

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

December 1, 2015

Opinion No. 15-78

Tax on Short-Term Rentals of Homes, Apartments, and Rooms Arranged Through Websites

Question 1

Is sales tax due on short-term rentals of homes, apartments, and rooms in Tennessee that are arranged through websites such as www.airbnb.com and www.vrbo.com?

Opinion 1

Yes. The short-term rentals described in your request are subject to sales tax under Tenn. Code Ann. § 67-6-205(c)(1).

Question 2

Do these rentals qualify as “hotels” subject to a hotel occupancy privilege tax, levied pursuant to Tenn. Code Ann. § 67-4-1402, or any other general law or private act imposing a tax on transient lodging?

Opinion 2

Yes. The short-term rentals described in your request meet the statutory definition of “hotel” under Tenn. Code Ann. § 67-4-1401(2) and are thus subject to the hotel occupancy privilege tax in home-rule cities that have adopted the tax authorized by Tenn. Code Ann. § 67-4-1402. The short-term rentals also meet the statutory definition of “hotel” under Tenn. Code Ann. § 7-4-101(4) and are thus subject to the hotel occupancy privilege tax in metropolitan counties that have adopted the tax authorized by Tenn. Code Ann. § 7-4-102. Most counties and municipalities that levy a hotel occupancy privilege tax are authorized to do so by individual private acts. The applicability of each occupancy tax will depend upon the language of the authorizing private act; however, where the private act uses language similar to the language used in Tenn. Code Ann. §§ 7-4-101 and 67-4-1401, the short-term rentals described in your request will be subject to the tax.

Question 3

If the answer to question 1 or 2 is yes, who is responsible for collecting and paying those taxes—the owner of the property or the website facilitating the rental?

Opinion 3

The property owner is ultimately responsible for collecting and paying the sales tax under Tenn. Code Ann. §§ 67-6-501 and -502 and for collecting and paying the hotel occupancy privilege tax under Tenn. Code Ann. §§ 7-4-103 and -104 and 67-4-1404 and -1405. The property owner will likewise be responsible for collecting and paying the hotel occupancy privilege tax in counties and municipalities where the private act authorizing the tax uses language similar to the language in Tenn. Code Ann. §§ 7-4-103 and -104 and 67-4-1404 and -1405.

ANALYSIS

We are informed that, in recent years, individuals in Tennessee have chosen to use popular websites such as www.airbnb.com and www.vrbo.com (“the websites”) to rent their homes, apartments, or rooms to guests on a short-term basis. Many of these individuals do not collect sales tax or a hotel occupancy privilege tax from their renters.

The websites provide a platform for individuals to list their homes, apartments, or rooms for rent on a short-term basis. The websites allow consumers to search for available short-term rentals, communicate with individuals who have listed their homes for rent, and book and pay for short-term rentals online. The requestor asks whether these short-term rentals are subject to sales tax and hotel occupancy privilege tax, and, if so, who is responsible for collecting and paying the taxes.

1. Sales Tax

The sales tax is a tax on the retail sale of tangible personal property and certain services in Tennessee. *See generally* Tenn. Code Ann. §§ 67-6-101 *et seq.* The services that are subject to Tennessee’s sales tax include “[t]he sale, rental or charges for any rooms, lodgings, or accommodations furnished to persons by any hotel, inn, tourist court, tourist camp, tourist cabin, motel, or any place in which rooms, lodgings or accommodations are furnished to persons for a consideration.” Tenn. Code Ann. § 67-6-205(c)(1).¹

The transactions described in your request are short-term rentals of “rooms, lodgings, or accommodations,” and the homes, apartments, and rooms that are rented are “place[s] in which rooms, lodgings or accommodations are furnished to persons for a consideration.” *Id.* These short-term rentals are therefore taxable under Tenn. Code Ann. § 67-6-205(c)(1).

