SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA	:	
	:	
Plaintiff	:	
	:	
v.	:	2011 CA 002117 B
	:	Judge Craig Iscoe
EXPEDIA, INC., et al.	:	
	:	
Defendants	:	

ORDER

This matter is before the Court on Defendants' motion to dismiss and Plaintiff's opposition thereto. The Court held extensive oral argument on the motion on July 27, 2011. Counsel for Expedia argued on behalf of all Defendants other than Priceline, whose counsel explained how Priceline's business model differed from that of the other defendants and present related arguments. After consideration of the parties' filings, oral arguments, and for the reasons discussed more fully below, the Court denies the motion to dismiss.

Background

This suit is brought by the District of Columbia seeking to collect retail sales and related taxes associated with hotel bookings from the Defendants for a period over the past ten years. Defendants are online travel companies (OTCs) who offer and sell travel services, including the booking of hotel rooms, airline tickets, and rental cars throughout the world, including in the District of Columbia.

According to the District's complaint and the discussion at oral argument, the OTCs maintain contracts with many of the individual hotels and hotel chains that do business in the District of Columbia. These contracts provide that the hotels will offer

hotel rooms to the OTCs at rates that are significantly less than an individual would pay directly to the hotel. The OTCs do not, however, pay the hotel for a room unless an OTC customer has reserved a room at the hotel.[1] The OTCs then offer their customers these hotel rooms at higher rates than the OTCs would pay for the room.[2] The OTCs also offer potential customers the service of allowing customers to compare the prices and amenities of various hotels in the District. The price that a customer pays an OTC for a room is referred to in this Order as the OTC rate. The total OTC rate includes a "tax recovery charge" or similar fee. In general, the OTC rate is the same, or almost the same, as the rate that the hotels offer potential customers rooms on the hotels' own web sites. Similarly, the tax recovery charge listed is approximately 14.5% of the listed OTC rate displayed on the website, is the same percentage as the District's retail sales tax rate on hotel rooms, as is required by D.C. Code § 47-2002 and § 47-2002.02.

Customers who book a hotel room through an OTC make payment directly to the OTC, rather than directly to the hotel. The OTC then remits payment to the hotel at the previously negotiated rate, along with taxes based upon that lower rate, rather than the rate that a customer who had booked directly from the hotel would owe the hotel before the assessment taxes at the rate of 14.5%. In short, a customer pays the same amount of money when booking through an OTC or through a hotel, while the taxes paid to the District are less when the customer uses an OTC. The OTCs retain as profit both the difference between the OTC price that the customer pays and the lower price that the

[1] The timing of when the OTC actually pays the hotel may vary based on factors such as whether the OTC customer has the option of canceling the reservation.

[2] The Court recognizes that Defendant Priceline.com has a somewhat different business model than the OTCs, in that Priceline does not offer rooms to customers for a set price. Instead, it allows customers to bid on the price to pay for rooms and then, according to counsel's statement at oral argument, pays the hotel a discounted rate that is related to the cost for which Priceline has sold the room to its customer. For the purposes of the Plaintiffs' jointly filed Motion to Dismiss, these differences have no analytical significance.

OTC pays to the hotel, as well as the difference between the tax recovery charge the OTC imposes on the customer and the lower amount of tax on the discounted price for the room that the OTC pays to the hotel.[3] Before a customer who booked a room through an OTC checks in to the hotel, the hotel has no contract with the customer. It has only dealt with the OTC. Likewise, the customer's only contract is with the OTC.

It may be helpful to provide numbers to help illustrate the discussion above. Assume that a hotel offers a room for $100 to customers on its website. With taxes of 14.5%, the customer would pay a total of $114.50. The hotel would keep $100 and pay taxes to the District of $14.50. An OTC offering the same room would charge the OTC customer the same total price for the room -- $114.50. The taxes, however, would be significantly different. If the OTC and the hotel had a contract under which the hotel charged the OTC $50,[4] it would pay the hotel tax (for the hotel to remit to the District) of 14.5% of $50, or $7.25. The OTC's total outlay would be $57.25 ($50 plus $7.25). The OTC would then retain $57.25, the difference between $114.50 and $57.25, as its tax recovery charge and profit.

