Expedia, Inc. v City of N.Y. Dept. of Fin.

2011 NY Slip Op 08648 [89 AD3d 640]

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Appellate Division, First Department

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Expedia, Inc., et al., Appellants, et al., Plaintiffs,
v
City of New York Department of Finance et al., Respondents.

—[*1] Jones Day, New York (Robert W. Gaffey of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Joshua M. Wolf of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 22, 2010, which granted defendants' motion to dismiss the first cause of action seeking a declaration that Local Law No. 43 (2009) of City of NY violates the Constitution of the State of New York and declared in favor of the New York City Department of Finance and the City of New York (defendants or City) that there is no constitutional violation, unanimously reversed, on the law, without costs, the motion denied, and, upon a search of the record, it is declared that Local Law 43 violates the New York State Constitution.

Plaintiffs, on-line travel intermediaries that facilitate hotel room reservations, commenced this action against defendants challenging the constitutionality of Local Law 43, which amended certain subdivisions of the Administrative Code of the City of New York § 11-2501 *et seq.* in order to extend the hotel room occupancy tax to include imposition of the tax on the service or booking fees earned by plaintiffs in connection with hotel room reservations. Plaintiffs seek, inter alia, a declaration that defendants lacked the authority to expand the hotel room occupancy tax to impose it on the fees earned by them. The enabling legislation authorized the City of New York to impose on a hotel occupant a tax at a rate of up to six percent of the rent or charge per day for each hotel room (CLS Uncons Laws of

NY, ch 288-C, § 1, as added by L 1970, ch 161, § 1). Contrary to the motion court's finding, the plain language of the enabling legislation did not clearly and unambiguously provide the City with broad taxation powers with respect to imposing a hotel occupancy tax. Rather, it permitted the City to impose the tax on "hotel occupants." Given the well-established rule that a statute that levies a tax "must be narrowly construed" and "any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (*Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657, 661 [1993]), the plain meaning of this phrase did not encompass the service fees charged by the travel intermediaries and the legislation may not be extended so as to permit the imposition of the tax in a situation not embraced by it (*id.*). [*2]To extend the tax to cover these fees requires action by the State Legislature, such as that taken in 2010 (*see* CLS Uncons Laws of NY, ch 288-C, § 1; L 2010, ch 57, Part AA, § 1, eff Sept. 1, 2010). Concur—Saxe, J.P., Friedman, Renwick, DeGrasse and Freedman, JJ.