“Dealers” are responsible for collecting and remitting the sales tax. Tenn. Code Ann. §§ 67-6-501 and -502. “Dealer” is defined in pertinent part as “every person . . . who . . . [f]urnishes any of the things or services taxable under this chapter.” Tenn. Code Ann. § 67-6-102(25)(H). In the transactions described in your request, the individuals who rent their homes on a short-term basis via the websites are the persons who furnish the taxable service of renting rooms, lodgings, or accommodations. The websites facilitate the transactions, but they do not furnish the

¹ The tax does not, however, apply to rentals to the same person for 90 continuous days or more. *Id.* We assume that the rentals described in your request as “short term” are for a period of less than 90 days.

taxable service. In these transactions, therefore, the individuals who rent their homes on a short-term basis are “dealers” and are responsible for collecting and paying the sales tax.

The sales tax does not, however, apply to “occasional and isolated sales or transactions.” Tenn. Code Ann. § 67-6-102(9)(B); Tenn. Comp. R. & Regs. 1320-05-01-.09(1). In this context, “occasional” means “[n]ot habitual; infrequent,” and “isolated” means “[s]olitary; alone.” *The American Heritage College Dictionary* 720, 943 (3rd ed. 1993). Accordingly, individuals who regularly or frequently rent their homes on a short-term basis are responsible for collecting and remitting the sales tax, while individuals who rent their homes on a short-term basis infrequently or irregularly or only once are not responsible for collecting and remitting the sales tax.

2. Hotel Occupancy Privilege Tax

Tennessee Code Annotated § 67-4-1402(a) authorizes incorporated cities that have adopted home rule² “to levy by ordinance a privilege tax upon the privilege of occupancy in any hotel of each transient in an amount not to exceed five percent (5%) of the consideration charged by the operator.” “Hotel” is defined as

any structure or space, or any portion thereof, that is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes, and includes any hotel, inn, tourist camp, tourist court, tourist cabin, motel or any place in which rooms, lodgings or accommodations are furnished to transients for consideration.

Tenn. Code Ann. § 67-4-1401(2). “Transient” is defined as “any person who exercises occupancy or is entitled to occupancy of any rooms, lodging or accommodations in a hotel for a period of less than thirty (30) continuous days.” Tenn. Code Ann. § 67-4-1401(7).

Tenn. Code Annotated § 7-4-102(a) similarly authorizes counties having a metropolitan form of government and certain municipalities located partly within such counties and partly within adjacent counties³ to levy “a privilege tax upon the privilege of occupancy in any hotel of each transient in an amount not to exceed three percent (3%) of the consideration charged by the operator.” Additional one-percent privilege taxes are authorized for metropolitan counties having a population in excess of 100,000, Tenn. Code Ann. § 7-4-102(a)(2); metropolitan counties that have entered into a binding contract with a general contractor for the construction of a convention center, Tenn. Code Ann. § 7-4-102(b)(1); and metropolitan counties having a population in excess of 500,000, Tenn. Code Ann. § 7-4-102(b)(2). The statute’s definitions of “hotel” and “transient”

² Through the statute’s definition of “municipality,” the authorization to levy the tax is limited to “incorporated cit[ies] that ha[ve] adopted home rule in accordance with the Constitution of Tennessee, article XI, § 9.” Tenn. Code Ann. § 67-4-1401(3).

³ Through the statute’s definition of “counties and municipalities,” the authorization to levy the tax is limited to “the counties having a metropolitan form of government and municipalities with a population of five thousand (5,000) or more, according the 1980 federal census or any subsequent federal census, located partly within such counties and partly within adjacent counties.” Tenn. Code Ann. § 7-4-101(3).

are nearly identical to the definitions of those terms in Tenn. Code Ann. § 67-4-1401. *Compare* Tenn. Code Ann. § 7-4-101 *and* Tenn. Code Ann. § 67-4-1401.