On March 22, 2011, the District of Columbia filed a complaint against the OTCs for failure to pay taxes due, failure to file monthly and annual returns, failure to state taxes separately from the sale, and penalties. In essence, the District contends that the OTCs should pay taxes on the amount that an OTC customer pays for the room, not the

[3] The OTCs generally characterize these two amounts as a non-taxable service fee for the OTCs provision of a choice of hotels to a consumer over the internet.

[4] For understandable reasons, no Plaintiff at oral argument wanted to state the usual discount or range of discounts that it receives from a hotel. The Court assumes that an OTC often pays more than 50% of the rate that a hotel charges a customer, but has chosen to use 50% in order to make it easier to follow the arithmetic calculations in the example above.

amount that the OTC pays the hotel for the room. The OTCs filed their motion to dismiss on May 5, 2011.

In their motion to dismiss, Defendants contend that the hotel sales taxes at issue do not apply to the OTCs, because OTCs are not hotels and do not "furnish" rooms to transients. Defendants assert that the D.C. hotel sales taxes apply only to the sale or charge (1) for any room or rooms, lodgings, or accommodations (2) furnished to a transient (3) by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients. They argue that their fee for the service of providing a selection of hotels is not a charge for rooms.

In support of this contention, the Defendants argue that the April 8, 2011 amendment to the D.C. Sales Tax Act specifically exempts the OTCs from taxation. As such, the OTCs contend that because the new act is a "clarification" of the old act, the Court should interpret the change to mean the legislature believed the old act to be ambiguous or unclear. They go on to argue that ambiguous tax statutes should be strictly construed against the District and in favor of the taxpayer. Finally, they offer support for their position from similar tax cases brought in other jurisdictions.

The District of Columbia responds that the pre-April 2011 statute is not ambiguous and that the subsequent amendment of the statute is therefore irrelevant to the Court's interpretation of the D.C. retail sales tax. It argues that two questions must be answered for any tax statute: (1) what is being taxed; and (2) on whom is the tax imposed. As to the first question, they assert that the gross receipts from the retail sale of a covered product or service are taxed. In this case, the District asserts that a room furnished to a transient by any hotel is a covered service and cites to District of Columbia

precedent in support. As to the second, the District asserts that the tax applies to vendors, which is defined as anybody who is engaged in retail sales. It further argues that the statutory language is clear, but if the Court chooses to examine the legislative history of the retail sales tax, that history also supports the District's position. Finally, the District also offers support from other jurisdictions for their position.

Defendants reply by noting that the definitions of "vendor" and "gross receipts" under the statute are circular in that both are defined with respect to "retail sales." They argue that this circularity leads back to their initial argument that they are not engaged in retail sales because they are not selling rooms, they do not furnish rooms to transients, and they are not hotels. They also discount the District of Columbia's arguments regarding legislative intent and challenge the District's interpretation of the case law.

A motions hearing was heard on July 27, 2011, during which the parties argued their respective positions. The matter is now ripe for determination by the Court.

Discussion

I. Standard of Review

A. Motion to Dismiss

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *Vincent v. Anderson*, 621 A.2d 367, 372 (D.C. 1993). In reviewing the complaint, the Court must accept all well-pleaded allegations as true, and construe all facts and inferences in a light most favorable to the non-moving party. *Oparaugo v. Watts*, 884 A.2d 63, 79 (D.C. 2005). Dismissal for failure to state a claim upon which relief can be granted is warranted when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of [their] claim that would entitle [them] to relief."

Duncan v. Children's Nat. Med. Ctr., 702 A.2d 207, 210 (D.C. 1997). It tests only the legal sufficiency of the complaint and leaves aside any doubts as to the sufficiency of the factual foundation. *Am. Ins. Co. v. Smith*, 472 A.2d 872, 873 (D.C. 1984).

