Beth Goldman
Deputy Commissioner
Legal Affairs
GoldmanBeth@Finance.nyc.gov

345 Adams Street
3rd Floor
Brooklyn, New York 11201

+1 718 403-4908 tel
+1 718 403-6287 fax

March 6, 2013

Re: Request for Anonymous Ruling
New York City Hotel Room Occupancy Tax
FLR No: 12-4933

Dear Mr. :

This is in response to your request for an anonymous ruling received on September 5, 2012 regarding the application of the New York City Hotel Room Occupancy Tax ("HROT"). In response to our request, additional information was supplied on October 19, 2012.

FACTS

The facts presented are as follows:

The Company is a corporation which provides an Internet platform through which a hotel and a person desiring to book an accommodation (a "Traveler"), have the opportunity to negotiate and consummate a rental transaction. The Company's platform provides a means by which hotels and Travelers can locate each other, and thereby, reach an agreement for the rental of accommodations. The Company is not a party to the agreement between the hotel and the Traveler. The Company does not participate in the ownership or operation of any of the accommodations offered to the Traveler. Each hotel is responsible for ensuring the accuracy of the accommodation description, safety, cleanliness and access. The hotel, not the Company, sets the room price; the Company does not "mark up" the price of the room. The hotel and Traveler are able to communicate directly with each other via the Company's Internet platform prior to the consummation of a booking. If the hotel and the Traveler agree to the price and terms of the booking, they enter into a binding agreement to which the Company is not a party. The Traveler pays for the hotel room electronically using the Company's Internet platform. The Company does not have the right to book any accommodations and does not have the right to resell or remarket any room accommodations.

The Company receives a fixed service fee (which is a percentage of the rental price) from both the Traveler and the hotel to cover the search, communication and other services provided by its platform, including the provision of a secure payment platform to enable payment to hotels. The Company does not receive any other form of fee or other payment for its services related to rentals. The service fee collected from the Traveler is separately indicated and is collected via credit card charge at the time of consummation of a booking on the Company's internet platform. The fees collected from the Traveler vary from 6% to 12% of the rental price depending on the amount of each reservation with the hotel. Also, the Traveler's fees are affected by foreign exchange, which is not a factor in the United States. The fees collected from the hotel are currently fixed at 3% of the rental price.

Payments made by the Traveler are initially held by the Company. If a hotel does not confirm a booking within twenty-four hours of a Traveler's payment, any amounts received by the Company are refunded to the Traveler. The Company releases the Traveler's payment (less the service fee charged by the Company) to the hotel twenty-four hours after the Traveler's check-in date.

Each hotel agrees that the collection and remittance of all hotel taxes are the responsibility of the hotel. Cancellation and refund policies are established by each hotel and included in the accommodation listing. If an issue arises during the Traveler's stay that cannot be resolved by the hotel, the hotel is responsible for reimbursing the Traveler up to the total amount paid by the Traveler for the accommodations. However, if the hotel must cancel the reservation, the Company will refund to the Traveler the total fees collected.

ISSUES PRESENTED

You have requested the following rulings:

(a) The Company is not considered a "room remarketer" as defined in Section 11-2501.12 of the New York City Administrative Code (the "Code").
(b) The Company is not responsible for collecting and remitting any HROT.

CONCLUSIONS

1. The Company is not a "room remarketer" as defined in Code Section 11-2501.12.
2. The Company is not responsible for collecting and remitting any HROT.

Finance

DISCUSSION

Under Code Section 11-2502(a), the HROT is imposed "for every occupancy of each room in a hotel in the city of New York." The Code further states that "[w]here an occupant rents a room directly from an operator, the tax shall be paid by the occupant to the operator…., and the operator shall be liable for the collection of the tax on the rent and for the payment of the tax on the rent. The operator or room remarketer…shall be personally liable for the portion of the tax collected or required to be collected…" Code Section 11-2502.f. An "Operator" is "[a]ny person operating a hotel in the city of New York, 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." Code Section 11-2501.2.

