STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EXPEDIA, INC.	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period August 9, 2005 through December 31, 2006.	:	DETERMINATION DTA NOS. 825025 AND 825026
In the Matter of the Petition	:	
of	:	
EXPEDIA, INC. (DELAWARE COMPANY)	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 2007 through December 31, 2007.	:	

Petitioner Expedia, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period August 9, 2005 through December 31, 2006. Petitioner Expedia, Inc. (Delaware Company) filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the period January 1, 2007 through December 31, 2007.

A consolidated hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in Albany, New York, on January 16 and 17, 2014, with all briefs to be submitted by August 25, 2014, which date began the six-month period for the issuance of this determination.

Petitioners appeared by Sutherland Asbill & Brennan LLP (Marc A. Simonetti, Esq., and Andrew D. Appleby, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Clifford M. Peterson, Esq., of counsel).

ISSUES

I. Whether petitioners' travel reservation facilitation receipts were derived from the performance of services or classified as other business receipts pursuant to Tax Law § 210.

II. Whether the Division of Taxation correctly determined that petitioners' travel reservation facilitation receipts were properly allocated to New York.

III. Whether the Division of Taxation's notices of deficiency violate the federal Internet Tax Freedom Act.

IV. Whether the Division of Taxation's notices of deficiency violate the United States Constitution and New York State Constitution.

V. Whether the Division of Taxation correctly determined that petitioners' online advertising service receipts were properly allocated to New York.

FINDINGS OF FACT

1. Petitioner Expedia, Inc., is a Washington corporation with its principal place of business in Bellevue, Washington. At all relevant times, it operated a travel reservation facilitation business directly and through its subsidiaries and affiliates including Travelscape, LLC, Hotels.com, L.P., Hotwire, Inc., Egencia, LLC, and EAN, LLC.

2. Petitioner Expedia, Inc. (Delaware Company) (Expedia Del) is a parent holding company headquartered in Bellevue, Washington, that owned stock in several wholly-owned subsidiaries, including petitioner Expedia, Inc., and TripAdvisor Business Trust (TripAdvisor), which was headquartered in Massachusetts.

3. During the audit period, petitioner[1] conducted a travel reservation facilitation business that assisted the reservation of hotels, flights, rental cars, and cruises by customers on a stand-alone or package basis. In particular, petitioner derived revenue from facilitating reservations for its customers with airlines and cruise ships, hotels and resorts, and car rental companies (collectively, Travel Service Providers). Petitioner was authorized, based on agreements with Travel Service Providers, to collect information regarding travel services (including rate and availability information) and transmit that information to customers. In addition, petitioner provided customers with the ability to use its Internet-based portals to request that it act to facilitate the customers' purchases of travel related services. Petitioner's competitors were other online and offline travel intermediaries.

4. Petitioner negotiated with Travel Service Providers to obtain special rates and availability for its travel customers.

5. Petitioner facilitated travel bookings and reservations through two business models: the merchant model and the agency model. In both models, petitioner received reservation requests from travel customers and transmitted the reservation requests from travel customers to Travel Service Providers, which in turn furnished a confirmation number to the customer through petitioner. The reservation process and call center support was generally the same for both merchant model and agency model transactions.

6. In merchant model transactions, petitioner served as the merchant of record and charged the customer's credit card for the reservation. When customers made reservations under this model, they agreed to pre-pay in full, and they authorized petitioner to forward payment to Travel

[1] Unless otherwise stated, the term petitioner refers solely to Expedia, Inc., its subsidiaries and affiliates.

Service Providers. Hotel reservations were examples of merchant model transactions. A typical transaction under this model proceeded as follows:

a. A consumer used petitioner's Internet-based search engine and portal to select the desired hotel accommodations using the computer-based information resources made available by petitioner.

b. After selecting the desired accommodations, the consumer provided petitioner with his or her personal identification and payment information using petitioner's Internet-based portal.

c. Petitioner transmitted the consumer's request to the operator of the requested hotel to reserve the accommodations on behalf of the consumer.

d. The hotel operator confirmed the consumer's booking of accommodations to petitioner.

e. Petitioner charged the consumer's credit card for the hotel selected, and included petitioner's fees.

f. Petitioner sent the consumer a confirmation e-mail, acknowledging the pertinent information of the purchase.

g. Upon arrival at the hotel, the hotel operator informed the consumer that the room had been arranged through petitioner and that no further payment for the accommodations was required.

h. After the accommodations were provided, the hotel operator submitted an invoice to petitioner, which, in turn, remitted payment.

