No. S218400
2d Civ. No. B243800

IN THE SUPREME COURT OF CALIFORNIA

In Re Coordinated Proceeding Special Title (Rule3.550(c))
TRANSIENT OCCUPANCY TAX CASES.

CITY OF SAN DIEGO, CALIFORNIA,

Petitioner,

v.

HOTELS.COM, L.P., et al.,

Respondents.

Appeal from the Los Angeles County Superior Court
Hon. Elihu M. Berle, Judge, Case Number: GIC861117
(Judicial Council Coordination Proceedings No. JCCP4472)

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Answer filed by the online travel companies ("OTCs") fails to set forth a single tenable reason why the issues presented for review do not qualify as issues of statewide importance that merit this Court's review.

As to the first issue for review—i.e., whether San Diego's transient occupancy tax ("TOT") ordinance imposes a tax on the *retail* amount that a customer pays to obtain the privilege of occupying a hotel room or only on the *wholesale* amount that the hotel receives after the OTCs have deducted their markups—the OTCs contend that review should be denied because the Court of Appeal got it right. But, this merely begs the question. Of course, it is for this Court, not the Court of Appeal, to decide the merits.

It is undeniable that the TOT-interpretation question is an important question of law. The OTCs do not prove otherwise. They do not refute that the language of San Diego's TOT ordinance has been widely enacted by more than 400 California counties and cities, or that the amounts in controversy statewide are huge, or that the public entities whose TOT laws mirror San Diego's depend significantly on room-tax revenues. Saying the Court of Appeal got it right does not negate the issue's statewide impact.

To the extent that the OTCs mean to suggest that their view of the merits is so obviously correct that there is no real review issue here, the OTCs are wrong. Their cramped interpretation of the ordinance language ignores the clear purpose of the ordinance, as well as some of its significant

terms. For example, the OTCs assert that the term "rent charged by the Operator" is dispositive. But, these words do not stand alone. Rather, the sentence that contains them establishes that the tax is based on the amount the customer pays for the "privilege of Occupancy." And it is undisputed that the customer cannot attain the privilege of occupying a room unless he pays rent at the *retail* rate. Thus, it necessarily follows that the retail rate (not the wholesale rate) must afford the basis on which the tax is calculated.

The bottom line: The TOT-interpretation issue is a hotly-contested, billion-dollar question, the resolution of which will affect almost every city and county in the State, as well as the needs of their residents. The Court should grant review to decide the matter.

Equally deserving of this Court's attention is the second issue presented for review, namely, the law-of-the-case issue. The Court of Appeal's published opinion holds, flat out, that an appellate decision in one of several coordinated actions is automatically law of the case as to all of the other coordinated actions. Period. That holding is wrong and, if allowed to stand, will yield improper results for years to come in both coordinated and consolidated actions, in all possible contexts.

The OTCs advance no serious reason why law-of-the-case consequences should necessarily flow from an appellate decision in a coordinated action absent an order or stipulation expressly merging the cases into one case—i.e., an order notifying the parties that a binding issue will be decided and ensuring that all parties have a chance to be heard on

the matter. Rather, the OTCs argue that review should not be granted because, they assert, the Court of Appeal's published law-of-the-case holding will never be applied broadly, but rather will be limited to justifying an appellate court's reliance on previously unpublished decisions. The OTCs' speculation is not warranted by reality. There is, of course, absolutely no assurance that litigants and other courts will rely on the opinion in the limited fashion the OTCs suggest; indeed, the odds are high that the OTCs themselves will argue for broad application in this case if the Court does not grant review. Unless this Court acts to eliminate or limit the Court of Appeal's pronouncement on this issue, the entire body of law applicable to coordinated and/or consolidated proceedings will be upset.

The issues presented for review are of undeniable statewide importance. The OTCs do not argue or demonstrate otherwise. Review should be granted.