B. Statutory Interpretation of the Tax Code

It is a maxim that the language of a statute controls its application. *School Street Associates Ltd. Partnership v. District of Columbia*, 764 A.2d 798, 805 (D.C. 2001). "The first step in construing a statute is 'to read the language of the statute and construe its words according to their ordinary sense and plain meaning.'" *Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 136 (D.C. 2007) (quoting *United States v. Bailey*, 495 A.2d 756, 760 (D.C. 1985)). "[A court is] required to give effect to a statute's plain meaning if the words are clear and unambiguous. The literal words of a statute, however, are not the sole index to legislative intent, but rather, are to be read in the light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." *District of Columbia v. Bender*, 906 A.2d 277, 281-82 (D.C. 2006) (internal quotes and citations omitted). "Because the legislature must be presumed to have acted rationally and reasonably, with an awareness of the goals of the statutory scheme as a whole, the courts eschew interpretations that lead to unreasonable results, that create obvious injustice, or that produce results at variance with the policies intended to be furthered by the legislation." *In re C.L.M.*, 766 A.2d 992, 996-97 (D.C. 2001) (internal citations omitted).

Where the literal words of a tax statute are ambiguous, the analysis shifts somewhat in favor of the taxpayer. In *District of Columbia v. Acme Reporting Co.*, the District of Columbia Court of Appeals agreed that "[i]n construing acts of Congress, we

must look first to the language of the statute and, if it is clear and unambiguous, give effect to its plain meaning." 530 A.2d 708, 713 (D.C. 1987) (internal quotes omitted). Where the plain meaning could not be ascertained, the court made clear "the settled rule [is] that tax laws are to be strictly construed against the state and in favor of the taxpayer, if the statute in controversy is unclear and ambiguous." *Id.* at 712 (quoting 3A Sutherland, *Statutes and Statutory Construction* § 66.01 (C. Sands, 4th ed. 1986)); *see also* Sutherland § 66.03 ("A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons."). However, the *Acme* decision simultaneously tempered this declaration by stating that "tax laws ought to be given a reasonable construction, without bias or prejudice against either the taxpayer or the state, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve." *Id.* at 715 (quoting 3A Sutherland, *Statutes and Statutory Construction* § 66.02).

In their submission and at oral argument, the Defendants argued that *Acme Reporting Co.* stands for the principle that where a tax statute is unclear or ambiguous on its face, the court must rule in favor of the taxpayer. According to the Defendants, if two rival readings of the statute exist, the taxpayer's reading must prevail. The District of Columbia argued that *Acme Reporting Co.* stands for the proposition that the Court should look to the text of the statute first, and, where the statute is ambiguous, the Court should then turn to the legislative history and other tools of reasonable statutory interpretation. Only if the statute remains ambiguous after resorting to all of the normal tools of statutory construction should the Court construe any remaining reasonable ambiguity against the District and in favor of the taxpayers.

The Court finds the District's interpretation of *Acme Reporting Co.* sound. The *Acme* decision itself is instructive. The *Acme* case sought to resolve the question of whether court reporters were to be taxed as "public stenographic services." Following its own standard, the Court of Appeals first determined that a reading of the statute did not leave it with "a clear and unambiguous understanding of the phrase 'public stenographic services,' so as to persuade [the court] to conclude the plain meaning" required inclusion of all court reporters. *Id.* at 712. As a result, the court went on to analyze the legislative history of the term 'public stenography services' in the tax statutes, as well as the general structure and purpose of the statute. *See id.* at 713-15.

The *Acme* court concluded its analysis by recognizing that if an interpretation resulted in absurdity, such construction might not be reasonable. *Id.* at 715; *see also* 3A Sutherland, *Statutes and Statutory Construction* §66.03 ("Courts may reject a plea for the plain meaning rule when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature."). The court declared that crucial to its determination was that in the District of Columbia, "reasonableness of a construction can often be tested by considering the consequences of a different one," and subsequently noting that the end result of the alternative interpretation would have a "chilling effect" on judicial proceedings that could not have been intended. *Acme Reporting Co.*, 530 A.2d at 715. The District's reading of *Acme* is consistent with how the Court of Appeals has explained and relied upon *Acme* in subsequent decisions. *See Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 137-38 (D.C. 2007) ("[T]he reasoning in *Acme Reporting Co.* remains sound. . . ."); *Hiligh v. D.C. Dep't of Empl. Servs.*, 935 A.2d

1070, 1074 (D.C. 2007) (citing *Acme* favorably for the rule that where statutory language is ambiguous, the court examines the statute's legislative history for assistance).

