
Coates' Canons Blog: More Occupancy Tax Q & A

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If you missed our webinar on the regulation and taxation of short-term rentals such as those listed on AirBnB, it will soon be available for on-demand viewing here. In that webinar, my SOG colleague Rebecca Badgett and I discussed different options available to local governments that are concerned about the proliferation of short-term rentals (“STRs”) or view them as a desirable revenue source. This blog examines in more detail a few of the issues that arose during that discussion. For a more basic discussion of this topic, please see this blog post and this one on STR regulation and this blog post and this one on occupancy taxes.

Who is responsible for unpaid occupancy taxes?

The answer to this question is usually easy: the property owner. If the Tar Heel Town Motel doesn't file an occupancy tax return or pay any occupancy taxes, the town may use property tax remedies of attachment & garnishment and levy & sale against the owner of that motel.

But changes to North Carolina tax provisions in recent years have muddied the waters when it comes to properties that are rented thru an agent or an on-line “facilitator” such as AirBnB. If an accommodation is rented thru one of those third parties, the owner of the property is usually not liable for unpaid occupancy taxes on that rental.

This is not a happy result for local tax collectors, because it almost certainly would be easier for a collector to pursue enforced collections against a local property owner rather than against San Francisco-based AirBnB (although it would be cool to hold a meeting in one of their “camping” rooms).

Here's why property owners are off the hook:

The general provisions for local occupancy taxes (G.S. 153A-155 (counties); G.S. 160A-215 (municipalities)) tie those taxes to G.S. 105-164.4F, the statute that governs sales taxes on the rental of accommodations. G.S. 105-164.4F makes these statements about third-party rentals (note that the terms “retailer” and “provider” refer to the property owner):

Facilitator Transactions: *A facilitator that does not send the retailer the tax due on the sales price is liable for the amount of tax the facilitator fails to send. . . . A retailer is not liable for tax due but not received from a facilitator.*

Rental Agent. – *A person who, by written contract, agrees to be the rental agent for the provider of an accommodation is considered a retailer under this Article and is liable for the tax imposed by this section. The liability of a rental agent for the tax imposed by this section relieves the provider of the accommodation from liability.*

I've confirmed my interpretation of these provisions with the Department of Revenue staffers who specialize in sales taxes. They agree with my conclusion that tax collectors generally may **not** hold property owners responsible for occupancy taxes paid on rentals that are paid thru agents or facilitators such as AirBnB or Homeaway.

The good news is that AirBnB has been sending checks for occupancy taxes on its rentals to local governments since it signed a sales tax agreement with the Department of Revenue in 2015. But from what I hear, those checks do not come with any details identifying the properties and rentals to which the payments apply. Attempts by local governments to obtain more details about those payments from AirBnB have not been successful.

Does this mean that once a house is listed on AirBnB, a local tax collector has no options to ensure that occupancy taxes are being paid on that house? Maybe not.

I think tax collectors can demand that local property owners prove that any rentals of their properties have been paid for thru AirBnB or a similar on-line service. The best proof of that fact would likely be the regular reporting that (I assume) AirBnB provides to property owners for each rental it makes on their behalf. If the property owner can't or won't produce such proof, then I think the tax collector can proceed under the assumption that the rentals were not made thru AirBnB and that the property owner is liable for the occupancy taxes on those rentals.

This might occur quite frequently. I've rented several private homes that I first found on AirBnB but then paid the homeowner directly outside of the website. Whenever that occurs, the property owner should remain liable for the occupancy taxes on the rental.

Also remember that a property owner is liable for occupancy taxes that are collected by a facilitator and sent to the property owner instead of the taxing jurisdiction. I don't think this occurs with AirBnB, but other on-line facilitators may follow different procedures.

Finally, I think that rental agents advertising properties on AirBnB or other websites may still be held responsible for taxes on those rentals. G.S. 105-164.4F makes rental agents liable for occupancy taxes on rentals they process and the involvement of AirBnB or another on-line facilitator should not terminate that liability. It should be much easier to target a local rental agent with enforced collections as opposed to an out-of-state internet facilitator.

Although these approaches are not perfect solutions, they do give the local tax collector some leverage despite the unfavorable language of G.S. 105-164.4F.

May the Tourism Development Authority (“TDA”) members see individual occupancy tax payment records?

No.

Occupancy tax returns are made non-public by G.S. 153A-155 and G.S. 160A-215. Those returns and any other records that show income information are also made confidential by G.S. 53A-148.1 and G.S. 160A-208.1. Records that show occupancy tax payments also show income information because the tax is computed as a percentage of income.

These records may be disclosed under very limited circumstances identified in G.S. 53A-148.1 and G.S. 160A-208.1. The only one of those circumstances that might apply to the TDA would be the authority to disclose income information “to sort, process, or deliver tax information on behalf of the county, as necessary to administer a tax.” (A similar provision for municipalities exists in G.S. 160A-208.1.)

But I don't think the TDA “administers” an occupancy tax. The TDA's only authority is to spend the revenue produced by the occupancy tax. They have no collection responsibility or authority. The county or the municipality administers and collects the occupancy tax; the TDA simply spends whatever funds the county or municipality turns over to the TDA.

With respect to seeing occupancy tax payment records from individual taxpayers, I think the TDA is the equivalent of me or Coach K and the rest of the general public. We're all third-parties with no authority to see confidential income information.

TDA members (and me and Coach K) certainly have the right to see aggregate occupancy tax payment records, such as documents that summarize the total amount of occupancy tax paid by all taxpayers or by some general subset of taxpayers (hotels vs. private homes, for example). But I don't think the TDA can demand to see occupancy tax payment records for specific taxpayers.

Links

- www.sog.unc.edu/courses/webinars/what-do-about-short-term-rentals-local-regulation-and-occupancy-taxes
- www.officelovin.com/2015/07/31/a-tour-of-airbnbs-gorgeous-new-san-francisco-headquarters/
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-155.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-215
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=105-164.4F



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- www.newsobserver.com/news/local/counties/wake-county/article21331905.html
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-215
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-148.1.html
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-208.1