ST 16-0001-PLR 01/13/2016 HOTEL OPERATORS' TAX

This letter discusses the Hotel Operators' Tax Act. See 86 Ill. Adm. Code 480.101(b)(3). (This is a PLR.)

January 13, 2016

Dear Xxxxx:

This letter is in response to your letter dated December 28, 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.

Review of your request disclosed that all the information described in paragraphs 1 through 8 of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to ABC for the issue or issues presented in this ruling, and is subject to the provisions of subsection (e) of Section 1200.110 governing expiration of Private Letter Rulings. Issuance of this ruling is conditioned upon the understanding that neither ABC nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request. In your letter you have stated and made inquiry as follows:

> Please accept this letter as a request for a Private Letter Ruling pursuant to Illinois Administrative Code § 1200.110. The undersigned person (the "Taxpayer") requests the ruling to determine his tax liabilities under the Illinois Hotel Operator's Occupation Tax, 35 ILCS 145/1 et seq. (the "HOOT"). On Month 21, 20XX, Taxpayer made a payment – under protest – of $$$ in taxes to the Illinois Department of Revenue. Taxpayer believes that, pursuant to 86 Ill. Adm. Code 480.101(b)(2), he should not have been required to pay any HOOT on any income he received while renting out accommodations through a private club.
>
> In the alternative, Taxpayer submits that even if the IDOR determines that he is liable for HOOT, that pursuant to Section 2 of Article IX of the 1970 Illinois Constitution, the IDOR should abstain from enforcing or seeking to collect the HOOT fro [sic] Taxpayer, unless and until the IDOR can determine a reasonable and uniform method of assessing and collecting said HOOT from all members of the class of people similarly situated to Taxpayer. Accordingly, Taxpayer requests a Private Letter Ruling in his favor, as well as a refund of taxes paid.

The following paragraphs and attachments provide a complete statement of the facts and other information necessary to process Taxpayer's request:

COMPLETE STATEMENT OF FACTS

1. The interested party is the undersigned Taxpayer.

2. Taxpayer resides in a two-bedroom, two bathroom apartment in CITY 1, Illinois, located at ADDRESS, CITY 1, Illinois, Unit (the "Apartment"). The basic floorplan [sic] of the Apartment is attached hereto as *Exhibit 1.*

3. The Apartment is located in a 20-story condominium building that contains over 100 separate units.

4. Taxpayer is the sole resident in the Apartment. The second "guest" bedroom is furnished with a cloth sofa, a television, and a coffee table. There is no bed in the second "guest" bedroom. Taxpayer sleeps in the first "master" bedroom, which is furnished with a queen sized bed, dresser and end tables. There is a common living room between the two bedrooms that contains a cloth sofa and a leather sofa, a dining table, a television, and other assorted furniture. There is also a common kitchen between the two bedrooms.

5. In July 2012, Taxpayer learned of a website, COMPANY.com. COMPANY describes itself as a "trusted community marketplace for people to list, discover, and book unique accommodations around the world – online or from a mobile phone." On its website the COMPANY states that it operates in "more than 33,000 cities and 192 countries" and that, through its website, it has arrange [sic] for "over 10 million nights booked" and has facilitated "over 600 million Social Connections."

6. COMPANY operates solely on the internet, and holds itself out as nothing more than an "online platform that connects hosts who have accommodations to rent with guests seeking to rent such accommodations." The COMPANY.com Terms of Service (last updated MONTH 22, 20XX) are attached hereto as *Exhibit 2*, and incorporated herein by reference (all of COMPANY's terms, including its Privacy Policy, Host Guarantee Terms, and the Guest Refund Policy, can be found on COMPANY'S website.

7. Particularly, in its Terms of Service, COMPANY defines "Host" as "a Member who creates a Listing via the Site, Application and Services." A "Guest" is defined as "a Member who requests a booking of an Accomodations [sic] via the Site, Application or Services, or a Member who stays at an Accomodation [sic] and is not the Host for such Accomodation." [sic]

8. In its Terms of Service, COMPANY defines a "Member" as "a person who completes COMPANY's account registration process, including, but not limited to, Hosts and guests, as described under "Account Registration" below."

