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LATE

To: The Honorable Donovan M. Dela Cruz, Chair
and Members of the Senate Committee on Ways and Means

Date: Wednesday, February 21, 2018
Time: 10:08 A.M.
Place: Conference Room 211, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 2615, S.D. 1, Relating to Transient Accommodations Tax

The Department of Taxation (Department) supports the intent of S.B. 2615, S.D. 1, and offers the following comments for the Committee's consideration.

Summary of S.B. 2615, S.D. 1

The Department appreciates that many of its proposed amendments were adopted by the Joint Committees on Economic Development, Tourism, and Technology and Commerce, Consumer Protection, and Health. The following is a summary of key points of the bill, which applies to taxable years beginning after December 31, 2018.

Definitions

- "Transient accommodations intermediary" replaces the definition of "transient accommodations broker" and is defined as any person who operates or markets transient accommodations through travel agencies, tour packagers, wholesale travel companies, online websites, online travel agencies, online booking agencies, or booking platforms that advertises, books, or collects payment for transient accommodations or time shares.
- "Gross rental" or "gross rental proceeds" in Hawaii Revised Statutes (HRS) section 237D-1 is amended as including the gross amount collected from the consumer, including booking fees, cleaning fees, lodging fees, transient fees, and other fees, but excluding fees for ground transportation, airfare, meals, excursions, tours, or other fees unrelated to the transient accommodations.

Imposition of TAT

- The TAT will be imposed on transient accommodations intermediaries who arrange transient accommodations at noncommissioned negotiated contract rates.
- When transient accommodations are furnished through transient accommodations intermediaries at noncommissioned negotiated contract rates, the TAT will apply to each person with respect to that person's portion of the proceeds.

Registration

- Transient accommodations intermediaries will be required to register with the Department.

Background

Under current law, the imposition of the TAT on transient accommodations sold through a travel agency or tour packager varies depending on whether the transaction was on a commissioned or noncommissioned basis. In Travelocity.com, L.P. v. Director of Taxation, 135 Hawaii 88 (2015), the Hawaii Supreme Court explained that a "commission" is a "fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received by the transaction." Travelocity, 135 Hawaii at 111 (quoting Black's Law Dictionary 327 (10th ed. 2014) (internal quotations omitted). The court further explained that a "noncommissioned rate" is "an amount of money paid to an entity or person other than an agent or an employee." Travelocity, 135 Hawaii at 111. The court clarified that unlike a commissioned transaction, in which a fee is usually paid as a percentage of the income received, in a noncommissioned transaction, a hotel has no means of knowing what the travel agent's mark-up will be. In sum, when a hotel pays a travel agent for a room on a commission basis, the room rate is readily definable, but in a noncommissioned transaction, the hotel has no means of knowing the travel agent's markup and actual room rate. Id.

When transient accommodations are furnished through arrangements made by a travel agency or tour packager at noncommissioned negotiated contract rates, the TAT is imposed solely on the operator on its share of the proceeds. There is no tax imposed on the travel agency's or tour packager's share of proceeds. In comparison, when transient accommodations are furnished through a travel agency or tour packager on a commissioned basis, the TAT is imposed on the gross proceeds of the operator, including the commission paid to the travel agency or tour packager. Similarly, when transient accommodations are sold directly by the operator, the TAT is imposed on the gross proceeds of the operator. Accordingly, the TAT imposed on a unit will differ depending on whether the unit was sold directly by the operator, sold by a travel agent or tour packager on a commissioned basis, or sold by a travel agent or tour packager on a noncommissioned basis.

For example, if a room is sold for \$100 to a guest directly by a hotel, the hotel will owe \$10.25 in TAT (10.25 percent of \$100). Similarly, if a room is sold for \$100 by a travel agency who earns a \$20 commission on the transaction, the hotel will owe \$10.25 in TAT (10.25 percent of \$100). If, however, the same room is sold for \$100 by an online travel company (OTC) who has a noncommissioned agreement with the hotel and keeps \$20 from the transaction, the hotel

will owe \$8.20 in TAT (10.25 percent of \$80); the \$20 kept by the OTC is not subject to TAT. These concepts are illustrated in the following table:

Type of Transaction	Amount Paid by Guest	Amount Kept by Travel Agency	Amount Kept by Operator	TAT Base	TAT Due
Direct sale by hotel	\$100	\$0	\$100	\$100	\$10.25
Sold by travel agent on commissioned basis	\$100	\$20	\$80	\$100	\$10.25
Sold by travel agent on noncommissioned basis	\$100	\$20	\$80	\$80	\$8.20

Comments

First, the Department notes that this bill attempts to create parity between commissioned and noncommissioned transactions by imposing the TAT on each person’s share of income when transient accommodations are booked through an intermediary at noncommissioned negotiated contract rates. Section 2 of the bill, however, should be amended to clarify that the TAT is imposed on operators in all transactions, not just those in which transient accommodations are furnished at noncommissioned negotiated contract rates. As currently drafted, the bill could be interpreted as making the TAT inapplicable to commissioned transactions. Accordingly, the Department suggests the following language:

Every [~~operator and every~~] transient accommodations intermediary who arranges transient accommodations at noncommissioned negotiated contract rates and every operator shall pay to the State the tax imposed by subsection (a), as provided in this chapter.

Second, because transient accommodations intermediaries will be required to register with the Department under HRS section 237D-4(i), the Department suggests deleting “transient accommodations intermediary” from HRS section 236D-4(a) in Section 3 of the bill.

