

## Hamilton, Cassandra (TAX)

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**From:** Peterson, Kristen (TAX)  
**Sent:** Tuesday, October 19, 2010 11:52 AM  
**To:** Hamilton, Cassandra (TAX)  
**Subject:** FW: Comments on the OTC Draft Report

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**From:** Dana R. Harmeyer [mailto:DHarmeye@vbgov.com]  
**Sent:** Thursday, September 23, 2010 12:45 PM  
**To:** Peterson, Kristen (TAX)  
**Subject:** Comments on the OTC Draft Report

Ms. Peterson,

I have read the draft of the OTC draft report. I have two substantive comments that may be of some assistance in finalizing this report.

One page 21, the report says that the nexus argument has yet to reach the courts. You will find the Georgia Supreme Court looked at this issue in *Expedia v. City of Columbus*, 285 Ga. 684, 681 S.E.2d 122 (Georgia 2009). The discussion mentions *Quill*, and the pincite for this discussion is 285 Ga. at 690-91, 681 S.E.2d at 128.

On page 28, the report says there is no guidance regarding whether the tax for cities and towns (based on Va. Code 58.1-3840) is a tax on customers or the hotel. The report suggests this lack of guidance could result in an ordinance providing the tax is the responsibility of the customer being declared invalid. This conclusion overlooks the language of 58.1-3840 that provides the excise taxes are "consistent with the provisions of § 15.2-1104." Section 15.2-1104 provides, "A municipal corporation may raise annually by taxes and assessments on property, persons and other subjects of taxation, which are not prohibited by law, such sums of money as in the judgment of the municipal corporation are necessary to pay the debts, defray the expenses, accomplish the purposes and perform the functions of the municipal corporation, **in such manner as the municipal corporation deems necessary or expedient.**" (emphasis added) I would argue that the General Assembly clearly delegated the final form and incidence to the municipalities. Thus, the worry of whether the tax could be declared invalid requires examining the expression of the legislative body of the municipal corporation (in its local code). This approach is exactly what the Virginia Supreme Court did in the Delta Air Lines case (242 Va. 209).

Alternatively, the previous page (page 27) provides a quote from 58.1-3819(D), which mentions the tax imposed on the "consumer." While other parts of 58.1-3819 are specifically applicable to counties, subpart D provides "... any county, city or town..."

Please let me know if I may be of any assistance.

Regards,  
Dana Harmeyer

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