9. In July 20XX, Taxpayer became a "member" of COMPANY, by completing the Account Registration process, which included filling out personal information and providing credit card information.

10. Taxpayer also created a "listing" for this second bedroom.

11. COMPANY goes to great lengths to protect its Members. The personal information gathered (including the credit card information) allows for COMPANY to positively identify either "hosts" or "guests" that misbehave or cause injury or damage. All members are allowed to post reviews – both positive and negative – of other members with whom they have interacted, on the COMPANY website, and members may review these comments before booking or accepting a request to book an accommodation. [sic] If a "guest" experiences a travel issue, including, for instance, a last-minute cancellation by the host, or an accommodation that does not match the listing description or pictures, COMPANY offers such a guest a full refund, and may even find the guest alternative accommodations. In turn, "hosts" are provided an insurance policy of up to $1 million as well as access to a security deposit that is automatically charged against the guest's credit card upon booking. These security assurances are only provided to COMPANY members.

12. Further, COMPANY allows for anonymity from the general public. A person would have no way of knowing that Taxpayer is a member of COMPANY, or that he has a listing available on the website, unless that person becomes a registered COMPANY Member. COMPANY's Terms of Service state: "In order to access certain features of the Site and Application, and to book an Accommodation or create a Listing, you must register to create an account ... and become a Member." Thus, Taxpayer's listing is only viewable to COMPANY members, and only COMPANY members who have contacted Taxpayer through the website, and that Taxpayer has accepted, can learn Taxpayer's exact address or discover any other personal identifying information about Taxpayer.

13. Since MONTH 20XX, Taxpayer has hosted several COMPANY guests, and has received approximately $$$ as compensation from MONTH 1, 20XX to MONTH 31, 20XX. Each guest contacted Taxpayer through the COMPANY website, and booked accommodations through the website. All of the guests that have booked with Taxpayer have stayed for less than 30 days, although each has the option to stay indefinitely, and some guests have stated their intent to return for longer stays.

14. Even though he has received compensation, however,Taxpayer is not 'in the business" of renting out his second bedroom. Taxpayer has a full-time job in CITY 1 as PROFESSION, and like anyone else, Taxpayer enjoys his privacy. Taxpayer lists his $$ rate for rental of the second bedroom not for business reasons, but more as a way for Taxpayer to avoid having a full-time flatmate every day of the month, and to "weed out" potentially undesirable "guests" who are unable to afford even $$.

15. Taxpayer participates in COMPANY because there is a social benefit to being an active member of a network. Taxpayer also enjoys the social connections made through COMPANY, and has actually made friends through the website. Taxpayer also enjoys travelling himself, and would like to someday use COMPANY to book accommodations with other members in other cities. Taxpayer has been reviewed positively by several of his guest, and Taxpayer himself has posted favorable reviews of guests that he has hosted.

16. In MONTH 20XX, Taxpayer realized that the compensation he was receiving might be subject to a HOOT. Taxpayer was unsure and contacted COMPANY for guidance. Per their Terms of Service, COMPANY declined to provide specific tax advice. *See* Exh. 1 ("COMPANY cannot and does not offer Tax-related advice to any Members of the Site...").

17. Taxpayer then contacted the IDOR. The IDOR stated that they did not know the answer of whether Taxpayer owed a HOOT but advised that Taxpayer register as a hotel operator business and that Taxpayer pay the tax regardless, and seek a refund later.

18. Following this conversation, Taxpayer registered with the IDOR as a "hotel operator." A true and correct copy of the Illinois Business Authorization Certificate of Registration is attached hereto as *Exhibit 3*.

19. On MONTH 11, 20XX, Taxpayer wrote a letter to the IDOR seeking guidance or a private letter ruling. A true and correct copy of this letter is attached hereto as *Exhibit 4*.

