

Summary of SC91228, *St. Louis County, et al. v. Prestige Travel, Inc.*

Appeal from the St. Louis County circuit court, Judge John F. Kintz

Argued and submitted April 5, 2011; opinion issued June 28, 2011

Attorneys: The county and visitors commission were represented by Joe D. Jacobson, Martin M. Green, Jonathan F. Andres and Fernando Bermudez of Green Jacobsen PC in Clayton, (314) 862-6800. The online travel companies were represented by James Bennett and Jennifer S. Kingston of Dowd Bennett LLP in Clayton, (314) 889-7300; Elizabeth B. Herrington of McDermott Will & Emery LLP in Chicago, (312) 372-2000; Brian Stagner and Chad Arnette of Kelly Hart & Hallman LLP in Ft. Worth, Texas, (817) 878-3561; James Karen of Jones Day in Dallas, (214) 220-3939; and Terrence J. O’Toole of Bryan Cave in St. Louis, (314) 259-2000. The attorney general, who filed a brief as a friend of the Court, was represented by State Solicitor James R. Layton of the attorney general’s office, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A county and convention and visitors commission appeal a trial court’s judgment that certain travel companies that facilitate the booking of hotel and motel rooms over the Internet are not required to pay the county hotel tax or the state tourism tax. In a unanimous decision written by Judge Zel M. Fischer, the Supreme Court of Missouri affirms the trial court’s judgment. The bill that enacted the authorization for the taxes does not violate the legislative procedural requirements of the Missouri Constitution, and the county and commission failed to demonstrate that the tourism tax adopted in the bill clearly required the travel companies to pay the tax; therefore, they have failed to establish that the bill violates article III, section 39(5) of the state constitution. The amount the companies retain – the difference between the discounted price at which they purchase rooms from hotels and motels and the higher price at which they sell those rooms to transient guests – is compensation for facilitating a reservation, not providing a sleeping room. As such, they are not subject to the hotel or tourism tax.

Facts: St. Louis County and the St. Louis Convention and Visitors Commission sued Prestige Travel, Expedia, Hotels.com, Hotwire, Interactive Hotel Solutions, Internetwork Publishing Corp., Lowestfare.com, Maupin-Tour Holdings, Onetravel, Orbitz, Priceline.com, Site59.com, Travelnow.com, Travelocity.com, Travelport, Travelweb and Tripnetwork, all of which facilitate the booking of hotel and motel rooms over the Internet. The county and commission alleged the companies contracted with hotel and motel operators for hotel rooms at discounted rates, then sold or resold the rooms to guests at a marked-up price, remitting only the discounted rate to the hotel and motel operators and keeping the difference between the two rates. The county and commission alleged the companies did not collect the hotel tax imposed by sections 502.500 to 502.550 of the St. Louis revised ordinances or the tourism tax imposed by sections 67.601 to 67.626, RSMo 2000. Specifically, the county and commission alleged that the companies did not collect the taxes as a percentage of the marked-up price but rather as a percentage of the discount price or that the companies did not collect these taxes on the rooms they sold or resold. The booking companies filed a motion to dismiss the suit, which the circuit court overruled. Shortly thereafter, the legislature passed House Bill 1442, which specifically exempts online travel companies from the tax. The companies filed a motion to reconsider its motion to dismiss. Following a hearing, the court dismissed the suit. The county and commission appeal.

AFFIRMED.

Court en banc holds: (1) The county and commission have failed to demonstrate that the tourism tax adopted in HB 1442 clearly imposed a liability on the travel companies and, therefore, have not established a violation of article III, section 39(5) of the Missouri Constitution. To establish a violation of this provision, the county and commission would have had to show that the travel companies owed an indebtedness, liability or obligation to St. Louis County before the effective date of HB 1442 and that the bill extinguished that indebtedness, liability or obligation without consideration. Although the county and commission raised other constitutional claims in their response to the travel companies' motion for reconsideration, they failed to make a challenge based on article III, section 39(5). As such, they waived this challenge by failing to raise it at the earliest opportunity. Even if this challenge was not waived, however, it lacks merit. In section 502.500 of its ordinances, the county imposes a hotel tax of 3.5 percent on "the amount of sales or charges for all sleeping rooms paid by the transient guests of hotels and motels situated within St. Louis County." Separately, section 67.619.1 authorizes the county to impose a tourism tax of not more than 3.75 percent "on the amount of sales or charges for all sleeping rooms paid by the transient guests of hotels and motels situated within the city and county involved, and doing business within such city and county." The language of these statutes is clear: the taxes are imposed on operators of hotels and motels. Because the travel companies are not engaged in the business of operating a hotel or motel, they have no tax obligation. Taxing statutes must be construed strictly, and this Court will not read a tax obligation into the law where one is not expressed clearly. Even if the tourism tax were not levied only on St. Louis businesses, the travel companies are not liable because they do not provide sleeping rooms. Rather, they are Internet companies that facilitate room reservations between the hotels or motels and transient guests. The money the companies retain after remitting the portion they owe to the hotels and motels is compensation for facilitating a reservation, not providing a sleeping room. Tax statutes are to be construed against the taxing authority, and taxes are not to be assessed unless they are expressly authorized, which the county and commission have not shown here.

(2) HB 1442 does not violate the original purpose requirement of article III, section 21 of the Missouri Constitution. The original purpose is measured at the time the bill is introduced. The original purpose of HB 1442 was regulating taxes, even though the original title stated "relating to city sales taxes." Regulating taxes also was the purpose of the final version of the bill. Section 67.200 authorizes a sales tax, while section 70.220 provides that municipalities and other political subdivisions can contract to share tax revenues. Both are germane to the original purpose of regulating taxes.

(3) HB 1442 does not violate the clear title or single subject requirements of article III, sections 21 and 23 of the Missouri Constitution. The challenged sections – sections 67.2000, 70.220, 137.1040 and 138.431 – arguably all involve independent tax-related provisions. Even if they individually would not withstand a constitutional challenge, they still are not so essential to the efficacy of the bill that the legislature would not have passed the bill without them or that the hotel and tourism tax provisions of the bill, standing alone, are incomplete or incapable of being executed in accordance with legislative intent. As such, even if one were unconstitutional, it merely would be severed from the bill rather than striking down the entire bill. *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103 (Mo. banc 1994).