ARGUMENT

I. THE OTCS DO NOT REFUTE THAT THE TOT ISSUE PRESENTED FOR REVIEW IS ONE OF HUGE STATEWIDE IMPORTANCE.

This case presents a question of undeniable statewide importance: Interpretation of tax ordinance language common to almost every public entity in California, and involving over $1 billion in past and future revenues. Both in terms of widespread effect and financial impact, this case is massive and the TOT-interpretation question presented is a serious one. (Petition For Review ["Pet."] 19-34.)

The OTCs do not show otherwise. They do not dispute the large amount of money at stake. They do not refute that the language used in San Diego's TOT ordinance has been enacted by over 400 other California public entities. They do not negate the statewide impact of the TOT issue presented here. Nor do they refute the fact that this issue will effectively become non-reviewable if this Court does not grant review now.

The sole argument that the OTCs advance is that review should be denied because, they insist, Division Two got it right—that the Court of Appeal's ruling is so obviously correct on the merits that there is no real dispute here. (Answer ["Ans."] 14-22.) But the OTCs' monochromatic view of the merits is wishful thinking. It ignores the plain words of the ordinance; it reads certain words in isolation without considering their meaning in context; it misreads certain words (i.e., reading "rent charged by

the Operator" as "rent *received* by the Operator"); and it ignores the broad intent and purpose of the ordinance—to compel customers to pay TOT on the amount they must pay to book a room.

A. The OTCs Do Not Refute That Over 400 Cities And Counties Have Enacted Ordinance Language That Is Identical Or Functionally Identical To That At Issue Here.

The ordinance interpretation issue presented by this petition affects the over 400 public entities across the State that have adopted identical or functionally identical ordinances. (Pet. 19-22 & Request For Judicial Notice [RJN], Ex. I; Renewed and Supplemental Request For Judicial Notice ["SRJN"], Ex. J.) Indeed, about 90% of the 470 cities and counties with TOT ordinances share language that, like San Diego's language, levies a tax on the amount of rent that a customer is charged for the privilege of occupying a hotel room. (See RJN, Ex. I.; SRJN, Ex. J.)

Other than opposing San Diego's judicial-notice request on technical grounds, the OTCs offer no response to San Diego's showing of widespread impact, nor could they honestly do so.[1] The fact remains: Because the relevant provisions of San Diego's ordinance are echoed in the ordinances of over 400 other public entities throughout the State, the proper interpretation of that ordinance language is a matter of widespread concern

[1] Concurrently with this Reply, the City is filing a "Renewed and Supplemental Request For Judicial Notice," attaching copies of all of the relevant tax ordinances for this Court's easy reference.

for literally hundreds of California public entities and, more importantly, their residents.

B. The OTCs Do Not Dispute That The Statewide Financial Stakes Dependent On The Outcome Of This Case Are Enormous—Amounting To Over $1 Billion.

The financial magnitude of the room-tax interpretation issue is massive, amounting to over $1 billion. (Pet. 30-32; see also League Of Cities' Amicus Letter.) Room-tax revenues comprise a major chunk of the annual revenues of public entities across the State. (*Ibid.*) This is money that these public entities need to provide essential services to their residents. (*Ibid.*) This is money that they can ill afford to lose. (*Ibid.*)

Again, the OTCs do not deny that this is so. Instead, they say that financial stakes alone shouldn't matter (Ans. 5)—a tacit concession that there *are* huge financial stakes at play here. Before the public entities and their residents lose millions of dollars of tax revenues, this Court should weigh in on the statutory interpretation question presented here.

C. The OTCs Do Not Dispute That Unless This Court Intervenes, There Will Never Be A Different Result Because Of The Coordination Order And Division Two's Law-Of-The-Case Holding.

Nor is there any real dispute that this Court's review is the only means of ensuring that, if San Diego's interpretation of the ordinance is correct, the more-than-400 public entities affected by Division Two's

opinion will receive the revenues they are due. Without review, the fate of these entities and their residents is forever sealed. (See Pet. 22, 28-29.) If San Diego's interpretation of the room-tax language is even arguably correct (we submit it is the only correct interpretation), this Court's review is necessary to ensure that valid claims, collectively worth more than a billion dollars, will not improperly be rejected. (*Ibid.*)

Once again, the OTCs do not provide any basis for concluding otherwise. For this reason, too, this case merits this Court's attention.