7. Under the agency model, the customer directly paid the Travel Service Provider, which then paid a commission to petitioner for its facilitation role. Typical agency model transactions included those for airline tickets, car rentals, and cruises.

8. Petitioner's customers had the ability to use the Internet or telephone to request that petitioner act to facilitate the customer's reservation of travel-related services from Travel Service Providers. The same travel services were available to petitioner's customers under either method.

9. Petitioner's customers' booking process was generally the same whether the customer called petitioner's customer service call center and was assisted by a representative that used its computer systems, or accessed petitioner's website directly on his or her home computer.

10. Pre- and post-transaction support was provided by petitioner, including customer assistance, rewards for booking the service through petitioner, and maintaining the customer's reservation information.

11. Petitioner provided services to its customers similar to a traditional brick and mortar travel agency, allowing travelers to create customized travel and vacation packages by combining reservations for different travel components, often at reduced prices.

12. The servers related to petitioner's websites were located outside of New York State.

13. As of December 31, 2006, petitioner employed approximately 6,600 employees.

14. Petitioner's employees conducted business operations primarily in the State of Washington and performed partner relations activities primarily outside of New York State.

15. Petitioner maintained customer service call centers outside of New York State and did not maintain call centers in that state during the audit period. The call centers offered seven-day-a-week traveler support by telephone or e-mail.

16. In 2006, petitioner had approximately 26,600,000 United States transactions. That same year, petitioner's customer service call centers handled approximately 20,800,000 United States sales and service calls. In 2007, petitioner had approximately 29,500,000 United States transactions. That same year, petitioner's customer service call centers handled approximately 22,000,000 United States sales and service calls. Full data on these points was not available for 2005. The correlation between individual calls and any particular transaction is unclear.

17. Petitioner's administrative and corporate functions related to the operation of the company, its websites, and customer call centers were performed outside of New York State.

18. Petitioner did not provide its customers with any licenses or other intangible property rights of any kind, including but not limited to any right to access or use confidential or proprietary information. Petitioner did not provide its customers with any right to modify, copy, distribute, transmit, display, perform, reproduce, publish, license, create derivative works from, transfer, or sell or re-sell any information, software, products, or services obtained through its websites.

19. Petitioner's customers were located both in and out of New York State.

20. During the years at issue, petitioner Expedia Del's subsidiary, TripAdvisor, operated an online travel search engine and directory that aggregated user reviews, opinions, photos, and articles regarding various travel destinations and activities. During the period from January 1 through December 31, 2007, TripAdvisor derived revenue from advertisers and other third parties for advertisements placed on its websites.

21. The procurement and management of TripAdvisor's advertisements were performed exclusively outside of New York State by employees located in Massachusetts. Meanwhile,

TripAdvisor employees in Washington State and Massachusetts conducted all of the company's corporate administrative activities, including legal, tax, and accounting services.

22. During the relevant time, TripAdvisor did not publish newspapers or periodicals, nor did it produce radio or television programs.

23. For the taxable years 2005 and 2006, petitioner timely filed separate New York State general business corporation franchise tax returns. On each of those returns, it was required to compute a business allocation percentage that consisted of a property factor, a payroll factor, and a weighted receipts factor. For allocation purposes under Tax Law § 210, petitioner treated its travel reservation facilitation receipts as arising from services performed, determined that such services were performed out of New York State, and reported that it had no receipts in the regular course of business in New York State. As a result, it reported a New York State receipts factor of zero.

24. Unlike 2005 and 2006, for the taxable year 2007, petitioner and TripAdvisor were included in the timely filed New York State general business corporation combined franchise tax return for their parent holding company, petitioner Expedia Del. On the 2007 return, petitioner Expedia Del reported that it had no receipts in the regular course of business in New York State for the same reasons discussed in Finding of Fact 24 and reported a New York State receipts factor of zero.

