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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re TRANSIENT OCCUPANCY TAX CASES	B255223 (Los Angeles County Super. Ct. No. BC326693; JCCP No. 4472)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elihu M. Berle, Judge. Affirmed.

Baron & Budd, Thomas M. Sims, Laura J. Baughman; Office of the City Attorney and Beverly A. Cook for Appellant City of Los Angeles.

Skadden, Arps, Slate, Meagher & Flom, Jason D. Russell and Stacy R. Horth-Neubert; Troygould and Daniel M. Rygorsky for Respondents Priceline.com, Inc., Travelweb LLC, and Lowestfare.com, Inc.

Jones Day, Brian D. Hershman and Erica L. Reilley for Respondents Expedia, Inc., Hotels.com, L.P., Hotels.com GP, LLC, Hotwire, Inc., Travelnow.com, Inc., Orbitz, LLC, Trip Network, Inc., and Internetwork Publishing Corp.

Morgan, Lewis & Bockius, Thomas M. Peterson and Deborah E. Quick for Respondents Expedia, Inc., Hotels.com, L.P., Hotels.com GP, LLC, Hotwire, Inc., and Travelnow.com, Inc.

Kelly Hart & Hallan and Brian S. Stagner for Respondents Travelocity.com LP and Site59.com, LLC.

This action is one of the coordinated "Transient Occupancy Tax Cases," in which certain cities have sought to impose liability on online travel companies (OTCs) for transient occupancy tax (TOT).[1] In a typical transaction, an OTC charges a transient room rental, plus a markup, and service fees. In this matter, appellant City of Los Angeles (the city) assessed alleged unpaid TOT against the OTCs based on the full amount of the OTCs' markup and service fees. The OTCs filed a petition for writ of administrative mandate, seeking reversal of the assessments. The OTCs argued that the language of the city's TOT ordinance did not encompass the OTCs or their markups and service fees. The trial court granted a motion for judgment in favor of the OTCs, and the city appeals.

While the city's appeal was pending, the Supreme Court decided *In re Transient Occupancy Tax Cases* (2016) 2 Cal.5th 131 (*San Diego*). The Supreme Court rejected the City of San Diego's position that charges imposed by the OTCs constituted taxable rent under San Diego's TOT ordinance. The city acknowledges that the Supreme Court's decision undermines its previous position in this litigation. Thus the city acknowledges the assessments, as issued in this matter, are erroneous and unenforceable.

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[1] Respondent OTCs in this matter are Hotels.com, L.P.; Hotels.com GP, LLC; Hotwire, Inc.; Cheap Tickets, Inc.; Cendant Travel Distribution Services Group, Inc.; Expedia, Inc.; Internetwork Publishing Corp. dba Lodging.com; Lowestfare.com, Inc.; Maupintour Holding, LLC; Orbitz, Inc.; Orbitz, LLC; Priceline.com, Inc.; Site59.com, LLC; Travelocity.com, Inc.; Travelocity.com, LP; Travelweb, LLC; and Travelnow.com, Inc.

However, the city seeks to capitalize on the Supreme Court's comment that, "[t]o the extent a hotel determines the [OTC's] markup, such as by contractual rate parity provisions requiring the OTC to quote and charge the customer a rate not less than what the hotel is quoting on its own website, it effectively 'charges' that amount . . . ." (*San Diego, supra,* 2 Cal.5th at p. 138.)

Based on this language in the *San Diego* case, the city seeks, in this appeal, to revise the assessments against the OTCs. Because the Supreme Court has rejected the city's position that the entire amount of the OTCs' markup and service fees is taxable under the TOT ordinance, the city now wants to collect only "14-percent of the *hotel-mandated markup* for each and all merchant-model transactions from July 7, 2004 forward." (Italics added.)

Revision of the assessments is not procedurally appropriate at this stage of the litigation. The facts concerning (1) which transactions included hotel-mandated markups, and (2) the taxable amount of such markups, have not been established, and are disputed. Revised assessments against the OTCs, based upon a portion of the OTCs' margins in certain transactions, must be issued by the Office of Finance in the first instance.

The role of this court is to assess error in the proceedings below. Appellant has failed to show any factual or legal error in the trial court's decision. Therefore we affirm.