II. Application of the D.C. Sales Tax to the Defendants' Business Model

A. Application of the Pre-April 8, 2011 Sales Tax Statute to the Defendants' Business Model as Alleged in the Complaint

District of Columbia Code § 47-2001, *et seq*., governs the District's sales tax. The Court will first focus on the statute as it existed prior to its April 8, 2011 amendment by the Payment of Full Hotel Taxes by Online Vendors Clarification Act of 2010, 2010 District of Columbia Laws 18-364 (Act 18-715). Accepting the factual allegations of the complaint as true for the purposes of this motion, and construing all inferences in favor of the District of Columbia, the Court finds that the business model of the Defendants, as alleged, falls within the statutory definition of retail sales and that the transactions alleged are therefore taxable.

1. The Plain Language of the District's Sales Tax Statute

Following the *Acme* standard, the court must first determine if the statutory language is plain and unambiguous. The general language in question is found in D.C. Code § 47-2001(n)(1)(C), § 47-2002(2), and § 47-2002.02(1). The court finds that the relevant language in these portions of the statute is ambiguous. § 47-2001 defines retail sale as "[t]he sale or charge for any room or rooms, lodgings, or accommodations furnished to transients by any hotel . . . or any other place in which rooms . . . are regularly furnished to transients for a consideration." There are two interpretations of this definition that have been argued by the parties: 1) Defendants argue that they cannot be subject to the tax as they do not sell or charge for hotel rooms, they do not furnish rooms to transients, and that they are not hotels; 2) The District argues that the charges to

be taxed are those for any room that is ultimately furnished by a hotel, and that an OTC is therefore a vendor selling the room to be furnished by a hotel. Both Plaintiff and Defendants contend that their interpretations of the statute are grounded in a reasonable reading of the statute.

"A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons." Sutherland, *Statutes and Statutory Construction* § 66.03 (C. Sands, 4th ed. 1986)). The Defendants' interpretation is based on a reading of the language that finds no restrictive clauses. Defendants argue that in order to be taxed, they must 1) charge for a hotel room, 2) furnish the hotel room, and 3) be a hotel. On the other hand, the District's interpretation, in effect, is that the phrases in the statute do form a series of restrictive clauses modifying and limiting the type of sale or charge being taxed. Thus, under the District's interpretation, not all sales or charges are taxed, only those "for any room." But not every room that is provided as part of a sales transaction is taxed, only those rooms "furnished to transients by any hotel . . ." as opposed to rooms furnished to long-term residents or by a private citizen renting out a room in their house on an intermittent basis. The series of phrases further define and narrow the scope of the particular transactions subject to tax. If, in the course of a transaction, the ultimate consumer receives the right to occupy a room, and that room is to be furnished to him or her as a transient by a hotel, i.e. a <u>hotel room</u>, then the transaction is a taxable retail sale.

Both interpretations are reasonable. Both the Defendant and the District read the statute in the manner a well-informed person might. Because the plain meaning of the statute is open to two reasonable, yet opposing, interpretations, it is necessary under

Acme to turn to other tools of reasonable statutory interpretation in order to discern the purpose of the statute and avoid absurd results. The purpose of the statute is evident from the statutory structure and legislative history

2. Analysis of the Statutory Structure and Legislative History

There are two primary findings regarding the structure of the relevant portions of the statute: 1) any party making a retail sale, or a sale of a specified service, may be taxed under the statute, and 2) the statute seeks to include the total cost of a transaction in calculating gross receipts.

a. Under the District's facts, the OTCs are making a retail sale

The sales tax is imposed by D.C. Code § 47-2002, which, prior to April 2011 stated, in relevant part:

> A tax is imposed upon all vendors . . . for the privilege of selling certain selected services (defined as "retail sale" and "sale at retail" in this chapter). The rate of such tax shall be 5.75% . . . of the gross receipts from sales of or charges for such . . . services, except that:
>
> . . .
>
> (2) The rate of tax shall be 10.05% of the gross receipts from the sale of or charges for any room or rooms, lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients;

Pursuant to this section, vendors are taxed on their gross receipts derived from selling a specifically listed service called a retail sale or sale at retail. A vendor is defined by § 47-2001 of the statute as:

> (w) . . . a person or retailer . . . rendering services upon the receipts from which a tax is imposed under this chapter.

