Code. Because Phoenix is the named Appellee and the Phoenix City Code and the Model City Tax Code are not substantively different, we refer to the Phoenix City Code throughout this decision.

the hotel later remits to the city as a privilege tax and an additional service fee paid to the OTC, undisclosed to the customer.

¶4 The OTC appears as the merchant of record on the customer's credit card. The OTC handles the customer's financial and customer service concerns until the customer arrives at the hotel. If the customer does not keep a reservation and fails to cancel, the OTC sometimes keeps all of the money from the transaction, including the tax. The customer directly pays the hotel only for incidentals during the stay.

¶5 After a customer's stay, the hotel typically invoices the OTC for the net room rate and tax the hotel owes on that amount. The hotel then pays tax to the city on the amount it receives from the OTC. The OTC does not pay to the city any tax on its service fees, and the city does not receive tax on the money the OTC keeps.

¶6 To illustrate, assume an OTC contracts with a hotel in a city with a combined 10% occupancy tax. The OTC and the hotel agree to a net rate of $80. The OTC, then, sells the right to occupy the room to a traveler for $100, plus $10 taxes and service fee. After the traveler's stay, the hotel invoices the OTC for $80, plus the 10% tax of $8. The hotel remits the $8 to the city, and the OTC keeps the remaining $22.

¶7 In 2014, the Cities issued business activity privilege tax assessments to the OTCs for a review period of June 2001 to April 2009. The Cities argued that the OTCs were engaged in taxable activities under the Code §§ 14-444 and -447 for the privilege of engaging in the business of operating hotels, or alternatively, for acting as brokers for hotels. The OTCs sought redetermination of the Cities' assessments, arguing that the OTCs are not subject to the tax because they 1) do not operate hotels and are not hotels; and 2) are not brokers.

¶8 The Hearing Officer agreed with the OTCs, finding that the OTCs are not engaged in the business of operating a hotel and are not brokers because they do not act for hotels in the operation of the hotel. Also, the Hearing Officer found that, even if the OTCs were brokers under the regulation, the taxable portion of the transaction is only the net amount paid to the hotel, for which audits showed the Cities received remittance.

¶9 The Cities appealed the Hearing Officer's ruling to the superior court and filed a motion for summary judgment, which was partially granted and partially denied. The superior court concluded: 1) the OTCs did not own or operate hotels; 2) the OTCs "clearly and unambiguously fall within the definition of 'broker'" under the Code

because "the hotel uses the OTC as its agent to obtain business – in short, as a broker;" 3) the Cities' "broker" position constituted "a new interpretation or application" under the Code, and the Cities could, thus, only assess taxes prospectively. *See* Code § 14-542.

¶10 The OTCs timely appealed the superior court's rulings. The Cities cross-appealed the ruling barring retrospective collection of the tax. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶11 Entry of summary judgment is proper "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We determine *de novo* whether any genuine issue of material fact exists and whether the trial court erred in applying the law, and will uphold the court's ruling if correct for any reason. *Logerquist v. Danforth*, 188 Ariz. 16, 18 (App. 1996). We construe the evidence and reasonable inferences in the light most favorable to the non-moving party. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 482, ¶ 13 (2002).

¶12 This case involves issues of statutory interpretation that we review *de novo. United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195 (App. 1990); *State v. Gallagher*, 205 Ariz. 267, 269, ¶ 5 (App. 2003). City charters and ordinances are construed by the same rules and principles that govern construction of statutes. *Rollo v. City of Tempe*, 120 Ariz. 473, 474 (1978).

¶13 "[T]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 234 Ariz. 343, 344, ¶ 8 (2014) (citation omitted). "We construe the statute as a whole, and consider its context, language, subject matter, historical background, effects and consequences, as well as its spirit and purpose." *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, ¶ 9 (2004) (quoting *State ex rel. Ariz. Dep't of Revenue v. Phx. Lodge No. 708, Loyal Order of Moose, Inc.*, 187 Ariz. 242, 247 (App. 1996)) (internal quotations and marks omitted). Statutes imposing taxes are liberally construed in favor of taxpayers and against the government. *Id.* at ¶ 10.