FACTS

The city's TOT ordinances

In 1964, the city enacted the TOT ordinance to impose a general tax on the privilege of occupying a hotel room. Tax was imposed only on the "rent charged by the operator." (Former L.A. Mun. Code, § 21.7.3.) "Rent" was defined as "consideration charged . . . for the occupancy of space in a hotel." (Former L.A.

Mun. Code, § 21.7.2, subd. (e).) An "operator" was defined as "the person who is [the] proprietor of the hotel, whether in the capacity of owner, . . . or any other capacity." Where the operator performed his functions through a managing agent, the managing agent was "deemed an operator" with "the same duties and liabilities as his principal." (Former L.A. Mun. Code, § 21.7.2, subd. (f).) Thus, the tax was imposed only on the amount the proprietor or manager of the lodging establishment charged for occupancy.

In 2004 and 2005, the city council adopted three separate pieces of legislation affecting the TOT ordinance. The city enacted Ordinance No. 176,005, effective July 7, 2004, without voter approval. Ordinance No. 176,005 expanded the scope of the term "operator" to include:

> "[T]he person who is either the proprietor of the hotel or any other person who has the right to rent rooms within the hotel, whether in the capacity of owner, lessee, mortgagee in possession, licensee or any other capacity. The owner or proprietor who is primarily responsible for operation of the hotel shall be deemed to be the principal operator. If the principal operator performs or assigns its functions, in whole or in part, through a managing agent, a booking agent, a room seller or room reseller, or any other agent or contractee, including but not limited to on-line room sellers, and on-line travel agents, of any type or character other than an employee, those persons shall be deemed to be secondary operators.
>
> "A secondary operator shall be deemed an operator for purposes of this article and shall have the same duties and liabilities as the principal operator, including but not limited to the collection and remittance of the full amount of the tax owed under the provisions of this article to the City."

(L.A. Mun. Code, § 21.7.2, subd. (f).)

The amendment changed the definition of "operator" to include OTCs, but did not change the definition of the tax base, which remained "rent charged by the operator." (L.A. Mun. Code, § 21.7.3.)

The city also enacted Ordinance No. 176,003, effective January 1, 2005, without voter approval. The Ordinance served to change an operator's TOT remittance requirement from quarterly to monthly. In addition, Ordinance No. 176,003 served to impose tax liability on "operators" for tax required to be collected that was not collected.[2] The amended ordinance reads:

> "[A]n operator shall not be required to remit to the Director of Finance any amount of tax not collected and not required to be collected from a transient. All taxes collected and required to be collected by operators pursuant to this article shall be held in trust for the account of the City until payment thereof is made to the City. The full amount of tax due, whether collected or owed but not collected, under this Article shall be deemed a debt owed to the City by the operator and shall be discharged only upon payment to the City."

(L.A. Mun. Code, § 21.7.7.)

Thus, Ordinance No. 176,003 made the operator liable for the tax, whether or not it was collected from the transient.

The city further amended the TOT ordinance in 2005 by enacting Ordinance No. 176,471, effective January 1, 2005, without voter approval. Ordinance No. 176,471, for the first time, imposed interest and penalties not only on taxes an operator collected, but did not remit, but also on taxes it was

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[2] The pre-amendment TOT ordinance imposed tax liability on "operators" only for tax collected, but not remitted. (Former L.A. Mun. Code, § 21.7.7.)

"required to . . . collect[]," but had not collected. (L.A. Mun. Code, § 21.7.8.)

The OTCs and Merchant-Model Transactions

OTCs publish comparative information about airlines, hotels and rental car companies on their websites. They allow consumers to book reservations with these different companies. OTCs do not qualify as operators under the pre-2004 version of the city's TOT ordinance. (*San Diego, supra,* 2 Cal.5th at p. 138.)