As the Defendants point out, this definition is circular, referring the Court back to § 47-2002 to determine what receipts are subject to tax. In short, any person who makes retail sales or sales at retail is considered a vendor for the purposes of the statute.

> D.C. Code § 47-2001 defines retail sales and sales at retail as:
>
> (n)(1) . . . the sale in any quantity or quantities of any. . . service taxable under the terms of this chapter. . . . For the purpose of the tax imposed by this chapter, these terms shall include, but not be limited to, the following:
>
> . . .
>
> (C) The sale or charge for any room or rooms, lodgings, or accommodations furnished to transients by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration.[5]

Under this definition, a retail sale is nothing more than the sale of any of the services made specifically taxable under the code, such as the sale of a hotel room to a transient. *See also Square 345 Ltd. P'ship v. District of Columbia*, 927 A.2d 1020, 1024 (D.C. 2007) ("The statute permits the District to tax the hotel "for the privilege of selling certain selected services," including the "sale of or charges for any room or rooms, lodgings, or accommodations furnished to a transient by any hotel." D.C. Code § 47-2002 (2); see *Acme Reporting Co*., 530 A.2d at 712.

It is important, however, to observe that it is not the provision of the service itself that is taxable. Rather, the code explicitly levies the tax on the transaction, i.e. the "sale or charge" for the service. Indeed, sale is explicitly defined in § 47-2001 as:

> (q). . . any transaction whereby services subject to tax under this chapter are rendered for consideration . . . and shall include, but not be limited to, any "sale at retail" as defined in this chapter. . . .

[5] There is no dispute between the parties on the definition of "transient."

Thus, the "sale" is the transaction or exchange that occurs between the parties. Likewise, the undefined term "charge" from the statute is most naturally read to mean "the price asked for something." *The American Heritage Dictionary of the English Language* 322 (3d ed. 1992). "Price" here refers to the value of the monetary exchange that occurs between the parties. The tax is levied on the overall value, as expressed in money, of the transaction that is occurring.

In addition, purchaser is defined by § 47-2001 as:

> (j) . . . a person . . . whom is rendered services, receipts from which are taxable under this chapter.

Thus, a purchaser is defined as the end-user of the transaction, or the person who ultimately receives the service obtained in exchange for consideration. The natural reading of these statutory provisions, taken together, reveals that a vendor can only be the person or entity on the other side of a taxable sales transaction from the purchaser, who is defined as the ultimate recipient of the taxable services. The structure of the statute is clear: it is designed to tax the transaction by which the room is sold to the transient, not to a third party intermediary.

The legislative history further supports that transactions where one party purchases an item and sells it virtually unchanged to the final purchaser, are taxable. In the Senate report on H.R. 3704, the Committee on the District of Columbia noted that the initial purchase was not intended to be included in the statutory definition of retail sales. S. Rep. No. 81-260, at 8 (1949) ("[Retail sales is] defined as to be inapplicable to sales where the purpose of the purchaser is to resell the property so transferred in the form in which bought by him.") This lends support to the Court's holding that the wholesale transaction that allegedly occurs between the OTCs and District of Columbia hotels is

non-taxable, and that the transaction that occurs between the OTCs and the final consumer is taxable. It is not the transaction between the hotel and the OTC that is the retail sale; rather it is the subsequent sale to the ultimate purchaser.

b. The purpose of the statute is to tax the transaction in its entirety

The tax in question in this case is a combination of two taxes from D.C. Code § 47-2002(2) and § 47-2002.02(1). These two statutes impose sales taxes totaling 14.5% on the gross receipts of the applicable party to be taxed. Gross receipts are defined by § 47-2001 as:

> (h) . . . the total amount of the sales prices of the retail sales of vendors, valued in money, whether received in money or otherwise.

The term "gross receipts" thus applies to any transaction that is considered a retail sale under the statute. Gross receipts includes the entirety of a sales price, defined in § 47-2001 as:

> (p)(1) "Sales price" means the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following:
> (A) The cost of the property sold;
> (B) The cost of materials used, labor or service cost, interest charged, losses, or any other expenses;
> (C) The cost of transportation of the property prior to its sale at retail.
> The total amount of the sales price includes all of the following:
> (i) Any services that are a part of the sale; . . .