I. The OTCs are brokers engaging in a taxable activity under Phoenix City Code Section 14-444.

¶14 In section 14-444, the Code imposes a tax on "the gross income from the business activity of every person engaging or continuing in the business of operating a hotel charging for lodging." Code § 14-444. The OTCs are included under this section because: a) they are brokers; b) they provide services generally performed in operating a hotel; and c) their service fee is part of the entire amount a customer must pay for the lodging—the taxable gross income.

A. The OTCs are persons under section 14-444 because they are brokers.

¶15 The Cities argue the OTCs are "persons" under this ordinance because they are hotel room brokers. The OTCs counter the definition does not apply to them because they do not own or operate hotels. The Code generally defines "person[s]" as any "individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate, *broker*, the Federal Government, this State, or any political subdivision or agency of this State." Code § 14-100 (emphasis added). The Code, then, specifically defines "broker" as "any person engaged or continuing in business who acts for another for a consideration in the conduct of a business activity taxable under this Chapter, and who receives for his principal all or part of the gross income from the taxable activity." Code § 14-100. The superior court concluded that the OTCs "clearly and unambiguously fall within the definition of 'broker.'" We agree.

¶16 Under the Code, the OTCs are brokers for the following four reasons: 1) they act for hotels by providing advertising, booking, and other hotel services; 2) they accept payment for their services from travelers; 3) they accept consideration for their services from hotels; and 4) they assist hotels with taxable hotel operations.

¶17 First, the OTCs act for hotels by advertising available rooms, soliciting customers, collecting customer information, processing payment, and handling certain aspects of customer service. While the OTCs argue they merely provide information and services to travelers, they facilitate additional services to travelers by taking on numerous duties of the hotel during the booking process.

¶18 Second, the OTCs earn consideration for their actions in the form of service fees. They argue they are not brokers under the Code because the *traveler* pays the fees in consideration for their services. But the

Code does not specify who must pay the consideration, only that consideration is exchanged.

¶19 Third, the OTCs perform hotel operations, for which hotels exchange consideration. The OTCs claim customers pay their fees for the information compiled on their websites and ease in the booking process. However, advertising and booking are essential hotel operations that the OTCs assume. The OTCs, thus, receive consideration for acting on behalf of the hotel, as contemplated by the Code. *See* Code § 14-100. Additionally, hotels agree to take a smaller amount of revenue in OTC-facilitated transactions in exchange for the exposure to a wider customer base the OTCs provide. This loss in revenue, in exchange for services and access to customers, is also a form of consideration.

¶20 Fourth, although the OTCs argue they do not directly engage in business activities taxable under the Code, the taxable activity is furnishing hotel lodging to customers. Not only do the OTCs collect the entire amount of fees for lodging on behalf of hotels, but they also assume advertising, booking, and customer service duties for hotels.

B. The OTCs provide services performed in the business of operating a hotel.

¶21 The OTCs correctly point out that they do not perform all of the functions involved in operating a hotel; however, defining brokers as those who perform *all* aspects of hotel operation is contrary to the Code's plain language. *See Harris (Shilgevorkyan)*, 234 Ariz. at 344, ¶ 8. Brokers are included as "persons" under § 14-444, and all "persons" must pay tax on the total amount of revenue they generate from hotel operations. The OTCs, as brokers, assume a number of duties hotels generally perform. Thus, brokers must pay tax on the income they generate from performing those operational duties. Applying the Code only to those who perform *all* operational functions of a hotel would render the broker definition superfluous. *See Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 244 (App. 1997) ("We presume that the legislature does not enact superfluous or reiterative legislation.").

C. The entire amount the OTCs collect from a customer is the taxable gross income for the lodging transaction.

¶22 The OTCs contend the revenue they collect is not the gross income paid for hotel lodging; instead, the customer pays a certain amount for the hotel stay and a separate amount the OTC retains as a service fee. However, Code section 14-100.1 provides:

> (a) For the purposes of proper administration of this chapter and to prevent evasion of taxes imposed, *brokers* shall be wherever necessary treated as taxpayers for all purposes, and shall file a return and remit the tax imposed on *the activity on behalf of* the principal. *No deduction shall be allowed for any commissions or fees retained by such a broker*, except as provided in Section 14-405, relating to advertising commissions.