25. Beginning in 2008, the Division of Taxation (Division) audited petitioner's 2005 and 2006 New York State general business corporation franchise tax returns and petitioner Expedia Del's 2007 New York State general business corporation combined franchise tax return. The Division determined that petitioners' receipts should not be classified as receipts from services, but rather as "other business receipts" under Tax Law § 210. As such, the Division concluded

that such receipts were earned at the point of customer access, which was the customer's computer, and should have been allocated by location of the customer, some of which were in New York. Likewise, the Division determined that petitioner Expedia Del's receipts earned from advertising on TripAdvisor were "other business receipts" and, again, should have been sourced to its customer's modem. Although the Division requested that petitioners provide the amounts of receipts from travel reservations generated by consumers on their computers located in New York, such information was never furnished. Instead, the amount of receipts allocated to New York was estimated by the Division based on information taken from petitioner Expedia Del's forms SEC 10-K and United States census population data. Consequently, the Division determined that an adjustment to each return was warranted as petitioners had receipts that must be allocated to New York.

26. In addition, for the 2007 taxable year only, the Division concluded that petitioner Expedia Del had a New York City office and, thus, had nexus with the Metropolitan Commuter Transportation District (MCTD). That conclusion was based on a statement in petitioner Expedia Del's 2006 form 10-K and an admission by petitioner during the audit process. Petitioner Expedia Del, however, did not report a liability for the MCTD surcharge for 2007. Hence, the Division estimated petitioner Expedia Del's MCTD surcharge based on its additional tax liability for that year.

27. On January 14, 2010, the Division issued to petitioner Notice of Deficiency number L-033172472-7 asserting additional corporation franchise tax liabilities for 2005 and 2006 in the amounts of $182,736.00 and $409,164.00, respectively, plus interest.

28. On January 14, 2010, the Division issued to petitioner Expedia Del Notice of Deficiency number L-033172547-3 asserting additional corporation franchise tax liability for 2007 in the amount of $556,362.00 and an MCTD surcharge of $73,170.00, plus interest.

29. The additional tax asserted in the notices of deficiency resulted from the Division increasing the numerators of the receipts factors reported on the returns filed by petitioners. The Division increased petitioner's receipt factor numerator by $28,347,250.00 and $69,529,241.00, respectively, for the tax years 2005 and 2006, and petitioner Expedia Del's receipts factor numerator by $116,328,100.00 for the tax year 2007 to reflect transactions sourced in New York State.

30. Petitioners submitted proposed findings of fact numbered 1 through 35, which have been generally accepted and incorporated herein except for proposed findings of fact 13 and 14, which have been modified to better reflect the record.

SUMMARY OF THE PARTIES' POSITIONS

31. Petitioners contend that the travel reservation facilitation receipts during the years at issue were service receipts under Tax Law § 210(3)(a)(2)(B). As such, the receipts must be sourced to the location where the services were performed, which, in this case, was outside of New York State. Additionally, petitioner Expedia Del argues that TripAdvisor's advertising receipts were also service receipts that, likewise, must be sourced outside of New York. Consequently, petitioners maintain that their returns were properly prepared and the subject notices should be canceled.

Alternatively, petitioners argue that the Division's statutory notices violate the Internet Tax Freedom Act (ITFA), and the Equal Protection, Due Process, and Commerce clauses of the

United States Constitution and New York State Constitution as they improperly discriminate against an Internet provider.

32. The Division, on the other hand, maintains that petitioners' receipts from travel facilitation should be classified as other business receipts under Tax Law § 210(3)(a)(2)(D) and not services, since there was no human involvement at the moment of sale, as required by its regulations. Similarly, the Division argues that TripAdvisor's advertising receipts are not from services, but also must be categorized as other business receipts for the same reason. As such, both sets of receipts should be sourced to where they were earned, which, in this case, the Division maintains was the location of the customer's computer. The Division also disputes that its assessments are violative of ITFA, and the Due Process, Equal Protection, and Commerce clauses of the Unites States Constitution and New York State Constitution. Finally, the Division states that should petitioners' corporation franchise tax adjustments be canceled, the portion of the notice of deficiency issued to petitioner Expedia Del relating to the imposition of the MCTD surcharge should be sustained.