Room Remarketer

The HROT provisions with respect to room remarketers were most recently amended by Part AA of Chapter 57 of the Laws of 2010 ("Chapter 57") effective September 1, 2010. Chapter 57 amended the New York State ("NYS") sales tax provisions regarding room remarketers and made conforming changes to the HROT. Pursuant to the new law, a room remarketer is "[a] person who reserves, arranges for, conveys or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by such room remarketer, directly or indirectly, whether pursuant to a written or other agreement. Such person's ability or authority to reserve, arrange for, convey or furnish occupancy, directly or indirectly, and to determine the rent therefor, shall be the 'rights of a room remarketer.'" Code Section 11-2501.12.

"Occupancy" is "[t]he use or possession, or the right to the use or possession of any room or rooms in a hotel… 'Right to the use or possession' includes the rights of a room remarketer as described in [Code Section 11-2501.12]." Code Section 11-2501.4.

According to the statement of legislative findings and purposes included in Chapter 57 ("the statement"), the purpose of the amendment of the sales tax was to put room remarketers on the same footing as hotel operators. Prior to the enactment of Chapter 57, the State did not receive any tax on the remarketers' markup on the room, giving remarketers a competitive advantage over hotels using conventional reservation methods. In view of this fact, the statement provides, "[t]his bill would make clear that the right to 'resell' the occupancy, as well as the physical occupancy of a hotel room, are both taxable, thus removing the tax advantage that room remarketers currently have over hotel operators."

With respect to the NYS sales tax provisions, Technical Service Bureau Memorandum 10(10)S, Office of Tax Policy Analysis, New York Department of Taxation and Finance, 8/13/10 ("TSB-M"), states that the new provisions regarding room remarketers do not apply to certain types of businesses:

> Businesses, such as travel agencies, that reserve rooms on behalf of their customers and do not have the right to determine the amount of rent that their customer pays for the room (i.e., the rent is fixed and determined by the hotel, and is not allowed to be marked-up by the business that reserves the room on behalf of its customer), **are not** room remarketers for purposes of this new law.

As the TSB-M indicates, a business that does not have the ability to set or determine the rental rate for a hotel room or to mark up such a rate is not a room remarketer. Accordingly, the critical factor that distinguishes room remarketers from other types of service providers is whether they have the ability either to set or mark up the rate for a room. In this case, the hotel has the exclusive right and ability to determine the price of the hotel room, including the discretion to negotiate with the Traveler and to raise and lower the price at any time, and the agreement is exclusively between the hotel and Traveler. Moreover, the Company does not have a contract with the hotel that would allow the Company to reserve the room on behalf of the Traveler. The Company instead provides an Internet platform through which the hotel has the ability to offer a Traveler the opportunity to reserve a room with the hotel at a price set by the hotel, and also to provide the Traveler a means of locating available hotel room or rooms and to pay for the room or rooms electronically. The Company receives a service fee from the hotel and the Traveler for the use of its platform and payment services. The fact that the service fee is based on the hotel rate does not change the character of the payment. Thus the Company is not a room remarketer as defined by Code Section 11-2501.12.

Collection and Remittance Responsibility

Under Code Section 11-2502.f, the parties responsible for collecting and remitting the HROT are the hotel operator and room remarketer. Under the facts presented, the Company is neither a hotel operator nor a room remarketer. The Company is not a person operating a hotel in New York City, nor is it an owner, proprietor, lessee, sublessee, mortgagee in possession, licensee, or any other person operating a hotel in New York City. The Company is also not a room remarketer, as discussed above. Rather, the Company is an Internet platform service provider through which the hotels using its services have the ability to display to a Traveler the available accommodations and to communicate with a Traveler in order to reach agreement on a rental

transaction. Based on this conclusion, the Company is not subject to requirement to collect and remit the HROT. Additionally, because the Company is not a party to the rental contract between the hotel and the Traveler, it has no obligation to collect and remit the HROT.

Very truly yours,

Beth Goldman
General Counsel

CS:cs