Filed 5/23/18 In re Transient Occupancy Tax Cases CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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	B253197 (Los Angeles County Super. Ct. No. JCCP No. 4472)

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

Greines, Martin, Stein & Richland, Irving H. Greines, Kent L. Richland, Cynthia E. Tobisman, and David E. Hackett; San Francisco City Attorney's Office, Dennis J. Herrera, Julie Van Nostern, Jean H. Alexander, James M. Emery, and Owen J. Clements; McKool Smith Hennigan and Steven D. Wolens for Appellant City and County of San Francisco.

Morgan, Lewis & Bockius, Thomas M. Peterson, Deborah E. Quick, and Elizabeth B. Herrington for Respondents Expedia, Inc., Hotels.com, L.P., and Hotwire, Inc.

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

Troy Gould and Daniel M. Rygorsky; Skadden, Arps, Slate, Meagher & Flom for Respondents Priceline.Com Inc., Travelweb LLC, and Lowestfare.Com.

Kelly Hart & Hallman, Brian S. Stagner and J. Chad Arnette 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 2008, the City of San Francisco (the city) assessed transient occupancy taxes against the OTCs. The OTCs paid the tax assessments under protest and sued the city, challenging the assessments and seeking refunds. The trial court granted the OTCs' motion for summary judgment, finding that the OTCs are not "operators" under the city's ordinance and that any consideration above the amount received by the hotel itself is not rent, but consideration for services other than use or possession of a room. Judgment was entered, specifying the amount of refunds owed to the individual OTCs, along with pre- and post-judgment interest. The city appeals.

We find that the OTCs are not liable for TOT under the language of the city's TOT ordinance, therefore we affirm the trial court's judgment.

---

[1] Respondent OTCs in this matter are Expedia, Inc., Hotels.com L.P., Hotwire, Inc., Priceline.com Inc., Travelweb LLC, Lowestfare.com, Travelocity.com LP, Site59.com LLC, Orbitz LLC, Trip Network, Inc. (doing business as Cheaptickets.com), and Interwork Publishing Corp. (doing business as Lodging.com).

FACTS

The city's TOT ordinance

The city's TOT ordinance is found in Article 7 of the city's Business and Tax Regulations Code. The ordinance provides: "There shall be paid a tax of eight percentum on the rent for every occupancy of a guest room in a hotel in the City and County." (S.F. Bus. & Tax Reg. Code, § 502.)[2] Effective August 1, 1996, a surcharge of six percent, "in addition to the eight percent tax specified in Section 502," was imposed "on the rent for every occupancy of the guest room in a hotel in the City and County of San Francisco." (§ 502.6-1.)

The TOT is to be paid to "the operator." Section 503 specifies: "[e]very occupant occupying a guest room in a hotel in this City and County shall be required to pay the tax imposed herein to the operator along with the rent for occupancy." (§ 503.)

An operator is defined within the TOT ordinance as: "Any person operating a hotel in the City and County of San Francisco, including, but not limited to, the owner or proprietor of such premises, lessee, sublessee, mortgagee in possession, licensee or any other person otherwise operating such hotel." (§ 501, subd. (a).) A hotel is defined as "Any structure, or any portion of a structure . . . which is occupied, or is intended or designated for occupation, by guests . . . ." (§ 501, subd. (d).)

"Occupancy" is defined as "The use or possession, or the right to the use or possession of any room or apartment in a hotel 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." (§ 501, subd. (c).)

---

[2] All further statutory references are to the San Francisco Business and Tax Regulations Code unless otherwise noted.

"Rent" is defined 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, and also the amount for which credit is allowed by the operator to the occupant, without any deduction therefrom whatsoever." (§ 501, subd. (f).)

"Every operator maintaining a place of business in [the] City and County . . . , and renting guest rooms in [the] City and County to an occupant" is responsible for collecting tax from the occupant "at the time of collecting the rent from the occupant." (§ 504.) If the rent is not collected by the operator, the operator is "liable to the Tax Collector of the City and County for the amount of the tax due on the amount of taxable rent collected from the occupant under the provisions of this Article, the same as though the tax were paid by the occupant." (§ 504.)

The OTCs

OTCs are companies that publish comparative information about airlines, hotels and rental car companies on their websites. They allow consumers to book reservations with these different travel providers. The OTCs do not own, possess, operate, or control hotels.