D. The OTCs Do Not Dispute That Unless This Court Decides The Issue Presented in the Petition for Review, Public Entities Will Remain In Litigation And Legislative Limbo For Years To Come.

Without this Court's review, public entities across the State are stuck in litigation and legislative limbo: They must decide whether to continue to pursue their room-tax claims knowing they will lose in Division Two, but hopeful that this Court will eventually grant review, or whether to begin the lengthy and difficult process of trying to amend their room-tax ordinances (despite their belief that amendment is unnecessary because the present language clearly permits the taxes now being sought). (Pet. 29-30.)

The OTCs' answer is that the public entities' litigation represents an attempt to avoid amending their ordinances. (Ans. 1, 18-20.) They suggest that the public entities want to raise taxes by circumventing the voters.

(*Ibid.*) But the OTCs' argument assumes its conclusion (i.e., that the OTCs' construction is correct).

The public entities maintain that the *present language* of their TOT laws justifies imposition of the tax based on the retail room rent paid by the customers and, thus, that amendment is not necessary. The public entities thus do not seek to *raise* tax rates, or to require anyone other than the transient to pay the tax. They seek only to be paid the taxes that are *presently due*. They seek to have the OTCs remit the taxes that those companies collected from customers and were supposed to remit, rather than re-naming those taxes "service fees" and pocketing them.

Whether the OTCs are unlawfully withholding money that was supposed to go to the municipalities is the question at the core of this petition. It is a question that is peculiarly appropriate for resolution by this State's highest court. The City's request that this Court decide it is, thus, not an attempt to avoid the legislative process. To the contrary, it is an attempt to determine whether the City's understanding of its own tax ordinance is correct. It is an attempt to avoid the laborious process of seeking to amend TOT laws that the public entities believe already achieve the result they seek. The Court should grant review to provide the needed guidance.

E. The OTCs Do Not Dispute That State Supreme Courts Across The Country Have Found The Room-Tax Interpretation Issue Worthy Of Review.

The question posed by this petition is echoed in cases across the country: A half-dozen state supreme courts have taken up the issue of what the tax base is for calculating room taxes. (Pet. 34.) The OTCs do not deny this is so. Instead, they cite lower state court and federal district court decisions ruling in favor of the online travel companies. (Ans. 20-21.) And, they note the City's concession that the express terms of the tax ordinances at issue in the out-of-state cases differ from those at issue here. (Ans. 22.)

But the City's point is not that the out-of-state cases should control here. Rather, the City's position is that the room-tax interpretation issue is one of obvious importance, plainly meriting review by this State's highest court—as evidenced by the fact that so many of the highest courts of other states have reviewed the issue. (See Pet. 34 [six supreme courts have addressed the issue].)

This Court should come to the same conclusion as those other states' supreme courts: The issue is worthy of review.

F. The OTCs' Discussion Of The Merits Provides No Basis For Denying Review.

1. A Merits Discussion At The Petition-For-Review Stage Is Irrelevant.

Left with no argument refuting the statewide importance of the TOT-interpretation issue presented here, the OTCs dwell on the merits. (Ans. 14-22.) Indeed, the bulk of their Answer is devoted to explaining why they believe their interpretation of the ordinance language is correct. (*Ibid.*) But the merits are only relevant at this stage insofar as they establish whether there is, in fact, a legal controversy here.

The City has briefly addressed the merits in its Petition and in this Reply not for the purpose of showing that its view is correct, but rather solely for the purpose of demonstrating that there *is* a controversy—indeed, that there is considerable merit to the City's position. Of course, full briefing of the merits by each side must await this Court's determination whether to grant review; and resolution of the merits, based on full briefing, can only happen after review is granted.

2. The OTCs' Assertion That There Is No Review Issue Because They Are Obviously Correct On The Merits Is Misguided.

The OTCs' central argument appears to boil down to an assertion that *notwithstanding* the statewide importance and impact of the TOT issue presented, review should be denied because Division Two's opinion is so

obviously correct that there is no real controversy. But this assertion doesn't hold water.