(Emphasis added.)

¶23 The OTCs admit that the fees they collect are service fees. Although the OTCs argue that these fees are separate from the price customers pay for the right to occupy a hotel room, each consumer must pay the total amount the OTC charges, including service fees, to rent the room. The OTC's decision not to separately itemize service fees, but to label the hotel room's net rate plus the service fees as the "Reservation" or "Nightly Rate" on their customer invoices, further demonstrates that the entire amount is the price paid for lodging. Because customers must pay the entire combined amount to obtain future lodging at the time they book with the OTC, the entire amount they pay is the sales price for the lodging paid to the OTC on the hotel's behalf at the time of the sale. The Code does not provide a deduction for service fees retained by the OTCs. Thus, the entire sales price the OTC charges is the gross income for the lodging transaction and is taxable under § 14-444.

¶24 Our reasoning accords with decisions regarding the taxability of OTCs in other state and federal courts. In jurisdictions that require only hotel owners and operators to remit taxes on the revenues they receive, the OTCs' service fees have generally not been found taxable.[2] In jurisdictions that apply a tax to the entire cost of purchasing lodging, the OTCs' service fees have been found taxable.[3] For example, Baltimore changed its tax laws

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[2] *See, e.g.*, *Pitt Cty. v. Hotels.com, G.P., LLC*, 553 F.3d 308, 313 (4th Cir. 2009) (tax only imposed on hotel "operators"); *Louisville/Jefferson Cty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 385 (6th Cir. 2009) (imposed tax on amounts charged by entities "doing business as . . . hotels"); *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642, 651 (6th Cir. 2012) (amount charged by hotel is taxable).

[3] *See, e.g.*, *Travelscape, LLC v. S.C. Dep't of Revenue*, 705 S.E.2d 28, 32–33 (S.C. 2011) (OTCs' hotel transactions subject to tax upon gross proceeds); *Travelocity.com, L.P. v. Wyo. Dep't of Revenue*, 329 P.3d 131, 145, ¶ 55 (Wyo.

to reflect models that charge tax on the entire lodging transaction to successfully collect tax from the OTCs. Jaan Rannik, Note and Comment, *Locality v. Online Travel Company: Does the Bell Finally Toll for Quill Corporation v. North Dakota?*, 9 J. Bus. & Tech. L. 293, 297-98 (2014); *see also Mayor & City Council of Balt. v. Priceline.com Inc.*, 2012 WL 3043062 at *9 (D. Md. July 24, 2012) (mem. decision).

¶25 The superior court correctly applied the law and summary judgment on this issue was appropriate.

II. The OTCs are not taxable entities under Phoenix City Code § 14-447.

¶26 Unlike § 14-444, which specifically incorporates hotel room brokers as taxpayers, § 14-447 taxes "the gross income from the business activity of *any hotel* engaging or continuing within the City in the business of charging for lodging." (Emphasis added.) The OTCs argue that § 14-447 taxes income received by hotels and does not apply to OTC activities. The Cities argue that § 14-447 taxes *all* entities receiving gross business income from furnishing lodging to customers.

2014) (as vendors, OTCs' markups are subject to sales tax); *City & Cty. of Denver v. Expedia, Inc.*, 405 P.3d 1128, 1138, ¶ 35 (Colo. 2017) (the OTCs' service fee is taxable as it is inseparable from the price of lodging).

¶27 While § 14-200 does define gross income broadly,[4] § 14-447's plain text limits the taxable income to business activities of *hotels*. The Cities do not explain how § 14-200 overcomes § 14-447's limitation on hotel income only. The Cities argue that § 14-447 institutes a tax on the entire consideration consumers pay for hotel rooms regardless of its later division. If § 14-447 were to be read as broadly as the Cities suggest, however, the tax could be applied to the income of any business affiliated with the hotel industry. We agree with the OTCs that the language of § 14-447 limits taxpayers to hotels renting lodging to customers. It does not extend to brokers engaging in hotel operations, as reflected in other sections of the Code.