The OTCs contract with hotels for the right to facilitate traveler transactions. The trial court noted that it was undisputed that "The OTCs serve as third party intermediaries between hotels and travelers by helping travelers secure reservations with hotels." The hotels and OTCs use different models to conduct business. The model at issue here is known as the merchant model. 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."

(*In re Transient Occupancy Tax Cases* (2016) 2 Cal.5th 131, 134-135 (*San Diego*).)

The city's attempt to obtain voter approval

In 2010, two years after the city initiated tax collection efforts in this case, San Francisco voters were presented with Propositions J and K. Proposition J was captioned "Hotel Tax Clarification and Temporary Increase." If passed, Proposition J would have done three things:

(1) increase the hotel tax rate from 14 percent to 16 percent for the following three years;

(2) "confirm" that anyone collecting rent from a hotel guest must also collect tax on room rental and related charges; and

(3) define "permanent resident" so that only an individual could qualify for the "permanent resident" exemption.

Proposition J did not seek to amend section 501's definition of operator. Instead, it sought to add a new section 507 that would proclaim the intent of section 501 was "that the entire consideration the occupant pays for room rental be subject to the tax and that the person or persons receiving or collecting the taxable rent from the occupant, regardless of their relationship to the hotel or the occupant, remit the tax to the City."

Proposition K was captioned "Hotel Tax Clarification and Definitions." If passed, Proposition K would have maintained the hotel tax rate at 14 percent. In addition, Proposition K proposed a new section 6.2-13 which would define the term "Operator" to mean "[a]ny person who (A) receives any consideration from the occupant; . . . or (C) is the merchant of record in the transaction." Proposition K would have deleted the present definition of "Operator" found in section 501, subdivision (a).

The voters rejected both propositions.

Prior rulings in related cases

Several California cities have initiated proceedings against the OTCs for alleged unpaid TOT. The proceedings were coordinated under an order mandating that all such cases be assigned to the same judicial officer in Los Angeles County Superior Court.

The initial complaint and coordinated proceeding

In December 2004, Los Angeles filed a putative class action in Los Angeles Superior Court alleging that, under Los Angeles's TOT ordinance as it existed prior to the 2004 amendments, the OTCs were "operators of . . . hotels."

The City of San Diego was a putative class member. San Diego then filed its own complaint. San Diego also alleged that the OTCs were hotel "operators" liable for the 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 Los Angeles 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 the trial court 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 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

---

[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.

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. The Supreme Court granted San Diego's petition for review.

The Supreme Court issued a decision in the *San Diego* case in December 2016 analyzing San Diego's TOT ordinance. (*San Diego, supra,* 2 Cal.5th 131.) The high court determined that San Diego's 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." (*Id*. at p. 135.) 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 the operator to assessment of the tax and penalties. [Citation.]" (*San Diego, supra*, 2 Cal.5th at pp. 139-140.)

In interpreting the words "rent charged by the operator," found in San Diego's ordinance, 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."

(*Ibid*., 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 admitted 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.*)

PROCEDURAL HISTORY

The city initiated tax collection efforts against the OTCs in 2008, following the lawsuits by other California cities. The city's tax collector audited the OTCs, determined they had failed to remit taxes, and assessed them for unpaid room tax, penalties, and interest. The OTCs paid the tax assessments under protest and sued, challenging the assessments and seeking refunds.

The parties filed cross-motions for summary adjudication regarding the key legal issues in the case:

(1) whether the OTCs were "operators" for purposes of the governing ordinance and thus subject to tax collection and remittance obligations; and

(2) whether the tax base included the full room rate plus the OTCs' "service fees," or whether the tax base was limited to the consideration received for use or possession of the right to use hotel rooms.

The trial court announced its decision on the cross-motions for summary adjudication on February 6, 2013. The court granted the OTCs' motion for summary adjudication, finding that "the ordinance does not suggest an intention to apply TOT to amounts paid to or charged by an OTC or an entity other than a hotel located within the boundaries of San Francisco." The court found that the OTCs were not hotel "operators," since the city's use of the term "operator" was limited to "a person or entity that controls and runs a business, in this case a hotel." The court also discussed the definition of "rent" as used in San Francisco's TOT ordinance. The court acknowledged that the ordinance was written using the passive voice, defining rent as "consideration received for occupancy." Thus, the court reasoned, it was required to analyze the statute through the eyes of the recipient, the OTC. The court found:

> "From the OTC's perspective the net amount for [the] room is received for occupancy. The net rate is received for occupancy. From the OTC perspective the balance of money received was for something other than occupancy. It was received for markup, for profit, for margin, for fees, for other services."