As shown (Pet. 2-4, 19-21), the ordinance levies a tax on hotel-room customers in the amount of the "rent charged by the Operator [the hotel]" for the customer's "privilege of Occupancy." Because it is the *customer* who desires the privilege of occupancy, who pays rent to obtain that privilege, and who is charged with the tax, the tax base must be based on what the *customer* must pay to book the room. And, the customer can never acquire the room unless he pays the *retail rate* quoted by the OTCs—an amount conceded by the OTCs to be a rate floor (Ans. 16). No matter what net amount the hotel ultimately receives as a result of its contractual arrangement with the OTCs, the hotel never allows the customer to occupy the room for less than the retail rate. That rate is, thus, the "rent charged" under the tax ordinance.

This reading is consistent with a common-sense understanding of how a room-tax functions: It is a tax on the customer who rented the room, so the tax looks to and must be based on what the customer actually paid. The tax doesn't look to what the hotel retains after the OTCs pay themselves their markup. This interpretation is also consonant with the administrative hearing officer's determination made after conducting a thorough review of the history of the TOT enactment: The City intended to reach the retail amount paid by the taxpaying customer, not just the wholesale amount kept by the hotel. (See Pet. 12.)

The OTCs' reading of the TOT ordinance is strained and limited, ignoring controlling ordinance language. It focuses on only one phrase—"rent charged by the Operator" (Ans. 14-17)—while ignoring other ordinance language that gives essential meaning to that phrase. Indeed, the phrase "rent charged by the operator" must be read in conjunction with the language stating that the tax must be based on the rent the customer must pay to obtain "the privilege of occupancy." As to what rent the customer must pay to obtain occupancy, it is undisputed that the customer is never offered a room at the wholesale rate. Unless the customer pays the full *retail* amount, he cannot occupy the room. (Pet. 25.) The retail amount actually paid by the customer, thus, must be the tax base.

The price-parity contracts that are standard in the industry support the conclusion that the wholesale rate cannot be treated as the tax base for calculating TOT. (Pet. 26-27.) By requiring the OTCs to never offer rooms to the public for less than the hotels' retail rates, those contracts ensure that the customer is never offered a room at the wholesale rate. (*Ibid.*) The OTCs don't deny this is so. Their only response is that the price-parity contracts have the effect of setting a price "floor" that the OTCs cannot go below when offering rooms to the public. (Ans. 16-17.)[2]

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[2] The OTCs contend the agreed-upon rent "floor" does not prevent them from charging more for the rooms they offer. (Ans. 16.) While this might be theoretically true, it's not practically true because of market forces. A customer presented with the choice of booking the same room through the hotel or booking it at a higher price through an OTC will, of course, choose the lower retail room rate offered by the hotel (or by another OTC offering the room at parity with the hotel's room rates). This is significant:

But this is exactly our point. The price-parity contracts establish that whatever lower amount the hotel is willing to accept from the OTC on each room rental booked through the OTC, the hotel is not willing to permit the customer to *pay* that lower amount—the customer can never obtain the room for that amount. Simply put, the hotel never allows its room to be rented to the public at any price beneath its own retail room rate.

As a matter of agency law, too, the total amount of money that the OTC collects from the customer (i.e., the retail amount) must be the tax base. (Pet. 27-28.) This is so because in the merchant model, the OTC stands in the hotel's shoes. The OTC books the room in the customer's name and takes the customer's money for doing so. (*Ibid.*) This is a *hotel* function. (*Ibid.*) Thus, when the OTC, as the hotel's agent, charges the customer for the room, it is tantamount to the hotel itself charging the

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It means the parity agreements effectively ensure that customers will pay the same retail room rate (whether they pay it to the hotel directly or to the OTC) and that they will never be able to rent the room for less than that rate. Since it is undisputed that the customer can never obtain the right to occupy a room for less than the "floor" rate, that rate (not the wholesale rate ultimately received by the hotel) is necessarily the rent amount on which the room-tax must be based. Since the hotel will not relinquish occupancy of its rooms for less than the "floor" rental rate and since that is the rate the customer must pay to gain the privilege of occupancy, that rent—the retail amount charged to the customer—is necessarily the "rent charged by the Operator" for "the privilege of Occupancy."

customer for the room. (See Pet. 28 [acts of agent are tantamount to the acts of the principal].)[3]

Also without merit is the OTCs argument that, when construing tax laws, all doubts must be resolved in favor of the taxpayer. (Ans. 14, fn. 7.) The argument is devoid of merit for the simple reason that the OTC is never the taxpayer; the customer is. The OTCs are *tax collectors* and, thus, have no basis for asserting a rule that could only be asserted by the customer. In any event, the rule of construction that the OTCs invoke applies only where the tax law is ambiguous. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 329-330 [in absence of ambiguity, rule does not apply].) Here, the TOT ordinance is clear and leaves no doubt; its terms and its purpose compel that TOT must be based on the retail room rate.

* * * * *

The published opinion by Division Two interprets tax-ordinance language that has been adopted across the State. Because of that widespread adoption, the ripples of this case touch the coffers of virtually every public entity in California. This petition presents an undeniably important question of law. The Court should grant review to decide it.

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[3] The OTCs contend Division Two refused to reach the agency question because it concluded that even if the OTCs were the hotels' agents, "they would only be liable for TOT on the rent charged by the operator—not on the fees that the OTCs themselves charge." (Ans. 17, citing Opn. 17.) This argument is a dodge: Neither the OTCs, nor the Court of Appeal, has ever addressed the implications of the OTCs' agency relationship with hotels; indeed, Division Two expressly stated it was not deciding that issue. (Opn. 17.)

II. THE LAW-OF-THE-CASE CONSEQUENCES OF COORDINATED PROCEEDINGS IS AN ISSUE OF BROAD STATEWIDE IMPORTANCE.

It is axiomatic that neither courts nor litigants may cite an unpublished opinion unless one of the narrow exceptions to this rule applies. (Cal. Rules of Court, rule 8.1115(b) [unpublished opinion can be cited when relevant as law of the case].) Division Two's justification for relying on its prior unpublished decisions in the coordinated Santa Monica and Anaheim actions is that those decisions, having issued in coordinated proceedings, are necessarily law-of-the-case and, thus, fall within an exception to the rule that precludes citation to unpublished decisions. (Pet. 16, citing Opn. 3-4, fn. 4.) This can be read only one way: Law-of-the-case consequences automatically flow from the fact that the cases were coordinated. Thus, the published pronouncement on this issue necessarily stands for, and will be cited and relied upon, for the proposition that an appellate decision resolving issues in one coordinated action will automatically constitute law of the case in all the coordinated actions.

This is an erroneous and dangerous pronouncement. (See Pet. 35-40.) Boiled down, the OTCs' sole response is: Don't worry, the published language will never be read that broadly. (Ans. 23-28.) But that's no response at all. Division Two's language is broad and of course, it will be cited without limit. It will cause havoc for years to come unless this Court intervenes.

CONCLUSION

The Answer does not afford a single tenable reason why review should not be granted. For all the reasons stated in the Petition and above, the Court should grant review.

DATED: June 6, 2014

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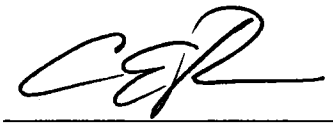
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **PETITION FOR REVIEW** contains **3,397 words**, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

DATED: June 6, 2014



Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On June 6, 2014, I served the foregoing document described as: **REPLY TO OPPOSITION TO PETITION FOR REVIEW** on the parties in this action by serving:

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Executed on June 6, 2014, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie

2d Civ. No. B243800
In Re Coordinated Proceeding Special Title (Rule 3.550(c))
TRANSIENT OCCUPANCY TAX CASES

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Judge Elihu M. Berle, Dept. 323 Los Angeles Superior Court Central Civil West 600 S. Commonwealth Avenue Los Angeles, CA 90005	Court of Appeal Second Appellate District, Division Two Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 **[(Served electronically pursuant to Second Appellate District electronic brief filing program. See Cal. Rules of Court, rule 8.212(c)(2).)**