Having decided the police inquiry was a search, the majority evaluated whether the searches were reasonable. The majority did not engage in the normal balancing test to answer this question requires because, as it said, "that balance has already been struck. The Supreme Court has made clear that, to be reasonable, an administrative record-inspection scheme need not require issuance of a search warrant, but it must at a minimum afford an opportunity for pre-compliance judicial review, an element that § 41.49 lacks."

Given these findings, the majority held the inspections to be facially invalid because, despite furthering a legitimate government interest (stated by the city as deterring drug dealing and prostitution in hotels) and being sufficiently "limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome," the law failed to provide hotel operators "an opportunity to obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." In the majority's opinion the law left hoteliers subject to "unbridled discretion" of officers in the field with nothing but "risking criminal conviction" as a tool to challenge the reasonableness of an officer's decision to inspect the records. Since the hallmark of the law was that hoteliers turn over records non-consensually and without a warrant, the majority held this deficiency meant there were no circumstances whatsoever in which the law could be applied constitutionally.

DISSENT: Two dissenting opinions were filed in the case. First, Judge Tallman dissented on the grounds that the majority decided the case based on a facial challenge, rather than an as-applied challenge. He cited Supreme Court precedent directing lower courts not be "drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of [a statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible." The second dissent, by Judge Clifton, held neither the plaintiffs nor the majority had proved the ordinance was unreasonable in all circumstances.

http://cdn.ca9.uscourts.gov/datastore/opinions/2013/02/19/08-56567.pdf (last accessed Jan. 9, 2014)

Taxes: Online Travel Companies Not Liable for Unpaid Lodging Taxes Where City Cannot Establish That They Collected Retail Room Price

City of Rome v. Hotels.com, No. 12-14588 (11th Cir. Dec 13, 2013)

In another of the now-familiar cascade of online travel company (OTC) taxes, the Eleventh Circuit has upheld the OTC's argument that the municipality was unable to establish that they had collected a "retail" room price rather than a "wholesale" price.

For years cities and counties in Georgia have been litigating with OTC's about taxes and fees. The latest round to make it through the courts came a couple weeks ago when Rome, Georgia, representing a class of 250 cities and counties in Georgia, sued Hotels.com and other OTC's

over back taxes allegedly owed by the sellers. This spat started over a Georgia law, O.C.G.A. § 48-13-51(a)(1)(B)(i), which provides that "every . . . entity subject to a tax levied as provided in this Code section shall . . . be liable for the tax at the applicable rate on the lodging charges actually collected." Based on this enabling statute Rome argued in district court that they were entitled to back taxes from these companies. At the core of the issue is the way in which the online companies calculate and remit taxes to cities and counties. The business model of Hotels.com and other online companies is to buy rooms at wholesale prices from hotels, then resell them to customers online at a "retail" rate. These companies charge customers the retail rate, plus some amount or "taxes and fees." Rome argued the above mentioned enabling statute was violated because the remitted taxes were based on the wholesale price and not the retail price. Rome therefore sought what it saw as unpaid back taxes.

The district court granted summary judgment to Hotels.com because it held Rome failed to prove the online retailers actually collected, but didn't pay the taxes on the retail amount. It also held Georgia law prohibits cities recovering back taxes that online retailers never actually collected. Rome appealed.

HELD: The Eleventh Circuit affirmed the district court.

DISCUSSION: Rome's primary argument was that the district court erred in when it determined there was insufficient evidence for a reasonable jury to find the online retailers actually collected the retail rate but failed to remit the taxes for that rate. Rome backed up its argument that the retailers actually collected taxes for the retail rate with various pieces of evidence, including that 1) the online retailers represented to customers that the taxes and fees covered all "applicable taxes," 2) the taxes and fees actually charged were generally equivalent to the retail rate, and 3) virtually every transaction included a charge for taxes and fees that was enough to pay the tax on the retail rate. The Circuit Court agreed, saying that this evidence only provided enough for a reasonable jury to find for Rome based on "guesswork and conjecture."

Second, Rome contended that the online hoteliers were liable for the back taxes under two recent Georgia Supreme Court cases, both of which also deliberated the issue of online hoteliers and tax collection. Rome contended the cases announced a new rule that required these retailers to collect the tax and that this rule was retroactive. The Circuit Court denied this argument, instead finding that the cases foreclosed any relief for back taxes against third-party tax collectors like the online hoteliers. In the first case, City *of Atlanta and Expedia, Inc. v. City of Columbus*, 285 Ga. 684 (Ga. 2009), the state supreme court found that the online hotelier had to pay the occupancy tax and that the applicable rate was the retail rate, not the wholesale rate. But it also held that while back taxes were the standard damages, in a dispute between an hotelier and a city where the hotelier failed to remit the taxes, the city did not have that remedy. In *City of Atlanta v. Hotels.com*, 289 Ga. 323 (Ga. 2011), the same court held the district court properly granted injunctive relief and did not award back taxes as "the city did not have [that] remedy" available. Thus, the Circuit Court affirmed the lower court, holding Rome's "attempt to construe either decision as supporting a remedy for back taxes [wa]s without merit."

http://www.ca11.uscourts.gov/unpub/ops/201214588.pdf (last accessed January 8, 2014).