



Legislation Text

File #: 17-0299, **Version:** 1

TO:

Honorable Mayor and Members of the City Council

THROUGH:

Mark Danaj, City Manager

FROM:

Bruce Moe, Finance Director

Steve Charelian, Revenue Services Manager

SUBJECT:

Shade Hotel Appeal of Transient Occupancy Tax Audit Findings (Finance Director Moe).

CONDUCT APPEAL HEARING

RECOMMENDATION:

Staff recommends that the City Council conduct an appeal hearing of the Shade Hotel Transient Occupancy Tax audit findings and render a decision on the collection of the tax.

FISCAL IMPLICATIONS:

A total of \$22,597.46 in Transient Occupancy Tax (TOT) is considered due and payable from the Shade Hotel as a result of an audit conducted in FY 2015-2016 for calendar years 2012-2015. This is based upon under-collection/under-reporting of the City's TOT on hotel revenue of \$225,975.

BACKGROUND:

During FY 2016-2017, the City undertook an audit of Manhattan Beach hospitality industry providers (hotels, motels) to determine if the appropriate amount of Transient Occupancy Tax (TOT) had been collected during calendar years 2012-2015. The audit of all twelve businesses resulted in the following findings:

- Five of the twelve hotels were found to have no deficiencies, meaning TOT was collected appropriately for all fees, including pet fees, cancellation, no show fees, etc.
- The seven hotels with deficiencies under-reported/under-collected taxes of between \$99.70 to \$22,597.46
- The median amount due from the seven hotels was \$8,834
- Seven of the hotels reported pet fees correctly
- Ten of twelve hotels collected TOT on no-shows correctly

Of the seven hotels with deficiencies, six ultimately complied with the audit findings and remitted the TOT due. The one remaining hotel, Shade, disagreed with the audit findings.

The City issued Shade a Notice of Deficiency Determination dated June 6, 2016 (Attachment #1) for

which payment was due no later than June 17, 2016. In accordance with Municipal Code Section 8.20.080 (Attachment #2), if Shade had desired to appeal the tax the request would have to have been filed no later than ten days after mailing of the Notice of Deficiency Determination (June 6, 2016), thus the appeal should have been requested by Shade by June 16, 2016.

On June 22, 2016, the City issued Shade a past due notice for the Transient Occupancy Tax due (Attachment #3). Shade requested an appeal on July 18, 2016 (Attachment #4), but because the request was past the deadline, they were advised that any extension of the appeal period would require City Council approval. The extension was requested and approved by Council on September 6, 2016 (see staff report - Attachment #5). The appeal hearing was held with the City's Tax Administrator (Finance Director) on November 8, 2016.

DISCUSSION:

Shade's position on the TOT identified in the audit is that hotel management was unaware of the requirements and did not believe that TOT applied to cancellation and no-show fees; room upgrade fees; early and late departure fees; and pet fees. Based on this belief, Shade did not collect the associated TOT for those charges from guests. Shade further believes that the City has not made it clear what charges are subject to TOT. Finally, Shade believes that because the taxes were not collected from the guests, they should not be liable for the taxes due to the City.

In the City's response to Shade Hotel (Attachment #6), staff stated that the information seemed to indicate that while there may be some misinterpretation of the calculation of the TOT by hotels, it was not universal, particularly with five of twelve Manhattan Beach hotels reporting TOT completely accurately (most others had only minor underreporting errors). Nonetheless, the City accepted the suggestion of clarifying the charges subject to TOT in an effort to assist the hoteliers' collection and reporting, and recently implemented a new TOT reporting form that provides more information. The audit process itself assisted in awareness as well.

Results of Appeal to Tax Administrator

In reviewing the City's TOT ordinance, and making the tax due finding, staff paid special attention to the definitions which indicate those charges for which the TOT is to be collected:

"Rent" shall mean the consideration charged, whether or not received (emphasis added), for the occupancy of space in a hotel valued in money, whether to be received in money, goods, labor, or otherwise, including all receipts, cash, credits, property, and services of any kind or nature, without any deduction therefrom whatsoever."

The code also states that *"Occupancy" shall mean the actual use or possession, or the right to actual use or possession, (emphasis added) of any room, or portion thereof, in any hotel for dwelling, lodging or sleeping purposes by the same individual or individuals for a consecutive period of thirty (30) days or less."*

The cancellation and no-show charges being contested are a form of rent for which the guests, while they did not physically occupy the space, had acquired the right to use or possess the rooms by virtue of the reservation with the hotel. Rents (cancellation and no-show fees) were collected on those rooms. Therefore, the TOT should have been collected by Shade.

Other areas for which TOT was not collected on rents received included room upgrade fees, early

departure fees, late departure fees and pet fees. These are considered charges for the privilege of occupancy. These are rents as defined in the Municipal Code for which TOT should have been collected by Shade.

With regard to pet fees, Shade's position on this charge is that it is a cleaning fee not subject to the TOT. However, regardless of Shade's application of that revenue for that specified purpose, this is a mandatory charge for the privilege of occupancy. As such, it is subject to TOT.

In the review, the auditor noted that some taxes on fees were intermittently collected/not collected:

Room Upgrade Fees:

Not Collected: 1/1/2012 to 12/9/2015

Collected: 12/10/2015 to 12/31/2015

Early Departure Fees:

Not Collected: 1/1/2014 to 12/9/2015

Collected: 1/1/2012 to 12/31/2013 & 12/10/2015 to 12/31/2015

Pet Fees:

Not Collected: 1/1/2015 to 12/9/2015

Collected: 1/1/2012 to 12/31/2014 & 12/10/2015 to 12/31/2015

Late Departure Fees:

Not Collected: 1/1/2015 to 12/31/2015

Collected: 1/1/2012 to 12/31/2014

Some of the intermittent TOT collections on these fees seems to coincide with a change of accounting systems by Shade. This would seem to indicate an understanding that TOT applies to these fees, but that perhaps the accounting systems were not adequately identifying the taxability of certain rents.

Shade Appeal

Shade's position is that this is not a case of Shade collecting the taxes and failing to remit to the City; Shade simply did not believe the TOT applied to these charges, and therefore did not collect the TOT from guests.

The City's position is that regardless of the reasons provided by Shade for its failure to collect the taxes, the taxes are within the definitions of the Municipal Code and should have been collected by Shade. As a result, the initial appeal with the City's Tax Administrator (Finance Director) resulted in a determination that the taxes are due and payable to the City by Shade Hotel irrespective of non-collection from guests. Staff does not have the discretion to waive the taxes.

Shade was issued a letter dated December 8, 2016 advising them of the taxes due (attachment #6). Further, they were advised that if they wished to appeal the decision to the City Council, they may do so as prescribed in the Municipal Code (below):

8.20.090 - Appeals.

Any operator aggrieved by any decision of the Tax Administrator with respect to the amount of such tax, interest, and penalties, if any, may appeal to the Council by filing a notice of appeal with the City Clerk within fifteen (15) days after the service or mailing of the determination of the tax due. The Council shall fix a time and place for hearing such appeal, and the City Clerk shall give notice in writing to such operator at his last known place of address. The findings of the Council shall be final and conclusive and shall be served upon the appellant in the manner prescribed in this chapter for the service of the notice of hearing. Any amount found to be due shall immediately become due and payable upon the service of the notice.

Shade filed a request to appeal the TOT audit to the City Council within the prescribed timeframe (Attachment #7). Shade was properly noticed of the hearing date of September 19, 2017, following City Council's action at the August 15th meeting setting the date and time. The hearing will be held during the regular City Council meeting. The process will be for City staff to present the information from the audit outlined in this report. Shade will then present their information for Council consideration. Council will then make a decision on the collection of the taxes, which shall be binding.

Please note that the City received a letter from Shade Hotel's attorney John A. Strain, which has been included in this report as Attachment #9.

POLICY ALTERNATIVES:

Not applicable.

PUBLIC OUTREACH/INTEREST:

After analysis, staff determined that public outreach was not required for this issue.

ENVIRONMENTAL REVIEW

Not required.

LEGAL REVIEW

The City Attorney has reviewed this report and determined that no additional legal analysis is necessary.

Attachments:

1. Notice to Zislis Group
2. MB Municipal Code Section 8.20
3. Past Due Notice to Zislis Group of TOT
4. Shade Hotel Request for Appeal
5. Staff Report Requesting Extension of Appeal Period
6. City Notice of Results of Tax Hearing
7. Shade Hotel Appeal of Tax Administrator Decision
8. PowerPoint Presentation
9. Letter from Shade Hotel's Attorney John A. Strain