The court found that "[t]he additional amounts received by the OTCs above net rate and taxes are not for the use or possession or the right to use or possession of a hotel room." Thus, only the net rate ultimately received by the hotel for occupancy of the room is taxable rent.

Judgment was entered on October 10, 2013, in favor of the OTCs. On December 9, 2013, the city filed its notice of appeal.

This court stayed briefing in the present appeal pending the Supreme Court's decision in San Diego's appeal. (Aug. 7, 2014 Order Granting Application and Motion to Stay Appeal.) After the *San Diego* decision became final, briefing commenced in this appeal. (Jan. 25, 2017 Notice Regarding Commencement of Briefing.)

DISCUSSION

I. Standards of review

"'A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. . . .' [Citation.]" (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 644.) Where the court's ruling is based on application of a statute, we review the summary adjudications de novo. (*City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1376.) The evidence is reviewed in the light most favorable to the losing party, "resolving any evidentiary doubts or ambiguities" in that party's favor. (*Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120

Cal.App.4th 374, 384; *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1102).

II. Standards governing statutory interpretation

The parties' competing summary adjudication motions in this case involved the interpretation of the city's TOT ordinance. Thus, we briefly review the rules regarding statutory construction, which are well settled. The fundamental rule of statutory construction is that the court should ascertain the intent of the drafters so as to effectuate the purpose of the law. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal.2d 640, 645 (*Select Base*).)

In determining the intent of the enacting body, we first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698 (*California Teachers*).) If the language of the statute is clear and unambiguous, there is no need for statutory construction. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose." (*Ibid.*) "If . . . the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) Every statute should be construed "'with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]" (*Select Base, supra*, 51 Cal.2d at p. 645.) "'We must select the construction that comports most closely with the apparent intent of the [drafters], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Coronado, supra*, at p.

151.) The purpose of the statute "will not be sacrificed to a literal construction" of any part of the statute. (*Select Base*, at p. 645.)

In interpreting tax statutes, we must find an express intent to impose a tax. The Supreme Court has declared: "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.' [Citations.]" (*Pioneer Express Co. v. Riley* (1930) 208 Cal. 677, 687.) If statutes imposing taxes can be interpreted to favor the taxpayer, courts "generally will prefer the interpretation favoring the taxpayer. [Citation.]" (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 759.)

In sum, a taxing authority must be held to the express terms of a tax statute. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 327.)

III. The OTCs are not "operators" under the city's TOT ordinance

The threshold question in this matter is whether the OTCs are "operators" under the city's TOT ordinance. For the reasons set forth below, we find that they are not.

A. OTCs are not "operators" under the plain language of the city's TOT ordinance

The city's TOT ordinance is found in Article 7 of the San Francisco Business and Tax Regulations Code. Article 7 is captioned "Tax on Transient Occupancy of Hotel Rooms."

Under section 503, "every occupant occupying a guest room in a hotel in this City and County shall be required to pay the tax imposed herein to the operator along with the rent for occupancy."

Thus, the tax is only imposed on the rent paid to the operator for occupancy of the room. The term "operator" is defined as "[a]ny person operating a hotel in [the city], including, but not limited to, the owner or proprietor . . . or any other person otherwise operating such hotel." (§ 501, subd. (a).) A "hotel" is "[a]ny structure, or any portion of a structure, including any lodginghouse . . . containing guest rooms and which is occupied, or is intended or designated for occupation, by guests . . . ." (§ 501, subd. (d).) "Occupancy" is "[t]he use or possession, or the right to the use or possession of any room or apartment in a hotel . . . ." (§ 501, subd. (c).)

The OTCs do not operate hotels or any other structures within the city. Thus, under the plain language of the ordinance, they are not operators.

Further, in analyzing San Diego's similar TOT ordinance, the Supreme Court determined "Because . . . the ordinance imposes on the 'Operator' alone the duty to remit the tax . . . it does not appear to 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.)[4] The *San Diego* decision reinforces our determination here that OTCs are not operators of hotels. Instead, they serve as intermediaries between the transients and the hotels.