CONCLUSIONS OF LAW

A. Article 9-A of the Tax Law imposes a franchise tax on all domestic and foreign corporations doing business, employing capital, owning or leasing property, or maintaining an office in New York State (Tax Law § 209[1]).

B. In New York, corporate taxpayers report their tax liability based on their computation of the highest of four income bases, one of which is entire net income (Tax Law 210[1][a-d]). Entire net income is allocated to New York pursuant to the taxpayer's business allocation percentage. For the years at issue, the business allocation percentage consists of property, receipts and payroll factors. This case solely concerns petitioners' calculation of their receipts

factor. The receipts factor is a fraction, the denominator of which is all of petitioners' receipts during the taxable period, and the numerator of which is the amount of those receipts allocable to New York from (i) sales of tangible personal property to points within the state, (ii) services performed within the state, and (iii) rentals and other business receipts within the state to all such income (Tax Law § 210[3][a]).

C. The threshold issue in this matter is whether petitioners' travel facilitation receipts are properly characterized as coming from "services" or constitute "other business receipts," as the Division asserts. The word "services" itself is not expressly defined under Article 9-A. The statute, for purposes of this issue, simply identifies "services performed within the state" (Tax Law § 210[3][a][2][B]). In cases of statutory interpretation, our prerogative is to ascertain and give effect to the intent of the Legislature (***Patrolmen's Benevolent Assn. v. City of New York***, 41 NY2d 205 [1976] ***citing Matter of Petterson v. Daystrom Corp.***, 17 NY2d 32 [1966]). The language of the statute is the clearest evidence of such intent (McKinney's Cons Laws of NY, Book 1, Statutes § 51[d]). Where no ambiguity exists, "the court should construe it so as to give effect to the plain meaning of the words used" (***Patrolmen's Benevolent Assn. v. City of New York***, at 208). Generally, words of ordinary import are to be given their ordinary and usual meaning (McKinney's Cons Laws of NY, Book 1, Statutes § 232).

The term "services" may be properly defined in the present context as "useful labor that does not produce a tangible commodity" (Webster's Ninth New Collegiate Dictionary, 1076) or "performance of labor for benefit of another, or at another's command" (Black's Law Dictionary 1227 [5th ed 1979]). An examination of the nature of petitioner's transactions, when considering the ordinary meaning of the word "services," leads to the inexorable conclusion that the receipts at issue were the result of performed services. Petitioner acted as a travel intermediary,

providing information to its customers, compiling summaries from Travel Service Providers, and facilitating travel arrangements. Petitioner also provided pre- and post-transaction support including customer assistance, rewards for booking the service through petitioner, and maintaining the customer's reservation information. All of these activities were part of the petitioner's process under either the merchant or agency models, and occurred whether its customer drew information from petitioner's database or was involved in a telephone call to a live person. Clearly, petitioner's product was the performance of a service as contemplated by use of that word in the statute.

D. Meanwhile, the Division points to its regulations to support its classification of petitioner's receipts as other business receipts and not services. The relevant regulation states, in pertinent part:

> "The receipts from services performed in New York State are allocable to New York State. All receipts from such services are allocated to New York State, whether the services were performed by employees, agents or subcontractors of the taxpayer, or by any other persons" (20 NYCRR 4-4.3[a]).

The Division maintains that petitioner's receipts cannot come from services performed as no employees, agents, subcontractors or other persons on behalf of petitioner were involved at the moment the transaction occurred. In essence, the Division insists that, pursuant to its regulation, there must be human involvement for the receipts to have emanated from services performed. Since there was not, according to the Division, the receipts at issue must be classified as "other business receipts" under Tax Law § 210(3)(a)(2)(D).