Third, the Department suggests amending HRS section 237D-4(i) to clarify that all intermediaries, not just those who market transient accommodations through a travel agency, who furnish transient accommodations at noncommissioned rates must register to pay the TAT. The Department suggests the following language:

Each transient accommodations intermediary [~~who markets transient accommodations through a travel agency~~], as a condition precedent to entering into an arrangement to furnish transient accommodations at noncommissioned negotiated contract rates, shall

register with the director. The [~~travel agency or tour packager~~] transient accommodations intermediary shall make a one-time payment of \$15 for each registration, upon receipt of which the director shall issue a certificate of registration in such form as the director determines, attesting that the registration has been made. The registration shall not be transferable and shall be valid only for the transient accommodations [~~remarketer or travel agency~~] intermediary in whose name it is issued.

Fourth, the Department suggests amending the definition of “transient accommodations intermediary” to clarify that an intermediary may be a travel agency, tour packager, wholesale travel company, etc., as opposed to a person who *markets through* a travel agency, tour packager, wholesale travel company, etc. The Department suggests the following language:

"Transient accommodations intermediary" means any person or entity[~~]~~ that offers, lists, advertises, markets, accepts reservations for, or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans, including but not limited to [~~persons who operate or market transient accommodations through~~] travel agencies, tour packagers, wholesale travel companies, online websites, online travel agencies, online booking agencies, [~~or~~] and booking platforms[, and any other person that offers, lists, advertises, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans].

Finally, the Department notes that it is able to administer this measure with its current effective date. Thank you for the opportunity to provide comments.



February 21, 2018



TO: Senate Committee on Ways and Means
The Honorable Donovan M. Dela Cruz, Chair
The Honorable Gilbert S. C. Keith-Agaran, Vice Chair

FROM: Amanda Pedigo, Vice President, Government and Corporate Affairs
Expedia, Inc.

RE: SB2615, SD1 Relating to Transient Accommodations Tax. - OPPOSE

Dear Chair Dela Cruz, Vice Chair Keith-Agaran, and Distinguished Members of the Senate Committee on Ways and Means,

I represent the Expedia family of companies providing online travel booking to the world. We oppose this bill's effort to extend Transient Accommodations Tax (TAT) collection beyond the furnishing of the accommodations.

SB2615, SD1 would expand the collection of TAT in two ways. First, it would expand the definition of "gross rental" and "gross rental proceeds" to include additional fees collected from visitors such as booking fees, lodging fees, transient fees, and cleaning fees. This expansion applies the TAT to fees not associated with the direct furnishing of accommodations.

This bill would also expand the application of the TAT to the fee collected by a travel agent or online intermediary for arranging the reservations. Currently, the TAT is only collected for the portion of the fee that is attributable to the furnishing of the accommodations and not the fee that is attributable to the travel agency arranging the reservations. That fee does not pay for the accommodations, but rather for services provided by the online intermediary, including 24/7 customer support. Operators and Plan Managers would no longer be the only entities subject to the TAT. This expansion would result in a higher total cost to the visitor.

The definition of "Transient Accommodations Broker" is changed to "Transient Accommodations Intermediary" and would include any person or entity that markets transient accommodations through wholesale travel companies and booking platforms.

Online travel agencies provide a critical service to travelers, our hotel partners, and the destinations we market. Hotels voluntarily use our services because we market their property on a global platform helping them reach new travelers and fill rooms that would otherwise remain vacant. For example, an out-of-state visitor planning a trip to Maui might assume there is a Hyatt or Westin nearby, and there is. They could call the hotel chains' 24-hour reservation line and take care of their booking. But there is a much



smaller chance that they would have heard of the Haiku Plantation Inn without the help of an online travel agency that displays multiple properties in response to a geographic search, or without calling a brick-and-mortar travel agent to help make recommendations on where to stay. In exchange for providing these search and facilitation services, we charge a service fee to the traveler.

Expedia, Inc. platforms shine an international spotlight on Hawai‘i’s small businesses. We connect them to a world of potential travelers on 200 travel booking sites in more than 75 countries, allowing them to transact business in foreign languages and currencies, and to be displayed side-by-side with some of the biggest hotel chains in the world. This model helps travelers, helps hotels, and helps the many other tourism-related industries, which are vital to a state’s economy, like restaurants, museums, arts venues, transportation companies, and others.

Expedia is also concerned with Section three of the bill. This section would hold transient accommodations intermediaries responsible for providing the Department of Taxation (DoTAX) with a name and physical address within the State for its operations subject to the TAT. This provision would seem to require our company to maintain a presence in the State in order to collect and remit this expanded TAT.

Finally, this bill would reiterate that advertisements for transient accommodations must include the tax registration number of the operator or plan manager and a local contact’s name, phone number, and electronic mail address. We hold firm in our contention that this provision is unenforceable due to the protections provided to internet advertising platforms under the Communications Decency Act. The provision of this information is and should be the responsibility of the operators of the transient accommodations and not the responsibility of booking platforms or travel agencies.

This expansion of the TAT will make visiting Hawai‘i even more expensive than it is today. The TAT was increased last year from 9.25% to 10.25%. We have worked hard to market Hawai‘i as a desirable destination for potential visitors, but this expansion of the TAT would make Hawai‘i less competitive as a travel destination.

It will also make it far, far less attractive to online businesses which market travel destinations around the world by cutting deeply into the compensation they receive for booking services. Through the GET burden on booking income, Hawai‘i already imposes more tax on online agents than most other destinations. If TAT were added, transactions involving travel to Hawai‘i would become far less profitable than transactions involving similar destinations. Economics dictate that online companies promote profitable destinations. This bill unintentionally undermines Hawai‘i’s market position.

Thank you for the opportunity to share this testimony.