---

[4] San Diego's TOT ordinance defined "operator" as "'the Person who is the proprietor of the Hotel, . . . whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other capacity. "Operator" includes a managing agent, a resident manager, or a resident agent, of any type or character, other than an employee without management responsibility.' [Citation.]" (*San Diego, supra,* 2 Cal.5th at p. 136, fn. omitted.)

Because the OTCs are not hotel operators, they are not subject to TOT collection or remittance obligations.

B. The definition found in Article 7 controls

The city largely ignores the definition of "operator" found in Article 7 (the city's TOT ordinance). Instead, the city points to the definition of "operator" found in Article 6, captioned "Common Administrative Provisions." Section 6.2-13 provides a definition of "operator" that is different from that found in the TOT ordinance. It provides:

"The term 'operator' means:

> "(a) Any person conducting or controlling a business subject to the tax on transient occupancy of hotel rooms;
>
> "(b) Any person conducting or controlling a business subject to the tax on occupancy of parking space in parking stations in the City . . . ;
>
> "(c) Any person conducting or controlling a business subject to the stadium operator occupancy tax . . . ;
>
> "(d) Any service supplier required to collect the utility users tax under Article 10; or
>
> "(e) Any service supplier required to collect the access line tax under Article 10B."

The city also notes that under Article 6, a "person" is defined as "any individual, firm, company, partnership . . . domestic or foreign corporation, [or] limited liability company . . . or any other group or combination acting as a unit." (§ 6.2-15.)

In determining which definition of "operator" controls here, we must examine "'the whole system of law of which it is a part so that all may be harmonized and have effect.' [Citation.]"

(*Select Base, supra*, 51 Cal.2d at p. 645.) Our role is to harmonize the law if possible. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1055.) However, "when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Code Civ. Proc., § 1859; see also *Manhattan Loft,* at p. 1056 ["'a particular or specific provision will take precedence over a conflicting general provision'"].)

Article 7 is the city's TOT ordinance. When drafting the ordinance, the drafters provided that the definitions set forth in section 501 provide the meanings of the listed terms "[w]hen used in this Article." (§ 501.) Thus, when used in reference to the TOT ordinance, the definition of "operator" found in Article 7 controls. Under that definition, the term "operator" is limited to "[a]ny person operating a hotel" in the city. (§ 501, subd. (a).)

Article 6, on which the city relies, captioned "Common Administrative Provisions," contains common administrative provisions addressing various aspects of tax remittance and administration. It applies to numerous city taxes, not just TOT. Article 6 specifies that its provisions apply "unless . . . specific language" of another provision "otherwise requires." (§ 6.1-1.) Thus, when drafting Article 6, the drafters deferred to more specific language found in other areas of the Business & Tax Regulations Code. Consequently, the definition of "operator" found in Article 6 does not conflict with the more specific definition found in Article 7. Instead, it expressly defers to that definition.

Even if the language of Article 6 did not defer to the language of Article 7, the definition found in Article 6 (Common Administrative Provisions) does not necessarily conflict with the definition found in Article 7. Article 6 defines "operator" as a

person "conducting or controlling a business subject to the tax on transient occupancy of hotel rooms." (§ 6.2-13.) Pursuant to Article 7, businesses subject to TOT are limited to those businesses which fit under Article 7's definition of "hotel." OTCs do not conduct nor control hotels, thus they are not operators under Article 6.

The city presents several arguments based on the provisions of Article 6 (Common Administrative Provisions). First, it argues that OTCs are "operators" because they are operating, conducting or controlling businesses "subject to the tax on transient occupancy." (§ 6.2-13, subd. (a).) The definition of "operator" found in Article 6 is not controlling, therefore we decline to address this argument further.

Further, the city argues that even if OTCs do not qualify as independent "operators" under Article 6, section 6.2-13, subdivision (a), they qualify as "operators" because they fit under the definition of "person" found in Article 6, section 6.2-15 (defining "person" as, among other things, "any other group or combination acting as a unit"). The definition of "person" found in Article 6, section 6.2-15 does not modify the definition of "operator" found in Article 7. Therefore, we decline to address this argument further.[5]

---

[5] Because OTCs are not "persons . . . responsible for performing the acts of collecting, accounting for, and remitting third-party taxes to the City," nor do they have the "power to control the financial decision-making process by which the operator allocates funds to creditors," the OTCs have no "joint and several" liability "with the operator[s]" for TOT. (§ 6.7-1, subd. (g).)

C. No triable issue of fact exists as to the OTCs' status under the applicable definition of "operator."

The city contends that, at the very least, there should be a trial regarding whether OTCs are "operators" for the purposes of the city's room tax ordinance, and, as such, are liable for all unpaid room tax.

The plain meaning of the TOT ordinance establishes that the OTCs are not "operators." (§ 501, subds. (a), (d).) The construction of the TOT ordinance is a purely legal issue. As the trial court noted in granting the OTCs' summary adjudication motion, the facts regarding the OTCs' "business operations" were "undisputed by the parties." Thus, no disputed issue of fact needs to be resolved by a factfinder.[6]

---

[6] The OTCs argue that the city may not seek, via judicial interpretation, to make changes to the TOT ordinance which the voters previously rejected. The California Constitution, article XIII C, section 2, subdivision (b) (voter-approved Prop. 218) requires voter approval before any tax may be imposed or increased. The OTCs point out that the city tried, in 2010, to have the voters confirm that OTCs fall within the definition of "operator." The voters rejected Propositions J and K, the two propositions designed to do that.

We agree with the OTCs' fundamental position that despite language characterizing the measures as merely "confirm[ing]" the TOT's already-existing definition of "operator," the measure would, in fact, have broadened the tax to include OTCs. However, the city argues that the voters' rejection of the measures cannot necessarily be interpreted as rejecting the proposed definition of "operator" because the measures contained various other provisions in addition to the attempted "confirmation" of the definition of "operator." We find this argument convincing. Because we do not know why the voters rejected the ballot measures, "we cannot speculate that the rejection amounted to" a disapproval of the proposed changes to the definition of "operator." (*Santa Clara County Local*

IV. OTCs' margin and fees are not "rent" under the city's TOT ordinance

Because OTCs are not "operators" under the city's TOT ordinance, they are not responsible for "the tax imposed" on "the rent for the occupancy" of a hotel room. (§§ 501, subds. (a), (d), 503.)

However, we briefly address the parties' arguments as to whether the OTCs' margin and service fees are "rent" under the city's TOT. As set forth below, we conclude that these amounts paid to the OTCs do not constitute rent, and thus are not taxable under the TOT ordinance.

A. The OTCs' margin and fees are not "rent" under the plain language of the ordinance

The city's ordinance imposes TOT on "the rent for every occupancy of a guest room in a hotel in the City and County." (§ 502.) "Rent" is defined 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, and also the amount for which credit is allowed by the operator to the occupant, without any deduction therefrom whatsoever."

(§ 501, subd. (f).)

The TOT must be paid "to the operator along with the rent for the occupancy." (§ 503.) The operator is to collect the tax "at the time of collecting the rent from the occupant." (§ 504.)

Transportation Authority v. Guardino (1995) 11 Cal.4th 220, 237-238.) The Supreme Court has noted that unpassed measures have little value in determining the intent of legislators or voters. (*Id.* at p. 238.)

The "rent" is therefore limited to money that the operator receives for occupancy of a hotel. The money the OTCs retain is not "consideration received for occupancy," but is consideration received by the OTCs in exchange for their services. The consideration that the OTCs retain for their margin and fees is never received by the hotel operator. It is not rent.

In *San Diego*, the Supreme Court reached a similar conclusion as to the nature of the OTCs' margins and fees. San Diego defined the taxable amount as the rent "'charged by the Operator.'" (*San Diego, supra,* 2 Cal.5th at p. 138.) The high court noted that "the only such amount involved in online room rental transactions is, as we have seen, the wholesale room rate plus any portion of the markup set by the hotel pursuant to the contractual rate parity provisions or otherwise." (*Ibid.*) Thus, rent was "the wholesale room rate plus the hotel-determined markup, exclusive of any discretionary markup set by the OTC." (*Ibid.*) In other words, the *San Diego* decision confirmed that an OTC's margin and fees do not constitute rent for occupancy.

Here, the city defines rent as "consideration received for occupancy" rather than the amount "charged by the operator." The city makes much of the ordinance's use of passive voice. The city argues that unlike San Diego's ordinance, its ordinance is drafted in a way that is unconcerned with who does the charging of the consideration.

The difference in wording does not change the outcome. The OTCs do not offer "occupancy," which is defined as the use or possession of a room in a hotel. (§ 501, subd. (c).) The OTCs offer other services, such as allowing comparison shopping for a variety of travel services. Because the OTCs do not offer -- and cannot provide -- actual occupancy in a hotel room, the money that the OTCs charge and retain above the amount the hotel charges for occupancy is not "consideration received for

occupancy," and thus is not taxable under the city's TOT ordinance.

B. Batt v. City and County of San Francisco *(2010) 184 Cal.App.4th 163 does not suggest the OTCs' margins and fees are taxable under the TOT ordinance*

The city argues that *Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163 (*Batt*) construed the city's TOT broadly to encompass a wide array of services that are only tangentially related to the customer's hotel stay. In *Batt*, the court interpreted the definition of "occupancy," which includes not only the use and possession of a hotel room, but "the right to the use or possession of the furnishings or to the services and accommodations accompanying the use and possession of the room." (§ 501, subd. (c).) Based on this language, the ordinance was interpreted to include parking charges. The *Batt* court noted that "'services' would appear to be that vast residuum of amenities offered or made available to guests, limited only by the imagination -- or the nerve -- of hoteliers to charge extra." (*Batt, supra,* 184 Cal.App.4th at p. 173, fn. omitted.)

Despite its expansive interpretation of the term "services" in section 501, subdivision (c), the *Batt* court did limit the term to those services "offered by the hotel." (*Batt, supra,* 184 Cal.App.4th at p. 174.) OTCs are not hotels, thus the comparison shopping and travel booking services provided by OTCs are not services "offered by a hotel." The *Batt* decision does not support the city's argument that the OTCs' margin and services fees constitute rent. Which, for the reasons set forth above, they do not.

C. The timing of the rent payment is irrelevant to the determination of whether the OTCs' margins are taxable rent

The city provides a detailed description of the transactional steps involved in the hotel room rental process. Under the city's three-step process, step number one is when the hotels and OTCs enter into the contracts that define their working relationships. Step number two is when the customer provides his credit card details to the OTC, and the OTC charges that card for the quoted room rate and taxes/ fees. Finally, step number three takes place after the customer's stay, when the OTC and the hotel split the proceeds received from the customer, and the hotel remits an amount for taxes to the city. The city takes the position that the only transactional step that could possibly be subject to tax is step number two.

San Diego made a similar argument, as the Supreme Court noted. (*San Diego, supra,* 2 Cal.5th at p. 137 ["San Diego observes, the tax is determined and collected at the same time the room is booked . . . the 'taxable moment,' as San Diego calls it"].) The argument did not persuade the Supreme Court that the entire amount paid by the customer, including the OTCs' margins and fees, constitutes taxable rent. Following this controlling authority, we also reject this argument. The definition of rent is not dictated by the timing of the transaction, but by the words of the ordinance.

D. The question of whether amounts subject to a rate parity provision are taxable "rent" is not before this court

The city seeks to capitalize on the Supreme Court's comment in *San Diego* 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.) The city argues that, at an absolute minimum, the tax base includes the amount a hotel requires an OTC to charge pursuant to a rate parity agreement.

This question is not properly before us. 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 has failed to show error in that reversal. The assessments were properly reversed, and there are no assessments currently pending against the OTCs. The city has failed to point to any current controversy between the parties regarding any specific amounts subject to rate parity provisions.[7]

---

[7] Although the issue is not before us, we note that the Supreme Court's discussion of rate parity provisions was specific to the language of San Diego's ordinance, which imposed tax on the amount "charged by the operator." (*San Diego, supra,* 2 Cal.5th at p. 138.) The Supreme Court reasoned that "[t]o the extent a hotel determines the [OTC's] markup, such as by contractual rate parity provisions . . . it effectively 'charges' that amount." (*Ibid.*) As the city has emphasized here, its own ordinance has different language, which taxes only the amount "received for occupancy," not the full amount charged by the hotel. (§ 501, subd. (f).) Thus, *San Diego* does not necessarily dictate that hotel mandated markups are taxable rent under the city's ordinance.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
MATZ

---

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