The Division's interpretation of the regulation, in this case, however, appears to be an impermissible expansion of Tax Law § 210(3)(a)(2)(B). Case law dictates that "a tax statute may not be extended by implication beyond the clear import of the language used" (***Yonkers Racing***

Corp. v. State, 131 AD2d 565, 566 [1987]). Unquestionably, 20 NYCRR 4-4.3(a) discusses the allocation of receipts from services, but the clause within it pointed to by the Division - "whether the services were performed by employees, agents or subcontractors of the taxpayer, or by any other persons" - simply attempts to prevent the avoidance of allocation when services are performed by an individual that may tangentially be related to a corporate taxpayer, rather than the taxpayer itself. Where, as here, words of a statute have a definite and precise meaning, it is not necessary to look elsewhere in search of conjecture so as to restrict or extend that meaning (***Matter of Erie County Agricultural Society v. Cluchey***, 40 NY2d 194 [1976]). By its plain language, Tax Law § 210(3)(a)(2)(B) does not require human involvement at the moment of sale in order for services to be performed, and the regulation must not be interpreted to improperly extend that meaning.

E. Additionally, as petitioners correctly argue, even if the Division's interpretation of 20 NYCRR 4-4.3(a) is correct, its conclusion on this point is factually incorrect as it ignores the evidence of human involvement throughout petitioner's process of providing its services. During the years at issue, petitioner employed approximately 6,600 people, many of whom were involved in the creation of its software used, negotiation of the agreements with its various Travel Service Providers, compilation of information, programming and operation of its servers, creation and maintenance of the website interface and telephonic and electronic customer service. Moreover, it is uncontroverted that some of petitioner's transactions occurred telephonically. The human involvement in petitioner's performance of its services, as evidenced by the record, certainly meets any required by the Division's stretched reading of the regulation. In sum, petitioner's receipts were the result of the performance of services as described in section 210(3)(a)(2)(B).

F. The Division also refers to several of its advisory opinions in support of its position that it has consistently concluded that services performed over the Internet or by electronic transmission should be classified as other business receipts (***Alvarez & Marsal***, Advisory Opinion, July 12, 2011, TSB-A-11[8]C; ***Insurance Services Office, Inc.***, Advisory Opinion, September 6, 2000, TSB-A-00[15]C; ***New York Mercantile Exchange***, Advisory Opinion, April 7, 1999, TSB-A-99[16]C). Of course, it is noted that such opinions are not precedential and are not in any way binding herein (***see*** Tax Law § 171; 20 NYCRR 2376.4). Nevertheless, each of the above advisory opinions involved receipts from initial access or subscription fees, a significantly different model from petitioner's business model, whose receipts were directly related to the travel services provided. Hence, the advisory opinions cited by the Division are no more persuasive on this point than its other arguments.

G. As petitioner's travel facilitation service receipts were derived from the provision of services, it must next be determined whether they were properly allocated by the Division to New York. Tax Law § 210(3)(a)(2)(B) states that services must be allocated to the location where they are performed (***see also*** 20 NYCRR 4-4.3[a]). The New York Court of Appeals has been instructive on this issue in ***Matter of Siemens Corp. v. Tax Appeals Tribunal*** (89 NY2d 1020 [1997]). In ***Matter of Siemens Corp.***, the Court examined Tax Law § 210 and found that to the extent interest income from loans resulted from work performed in New York, "the income may be fairly characterized as 'earned in New York.'" In reaching its conclusion, the court noted that the Tax Appeals Tribunal had earlier found that the activities performed in connection with the loans, such as accounting, financing, and general support services occurred in New York. Although the court ultimately dealt with an allocation of other business receipts under Tax Law § 210(3)(a)(2)(D) rather than Tax Law § 210(3)(a)(2)(B), the essence of the decision was that, in

analyzing allocation of receipts generally under Tax Law § 210, the location of the activities performed that gave rise to income in connection with the transaction is determinative. As was true in ***Matter of Siemens Corp.***, the travel facilitation services performed by petitioner had many components. Contrary to the Division's position, the services performed consisted of much more than a simple, instantaneous, fully automated transaction only taking place when a customer clicked on his or her computer. The ultimate provision of information and booking of travel arrangements for a customer required contracting with Travel Service Providers, compilation of information, programming and maintenance of servers, and customer service and, following the dictates of ***Matter of Siemens Corp.***, were all part of the performance of its travel facilitation service and generation of the income at issue. Thus, based on the record, petitioner's services were performed outside of New York State.