20. On MONTH 11, 20XX, Taxpayer received a "Notice Before Collection Action" from the IDOR. A true and correct copy of this Notice is attached hereto as *Exhibit 5*.

21. On MONTH 30, 20XX, the IDOR sent Taxpayer a General Information Letter in response. [sic] A true and correct copy of the IDOR GIL response is attached hereto as *Exhibit 6*.

22. In its GIL, the IDOR stated, in pertinent part:

> *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 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*

23. On MONTH 21, 20XX, Taxpayer dutifully completed the RHM-1 HOOT Returns from MONTH 2012 through MONTH 2012, and paid $$$ in Hotel Tax under protest. True and correct copies of Taxpayer's RHM-1 Forms, a copy of the check representing payment, and a copy of Taxpayer's Notice of Payment Under Protest form, are attached hereto as *Exhibit 7*.

CONTRACTS, LICENSES, AGREEMENTS

24. Taxpayer is a member of and host with the COMPANY website pursuant to the Terms of Service attached hereto as *Exhibit 2.* Other policies and terms are available on the COMPANY website.

25. Taxpayer is authorized to do business as a "hotel operator" with the State of Illinois (even though Taxpayer objects that he should not be considered a "hotel operator" notwithstanding his authorization to do business as such).

TAX PERIOD AT ISSUE / NO PENDING AND PRIOR RULINGS

26. The tax period at issue is MONTH 1, 20XX through MONTH 31, 20XX.

27. There is no pending audit or litigation with the IDOR, to the best of Taxpayer's knowledge.

28. To the best of Taxpayer's knowledge, the IDOR has not previously ruled on the same or a similar issue for the Taxpayer or a predecessor.

AUTHORITIES AND ARGUMENT IN SUPPORT OF TAXPAYER'S CONCLUSION

I. The HOOT Does Not Apply To Taxpayer.

There are three (3) reasons why the HOOT Act does not and should not apply to Taxpayer.

First, Taxpayer is not 'in the business' of renting out his second bedroom.

Second, Taxpayer's second bedroom does not meet the definition of a "hotel."

Third, Taxpayer does not rent his second bedroom to the general public, but only within and exclusively to members of a private club – COMPANY.

"Taxing laws are to be strictly construed and they are not to be extended beyond the clear import of the language used. If there is any doubt in their application they will be construed most strongly against the government and in favor of the taxpayer." *Oscar L. Paris Co. v.* Lyonsi, 8 Ill. 2d 590, 598 (1956). Under the HOOT Act, the IDOR is authorized to impose a tax "upon persons engaged in the business of renting, leasing or letting rooms in a hotel..." 35 ILCS 145/3(a). The HOOT Act defines a "hotel" as "any building or buildings in which the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations." 35 ILCS 145/2(1).

The first reason why the HOOT does not apply to Taxpayer is that Taxpayer is not "in the business" of renting out rooms in a hotel. There is no Illinois authority directly on point about what it means for a person to be engaged "in the business" of anything, let alone running a hotel. However, the facts do not support the conclusion that Taxpayer participates in COMPANY for business reasons, as opposed to social reasons. COMPANY itself boasts about its 600 million social connections that it fosters, and

Taxpayer submits that he is selective in terms of guests, that he has fostered ongoing friendships with guests, and that he hopes to “return the favor” and stay with one of his former guests someday. There are, at worst, mixed motivations behind Taxpayer’s activity.

The objective facts also do not support a finding that Taxpayer is engaged “in the business” of running a hotel. The compensation received by Taxpayer can only be described as incidental to his overall net income. Taxpayer has made no substantial investment of his own capital into renting out his second bedroom – he has not even bought a proper bed for his guests, who “crash” on his sofa – and he created his listing for free on the internet.

Can it be sufficient that, regardless of his motivations or the amount of compensation received, the mere fact that Taxpayer receives compensation from his guests in exchange for lodging means that he is liable for HOOT?

Taxpayer submits that this loose interpretation of the HOOT Act would be unconscionably broad, as it would mean that every time Taxpayer’s own mother stays with Taxpayer in that same second bedroom, and every time Taxpayer’s mother insists on paying for dinner or paying for groceries or household supplies herself, that such “compensation” is potentially taxable under the HOOT Act. The applicability of the HOOT Act cannot be reduced to the singular criteria of whether compensation is paid over in exchange for lodging.

The second reason why the HOOT does not apply to Taxpayer is that Taxpayer’s second bedroom is not a “hotel” because it is not a building. The definition of “hotel” under the HOOT Act is clear: the HOOT only applies to “hotels” which are defined only as “any building or buildings in which the public may, for a consideration, obtain living quarters, sleeping or housekeeping accommodations.” 35 ILCS 145/2(1).

Here, the building is located at ADDRESS. It has 20 floors, over 100 units and common areas. Taxpayer does not and could not hold out the entire building for rent to any of his guests. In fact, Taxpayer does not even hold out his entire Apartment for rent to any of his guests. His guests are not authorized to enter into Taxpayer’s master bedroom, for instance, without his permission.

The definition of a “hotel” under the HOOT Act includes “inns, motels, tourist homes or courts, lodging houses, rooming houses and apartment houses.” 35 ILCS 145/2(1). Each of those enumerated examples, however, is a free-standing ***building***. The Illinois General Assembly could have, but did not, categorize the renting out (or even subletting) a single room inside a single apartment unit as part of the definition of a “hotel.”

Construing the term “hotel” narrowly makes sense, because the very definition of a “hotel” is a building containing accommodations that is open to the public. When one thinks of a hotel, one thinks of (at a minimum) a front desk and common amenities. Here, there is no such “front desk” and there are no “common amenities” that are open to Taxpayer’s guests. The guest has access to the second bedroom and the sofa therein. Taxpayer is not renting out a “building” and thus, cannot be considered a “hotel” operator.

Third, the HOOT should not apply to Taxpayer because the definition of a "hotel" is an accommodation that is made available to "the public." Under the IDOR's own regulations implementing the HOOT Act, 86 Ill. Adm. Code 480.101(b)(2), the HOOT does not apply to private clubs that are not open to the public:

> **Since the [HOOT] is limited to the renting of rooms to the "public," a private club which restricts its renting of rooms to its members and their guests would not be liable for the tax on its rental receipts from such rooms.**

There is no direct authority in Illinois interpreting the HOOT Act and whether or when it applies to "private clubs." However, there is persuasive authority from outside of the State of Illinois. In *Ambassador Athletic Club v. Utah State Tax Commission,* 27 Utah 2d 377, 496 P.2d 883 (Utah 1972), the Utah Supreme Court considered whether an athletic club had to pay a similar Utah hotel operators' tax on the renting of rooms to its members, their guests, and the members of clubs in other cities where the club had a reciprocal agreement. The court noted a Kentucky court's definition of a hotel as "established and maintained for the purpose of serving the public" and as "an invitation to the public to become its guests," and held that "since [the club] does not hold itself out as providing services to the public as a whole, it does not perform the function of a hotel." *Ambassador Athletic Club,* 27 Utah 2d at 379 (quoting *Clemons v. Meadows,* 123 Ky. 178, 94 S.W. 13 (Ky. 1906)). A similar outcome was found by the Kansas Supreme Court in *City of Independence v. Richardson,* 117 Kan. 656, 232 P. 1044 (Kan. 1925), where the Kansas Supreme Court held that a hotel license tax could not be applied to the owner of a private rooming house because the rooms were not available or open to the general public indiscriminately.

Here, Taxpayer does not rent out his second bedroom to the general public. Only COMPANY members can view his listing and book an accommodation. There are security and anonymity barriers that prohibit the "general public" from viewing his listing or booking an accommodation with Taxpayer, unless and until they complete the registration process and become Members. Like the Utah athletic club, COMPANY is nothing more than a private club and accordingly, pursuant to 86 Ill. Adm. Code 480101(b)(2) [sic], the HOOT should not apply to Taxpayer's renting out his second bedroom through COMPANY exclusively to his fellow COMPANY members.

II. Even If The IDOR Concludes That The HOOT Applies To Taxpayer, The IDOR Should Abstain From Enforcing Or Collecting The HOOT From Taxpayer Because It Would Be Unfair to Do So.

Article IX, Section 2, 1970 Illinois Constitution:

> **<u>Section 2. Non-Property Taxes--Classification, Exemption, Deductions, Allowances and Credits</u>. In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds, and other allowances shall be reasonable.**

As further authority in support, Taxpayer refers the IDOR to *Northwestern University v. City of Evanston*, 221 Ill. App. 3d 893 (1st Dist. 1991), where the Illinois Appellate Court stated that "the test for determining whether a tax classification meets the requirements of uniformity is twofold: (1) whether any real and substantial differences exist between those who are taxed and those who are not, and (2) whether the classification is reasonably related to a legislative purpose." *Id*. at 896.

The problem with attempting to enforce or collect the HOOT against Taxpayer is that, even if it could technically be read to apply, it could never be enforced *uniformly* against all other members of the COMPANY host "class." The reason is simple: unless an COMPANY member *voluntarily* registers as a "hotel operator" with the IDOR and *voluntarily* discloses his COMPANY income on his RHM-1 monthly HOOT forms, there is no reasonable ways [sic] that the IDOR would ever know if a person owes HOOT. This is because there are <u>privacy walls</u>. First, there is an intrinsic privacy wall created by the nature of the internet itself. Unlike a "brick-and-mortar" hotel or motel, an "online" hotel operator does not have to hang out a shingle, put up a sign, or otherwise publicly declare that he or she has accommodations for rent. Second, within COMPANY, there is a separate "privacy wall" – only members can view listings, and even then, the "host" can control which member-guests can view the host's personal identifying information. Only a successfully consummated booking results in the "reveal" of the host's name, phone number and address.

Thus, applying the HOOT to Taxpayer (and other COMPANY members) would simply create a society of scofflaws. If only "do-gooders" who (1) voluntarily registered with the IDOR and (2) honestly filled out the RHM-1 forms were liable for paying the tax, then there would never be any future "do-gooders" because "scofflaws" would never be discovered (because of the aforementioned "privacy walls"). Because there is no possibility of uniformly enforcing the HOOT against COMPANY hosts, it would be unconstitutional to apply the HOOT solely against those that voluntarily register with the IDOR and honestly fill out RHM-1 HOOT forms.

<u>AUTHORITIES CONTRARY TO TAXPAYER'S PETITION</u>

29. Taxpayer is unable to locate any authorities contrary to his views.

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).

The consideration you receive for occupancy of the room meets the definition of "rent" contained in HOOT. You rent the room to provide living quarters. The lack of a bed in the room is not important. In a recent General Information letter, the Department reviewed facts similar to the ones provided in your letter. In that letter, the Department stated:

> "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."

In your letter you state that "COMPANY operates solely on the internet, and holds itself out as nothing more than an online platform that connects hosts who have accommodations to rent with guests seeking to rent such accommodations."

We liken the arrangement you described you have with COMPANY to be one where COMPANY "facilitates" the rental of your second bedroom. COMPANY facilitates the rental between you, as "Host", and the person who wishes to rent your room, the "rentee". COMPANY does not make the decision to rent your room; you make the decision and are paid by the rentee to permit the rentee to rent your room. You also state in your letter that "guests" stay for less than 30 days. Based upon the information you provided, it is the Department's position that the consideration you receive from the rental of the room in your condominium is subject to HOOT.

The factual representations upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the factual representations recited in this ruling are correct and complete. This Private Letter Ruling is revoked and will cease to bind the Department 10 years after the date of this letter under the provisions of 2 Ill. Adm. Code 1200.110(e) or earlier if there is a pertinent change in statutory law, case law, rules or in the factual representations recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Chairman, Private Letter Ruling Committee

RSW:DMB: