

Three Points From Hawaii's *Travelocity* Decision For Out-Of-State Tax Non-Filers

On March 17, 2015, the Hawaii Supreme Court decided [*In the Matter of the Tax Appeal of Travelocity.com, L.P.*](#) The decision adds to existing legal precedent on Hawaii's taxation of out-of-state service providers with its broad-based general excise tax. The general excise tax is a tax that applies to virtually all business transactions subject to the jurisdiction of Hawaii. This includes the sale of goods and the rendering of services.

The decision also has practical implications for individuals and businesses with unfiled Hawaii returns, whether for general excise, transient accommodations, or income tax.

The three points are:

- Hawaii may be moving to assess out of state service providers subject to its taxing jurisdiction.
- Assessments may be aggressive in scope and in penalty imposition.
- There is not a statute of limitations on unfiled returns.

Background:

In 2011 and 2012, the Hawaii Department of Taxation assessed multiple on-line travel companies ("OTCs") with Hawaii general excise ("GE") tax, penalties, and interest for their on-line travel booking activities relating to Hawaii accommodations. The OTCs included Expedia, Hotwire, Priceline, Orbitz, Travelocity, and Trip Network. The OTCs had not filed Hawaii tax returns.

The Hawaii Supreme Court affirmed the lower court's determination that the OTCs were subject to Hawaii's tax jurisdiction, and that the Department's imposition of penalties and interest appropriate. According to the Court, the OTCs were rendering services with a sufficient connection to Hawaii to warrant the imposition of Hawaii's general excise tax. The Court disagreed with the computation of the Department's tax assessments (sending the case back to the Tax Appeal Court for further determinations). The Court also held that the OTCs were not liable for Transient Accommodations Taxⁱ ("TA.")

The Hawaii Department Of Taxation May Have Permanently Changed Direction On Assessing Out-Of-State Service Providers.

In the *Travelocity* [decision](#), the Hawaii Supreme Court discussed communications and meetings between the OTCs, the Department of Taxation, and third parties concerning the application of the GE and TA taxes to the OTCs' activities. Generally summarized, the Department indicated to the OTCs that they were not liable for the TA tax and, possibly, that the Department was not going to pursue a GE assessment. See, II.B. "Contact Between The Parties...Prior To The 2011 Assessments." In 2009, the Department of Taxation actually prepared written materials documenting that a TA and GE case would not be pursued against the OTCs.

Subsequently, in 2011 and 2012, the Department of Taxation assessed the OTCs for GE and TA for periods as far back as 1999. At that point, the Department had a different Director and Hawaii a different Governor.

The Department of Taxation can change alter course and pursue matters previously considered unworthy of its attention. In this context, current Hawaii Governor David Ige has made numerous pronouncements to the effect that substantial tax revenue is being missed by Hawaii's Department of Taxation. In addition, there is an on-going nationwide trend by states to tax out of state taxpayers with "nexus."

The Hawaii Department Of Taxation May Assess More Than It Expects To Prevail On.

The Department assessed the OTCs with \$430 million in TA tax, penalties, and interest, despite having "probably" told the OTCs that the OTCs were not liable for TA and actually committing the position to writing in letters to legislative leaders and "to the file" memoranda.

With hundreds of millions at stake, the OTCs were capable of conducting an able defense (and ultimately prevailing) against the TA assessments, and, to a large extent, against the GE assessments. Many smaller taxpayers could be in a difficult position to as effectively contest the Department's position, either on the substance or the imposition of penalties.

There Is No Statute of Limitations On Unfiled Returns.

There is no statute of limitations for unfiled returns. (for more on Hawaii's tax statute of limitations, see [here](#).) The Hawaii Department of Taxation can and will go back as far as it deems practicable to assess unfiled returns. The OTCs were assessed in 2011 and 2012 for periods as early as 1999.

Out of state no longer means out of reach, and service providers with a sufficient connection to Hawaii to have "nexus" do not have legal protections against "retroactive" assessments on unfiled periods.

This note is not intended as legal advice or to be relied upon as legal authority or applicable to any particular situation.

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ⁱ The Transient Accommodations Tax is a type of hotel tax applicable to short-term rentals, including hotel rooms and vacation rentals.