

The Daily Transcript

Ruling: City owed \$21.2M in hotel tax case

By **THOR KAMBAN BIBERMAN**, The Daily Transcript
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The city of San Diego won an administrative ruling Wednesday in a case regarding the payment of transient occupancy taxes by online travel companies.

Douglas Barker, an attorney and hearing officer appointed by the mayor, concluded the city was owed a total of \$21.2 million -- an amount that will continue to grow if San Diego ultimately prevails.

The city is required under its own ordinances to exhaust administrative remedies before formal litigation ensues in Superior Court. That is happening already.

The city's case, which is being consolidated with similar cases in Los Angeles, Anaheim and San Francisco, is pitted against online travel companies such as **Hotels.com**, **Expedia**, **Orbitz**, **Priceline** and **Travelocity**.

Judge Carolyn Kuhl will hear the cases in a Los Angeles Superior Court.

The cases concern what online travel companies are or aren't required to pay in terms of transient occupancy taxes. More specifically, they concern whether or not the online travel companies should only be required to pay the taxes on the wholesale price of a room, or whether the city is entitled to the taxes based on the higher retail cost paid by the customer.

Barker wrote that the online travel companies owe the city slightly more than \$17 million in taxes that have never been remitted, and \$4.25 million in penalties.

Hotels.com is said to owe \$6.51 million; Hotwire Inc., \$1.33 million; Orbitz Group, \$1.36 million; Travelocity Group, \$1.29 million; and Expedia Group (Nasdaq: EXPE), \$8.65 million in charges and penalties.

Brian Hershman, a partner with the **Jones Day** law firm in Los Angeles who represents the travel companies, says the cities shouldn't be entitled to anything.

"We're not obligated to collect transient occupancy taxes. We're not operators under any ordinance," Hershman said.

The administrative ruling is already being appealed in Superior Court.

During the hearing conducted earlier this year, Gary Cruciani and Steve Wolens of **McKool Smith's** Dallas office, were joined by Los Angeles' **Kiesel, Boucher & Larson** and Dallas' **Baron & Budd**.

San Diego's legal team has more than a little experience handling such TOT-related cases.

After a contested evidentiary hearing, McKool Smith won a \$20 million verdict for the city of San Antonio and more than 170 other Texas cities in a federal lawsuit based on similar claims.

In California, the firm prevailed in another administrative hearing that resulted in a \$21 million award for the city of Anaheim in February 2009.

The Anaheim case -- now consolidated with San Diego's -- continues to be battled in court.

Barker said the city is entitled to the monies because the online travel company controls virtually everything, including the cancellation of a reservation.

What's more, he said, they also have the power to charge service fees for those reservations -- fees Barker and the city believe should be taxed to San Diego's benefit.

Hotel consultant and developer Robert Rauch said the main concern he has about this issue is that the hotels could unfairly end up being on the hook for more of the TOT monies.

"I don't feel hotels should pay a tax on what we don't receive," Rauch said.

Rauch said up until the mid-2000s, cities generally hadn't gone after these funds.

"Now they're looking at the opportunities," Rauch said.

Jon Taylor, San Diego deputy city attorney, said, "These cases will be decided on how the municipal code is interpreted."