When facilitating hotel room sales, the OTCs employ several different room-sale models. At issue here is what the parties refer to as the "merchant model." The merchant-model transactions were described by the Supreme Court as follows:

> "Under the merchant model, OTCs contract with hotels to advertise and rent rooms to the general public. OTCs handle all financial transactions related to the hotel reservations and become the merchant of record as listed on the customer's credit card receipt, but do not themselves own, operate or manage hotels, maintain an inventory of rooms, or possess or obtain the right to occupy any rooms. The price the hotel charges the OTC for the room is the 'wholesale' price; rate parity provisions in most master contracts between OTCs and hotels bar the OTC from selling a room for a rent lower than what the hotel quotes its customers directly. The OTC offers the rooms to the public at retail prices. Its charge to the customer includes a 'tax recovery charge,' which represents the OTC's estimate of what the hotel will owe in transient occupancy tax based on the wholesale price of the room as charged by the hotel to the OTC. The OTC provides the customer with a receipt that lists the room rate and, on a separate line, an amount for taxes and service fees. Once the reservation has been made and paid for, the OTC provides customer service until the customer checks into the hotel. The hotel then bills the OTC

> for the wholesale price of the room plus the transient occupancy tax the hotel will have to pay based on the room's wholesale price. The OTC remits the charged amount to the hotel, which in turn remits the tax to [the city]; the OTC retains its markup and service fees."

(*San Diego, supra,* 2 Cal.5th at pp. 134-135, fns. omitted.)

The transactions in this case

The transactions at issue in this case were based on the merchant model described above. The trial court noted that the city presented no evidence that the OTCs developed the business model with any intent to avoid TOT "or otherwise shirk [their] responsibilities for paying taxes to the city." The trial court described the transactions at issue in this case as follows:

> "The [OTCs] operate websites that allow customers interested in making hotel reservations to browse numerous hotel listings. Once a consumer selects a hotel, he or she then transmits a reservation request to the relevant [OTC], which, in turn, transmits the request to the relevant hotel.
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> "If the hotel accepts the reservation request, the [OTC] then charges the consumer one amount that includes the room charge, taxes, and fees, including a [TOT], as well as additional fees or markups charged by the [OTC.]"

The trial court did not make any factual findings that any portion of the markup in any of the transactions at issue here were charged or mandated by any hotel. The trial court noted that the OTCs took "a net rate . . . *as set by the hotels*," and remitted that amount, plus a transient occupancy tax on that amount, to the hotels. (Italics added.) In other words, according to the facts established in this case, the TOT remitted to the

hotels was "based on rent as charged by the hotel or the operators." There are no factual findings suggesting that any OTC in this case retained any portion of the hotel's entire mandatory charge for the room. Nor are there any factual findings that any OTC in this case retained TOT on any portion of the hotel's entire mandatory charge for the room.

PROCEDURAL HISTORY

The initial complaint and coordinated proceeding

In December 2004, the city filed a putative class action in Los Angeles Superior Court alleging that, under its pre-amendment TOT ordinance, the OTCs were "operators of the hotels." The city alleged that the OTCs had "failed to remit the transient occupancy taxes due and owed to [the city]" based on the alleged markups and fees charged by the OTCs.

The City of San Diego was a putative class member. There is no dispute that San Diego's TOT ordinance was substantively identical to the city's pre-amendment ordinance. San Diego then filed its own complaint. San Diego also alleged that the OTCs were hotel "operators" liable for TOT, and the OTCs' additional charges above the hotel's room charge constituted taxable "rent charged by an operator."

The cases were coordinated in the superior court. The OTCs' demurrers were sustained on the ground that the cities had failed to exhaust administrative procedures.

Proceedings regarding City of Anaheim

The City of Anaheim was the first to initiate administrative action against the OTCs. Anaheim audited and assessed the OTCs for alleged unpaid tax due to their alleged roles as hotel "operators." A hearing officer upheld the assessments, and the OTCs petitioned for writs of administrative mandamus.

The trial court granted the OTCs' petitions and set aside the assessments. The trial court ruled that the OTCs are not

hotel "operators," and the added amounts charged and retained by the OTCs are not taxable "rent charged by the operator." In November 2012, this court affirmed on both grounds. (*In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B230457 [nonpub. opn.] at p. *6.) The Supreme Court denied Anaheim's petition for review.[3]

Proceedings regarding City of San Diego

The City of San Diego also initiated administrative action, and a hearing officer held the OTCs liable to San Diego for allegedly unpaid tax as "operators." The OTCs sought judicial review, and in September 2011, the trial court set aside the assessments, holding that the OTCs are not hotel "operators" and thus, the amount charged by the OTCs above the hotel's room charge is not taxable "rent charged by the operator." In March 2014, this court affirmed on both grounds. (*In re Transient Occupancy Tax Cases* (2014) 225 Cal.App.4th 56, 65.) The Supreme Court granted San Diego's petition for review.

