

HB 571 Opponent Testimony

Jack Boyle Ohioans for Tax Reform

Chairman Schaefer, Vice-Chairman Scherer, Ranking Member Rogers, members of the Ways and Means Committee, good morning and thank you for the opportunity to testify today on House Bill 571.

My name is Jack Boyle. I am a resident of Solon, Ohio and I appear today in my role as Executive Director of Ohioans for Tax Reform to speak in opposition to the bill.

Let me begin by complimenting HB571's principle sponsor Rep Greenspan on an excellent presentation in the sponsor testimony which he gave a couple weeks ago. His presentation brought some clarity to the details of what is a fairly complex business issue and will allow us to understand the questions we are actually trying to answer with this legislative action.

I will begin therefore by using the example Rep Greenspan used in his testimony.

A consumer in Ohio books a hotel room in Ohio for \$100.00. He goes to the hotel, presents his credit card and pays the \$100 plus the applicable hotel use and occupancy tax plus sales tax which total 17.50%. His total charge including tax is \$117.50.

Alternatively, the consumer goes to the hotel website and books the room, uses his credit card on the website, pays the hotel charge plus tax \$117.50.

Third possibility, the consumer goes to an online travel website, Travelocity, Priceline, Expedia, etc. (Referred to as OTC's) He reserves the room, goes to the hotel, pays at the hotel the room charge plus tax \$117.50. So far, no problem. (I'm not sure the OTC's will actually allow a transaction done this way, I never use them)

In each of these examples the hotel charges the customer for the room, assesses the hotel occupancy and use tax and sales tax, collects it and remits it in its normal course of business.

The problem arises in the next example. The consumer books the room on an OTC website, and pays with his credit card on the OTC site: \$100 room charge plus \$17.50 tax for a total of \$117.50.

The OTC then pays the hotel the rate it has negotiated for the room, in Rep Greenspan's example, \$80, and it retains the difference, \$20, as its service fee for arranging the hotel stay. Further, The OTC pays the hotel occupancy and use tax plus sales tax, 17.50% on the cost of the hotel room \$80, or \$14.00.

But \$3.50 is left over. What is this sum and what should be done with it. At present, the OTC just keeps it.

Clearly, the governments involved want it. They've asked for it and they have demanded it. They've even sued for it. But then why haven't they gotten it, thus far at least?

One reason is that, manifestly, a service charge is not subject in Ohio to hotel occupancy and use taxes and sales tax. If it was subject to these taxes we would not be here today discussing it. There would be no need to pass HB571.

There has been considerable litigation over the years on this issue. In 2012 the non-partisan Tax Foundation issued a paper on the subject and found that in more than 70 cases the courts supported the OTC's over the taxing authorities in all but a handful of cases.

I've included a link to the report here:

https://files.taxfoundation.org/legacy/docs/sr198_travel.pdf

During Rep Greenspan's sponsor testimony he mentioned a list of more recent decisions in a number of states that supported taxation; but apparently the issue has not been settled in Ohio. A member of the Committee asked if there had been any litigation in Ohio on the issue. Rep Greenspan answered that several communities had filed suit in Federal Court but that the suit was dismissed because of jurisdiction issues.

The logical next question might be, if the communities had engaged counsel and had gone to the trouble and expense of filing suit in Federal Court, why didn't they just refile the suit in the proper state court.

An educated guess to answer that question could be that they were advised by counsel not to bother in state court because Ohio statutes do not provide for collecting hotel occupancy and use tax and sale tax on service charges.

So, what to do? First, it occurs to me that the OTC's know full well what they will pay the hotel and that in assessing charges in the way described in these examples they might be accused of overcharging their customers. Perhaps the OTC's, like the governments, just want the money.

While this may be the case, in a competitive business, being plausibly accused of overcharging customers, whether legally provable or not, is never a good business model. As Rep Greenspan discusses in his testimony, OTC's have been reserving sums in their financial statements against possible litigation settlements over this issue, so it is hardly invisible to the public.

In conversations with Rep. Greenspan and others, I am told that the OTC's consider their negotiated rates with hotels to be proprietary information and assessing taxes on the negotiated rate would reveal otherwise private business information. Again this idea does not seem likely. All the principle participants in this type of business, hotels, chains OTC's have a pretty good idea of what is occurring on a real time basis.

Perhaps the realization on the part of the traveling public that they could save 2 or 3 % on travel tax every time by using on OTC might disrupt the long term relationship between OTC's and hotels. Seems unlikely given the immediacy of looking at a website, comparing prices and booking a room.

Why don't the OTC's simply remit the entire \$17.50 to the hotel as a payment of occupancy use and sales taxes.

That would probably be a problem, at least in Ohio. If the combined rate is 17.50% but the OTC tells the hotel we're going to submit 21.875% what is the hotel to do with overcharging the customer.

Rep Greenspan in his testimony outlined three reasons that opponents would give for opposing this bill: 1. It is a tax increase. 2. That it will increase the cost of travel. 3. The Dormant Commerce Clause.

I find the Dormant Commerce Clause discussion to be something of a straw man argument. While there are serious nexus issues that occur in this industry, this bill fails on the other issues.

It will increase the cost of travel. Manifestly, hotel occupancy and use taxes do materially increase the cost of travel. Rep Greenspan estimates that Ohio would enjoy an additional \$25 to \$30 million in additional revenue if this measure is approved. He talks about the \$43 million in 2015 and \$62 million in 2014 that Expedia has reserved for possible settlements relating to this issue.

Where exactly do these sums come from? Of course they come from the consumer. Requiring the payment by the consumer of more than \$125 million or more of taxes on service fees in these couple of limited examples might be considered raising the cost of travel. If these numbers are indicative, one wonders what the magnitude of this tax is on a nationwide basis.

Finally, HB571 is indeed a tax increase.

In his testimony, Rep Greenspan says "To forestall these legislative efforts, opponents have argued that the clarifying legislation amounts to a tax increase. This argument is without merit. **The room guest bears the economic burden of the occupancy tax.**" (Greenspan's emphasis)

Of course the room guest bears the burden of the occupancy tax, the room guest is the consumer, the taxpayer; and that's who pays the tax.

Next "Secondly, **the legislation makes no reference to changing existing tax rates.** It merely ensures equal application of the applicable rate to all identical transactions."

"The taxes in question aren't "new" taxes. They have existed for many decades."

Finally, we arrive at the crucial question. It is true that hotel occupancy taxes and sales taxes have been being paid by Ohioans for many years. Changing the rate on these long standing taxes is not at issue here.

But up until now Ohioans have not paid hotel occupancy and use taxes on services fees; nor are service fees subject to Ohio sales tax. Otherwise HB571 would not be needed.

If one wants to make the argument that it is in some way "fairer" to create a new tax to cover this type of transaction, one is free to do so.

But applying a tax to an activity which up to now has not been subject to the tax cannot be understood as anything other than a tax increase.

Ohioans for Tax Reform believes that we need to seek ways to lessen the burden on taxpayers, not adding taxes on previously untaxed activities which will take additional millions out of their hands. OTR will consider a vote for HB 571 as a violation of the Taxpayer Protection Pledge.

Mr. Chairman, committee members, thank you for your attention. I would be happy to address any questions you may have.