

**New Hampshire Department of Revenue Administration
45 Chenell Drive, Concord, NH 03301**

**TECHNICAL INFORMATION RELEASE
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A Technical Information Release is designed to provide immediate information regarding tax laws administered by the Department or the policy positions of the Department as a service to taxpayers and practitioners. A Technical Information Release represents the position of the Department on the limited issues discussed herein based on current law and Department interpretation. For the current status of any tax law, practitioners and taxpayers should consult the source documents (i.e., Revised Statutes Annotated, Rules, Case Law, Session Laws, etc.). Questions should be directed to Customer Service at (603) 271-2191.

Revised Guidelines for Hotel Operators Using On-Line Booking Companies

In response to the Department's issuance of Technical Information Release 2007-008, Dated November 29, 2007 and entitled "Guidelines for Hotel Operators Using On-Line Booking Companies," several hotel operators in the State, representatives of the hospitality industry, and representatives of on-line booking companies have requested that the Department revisit the issues relating to the determination of the amount of Meals and Rentals (M&R) Tax, RSA 78-A, due on room rates booked by on-line booking companies that are not affiliated with the hotel operators. The Department has revised its approach based on information obtained through discussions with the industry representatives and additional research. This Technical Information Release supercedes TIR 2007-008.

On-line booking companies contract with hotel operators to make a certain designated number of rooms owned by the hotel operators available for on-line booking for use by the on-line booking companies' customers. An on-line booking company may collect the prospective guest's payment to the hotel operator for the accommodations. In these cases, the on-line booking company charges the guest an amount equal to the total rate the hotel operator charges for the occupancy of the room and a tax recovery charge/service fee to cover applicable taxes the on-line booking company expects to remit to the hotel operator as well as a fee charged by the on-line booking company for services it provides to a prospective guest. The hotel operator may not know the amount charged to the prospective guest by the on-line booking company.

If a prospective guest checks into a hotel, no additional payment is required, apart from incidental charges (e.g. telephone charges, movie rental, mini-bar usage, etc.). When the guest checks out of the hotel, the hotel operator bills the on-line booking company, which has agreed to facilitate a guest's payment to the hotel operator an agreed upon charge for the room. The amount billed to the on-line booking company, or "wholesale rate," is usually considerably less than the going rate at the hotel.

The issue for New Hampshire licensed hotel operators is: "To which room rate does the tax apply?"

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It is the Department's position that RSA 78-A requires the tax to be calculated on the room rate paid for the occupancy by the end user, regardless of the hotel's going rate for the room and regardless of the contract amount between the operator and the on-line booking company. However, as the hotel operator may be unaware of the rent charged to a guest by the on-line booking company, the hotel operator is only responsible to remit the amount of tax it receives from the on-line booking company. If the on-line booking company remits the tax based on 8% of the wholesale rate, the hotel operator will not be held responsible for any amount of tax in excess of 8% of the wholesale rate.

The M&R tax on hotel accommodations is a tax on the *occupancy* of a hotel room. RSA 78-A:6, I. *Occupancy* is defined as the use or possession, or the right to the use or possession, of any room in a hotel for any purpose. RSA 78-A:3, VI. An occupant is the person who, for *rent* paid, has the right to the use or possession of any room in a hotel. RSA 78-A:3, V. *Rent* is "the consideration received for occupancy valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property, or services of any kind or nature, and also any amount for which the occupant is liable for the occupancy without any deduction of any kind." RSA 78-A:3, VIII(s)(emphasis and underline added). The economic burden of the tax falls on the end user, not the operator or its agent. See, RSA 78-A:7, I (b) ("The operator shall demand and collect the tax from the occupant The occupant . . . shall pay the tax to the operator."); *Cagan's, Inc. v. New Hampshire Dept. of Revenue Admin.*, 128 N.H. 180 (1986)(RSA 78-A:7 places the burden of the M&R tax on the customer).

Given this statutory structure and the applicable case law, the amount the occupant pays to the on-line booking company for the room is the amount subject to M&R tax. However, as the hotel operator may be unaware of the rent charged to a guest by the on-line booking company, the hotel operator is only responsible for remitting the amount of tax it receives from the on-line booking company provided it receives at least 8% of the wholesale rate.

Example: A New Hampshire licensed hotel operator contracts with an on-line booking company to make available a block of rooms at a wholesale rate of \$80 per room. The company charges the end users \$100 for a room plus a \$12 tax recovery charge/service fee. The tax on the room would be 8% of \$100, or \$8. However, the on-line booking company only remits \$86.40 to the hotel operator, \$80 for the room and \$6.40 (\$80 *.08) in tax. It is the responsibility of the hotel operator to remit the \$6.40 collected to the Department.

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