Accordingly, the cost of any ancillary services provided as a part of the otherwise taxable sales transaction is includable within the sales price, and therefore is a part of the gross receipts of the transaction and thus subject to the tax. The statute is designed to ensure taxation applies to the entirety of the services being taxed.

As alleged in the pleadings, a potential customer of an OTC browses hotels on the OTC's website and chooses the hotel that he or she wishes to book. The customer then enters into a transaction with the OTC whereby the OTC accepts money from the customer, who in exchange receives the right to occupy the hotel room. As discussed above, there is nothing ambiguous regarding who the parties to the transaction are. The customer is the purchaser and ultimate end-user of the hotel room. The OTCs are engaged in a transaction with the purchaser whereby the purchaser receives the right to occupy a hotel room, as a transient, in exchange for consideration paid to the OTCs.

The OTCs' fees for providing the service of comparing hotel rooms is a part of the same physical transaction, those fees are subject to tax as a portion of the gross receipts. The primary purpose of the tax in question was to ensure the entire charge was taxed. The discussion above regarding the meaning of "gross receipts" makes clear that even ancillary services were meant to be included in the tax. There is little ambiguity in the statute that the whole cost is what was meant to be taxed, and that Congress intended the tax apply to the entire gross receipts paid by the purchaser. S. Rep. No. 81-260, at 7 (1949) ("[T]he tax imposed is applicable to the entire gross receipts . . . ."). The service of selling the hotel room is meant to be taxed, and under the District's facts regarding Defendants' business model, the service of allowing purchasers to compare hotel rooms is equally taxable as an ancillary service.

Defendants seek to remove themselves as a party to the transaction and substitute the hotels in their stead. They insist that the service they provide is to enable consumers to compare the costs of various hotels. But it is unnecessary for the court to decide in ruling on this summary judgment motion if this is factually correct. Under the facts

alleged by the District, the OTCs do, in fact, provide the service of selling the hotel room to the consumer. They do not merely direct the consumer to the hotel, but they provide the service of making the sale themselves. Indeed, the business model, according to the District, is designed to minimize the contact between the customer and the hotel altogether. For the hotels to pay tax under the statute, they must be the party on the other side of the taxable transaction from the purchaser.

Continuing to follow the *Acme* standard, the District's contention that the Defendants' proposed interpretation would lead to an absurd result is noteworthy. Nobody would be responsible for the retail sales tax under the OTCs' model. The hotel has no contract with the purchaser until check-in. No monetary transaction ever occurs between the hotels and the ultimate purchaser and thus there is no sale, by the statutory definition, to tax. No tax would ever be due on either of the transactions, a result plainly at odds with the structure and history of the act. The District of Columbia is correct when it argues that under the OTCs' proposed interpretation, retail sales tax could be avoided altogether by a hotel simply by interposing a shell company between its customers and the hotel.[6] The Court will not read a statute in such a way so as to produce an unreasonable result when an alternate and more reasonable interpretation exists. *In re C.L.M.*, 766 A.2d at 996; *see also City of Fairview Heights v. Orbitz, Inc.*, 2006 WL 6319817 at *5 (S.D. Ill. July 12, 2006) (describing the possibility of a hotel making a shell company or similar arrangement to rent hotel rooms to an entity which would

[6] Although Defendants' dispute this contention and contend that their actions were not "nefarious," the District's factual allegation that Defendants attempted to mislead the District must be taken as true for the purposes of considering Defendants' Motion to Dismiss.

re-rent the rooms to avoid taxes as potentially eviscerating the tax).[7] This is especially weighty when considering the statute's unambiguous purpose to tax the whole transaction.

3. Additional Matters of Precedent

The Defendants' argument here is also somewhat foreclosed by District of Columbia precedent. In *Square 345 Limited Partnership v. District of Columbia*, the D.C. Court of Appeals analyzed the application of the hotel sales tax to a hotel's attrition fees. 927 A.2d 1020, 1023 (D.C. 2007). Attrition fees are charged to purchasers when they book a block of rooms and then fail to make the minimum room reservations. *Id.* At issue in *Square 345* was whether this fee was for "rooms furnished to a transient." *Id.* The Court of Appeals held that the "service" of setting aside rooms for a group granted a right of occupancy to the group, thus making them transients under § 47-2001. *Id.* at 1024. The court noted that the statute did not require the transient to actually exercise his or her right to the room in order for the service to be taxable. *Id.*

Relying on the Court of Appeal's reasoning in *Square 345*, the Court finds that the sales tax statute also does not require the entity providing the room to physically furnish it. Rather, it only requires that the right to occupy a room is obtained as the result of a sales transaction. Equally, the tax code does not require that the entity selling the room be a hotel. Rather, it only requires that the room promised to the customer as part of the transaction is to be provided by a hotel.

[7] It is equally informative that conventional travel agents, who have been booking hotel rooms for consumers for many years before OTCs, did not receive their commission free of tax; a transaction fundamentally the same as the service fee at issue here. *See* Committee on Finance and Revenue, Council of the District of Columbia, *Report on Bill 18-655, the "Payment of Full Hotel Taxes by Online Vendors Clarification Act of 2010"* 4 (Dec. 2, 2010) (Michael Mazerov, Senior Fellow, Center on Budget and Policy Priorities).

The court also seeks to address the Defendants' argument in their submission that "Courts from other jurisdictions have concluded that tax statutes similar to the Hotel Sales Tax do not apply to the OTCs' fees. Defendants' Memorandum of Points and Authorities in Support of their Motion to Dismiss 12. In addition to lacking binding authority over this court, decisions from courts in other jurisdictions are even less useful when interpreting statutes that are significantly different from the District of Columbia's. For example, the Sixth Circuit in *Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381 (6th Cir. 2009) examined a Kentucky statute enabling counties to impose a transient room tax. Unlike with the sales tax under the D.C. Code, the Kentucky statute allowed taxes to be imposed on the rent "charged by" the hotels or similar accommodations businesses. Where the D.C. code uses the language "furnished by," leading to the two opposing interpretations discussed above, there is no ambiguity in the Kentucky statute that it was intended to apply only when the party charging the transient was the hotel itself. *See also Pitt Cnty. V. Hotels.com, L.P.*, 553 F.3d 308 (4th Cir. 2009) (involving a statute specifically indicating the tax was to be collected by the hotels or similar businesses); *Findlay v. Hotels.com, L.P.*, 441 F. Supp. 2d 855 (N.D. Ohio 2006) (involving a statute where vendor was explicitly defined as the owner or operator of a hotel). Such statutory differences make the comparisons drawn by Defendants irrelevant and unhelpful.

The court finds that after engaging in reasonable statutory construction, there remains no ambiguity as to the purpose and meaning of the sales tax statutes.

B. April 8, 2011 Changes to the D.C. Sales Tax Statutes

The last question before the Court is the impact of the April 8, 2011 changes to the D.C. sales tax statutes. Much of the Defendants' argument in their opening brief regarded the effect of these changes on the interpretation of the earlier statute. However, the Court finds that the District's modification was nothing more than an attempt to remove any lingering ambiguities in the plain meaning of the statute, and does nothing to undermine the above analysis of the pre-April 2011 statutes. Moreover, the expressed intent of the 2010 District of Columbia City Council offers little assistance to the Court in determining the intent of the United States Congress when it established the D.C. sales tax on hotel rooms in 1949. *See Twin Towers Plaza Tenants Ass'n v. Capitol Park Assocs.*, 894 A.2d 1113, 1120 n.14 (D.C. 2006) (noting the hazardous nature of using a subsequent legislature's proceedings to discern the intent of a statute passed by an earlier legislature).

However, in their reply brief, Defendants argue that the changes eliminate the District's claims for prospective injunctive relief. Both sides argued this point during oral argument, and a representation was made by the District that the city council is moving to amend the new law. Regardless of the progress of any such proposed changes, the Court must analyze the statutory scheme as it now exists in order to address this issue.