¶28 The superior court misapplied the law when it granted the Cities' motion for summary judgment as to the taxation provisions of § 14-447. Therefore, we reverse the superior court's grant of summary judgment on this issue and remand for entry of judgment in favor of the OTCs.

III. The Cities did not advance a new interpretation of the Code.

¶29 In its summary judgment order, the superior court concluded the Cities are barred from assessing any tax, penalty, or interest retroactively, before 2013, because the Cities did not enforce the taxes prior to that year. This conclusion is contrary to Code § 14-542(b)(2), which provides:

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[4] Pursuant to Code § 14-200(a), gross income includes:

> (1) The value proceeding or accruing from the sale of property, the providing of service, or both.
>
> (2) The total amount of the sale, lease, license for use, or rental price at the time of such sale, rental, lease, or license.
>
> (3) All receipts, cash, credits, barter, exchange, reduction of or forgiveness of indebtedness, and property of every kind or nature derived from a sale, lease, license for use, rental, or other taxable activity.
>
> (4) All other receipts, whether payment is advanced prior to, contemporaneous with, or deferred in whole or in part subsequent to the activity or transaction.

> If the Tax Collector *adopts a new interpretation or application* of any provision of this chapter or determines that any provision *applies to a new or additional category or type of business* and the *change in the interpretation or application* is not due to a change in the law . . . the Tax Collector shall not assess any tax, penalty or interest *retroactively* based on the *change* in interpretation or application.

(Emphasis added.)

¶30 Adoption of a new interpretation requires a change from an old position because the "liability for transaction privilege taxes arises *automatically* when a taxpayer engages in taxable business activity in Arizona." *Tucson Mech. Contracting, Inc. v. Ariz. Dep't of Revenue*, 175 Ariz. 176, 178 (App. 1992) (emphasis added). While taxing authorities may audit select taxpayers to ensure compliance, privilege taxes are self-assessed. *Id.* Failure to collect a privilege tax does not render an unambiguous statute unenforceable and does not preclude the tax authority from seeking to collect those revenues in the future. *Miami Copper Co. Div., Tenn. Corp. v. State Tax Comm'n*, 121 Ariz. 150, 153 (App. 1978). The OTCs bear the burden of proving that the Cities changed their interpretation of the tax law. *See* Code §§ 14-370(a) and 14-400(c); *see also Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 582, ¶ 55 (1998) (the department can be estopped from collecting taxes if taxpayer proves the department held inconsistent positions).

¶31 Here, the record shows no evidence that the Cities held positions contrary to the one they now advance. Therefore, the OTCs failed to demonstrate they qualify for an exclusion based on a change in the Cities' interpretation of the tax provisions. The OTCs also fail to demonstrate that their business is a new activity or category. Brokering hotel and travel services is not a new industry; although the OTCs provide these services through the internet, the nature of the services remains the same. The OTC's business activities are, therefore, not "new."

¶32 We conclude that the superior court misapplied the law; dismissal of the Cities' motion for summary judgment was inappropriate as the Code allows the Cities to collect tax from previous years, when not barred by statutes of limitation. Because there was no change in the Cities' application or interpretation of the Code and the OTCs' business activities are not new, we reverse and remand for further proceedings consistent with this decision.

CONCLUSION

¶33 For the foregoing reasons, we affirm the OTCs' status as taxable hotel room brokers under § 14-444, but reverse the conclusion that the OTCs are taxable under § 14-447 and that the Cities may not assess tax, penalties, and interest before 2013. We remand for further proceedings consistent with this decision. We award the Cities their costs on appeal subject to compliance with Arizona Rule of Civil Appellate Procedure 21. We decline to award the Cities attorneys' fees on appeal pursuant to A.R.S. § 12-348.01 because this section limits recovery by a municipality to lawsuits involving dispute with another government entity.

AMY M. WOOD • Clerk of the Court
FILED: AA