Most counties and municipalities that levy a hotel occupancy privilege tax are authorized to do so by individual private acts. For example, Chapter 12 of the Private Acts of 2007 authorizes the legislative body of Sevier County “to levy a privilege tax upon the privilege of occupancy in any lodging of each transient, in an amount not to exceed three percent (3%) of the rate charged by the operator.” 2007 Tenn. Priv. Acts ch. 12, § 2. “Lodging” is defined in pertinent part as “any structure or space, or any portion thereof, which is occupied or intended or designed for occupancy by transients for sleeping purposes” and includes “any lodging facility, including but not limited to, inn, tourist camp, tourist court cabin rental, campground or any place in which rooms, spaces or accommodations are furnished to transients for a consideration.” *Id.* § 1(4).

The homes, apartments, and rooms described in your request are structures or spaces or portions thereof that are occupied by transients “for dwelling, lodging or sleeping purposes” and are “place[s] in which rooms, lodgings or accommodations are furnished to transients for consideration.” Tenn. Code Ann. §§ 7-4-101(4) and 67-4-1401(2). The homes, apartments, and rooms thus meet the statutory definitions of “hotel” in Tenn. Code Ann. §§ 7-4-101 and 67-4-1401, and the short-term rentals are therefore subject to the hotel occupancy privilege tax in localities that have adopted such a tax under the authority of Tenn. Code Ann. § 7-4-102 or § 67-4-1402. The homes, apartments, and rooms also meet the definition of “lodging” in the private act authorizing Sevier County’s lodging occupancy privilege tax, and the short-term rentals are thus subject to the tax in Sevier County and in other localities that have similar authorizing private acts.

Under the statutes described above, hotel “operators” are required to collect and remit the hotel occupancy privilege tax. Tenn. Code Ann. §§ 7-4-103 and -104 and 67-4-1404 and -1405. “Operator” is defined as “the person operating the hotel, whether as owner, lessee or otherwise.” Tenn. Code Ann. §§ 7-4-101(6) and 67-4-1401(5). “Operate” means “[t]o control the functioning of; run.” *The American Heritage College Dictionary* 956 (3rd ed. 1993).

In the transactions described in your request, the individuals who rent their homes on a short-term basis via the websites are the owners or lessees of the “hotels” and have control over the “hotels.” The websites are not the owners or lessees of the “hotels” and do not have control over the “hotels.” The individuals who rent their homes via the websites are therefore the “operators” of the “hotels” and are responsible for collecting and remitting the hotel occupancy privilege tax. *See City of Columbus, Ohio v. Hotels.com, L.P.*, 693 F.3d 642, 648-50 (6th Cir. 2012) (holding that online travel companies were not hotels or operators of hotels under Ohio local ordinances); *Louisville/Jefferson County Metro Government v. Hotels.com, L.P.*, 590 F.3d 381 (6th Cir. 2009) (holding that online travel companies were not “like or similar accommodations businesses” responsible for collecting occupancy tax under Kentucky law). *But see City of Goodlettsville v. Priceline.com, Inc.*, 605 F.Supp.2d 982, 993-97 (M.D. Tenn. 2009) (ruling that online travel companies were “operators” of hotels where online travel companies purchased rooms from hotels at a wholesale rate and resold those rooms to consumers at retail).

“Operators” are likewise required to collect and remit Sevier County’s lodging occupancy privilege tax, which contains a similar definition of “operator.” 2007 Tenn. Priv. Acts ch. 12,

§§ 1(6), 3, and 5. The property owners are thus responsible for collecting and remitting the tax in Sevier County and in other localities that have similar authorizing private acts.

The statutes authorizing localities to enact a hotel occupancy tax do not contain an exception for “occasional and isolated sales or transactions” similar to the exception in the sales tax. It is thus possible that an “occasional” or “isolated” short-term rental would be subject to hotel occupancy tax, but not sales tax, unless the local ordinance enacting the tax creates an exception for “occasional and isolated” transactions or the courts imply such an exception.

The websites allow individuals who list their homes for rent on a short-term basis to set the price of the rental and to specify any taxes that are due from guests. It should thus not be overly burdensome for individuals who rent their homes via the websites to satisfy their obligation to collect and remit sales tax and hotel occupancy privilege tax.

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