Proceedings in this matter

While the Anaheim and San Diego cases were proceeding, the city's Office of Finance issued "Estimated Assessments" to the OTCs. The assessments were based on "the entire amount of rent and fees [the OTCs] receive from their customers, including the mark up." The assessments covered the periods from "January 2000 to July 2009 (Priceline.com Inc.) and June 2002 to July 2005 (Travelweb LLC)."

The OTCs appealed to the city's Board of Review, which concluded that the OTCs were liable for the tax, whether as "operators" in the pre-amendment ordinance, or as "secondary

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[3] A similar judgment against the City of Santa Monica was also affirmed by this Court. (*In re Transient Occupancy Tax Cases* (Nov. 1, 2012, B236166 [nonpub. opn.].) The Supreme Court denied Santa Monica's petition for review.

operators" under the post-amendment ordinance. The Board further concluded that the "rent charged by the operator" included "the OTCs' mark-up (margin) and fees." Finally, the Board concluded it was "unable to resolve" the OTCs' Proposition 218 constitutional challenge to the 2004 amendments.

Again the OTCs filed a consolidated writ of mandate to overturn the administrative decisions. The parties filed cross-motions in superior court. The OTCs brought a motion for judgment granting the writ, and the city brought a motion to deny the writ. The trial court granted the OTCs' petitions, and set aside the assessments.

The city's position below

The parties' arguments mirrored the positions they had advanced throughout the administrative process. The city argued that "[t]ransients always pay a single, indivisible 'charged' amount for the right to occupy a hotel room," and that the OTCs' commissions were a "non-itemized, bundled, indistinguishable (to the transient) part of the taxable 'rent' paid by transients to secure 'occupancy'" under the TOT. Thus, the city argued, the OTCs' commissions are taxable as "rent" under Los Angeles Municipal Code section 21.7.2, subdivision (e). The city specified, "the hotel and the OTC divide the total amount paid by the transient to secure the room in order to provide the OTC with its sale commission." The city explained:

> "[T]he OTCs' services are utilized for free by transients. The OTCs' revenue only derives from the post-transient's purchase, contractual splitting between the OTC and hotel, post-occupancy, in order to provide the OTC its sale commission."

The city described the transient's payment as an "indivisible amount." The city explained that the contract between the hotel and the OTC dictate both the "process whereby

the hotel and OTC divide between them the total amount paid by the transient" and "the amount of sale commission realized by the OTC for helping to effectuate the room sale." Thus, the city took the position that the entire amount retained by the OTC in any given transaction was the OTC's commission.

The OTCs' position below

The OTCs argued that they are not "operators," "proprietors," or "managing agents" of hotels. Thus, the OTCs took the position that the consideration paid by the transient and retained by the OTC is not "rent charged by the operator."

The OTCs further argued that the purported 2004 amendments to the TOT ordinance are invalid and unenforceable because they were not approved by the electorate as mandated by the California Constitution pursuant to Proposition 218.[4] However, the OTCs argued that even if the purported 2004 amendments were constitutional, they do not impose TOT on the consideration for the OTCs' services because such money is not "for the occupancy of space in a hotel." Under the merchant model, the OTCs argued, the "traveler compensates the OTCs for . . . online services, and not for providing 'occupancy' that the OTCs do not possess or have a right to confer."

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[4] Proposition 218, the "Right to Vote on Taxes Act," was passed by the voters in the 1996 general election. (*Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 815-816.) It added Articles XIII C and XIII D to the California Constitution. Section 2, subdivision 2(a) of Article XIII C provides that all taxes are either "general" or "special." Section 1, subdivision 1(a) provides that a "'general tax'" is one imposed for "general governmental purposes." Subdivision 2(b) mandates that "[n]o local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote."