Tellingly, the New York Legislature recently amended the Tax Law to change the allocation of service receipts, such as petitioner's, to a customer sourcing approach beginning with 2015 (L 2014, ch 59).[2] Such a change would be unnecessary if section 210 was interpreted as the Division suggests. As petitioner correctly points out, rules of statutory construction provide that "[w]hen the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law" and that "[b]y enacting an amendment of a statute and changing the language thereof, the Legislature is deemed to have intended a material change in the law" (***Matter of Stein***, 131 AD2d 68, 72 [1987] ***citing***

[2] The memorandum in support of the amendment states that "New York's current sourcing rules fail to acknowledge the shift to a service-based economy. Companies that generate significant receipts from services can incur greater tax liability if they increase their activity in New York. This reform proposal would source a business's receipts to the location of its customers. This assigns income to various states based on where the customers are located and eliminates factors that would increase tax if a company increased its activity in New York. This removes a previous disincentive to locating in New York" (2014-2015 New York State Executive Budget, Revenue Article VII Legislation, Memorandum in Support, Part A).

McKinney's Cons Laws of NY, Book 1, Statutes §§ 191, 193). In the instant case, by allocating every one of petitioner's transactions to the site of its customer's computer, the Division has applied a customer sourcing approach that was not effective until January 1, 2015, and runs contrary to the statutory scheme in place during the years at issue.

H. The next issue concerns whether the Division correctly adjusted petitioner Expedia Del's 2007 return by allocating some of TripAdvisor's advertising services receipts to New York. Initially, the Division maintains that TripAdvisor's receipts from advertising must be classified as "other business receipts" because they are not receipts from services under Tax Law § 210(3)(a)(2)(B) or 20 NYCRR 4-4.3(a) and, as such, must be sourced to where they are earned, which in this case is the location of the computer of its viewing customer. As support for its position, the Division points to Tax Law § 210(3)(a)(2)(B)(i), which reads:

> "in the case of a taxpayer engaged in the business of publishing newspapers or periodicals, receipts arising from sales of advertising contained in such newspapers and periodicals shall be deemed to arise from services performed within the state to the extent that such newspapers and periodicals are delivered to points within the state . . . ."

The Division asserts that the phrase "deemed to arise from services performed within the state," added in 1988 after the original enactment of Tax Law § 210, demonstrates that the Legislature needed to identify advertising receipts of this particular type as a service before directing how to source those receipts. As a result, the Division maintains, advertising receipts that do not fall under this exception cannot be considered services and must be considered other business receipts.

Petitioners' interpretation of the language added in 1988, and the statute as a whole, however, is more compelling. The phrase "shall be deemed" relates to the method of sourcing receipts in the case of newspapers and periodicals (i.e., based on deliveries within the state),

which is a departure from the general sourcing rule of location where the service was performed. Thus, as petitioners correctly note, the phrase emphasized by the Division is not used as a mechanism to deem the newspaper and periodical advertising as "services" under Tax Law § 210 to the exclusion of all other advertising, but rather to mandate an exception to the general method for sourcing such services.

During the period January 1 through December 31, 2007, TripAdvisor derived revenue from advertisers and other third parties for advertisements placed on its websites. This activity clearly was a service performed for its advertising clientele and consisted of much more than just the instantaneous viewing by one of TripAdvisor's purchasing customers. The procurement and management of TripAdvisor's advertisements were performed exclusively outside of New York State by employees located in Massachusetts. Furthermore, TripAdvisor employees in Washington State and Massachusetts conducted all of the company's corporate administrative activities, including legal, tax, and accounting services. Under the rationale of ***Matter of Siemens Corp.***, these receipts must be allocated to the location where the work that generated the income was performed - which in this case, was outside of New York State. Thus, petitioner Expedia Del properly allocated TripAdvisor's advertising receipts on its 2007 return and the Division's adjustments thereto were incorrect.

The Division's reliance on ***WTAS LLC*** (Advisory Opinion, March 9, 2009, TSB-A-09[5]C), on this issue is misplaced. In the advisory opinion, the Division concluded that advertising receipts should be allocated to New York based upon a) when either a New York subscriber clicks on an advertisement, or, b) the ratio of New York subscribers to subscribers everywhere. In reaching this opinion, the Division relied on the aforementioned language regarding newspapers or periodicals in Tax Law § 210(3)(a)(2)(B)(i). Petitioners are not in the

business of providing newspapers or periodicals, however, and thus, the advisory opinion is inapt to the case at bar.