The most significant new phrase coined in the statute is "room remarketer," defined in § 47-2001as:

> (III) . . . any person, other than the retailer, having any right, access, ability, or authority, through an Internet transaction or any other means whatsoever, to offer, reserve, book, arrange for, remarket, distribute, broker, resell, or facilitate the transfer of rooms the occupancy of which is subject to tax under this chapter; . . .

D.C. Code § 47-2001(n)(1)(C)(ii)(III). Under this definition, a room remarketer encompasses the OTCs. Additionally, the definition of retail sale now adds "room remarketer" after "hotel," thereby seeking to remove the ambiguity in the plain language of whether or not the OTCs' services are retail sales. D.C. Code § 47-2001(C)(i).

Although the use of room remarketer is clear from the plain language, the problem with the statute arises with the inconsistent use of the phrase "net sale" or "net charges." The sales tax imposed by § 47-2002 has been amended as follows:

> (B) If the occupancy of a room or rooms, lodgings, or accommodations is reserved, booked, or otherwise arranged for by a room remarketer, the tax imposed by this paragraph shall be determined based on the net sale or net charges received from the transient by the room remarketer.

D.C. Code § 47-2002(B) (emphasis added). However, net sale and net charges are defined in § 47-2001 as

> the gross receipts from the sale of or charges for any room or accommodations received by a retailer from a room remarketer.

D.C. Code § 47-2001(n)(1)(C)(ii)(II) (emphasis added). As counsel for the District acknowledged at oral argument, the drafters of this statute did not seem to look at the new definition of "net charges" when using the term in § 47-2002(B). Looking at the two statutory provisions together, it is impossible to reconcile any meaning out of the confusion.[8] The plain language essentially states that the tax is determined based on the gross receipts from the money paid to the hotel by the OTC received from the transient to the OTC. Ultimately, this construction—the only reasonable construction—is hardly reasonable at all. The failure of the District to consistently apply the phrase "net charges" makes the statute impossible to interpret. Because there exists no discernable plain

[8] Precisely the same statutory confusion is found in D.C. Code § 47-2002.02(B), and the same analysis applies.

meaning from the statute, the court must again follow the *Acme* standard and turn to other tools of reasonable statutory interpretation in order to discern the purpose of the statute.

With the 2011 amendments, the legislative history is especially instructive. After reviewing the legislative history, the court concludes that it is plain and unambiguous that the D.C. Council intended for the tax to apply to the transaction between the transient and the OTC, and not between the hotel and the OTC. The "Background, Purpose and Effect" section in the Committee on Finance and Revenue's report in favor of the bill states that "the transient accommodations tax rate, which is currently 14.5%, would be applied to the *total* amount charged to the consumer by the room remarketer, instead of to the amount charged to the room remarketer by the hotel . . ." Committee on Finance and Revenue, Council of the District of Columbia, *Report on Bill 18-655, the "Payment of Full Hotel Taxes by Online Vendors Clarification Act of 2010"* 2 (Dec. 2, 2010) (emphasis in original); s*ee also id.* at 3 (testimony of Emily Durso, President, Hotel Association of Washington) ("the purpose of the legislation—to mandate that third party intermediaries, such as online booking agencies, remit the hotel room sales tax on the full value of any room sold."); *id.* at 5 (testimony of Stephen Cordi, Deputy Chief Financial Officer, Office of Tax and Revenue) (observing that the current law was adequate and that this legislation simply restates existing law that the tax applies to OTCs).

With no ambiguities existing in the legislative history, the amended tax statute need not be interpreted strictly in favor of the taxpayer. Despite its unnecessarily ambiguous plain language, the court holds that the amended sales tax statute would apply to the OTCs transactions with transients prospectively.

Conclusion

The Court wants to emphasize that, throughout the foregoing analysis, it has made no factual findings as to the ultimate resolution of this case. In denying Defendants' motion to dismiss, the Court has ruled only on whether the law, as it existed prior to April 8, 2011, and as it now exists, could allow the District of Columbia to recover under the legal theories upon which it seeks relief.

Accordingly, it is this 12 day of October, 2011, hereby:

ORDERED, that Defendants' Motion to Dismiss is **DENIED**.

SO ORDERED.

CRAIG ISCOE
JUDGE
(Signed in Chambers)

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