Neither the city nor the OTCs pointed to any transactions in which contractual rate parity provisions dictated that a portion of the OTCs' markup was actually uncollected room rental. Instead, the parties argued that the amount retained by the OTCs was properly described either as a commission, or as consideration for the OTCs' services.

The trial court holding

The trial court rejected the city's assertion that the OTCs were "operators" under the pre-amendment TOT ordinance. The court concluded that the term "operator" is "not susceptible to an interpretation that would include a wholly-owned separate company with no access to or control over the hotel's real property or corporate companies." Thus, the court concluded that the "rent charged by [the] operator" only included the "net rate" charged by the hotel for occupancy. The court found that "compensation for the OTC's online services" is not subject to the tax.

Turning to the post-amendment TOT ordinance, the court held the amendment was specifically designed to include the OTCs as "operators" by including a definition of "secondary operators" that encompassed the OTCs. But the court observed that the amendments did not change the fact that the tax was only due on "amounts charged for occupancy." Thus, even though the OTCs were now considered "operators," they "should not be held liable for markups, fees, commissions, and profits above the amounts that are received from the consumer and turned over to the hotel for the net rate for occupancy." Thus, because the tax continued to be limited to "rent charged by the operator," the court found that "the 2004 amendment to the ordinance did not impose an additional liability on the [OTCs]."

Based upon its findings that there was no tax liability on the part of the OTCs, the court held that it was unnecessary to

rule on the constitutionality of the 2004-2005 amendments. However, the court noted in dicta that "[i]f the court were to find that the new language that included an amendment to the municipal code would impose an additional liability on the online travel companies for the transient occupancy tax, . . . the court would be compelled to find that the amendments extend or increase taxes." Thus, "if the amendment had succeeded in bringing [OTCs] within the scope of the [TOT], the amendments would have exposed the tax to an entirely new class of taxpayers . . . . To do so without voter approval would violate Proposition 218."

The trial court granted the OTCs' motion for judgment granting writ of administrative mandamus, and denied the city's motion.

Judgment and stay

Judgment in favor of the OTCs was filed on January 8, 2014. Notice of entry of judgment was served on the city by the OTCs on January 21, 2014. The city timely filed its appeal on March 21, 2014.

Subsequent to the initiation of the appeal, the California Supreme Court granted the City of San Diego's petition for review in its action against the OTCs for delinquent TOT. Due to the importance of the Supreme Court's decision to this appeal, the parties stipulated and petitioned for a stay until the Supreme Court's decision became final. This court granted the stay.

The Supreme Court's decision in *San Diego, supra,* 2 Cal.5th 131

The Supreme Court issued a decision in the *San Diego* case in December 2016, analyzing San Diego's TOT ordinance, which the parties agree was substantially similar to the city's pre-amendment ordinance. The high court determined that the TOT ordinance imposes liability on "'the Operator' alone" and does not

"contemplate that the city treasurer may assess an intermediary such as an OTC for unpaid transient occupancy tax." (*San Diego, supra,* 2 Cal.5th at p. 138.) The Supreme Court rejected San Diego's assertion that "the entire amount paid by the customer, . . . including any portion of the markup within the exclusive control of the OTC above that set by the hotel, is subject to the tax . . . ." (*Ibid*.) The Court explained:

> "That the OTCs act as hotels' agents or intermediaries for the limited purpose of charging and collecting the rent, however, does not subject the OTCs to assessment as an operator or make any undifferentiated portion of the charge representing the amount unilaterally set by the OTCs 'Rent charged by the Operator.' As noted, the hotels set the parity or floor rate the OTCs must charge the visitor, but do not control or determine any additional amount the OTCs may charge for their services, a circumstance that refutes any suggestion the OTCs are the hotels' agents for purposes of setting and collecting such discretionary additional charges."

(*San Diego, supra,* 2 Cal.5th at p. 139.)

The Supreme Court concluded that although "the OTCs act as agents for the hotels in renting rooms, providing customer service, and collecting and remitting to the hotels the rent and room tax on all transactions," these facts "cannot expand the reach of the ordinance and, in particular, do not subject an entity other than an operator to assessment of the tax and penalties . . . ." (*San Diego, supra,* 2 Cal.5th at pp. 139-140.)