I. The Division also argues that petitioners failed to meet their burden of proof as they did not offer any witnesses to testify at the hearing in this matter. Instead, petitioner submitted the affidavits of Thomas A. Pucci, its Senior Director of Global Indirect Tax, and Gabriela Gonzalez, a Director of Business Intelligence. Both affiants aver to the nature and location of petitioners' services and employees. In its brief, the Division maintains that the affidavits are not credible evidence and should be disregarded.

The Tax Appeals Tribunal's Rules of Practice and Procedure provide that "[a]ffidavits as to relevant facts may be received, for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits" (20 NYCRR 3000.15[d][1]). This rule must be balanced, however, by the inability of the administrative law judge to view the witnesses first-hand and the fact that the Division was not afforded the opportunity to cross-examine the affiants (***see Matter of Orvis Co. v. Tax Appeals Tribunal***, 86 NY2d 165 [1995], ***cert denied*** 516 US 989 [1995]). The weight given to the affidavits is particularly important if the affiants' statements are contradicted by other evidence in the record (***see Matter of Orvis Co.***).

In the instant matter, contrary to the Division's assertions, the affiants provided sufficient foundation in their affidavits to establish their credibility on the facts stated. Although Mr. Pucci was not employed by petitioners during the years at issue, he stated that through his work experience with petitioners, and his review of petitioner's information systems and prior contracts, he has become familiar with its operations during the relevant time. As for Ms. Gonzalez, the Division appropriately has concern with the fact that she did not work directly for petitioner until 2009. She did work with one of petitioner's relevant subsidiaries (Hotels.com)

beginning in 2005, however, and demonstrated sufficient experience with petitioner's operations in her affidavit to offer credible factual statements.

It is also significant that the relevant statements offered by the affiants lacked material contradiction by the Division. Both Mr. Pucci and Ms. Gonzalez made factual descriptions of petitioner's operations and business model during the years at issue. On the other hand, none of the Division's witnesses were qualified to offer, much less did offer, first-hand testimony regarding the factual details of petitioner's business operations. Moreover, their actual testimony certainly did not materially contradict the affidavits of Mr. Pucci and Ms. Gonzalez. On this point, the Division's witnesses simply offered anecdotal statements of their understanding of petitioner's services based on their personal use of its website. Furthermore, of equal significance, the documents in the record do not materially contradict the affidavits of Mr. Pucci and Ms. Gonzalez. In sum, the concerns with affidavits espoused by the Court of Appeals in ***Matter of Orvis Co.*** are not present here and they are of sufficient probative value to allow petitioners to create the factual record necessary to meet their burden of proof.

J. As petitioners' application of Tax Law § 210 is deemed correct, their alternative arguments that the Division's application of the statute violates ITFA or the United States and New York State Constitutions are therefore moot.

K. Notice of Deficiency number L-033172547-3 also assessed an MCTD surcharge pursuant to Tax Law § 209-B to petitioner Expedia Del. As noted, Tax Law § 209(1) imposes franchise tax on the basis of entire net income or other basis as may be applicable, for the privilege of a corporation's exercising its corporate franchise, or of doing business or of employing capital or leasing property in New York. Tax Law § 209-B imposes a surcharge on that privilege when an office is maintained in a MCTD. In the instant case, there is evidence that

petitioner Expedia Del leased office space in New York City in 2007, but failed to report or pay the MCTD surcharge. These facts went unrefuted by petitioners. As a result, the proper MCTD surcharge should be recalculated based on the total combined franchise tax as reported on petitioner Expedia Del's 2007 return, and the Division is directed to modify Notice of Deficiency number L-033172547-3 accordingly.

L. The petitions of Expedia, Inc., and Expedia, Inc. (Delaware Company) are granted subject to Conclusion of Law K. Notice of Deficiency number L-033172472-7 is hereby canceled and Notice of Deficiency number L-033172547-3 is modified accordingly.

DATED: Albany, New York
February 5, 2015

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE