

ST 12-0060-GIL 11/30/2012 HOTEL OPERATORS' TAX

The Hotel Operators' Occupation Tax Act is imposed upon hotel operators engaged in the business of renting, leasing or letting rooms in a hotel. See 86 Ill. Adm. Code 480.101. (This is a GIL.)

November 30, 2012

Dear:

This letter is in response to your letter dated October 11, 2012, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I write with an inquiry as to the applicability of hotel and other related state, municipal and quasi-municipal (i.e., MPEA) taxes for hotel operators upon private individuals, who through a private, members-only internet website, who list rooms in their private residential apartments, condominiums or homes, to other individuals who are also members of the same website, for a per diem fee.

A new generation of internet-based platforms has emerged – including XX.net and XXX.com – whereby a selective, members-only community of "hosts" can register and list their residences (or rooms within a larger private residence) exclusively to other members of the same website ("guests"), pursuant to terms and conditions of membership and the payment of certain membership fees. The benefit of such selective, private platforms is that there is a degree of monitoring and screening over both "hosts" and "guests" that is intrinsic to the registration process, such that not all listings are available to the general public but are instead, only available to those who register and qualify and are not otherwise excluded.

A question arises, however, as to the applicability of various state and local taxes that are ordinarily assessed against hotel operators in the business of marketing short-term accommodations to the general public. Specifically, the Illinois Hotel Operators' Occupation Tax Act, 35 ILCS 145/1 et seq., applies to "persons engaged in the business of renting, leasing or letting rooms in a hotel..." 35 ILCS 145/3(a). The act defines both the terms "hotel" and "room" separately: a "hotel" is a "building or buildings in which the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations. The term includes inns, motels, tourist homes, or courts, lodging houses, rooming houses and apartment houses." 35 ILCS 145/2(1). A "room," by contrast, is defined as "any living quarters, sleeping or housekeeping

accommodations.” 35 ILCS 145/2(4). The tax itself is imposed upon those who rent or lease rooms “in a hotel,” which further indicates that the legislature meant to differentiate between “rooms” and “hotels” (as opposed to rooms in buildings that are *not hotels*.) 35 ILCS 145/3(a).

These new-generation websites allow private individuals to rent or lease “rooms” in their private residences. However, these rooms are not located within “hotels”: the “hosts” are not in the business of running a “hotel,” insofar as (especially in multi-unit condominiums or apartment buildings), they do not individually own or control the “building”, they do not make the rooms within their private residences available to the “public,” and they do not otherwise advertise, market or hold themselves out to be innkeepers or hoteliers to the general public. There are no brochures, signs, marketing materials, or other incidences of “hotels” or “inns” – often, the listings are advertising a spare room with a couch or guest bed. Unlike a traditional hotel, inn, motel or bed-and-breakfast, there is no physical “shingle” that is hung that advertises to the general public that there are rooms available within for rent. Everything is on the internet only, and only visible to members of the website.

This type of activity clearly falls within a gray area in terms of how the tax might be assessed and collected, as well as a question of equity in terms of where the burden of paying the tax falls. While some “hosts” might voluntarily register their rooms as “hotels” with the Illinois Department of Revenue, and might voluntarily pay taxes as “hotel operators” to the State of Illinois, other “hosts” might not – out of ignorance, confusion or genuinely held belief, or out of intentional refusal to pay. Further, as with many issues regarding internet commerce, an issue of collectability arises for the State of Illinois DOR: unless an Illinois resident voluntarily registers as a “hotel operator,” and voluntarily remits taxes, the State has no way of independently knowing whether the person is in fact operating as a “hotel” through these private, members-only websites, unless the State subpoenas the confidential records of the website (which is usually located out of state). A tax that can only be assessed and collected against “do-gooders” who voluntarily register and pay, and cannot be assessed or collected against “scofflaws” or those ignorant of the law, is unfair on its face and unsustainable.

The question is thus: are persons who occasionally list their residences (or rooms within private residences) for short-term rental accommodations through a private, exclusive and members-only website, subject to the various state and local hotel operators taxes or not? Even if such persons are technically considered to be “hotel operators” subject to a tax, will the Illinois Department of Revenue waive the enforcement and collection of such taxes until it resolves the issue of unfairness?

The only statement I have seen from the Illinois Department of Revenue on this matter is contained within Illinois DOR Publication 106. In particular, the question is asked, on page 3: **“I operate a private club and rent rooms only to club members and their guests. Am I exempt [sic] from paying hotel tax?”** The Illinois Department of Revenue’s answer is: **“Since hotel tax is limited to the renting of rooms to the public and your club restricts its renting of rooms to members and their guests, you are not liable for hotel tax on your rental receipts from such rooms.”** Seemingly, the same answer would apply to the members-only websites where private

individuals rent rooms to each other (but not to non-members in the general public) on a short-term basis.

I am contemplating writing an article for the JOURNAL or similar legal publication to clarify this issue. To the extent a formal opinion on this matter is issued, please direct it to my attention, or if you have any questions or seek further information, or would like to make an informal statement, please call me at the number listed above.

DEPARTMENT'S RESPONSE:

The Hotel Operators' Occupation Tax Act ("HOOT") imposes a tax upon persons engaged in the business of renting, leasing or letting rooms in a hotel, as defined in the Act. HOOT defines "hotel" to include any building or buildings in which the public may, for consideration, obtain living quarters, sleeping or housekeeping accommodations. See 35 ILCS 145/2(1).

HOOT defines "rent" as "the consideration received for occupancy, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property or services of any kind or nature." See 35 ILCS 145/2(6). The definition of "rent" must be read in conjunction with the term "occupancy." HOOT defines "occupancy" as "the use or possession, or the right to the use or possession, of any room or rooms in a hotel for any purpose, or the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of the room or rooms." See 35 ILCS 145/2(3).

There is no corresponding tax imposed upon hotel room occupants. Rather, a hotel operator may reimburse himself for his HOOT liability by collecting a corresponding reimbursement charge from a room occupant. Although a hotel operator may state the reimbursement charge as "hotel tax" on his bill, it is nothing more than a reimbursement charge. Given the structure of the tax, the hotel operator will incur HOOT liability on the rental receipts even when he is not reimbursed by the room occupant.

If a person engaged in the business of renting, leasing or letting rooms does not intend for its rooms to be "exclusive" (like a school, hospital or private club) but, rather, welcomes and encourages "other individuals and organizations" to use its facilities (e.g. rooms), even though those individuals or organizations may be screened, the Department would generally consider the facilities open to the public. In contrast, if a person engaged in the business of renting, leasing or letting rooms intends for its rooms to be "exclusive" (e.g., rented only to members of a private club and not to the general public), the Department would not consider the facilities open to the public and, thus, not be subject to HOOT.

We are unable to give you the specific guidance you requested because the taxability or nontaxability of the transactions outlined in your letter is dependent upon the specific facts surrounding those transactions.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

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