In light of this decision, the city has abandoned its claims that the OTCs owe unpaid TOT from the period prior to the 2004 amendments.

The Supreme Court's definition of "Rent charged by the Operator"

In this appeal, the city attempts to capitalize on the Supreme Court's interpretation of the words "Rent charged by the Operator." In its explication of these words, the high court noted:

> "To the extent a hotel determines the markup, such as by contractual rate parity provisions requiring the OTC to quote and charge the customer a rate not less than what the hotel is quoting on its own website, it effectively 'charges' that amount, whether or not it ultimately receives or collects any portion of the markup . . . ."

(*San Diego, supra,* 2 Cal.5th at p. 138.)

The Court further explained that the only taxable amount is:

> "[T]he wholesale room rate plus any portion of the markup set by the hotel pursuant to the contractual rate parity provisions or otherwise. Thus, it is the wholesale room rate plus the hotel-determined markup, exclusive of any discretionary markup set by the OTC, that is 'charged by the Operator' and subject to the tax."

(*San Diego, supra,* 2 Cal.5th at p. 138, fn. omitted.)

The high court noted, however, that the distinction it was drawing between the portion of the markup set by the hotel pursuant to contractual rate parity provisions, and the portion unilaterally set by the OTC, may be "chimerical." (*San Diego, supra,* 2 Cal.5th at p. 138, fn. 7). The court acknowledged that the existence of such uncollected hotel-mandated "rent" was unlikely because "[m]arket forces are likely to ensure that the room rate charged by an OTC is seldom significantly higher than the rate a hotel charges to its customers directly." (*Ibid.*) The

Supreme Court did not consider, nor point to, any evidence in the *San Diego* matter suggesting that any such uncollected hotel-mandated charges existed in any particular transaction.

The parties' argument on appeal

The city's new theory on appeal

In the present appeal, the city has changed its theory of the case based on the language in *San Diego* suggesting that a portion of the markup, if mandated by the hotel, may constitute "Rent charged by the Operator."

The city's current position requires this court to assume that, in certain transactions at issue in this case: (1) the type of hotel-mandated markup described by the Supreme Court was present; and (2) the OTCs did not remit to the hotels TOT due on any such hotel-mandated portion of the markup. Conceding that it has not established the facts necessary to pursue this theory, the city asks that we remand the matter for a determination of which transactions might be taxable because a portion of the markup retained by the OTC was set by the hotel.

Assuming those facts -- which do not exist in the record before us -- the city argues that in transactions occurring after the 2004 amendments, the city may now collect from the OTCs TOT on these alleged hotel-mandated markups. The city argues that "[a]s secondary operators on and after July 7, 2004, the OTCs incurred the obligations to collect, account for, and remit to [the city] the TOT owing on their markups in the specified merchant-model transactions."[5] As secondary operators after July 7, 2004, the city argues, the OTCs are subject to the TOT ordinance, including liability for any uncollected tax. The city

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[5] As to those assessed transactions predating the July 7, 2004 amendments, the city concedes that the *San Diego* case precludes assessments of any kind against the OTCs.

ignores the fundamental problem that it has not established the existence of any uncollected tax in any single transaction or series of transactions.

The OTCs' response

In response, the OTCs point out that the 2004 amendments, which were passed without voter approval, are the only basis on which the city now seeks to impose tax liability on the OTCs. The OTCs highlight the contradiction apparent from the city's present position -- particularly since it argued for over a decade in this litigation that the 2004 amendments were immaterial. The OTCs primarily argue that the 2004 amendments to the OTC were unconstitutional under Proposition 218.

The OTCs note that even if the 2004 and 2005 amendments were constitutional, this case would have to be remanded for numerous factual determinations, including (i) which OTC merchant model reservation transactions after January 1, 2005, were made pursuant to an OTC/hotel contract that includes a rate parity provision; and for such transactions, (ii) the portion of the OTC's margin that the hotel required to be charged; and (iii) the tax owed on that amount.

DISCUSSION

I. Standards of review

In reviewing a trial court's decision on a petition for writ of administrative mandamus, the appellate court applies a substantial evidence standard. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1058.) Where only economic interests are at issue, the trial court reviews the administrative record for substantial evidence. (*Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274, 284-285.)

We review the trial court's interpretation of the TOT ordinance de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

It is a "'"well-established principle"'" that we do not "'"decide constitutional questions where other grounds are available and dispositive of the issues of the case."' [Citations.]" (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230 (*Santa Clara*).) Where the facts are not disputed, and it is appropriate to reach the constitutional issue, the determination of a statute's constitutionality is a question of law to which we apply a de novo standard of review. (*Alviso v. Sonoma County Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 204.)

II. The city has failed to show error below

This matter came before the trial court on a writ of administrative mandate filed pursuant to Code of Civil Procedure section 1094.5. Thus, the trial court was required to determine whether substantial evidence supported the city's tax assessments imposed upon the OTCs and whether those findings supported the city's determination of tax liability. (*Kirkorowicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 986.) "Our role is identical to that of the trial court." (*Ibid.*) Thus, we look to the administrative record to determine whether the city's findings and determination are supported by the record. This "does not constitute independent review where the court substitutes its own findings and inferences for that of the [city]." (*Ibid.*)

A. The city does not allege factual error

1. The city's assessments in this matter

The assessments issued against the OTCs in this matter were based on the city's position that TOT was due on "the entire amount of rent and fees [the OTCs] receive from their customers,

including the mark up." The assessments covered the periods from "January 2000 to July 2009 (Priceline.com Inc.) and June 2002 to July 2005 (Travelweb LLC)." The city's Board of Review explained that "the entire amount paid by a transient to an OTC would be considered rent . . . ."

The city did not assess any taxes against the OTCs for any portion or percentage of any markup based on rate-parity provisions. No such assessments are at issue in this case. Instead, the assessments at issue here were based on the entire markup, plus service fees, retained by the OTCs.

The city does not allege factual error in these assessments. On the contrary, this was the theory the city advanced below.

2. The trial court decision

The city did not change its factual position in the trial court. At oral argument, the city reiterated its position that "rent" was the "total amount that the transient is charged for and then pays . . . ." The city did not argue that any divisible portion of the "fee or markup or [] commission" should be considered "rent."

The trial court noted: "The parties agree that the material facts in this case are really not in dispute . . . ." The trial court, like the administrative agency, did not consider any facts suggesting that the OTCs' markup should be divided as to any single assessment or group of assessments.

3. The facts in the record do not support the city's position on appeal

The city does not argue on appeal that there was factual error in the trial court or at the administrative level. The trial court stated that the net rate remitted to the hotel was the full amount set by the hotel for the room. There was no evidence presented that any divisible portion of the markup retained by the OTCs was taxable rent. These factual findings are presumed

correct. (*Lee v. Board of Civil Service Comrs.* (1990) 221 Cal.App.3d 103, 108.)

The city has failed to establish factual error in the proceedings below.

B. The city has not established legal error

The trial court set out the legal issues before it in this matter as follows:

> "First, the court must determine whether the [TOT], as originally drafted and originally passed by the city, applies to [OTCs].
>
> "Second, the court must determine whether the [TOT] as amended in 2004 applies to the [TOTs].
>
> "And third, the court must determine whether the 2004 amendments are enforceable under Proposition 218."

The trial court determined that the OTCs were not hotel operators within the meaning of the city's TOT ordinance before 2004. The city concedes this point based on the *San Diego* decision.

Further, the trial court found that:

> "The only amount to be subjected to the [TOT] is the net rate, or the amount that is charged for the occupancy of the room; not the amount charged for the commissions, markup, profits, or other fees that the [OTC] charges to the consumer for using the online services."

As to the 2004 amendments, the trial court determined that although the amendments expanded the definition of "operator," the definition of "rent" remained the same. Thus, "the 2004 amendment to the ordinance did not impose an additional

liability on the [OTCs] for the [TOT] above the tax that is imposed on the net amount of the room rate for occupancy."

The city does not argue that the trial court committed error in its statutory interpretation. The city has abandoned its claims that the TOT statute imposed liability on OTCs prior to the 2004-2005 amendments. As to the post-2004 ordinance, the city takes the same position as the trial court: that the statute did not change the definition of rent, thus the fundamental calculation of TOT did not change.[6]

The city has not established legal error in the trial court's decision.[7]

III. The city may not present its new theory in this appeal

The assessments at issue in this matter were based on the city's theory that the definition of rent included the wholesale room rate and all amounts paid by the transient and retained by the OTCs. Those assessments have been reversed, and the city

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[6] The OTCs disagree that the 2004-2005 amendments did not change the tax calculation. The OTCs argue that after the amendments, "not only the amounts a hotel charges for occupancy, but also amounts charged for occupancy by 'secondary operators' (if any) are now swept into the tax base." However, the OTCs are not the appellants in this matter, nor were they aggrieved by the trial court's decision.

[7] The trial court found that it was unnecessary to reach the constitutional issue raised by the OTCs and briefed at length in this matter. However, the trial court stated hypothetically that "*if* the amendment had succeeded in bringing the [OTCs] within the scope of the [TOT], the amendments would have exposed the tax to an entirely new class of taxpayers . . . . To do so without voter approval would violate Proposition 218." However, the constitutional issue was not necessary to the court's decision, and was therefore dicta.

has failed to show error in that reversal. The assessments were properly reversed, and there are no assessments currently pending against the OTCs.

As a result of the *San Diego* decision, the city acknowledges that its TOT tax base, both pre- and post-amendment, is limited to the wholesale room rental plus any hotel-required markup. This is different from the tax base on which the initial assessments issued.

The city seeks, in this appeal, to revise the assessments against the OTCs. Because the OTCs have paid TOT on the wholesale room rate, the city now wants to collect "14-percent of the hotel-mandated markup for each and all merchant-model transactions from July 7, 2004 forward."

The OTCs dispute the city's claim that the city is entitled to additional tax on every merchant model reservation after July 2004 that was made pursuant to a contract with a "rate parity provision." The OTCs point out that the Supreme Court "acknowledged rate parity provisions were not included in every OTC/hotel contract." Further, the OTCs argue that not every transaction covered by such a provision resulted in additional taxable rent.[8]

The factual dispute between the parties prevents determination of this issue at the appellate level. "As a general rule, a party may not change the theory of his case on appeal" where the issue was not raised below. (*Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225.) An exception to this rule exists where "a question of law only is presented on the facts appearing in the record." (*Ibid.*) However, as explained above,

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[8] The OTCs further dispute that any portion of the OTC's margin in what they refer to as "'opaque'" or "'package'" transactions is subject to TOT.

the facts concerning the city's new theory are contested. The city has not established which of the numerous transactions at issue included a hotel-mandated markup. Further, the OTCs do not concede that they owe a portion of their margin on each and every transaction governed by a contractually-mandated markup. Simply put, the city's new theory "'contemplates a factual situation the consequences of which are open to controversy . . . .'" (*Ibid.*) As a result, it will not be considered by this court.

Revised assessments against the OTCs, based upon a portion of the OTCs' margins in certain transactions, must be considered and issued by the Office of Finance in the first instance.[9]

IV. Constitutional issues will not be decided where other grounds are dispositive of the issues

The parties spend the bulk of their briefing in this matter arguing about the constitutionality of the 2004-2005 amendments to the TOT ordinance. This question is not properly before us, as no enforceable assessments are currently pending against the OTCs.

"'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' [Citation.]" (*Santa Clara, supra*, 11 Cal.4th at pp. 230-231, citing *Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 445.) Thus, we "'"will not decide constitutional questions

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[9] We decline the city's request that we remand to the trial court for this factual determination. This is an administrative proceeding, and the administrative agency must issue the tax assessments in the first instance. The city has provided no legal precedent that a remand to the trial court for re-assessment of taxes would be appropriate in this matter.

where other grounds are available and dispositive of the issues of the case.'" [Citations.]" (*Ibid.*)

The constitutional issue was not necessary to the trial court's ruling below. Because the city has failed to show error in the proceedings below, and because there are no outstanding enforceable assessments against the OTCs, we decline to address the constitutionality of the 2004-2005 amendments to the city's TOT ordinance.

DISPOSITION

The city has failed to show that the trial court erred in reversing the assessments issued against the OTCs in this matter. The judgment is affirmed. The OTCs are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
MATZ

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.