

DISTRICT COURT, DENVER, COLORADO
1437 Bannock St.
Denver, CO 80202

DATE FILED: March 12, 2013

Plaintiffs:

EXPEDIA, INC.; et al

v.

Defendants:

CITY AND COUNTY OF DENVER, COLORADO; et al

♦ COURT USE ONLY ♦

Case Number(s): 12CV1446

Courtroom: 376

COURT'S ORDER RE: PLAINTIFFS' CLAIMS FOR RELIEF UNDER C.R.S. § 29-2-106.1 and C.R.C.P. 106(a)(4)

This matter is before the Court pursuant to Plaintiffs' Brief Supporting Their Claims for Relief Under C.R.S. § 29-2-106.1 and C.R.C.P. 106(a)(4), filed October 4, 2012. A Hearing was held February 2, 2013. The Court having reviewed the Motion, the file and being fully advised Finds and Orders as follows:

I. Background

Plaintiffs are out-of-state, online travel companies ("OTC") that operate websites allowing travelers to book reservations for hotels in Denver (as applicable here). Plaintiffs set the retail price a traveler pays for a room by adding a "service fee" to the negotiated (wholesale) room rate obtained from the hotel. Plaintiffs apply Denver's Lodging Tax to the negotiated room rate only and not to the "service fee." Travelers then pay Plaintiffs directly instead of the hotel. Upon receiving payment, Plaintiffs pay the hotel their negotiated room rate plus Denver's Lodging Tax based on that room rate. Plaintiffs keep the remaining money as a "service fee."

The City issued Lodging Tax assessments against Plaintiffs in 2010 seeking taxes back to 2001 based on the idea that the "service fee" was also subject to Denver's Lodging Tax. Plaintiffs filed protests and a hearing was held.

Plaintiffs now appeal the Hearing Officer's February 8, 2012 Order finding they owed Defendant City and County of Denver ("City") \$8,176,648 in back taxes from January 1, 2001 through April 30, 2010. Plaintiffs allege the plain language of Denver's Lodging Tax does not apply to them. Plaintiffs challenge the 15% late fee assessed against them and allege the applicable statute of limitations prevents collection before 2007. Plaintiffs assert the Hearing Officer, Mr. William Speckman, should have recused himself.

Finally, the Plaintiffs allege the Lodging Tax violates the U.S. Constitution's Commerce Clause, Colorado's Taxpayer Bill of Rights, and the Internet Tax Freedom Act.

II. Standard of Review

The function of a proceeding under C.R.C.P. 106(a)(4) is to review the action of an inferior tribunal which has allegedly exceeded its jurisdiction or abused its discretion. *Kornfeld v. Perl Mack Liquors, Inc.*, 567 P.2d 383 (Colo. 1977). The review is based solely on the record that was before the [tribunal], and the decision must be affirmed unless there is no competent evidence in the record to support it such that it was arbitrary or capricious. *City & County of Denver v. Bd. of Adjustment*, 55 P.3d 252 (Colo. App. 2002); *Lieb v. Trimble*, 183 P.3d 702 (Colo. App. 2008).

Pursuant to C.R.S. § 29-2-106.1, which governs sales and use tax, the court reviews the case de novo and the taxpayer (Plaintiff) has the burden of proof as to all factual matters except fraud. C.R.S. § 29-2-106.1(a)(7).

The Court's primary task in interpreting a municipal ordinance is *to give effect to the intent* of the body enacting it, which is done by looking at the plain language of the ordinance. *MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010)(*emphasis added*).

The legislative intent of the City's Lodging Tax states:

"It is hereby declared to be the legislative intent of the city council that, for the purposes of this article, every *vendor* who shall *make a sale* of lodging to a purchaser in the city shall collect the tax imposed by this article to the *total purchase price* charged for such lodging furnished at any one (1) time by or to every customer or buyer, in the manner set forth in this article."

D.R.M.C. § 53-167(b)(*emphasis added*).

Every *vendor* making sales to a purchaser in the city at the time of making such sales is required to collect the tax imposed by section 53-171(a) from the purchaser. D.R.M.C. § 53-173(a)(*emphasis added*).

