

MEMORANDUM OF LAW

DATE: November 13, 1985

TO: Susan L. Drake, License and Tax Audit Manager

FROM: City Attorney

SUBJECT: Transient Occupancy Tax; Holiday Clubs

International

Your memorandum of September 26, 1985 requested the advice of this office whether the transient occupancy tax applies to that portion of a room rate which is discounted to members of the Holiday Clubs International (HCI). You specifically asked whether or not the tax rate is based on an imputed prorated discount of \$22.95 as "rent charged by the operator." It is our conclusion that the tax should be based on the actual discount of 50% from the published room rate, rather than on an imputed discount of \$22.95.

Your memorandum provided information on the HCI plans. A

member pays \$2,295 to HCI which entitles the member to 100 nights at a "50% discounts . . . to the published (room) rate in effect at the time of occupancy" at participating Holiday Inns. The contract further states that "participating hotels have set aside a certain number of rooms exclusively for HCI as a convenience to our members. The Club will provide confirmation of reservations."

Your memorandum further indicated that HCI is a wholly owned subsidiary of Holiday Inns, Inc. The participating hotels do not receive any portion of the \$2,295 membership fee. You imply, however, that because a member has an entitlement to a discounted rate, the tax should be applied to the entire consideration paid by the guest, rather than to the discounted rate.

Our conclusion that the tax should be based on the undiscounted room rate, rather than on some other amount, is based on the language of the Transient Occupancy Tax Ordinance contained in Chapter III, Article 5 of the San Diego Municipal Code. The transient occupancy tax is established by San Diego Municipal Code section 35.0103 as follows: "For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax . . . of six percent (6%) of the rent charged by the operator." (Emphasis added).

"Rent" is defined in section 35.0102(e) as follows:

"Rent" means the consideration charged for the occupancy of space in a hotel as well as for such equipment as rollaway beds, cribs, television sets, etc., valued in money, whether to be received in money, goods, labor or otherwise, including all receipts, cash, credits and property and services of any kind or nature without any deduction therefrom whatsoever. (Emphasis added).

"Occupancy" is defined as the "use or possession, or the right to the use or possession of any room." (See section 35.0102(c) of the San Diego Municipal Code.)

Applying a literal reading of the Code, once the HCI member has a right to possession of a room, he is entitled to a 50% discount from the published room rate. This is a property right under the HCI membership contract and it is guaranteed to the member subject only to availability of rooms. Once available, however, his room reservation - and hence his occupancy - is guaranteed. Thus, the "rent" upon which the taxes are computed includes the 50% discount or "credit" that the transient HCI member is guaranteed by his membership.

This interpretation is consistent with an earlier opinion of

this office contained in a Memorandum of Law dated April 11, 1975 (copy attached). In that memorandum it was concluded that a transient occupancy tax could be imposed on a forfeited nonrefundable room deposit because the transient was thereby guaranteed a right of occupancy of a room. That opinion proceeded on the rationale that the guest had a contract right which was enforceable. Conversely, if the deposit was refundable, no taxable incident occurred.

This theory is harmonious with the HCI membership contract, since once the member occupies the room, he is absolutely entitled to the 50% discount. It matters not that the hotel does not receive a cash credit from HCI, since the term "rent" is defined in terms of credit and services in the hands of the transient from whom the tax is due, rather than in actual cash receipts in the hands of the hotel.

In the event you should have further questions on this specific issue or a related issue, please feel free to contact the undersigned.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

RH:mem:160.1(x043.2)

Attachment

cc Conny Jamison

ML-85-76