"Vendor" means a person *making sales* of or furnishing lodging to a purchaser in the city. D.R.M.C. § 53-170(8)(*emphasis added*).

"Purchase or sale" means *the acquisition* or furnishing for consideration by any person of lodging within the city. D.R.M.C. § 53-170(4)(*emphasis added*).

"Lodging" means rooms or accommodations for overnight use *furnished by any person or the representative of any person* to any person who for consideration uses, possesses, occupies or has the right to use, possess or occupy any such room or accommodation in a hotel. D.R.M.C. § 53-170(2)(*emphasis added*).

The taxes for any period shall not be assessed more than three years after the date on which the tax was or is payable. D.R.M.C. § 53-206 (a). A court may toll this limitation when a taxpayer has “wrongfully impeded the [claimant’s] ability to bring the claim.” *Brodeur v. Am Home Assur. Co.*, 169 P.3d 139, 149 (Colo. 2007).

When a taxpayer fails to file a return or pay the tax within the time required, but without the intent to defraud, a 15% penalty shall be added. D.R.M.C. § 53-184(a).

III. Conclusions of Law

Plaintiffs and Defendants each presented case authority from around the country with various interpretations of municipal tax statutes. These cases provide little guidance because Denver’s Lodging Tax has its own unique verbage, definitions and statement of intent. The Lodging Tax statute is not ambiguous.

Pursuant to the C.R.C.P. 106(a)(4) standard of review, the Court finds the Hearing Officer did not abuse his discretion in finding that Plaintiffs fall within the scope of Denver’s Lodging Tax.

However, the Hearing Officer abused his discretion in determining the statute of limitations allows collection of assessments before April, 2007. The applicable statute of limitations prevents the collection of taxes, interest and penalties from more than three years after the date on which the tax was or is payable unless the taxpayer wrongfully impeded the claimants ability to bring a claim. Defendants first issued Lodging Tax assessments against Plaintiffs in 2010. While Plaintiffs failed to pay Lodging Taxes from January 1, 2001 through April 30, 2010, there is little or no evidence that Plaintiffs wrongfully impeded Defendants’ ability to bring a claim. Accordingly, Defendants cannot collect for assessments before April, 2007.

The Hearing Officer also abused his discretion to the extent he found the Lodging Tax was a “use tax” and therefore subject to *de novo* review pursuant to C.R.S. § 29-2-106.1. The Lodging Tax is not a “use tax.”

The Court questions whether review under C.R.S. § 29-2-106.1 is appropriate. Nevertheless, pursuant to C.R.S. § 29-2-106.1 review, there is sufficient evidence in the record to find that Plaintiffs are “vendors” engaged in the “sale” of lodging in Denver and are thus subject to Denver’s Lodging Tax. The legislature’s express intent to tax the “*total purchase price* charged for each lodging” clearly includes Plaintiffs’ “service fees.”

Pursuant to C.R.S. § 29-2-106.1 review, there is insufficient evidence to show Plaintiffs wrongfully impeded the City from collecting the Lodging Tax assessments. As such, the City cannot collect the Lodging Taxes prior to April, 2007 for the reasons stated above. However, there is sufficient evidence to show Plaintiffs failed to pay the tax within the time required. The 15% penalty is warranted.

Mr. Speckman did not err or abuse his discretion in failing to recuse himself. His order is detailed, thorough and even handed.

Finally, the Court is unconvinced Denver's Lodging Tax violates the U.S. Constitution's Commerce Clause, Colorado's Taxpayer Bill of Rights, or the Internet Tax Freedom Act.

Accordingly, the Hearing Officer's ruling is **AFFIRMED IN PART** and **REVERSED IN PART** as set forth above.

DATED this 12th day of March 2013

BY THE COURT:

A handwritten signature in cursive script that reads "Herbert L. Stern, III". The signature is written in black ink and is positioned above a horizontal line.

Herbert L. Stern, III
District Court Judge

CC: Counsel of Record by e-filing