

**ARIZONA SUPREME COURT**

DOVE MOUNTAIN HOTELCO, LLC,  
d/b/a RITZ-CARLTON DOVE  
MOUNTAIN HOTEL and SPA,  
a Delaware LLC, and HSL  
COTTONWOOD RC HOTEL, LLC,  
an Arizona LLC,

Plaintiffs/Appellants,

v.

ARIZONA DEPARTMENT OF  
REVENUE, an agency of the State  
of Arizona,

Defendant/Appellee.

Arizona Supreme Court  
No. CV-23-0176-PR

Court of Appeals No.  
1 CA-TX 22-0003

Arizona Tax Court  
No. TX2019-000448

**ARIZONA DEPARTMENT OF REVENUE'S  
SUPPLEMENTAL BRIEF**

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## STATEMENT OF FACTS

Dove Mountain at all pertinent times operated a hotel-resort located in Marana, Arizona. (IR 40, ¶ 19.) It filed returns with multiple tax code classifications, with its primary business being under the Transient Lodging Classification, [A.R.S. § 42-5070](#). (*Id.*)

The Marriott Rewards Program (“Rewards Program” or “program”) is a loyalty marketing program that allows members to earn points from hotel stays, car rentals, branded credit card use, purchases, etc., and to use those points to pay for lodging, car rentals, gift cards, etc. (IR 36, ¶¶ 14-16, 19-21; IR 40, ¶¶ 12-13.) It is operated and administered by Marriott Rewards, LLC, not by Dove Mountain. (IR 36, ¶¶ 13, 15.) It is a marketing program designed to increase lodging at Marriott-branded hotels by rewarding members with points for paid stays at Marriott hotels. (IR 36, ¶ 16.)

Rewards Program members can use earned points for lodging at Marriott-branded hotels by redeeming points. (IR 36, ¶ 22.) They can also redeem points for other items such as merchandise, airline miles, car rentals, and gift cards. (*Id.*) Thus, the points belong to the member, who accumulates them from various purchases.

Dove Mountain receives monthly revenue from the Rewards Program when program members redeem points for lodging. (IR 36, ¶¶ 32-33; IR 40, ¶¶ 9-10, 14-17.) It cannot identify the underlying transactions in which points were earned or

identify whether the points were earned at Dove Mountain. (IR 40, ¶ 1.) It does not have “any documents showing the underlying transactions related to Points redeemed by members to stay at . . . Dove Mountain . . . under the Program.” (*Id.* ¶ 5.) Points redeemed for stays at Dove Mountain (1) may not have been earned there, (2) may not be from the business of transient lodging or from any business subjected to transaction privilege tax (“TPT”) under any different classification in Arizona, or (3) may have been earned through transactions outside Arizona. (*Id.* ¶¶ 4, 6-7.) The same holds true for Marana’s TPT.

The May 2012 Dove Mountain Income Detail worksheet that the taxpayer provided during the refund claim processing identified the Rewards Program revenue as one account named “Reward Rebates.” (*Id.* ¶ 17.)

Participating hotels pay 4.5% of their revenue from member-paid stays to the Rewards Program. (IR 36, ¶ 28.) These payments are used to pay for “points” that the program member owns. (IR 36 [Ex. D, at 2].) Dove Mountain’s expenses for the program are related to particular transactions with guests that may not have anything to do with a later stay in which a guest uses “points” and for which Dove Mountain receives revenue from the Rewards Program. (IR 40, ¶ 16.)

Points are not redeemed equally among the hotels because it is the member who chooses when and where to use the points. (IR 36, ¶ 38.) Resort and destination hotels redeem a higher percentage of points for lodging compared to other Marriott hotels participating in the marketing program because members tend

to use points for such destinations. (IR 36, ¶ 39.) Participating hotels that are in less demand for point-redemption stays pay proportionally more into the marketing program because members tend to redeem fewer points at these hotels, resulting in fewer payments from the Rewards Program. (IR 36, ¶ 40.)

## ARGUMENT

### I. **The Funds that Dove Mountain Receives from the Program Are Not “Post-Tax Funds.”**

The Court framed this issue as follows:

Did the Court of Appeals err when it equated post-tax funds reserved to reimburse the hotel for the cost of future awards to be “gross income” under A.R.S. §§ 42-5070 and -5001(4), (7) when the funds were paid to the hotel upon point redemption?

This statement assumes facts that are incorrect: that funds belonging to the Marriott Rewards Program that have been paid into the program from myriad sources are “post-tax funds.” The implication of this phrasing is that Dove Mountain pays funds into the program and retains rights to them as someone who puts money in his or her bank account would retain the right to withdraw funds from the account’s balance. This is not how the program factually or legally works. Under the rewards program, payments that participating businesses (such as hotels, credit card companies, car rentals, and airlines) make into the program are used to pay for “points” that customers earn. (See IR 37 [Ex. 1, ¶¶ 7-10; Ex. 2, ¶ 8]; IR 36, ¶¶ 16, 21, 27 [Ex. D, at. 2-3.1].) Customers can also purchase points

for their accounts. (IR 42, ¶ 3; IR 43 [Ex. A].) Thus, the “points” are the customer’s, not the participating merchant’s, and it is the customer who has a store of value to draw upon. The Rewards Program Participation Agreement describes this as follows:

Members of either program can earn points . . . at participating Marriott brand hotels and Ritz-Carlton hotels; and

. . . .

WHEREAS, in connection with the Marriott Rewards program and The Ritz-Carlton Rewards program (collectively the "Rewards Program) hotels that are branded by or otherwise affiliated with Marriott International, Inc., including its affiliate the Ritz-Carlton Hotel Company, LLC (collectively the “Company”) and that are participating in the Rewards Program (such hotels, “Participating Hotels”) - as well as airline, travel, and other companies (“Non-Hotel Participants”) - buy points in the Rewards Program from MRLLC. Those points are issued to members of the Rewards Program (“Members”) for buying certain property, services or other items at Participating and Non-Hotel Participants, and Members can then redeem points by means of an award certificate which may be exchanged for complimentary rooms at Participating Hotels . . . or other awards (“Program Awards”); . . . .

IR 36 [Ex. D, at 2-3].) The agreement goes on to describe

the amount due from such Participating Hotel to MRLLC with respect to the purchase of such points . . . .

(*Id.* at 4, § 3.1.)

Thus, the payment into the program is not like a payment into a bank account in which Dove Mountain has placed funds that it can get back. Rather, when it pays in, it is buying points that its customer owns and that become comingled, and are inseparable and untraceable to any point-earning transaction from that point on to be spent in at various merchants not limited to the merchant at which points were earned. As to participating merchants, “the program is a ‘marketing program’” intended to increase customer loyalty. (IR 37 [Ex. 1, ¶¶ 12-14].)

Further undermining the contention that money from the program is “post tax,” there is no evidence in the record that any points “‘earned’ at Dove Mountain were later redeemed at Dove Mountain” or that “points used were from a particular source.” (IR 55, ¶¶ 5-6.) Interrogatories that Dove Mountain answered confirmed that neither Dove Mountain nor Marriott Rewards, LLC traces the points spent at Dove Mountain back to Dove Mountain stays. (IR 41 [Ex. A, NUI 1, RFP 1 (stating that neither has “any document showing the underlying transactions related to Points redeemed by Members to stay” at Dove Mountain)].) Thus there is no basis for characterizing the funds that Dove Mountain receives when a customer pays with “points” and triggers a cash payment from the program to Dove Mountain as being “post-tax funds” as to Dove Mountain.

If a customer signs up for a credit card and gets bonus “points” that the customer spends at Dove Mountain, triggering payment to Dove Mountain, (1)

Dove Mountain never paid TPT on any prior transaction with the customer; (2) the TPT was not paid on the point-earning transaction; and (3) no other business paid TPT related to the points spent. And even if TPT was paid by someone other than Dove Mountain or was passed on to the customer, there is no authority for Dove Mountain to be able to claim another taxpayer's TPT from money earned in a prior transaction as a credit against its own taxes for money earned in a later transaction. The TPT "is a tax on the gross receipts of a person or entity engaged in business activities, liability for the tax falls on the taxpayer, not on the taxpayer's customers." *Id.*; *State ex rel. Ariz. Dep't of Revenue v. Tunberg*, 249 Ariz. 5, 7, ¶ 5 (App. 2020) (internal quotation marks omitted). Under this system, "post tax" can only mean that Dove Mountain already paid tax on the money from the program. But the facts do not support this conclusion. If "post tax" means that other businesses paid Arizona TPT on point-earning transactions, the facts do not support this conclusion either since the source of points is not traceable.

The taxes at issue for Dove Mountain are Arizona TPT (including Pima County TPT) and Marana TPT. Along with the lack of evidence regarding prior payment of Arizona TPT, there is no evidence that any of the funds that Dove Mountain received from the Rewards Program were previously subjected to Marana TPT in an earlier point-earning transaction. And if the customer had TPT passed on in the point-earning transaction, that does not result in a credit for Dove Mountain since the "tax is not one levied on the sale itself but on the privilege of

engaging in business in Arizona, measured by the gross receipts from sales.” *Ariz. State Tax Comm’n v. Sw. Kenworth, Inc.*, 114 *Ariz.* 433, 436 (App. 1977). Thus even if Arizona and Marana TPT were passed on to the customer in a point-earning transaction, that would not mean that the funds that Dove Mountain received upon point redemption were “post tax” as to Dove Mountain’s tax liability.<sup>1</sup> There is no taxation rule that once someone somewhere pays tax, any funds that can be traced to that initial taxable transaction are henceforth untaxable when received.

As for the “tax” having already been paid, the question is “which tax” was paid? If a different business paid Arizona TPT on a retail transaction charged to a Marriott card, that is not a lodging transaction and it would not be an equivalent tax. At the city level, Marana (like other cities) has two applicable taxes for lodging, the MCTC §§ 444 and 447 classifications, and unless the points were earned in a Marana lodging transaction, the point-earning transaction was not subjected to the “same” tax, given that both the classifications and the rates differ.

The “post tax” fallacy also erroneously implies double taxation. Dove Mountain contends that double taxation exists here because it pays tax on revenue when one Rewards Member pays for a room, and it is then taxed on revenues from

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<sup>1</sup> The principle that money received from redeeming points is new revenue to a business holds regardless of what is being purchased. If one spends “points” on a credit card to purchase tickets to a concert, the amusement business has revenue, regardless of whether another business paid TPT in point-earning transactions. The same is true with “cash back” offers if a cardholder gets cash back related to taxed purchases and spends it.

the program when a different member spends points earned elsewhere and it is paid by the program. But in these separate transactions with separate customers, Dove Mountain earns revenue from its lodging business.

Even assuming that the points were earned elsewhere in a transaction that was subjected to TPT, the transactions are separate revenue-generating transactions, in different months, at different businesses, in unknown taxing jurisdictions. “[D]ouble taxation occurs [only] when the same property or person is taxed twice for the same purpose for the same taxing period by the same taxing authority.” *US W. Commc’ns, Inc. v. City of Tucson*, 198 Ariz. 515, 524, ¶ 33 (App. 2000) (internal quotation marks omitted). Even if points were earned at Dove Mountain earlier, taxing revenue from the program that Dove Mountain later received when the points were spent does not constitute taxing Dove Mountain “twice for the same revenue in the same period.” Thus, taxing revenue received from the program is not “double taxation.” And the clear command of the statutes applies even if that results in double taxation. *Id.* at 525, ¶ 35.

Even if a Dove Mountain customer earned points in one month by paying for stays at Dove Mountain and used the points the next month, Dove Mountain would have separate revenue from separate transactions for both taxing periods. Each tax period stands on its own. *Stearns v. Ariz. Dep’t of Revenue*, 231 Ariz. 172, 178, ¶ 27 (App. 2012).

## **II. The Court of Appeals Did Not Err in Treating Dove Mountain’s 4.5% Remittance to the Marriott Rewards Program as a Payment to a Third-Party Vendor for Membership.**

As noted above, the payments are made to a third-party marketing program, are not deductible under any statutory deduction, and are made to buy “points” for the program member’s account. There is no evidence that any of the thousands of participating businesses retain any ownership or claim on funds paid into the program; instead the customers own the points and can decide where to spend them. The dissenting opinion apparently erroneously viewed the Rewards Program as being akin to Dove Mountain having a bank account holding “reserves” that accrue when points are purchased for customers. (Opinion ¶ 33.) Funds in the program do not belong to it or to any participating merchant.<sup>2</sup> The dissent also misstates facts, confusingly claiming that the payments are made from funds “entirely constituted from post-tax hotel revenues” (Opinion ¶ 26), then, relying on a statement made at oral argument, claiming that “points that members earn by” non-hotel transactions are “approximately 24%” of the points in the program and calling payments to the program “marketing costs.” (Opinion ¶ 30.)

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<sup>2</sup> The notion that a business can offset taxable payments from some higher level entity simply because it makes payments to that entity is wrong. A business relationship is not a bank account out of which one withdraws one’s own funds because of the two-way money flows in such a relationship.

**A. The Statutory Definitions of “Gross Income” and Relevant Case Law Support Taxing All Income, Including Money Later Paid into the Marketing Program.**

Revenues from the program are clearly part of Dove Mountain’s “gross income,” which means “the gross receipts of a taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property or service, or both, and without any deduction on account of losses.” [A.R.S. § 42-5001\(4\)](#).

“Gross receipts” means

the total amount of the sale, lease or rental price, as the case may be, of the retail sales of retailers, including any services that are a part of the sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of every kind or nature, and any amount for which credit is allowed by the seller to the purchaser *without any deduction from the amount on account of* the cost of the property sold, materials used, labor or service performed, interest paid, losses or *any other expense*. Gross receipts do not include cash discounts allowed and taken or the sale price of property returned by customers if the full sale price is refunded either in cash or by credit.

[A.R.S. § 42-5001\(7\)](#) (emphasis added).<sup>3</sup> Thus, while merchants are not taxed on “cash discounts” including free items that they give to their customers, money

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<sup>3</sup> Marana adopted MCTC §§ [400](#), [444](#), and [447](#) and applicable definitions. <https://www.maranaaz.gov/tax-rates-and-code>. Section 400(a)-(a)(1) imposes privilege taxes on gross income, and Marana taxes Dove Mountain under MCTC §§ 444 (Hotels) (<https://modelcitytaxcode.az.gov/articles/4-444.htm>) and 447 (Additional Tax on Hotels) (<https://modelcitytaxcode.az.gov/articles/4-447.htm>). MCTC § 100’s pertinent definitions are functionally identical. The MCTC tax base is “gross income,” which is analogous in breadth and also excludes

received is part of the taxable gross and expenses are not deductible without a statutory exemption.

In *Walden Books Co. v. Department of Revenue*, [198 Ariz. 584, 588](#), ¶ 17 (App. 2000), Walden Books had revenue from selling a discount membership program and claimed that revenue from the program was not taxable under the retail classification<sup>4</sup> because (1) the program was an intangible not a tangible personal property being sold and (2) it was a “service in addition to selling personal property at retail.” *Id.* at [586](#), ¶ 9. This Court held that the income was part of the retail tax base, stating as follows:

Waldenbooks’ sales of discount purchase rights were incidental or “integral” to Waldenbooks’ retail sales business in the sense that they were inseparable from that business and were interwoven in its operation to such an extent that they were in effect an essential part of it.

*Id.* at [588](#), ¶ 17 (citing *City of Phoenix v. Ariz. Rent–A–Car Sys., Inc.*, [182 Ariz. 75, 79](#) (App. 1995), and applying the test from *State Tax Comm’n v. Holmes & Narver, Inc.*, [113 Ariz. 165](#) (1976), to conclude that revenues from “intangible discount purchase rights” were taxable under the retail classification).

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deductions for expenses and credits granted. [MCTC § 200\(a\)-\(c\)](#). The MCTC approach to “coupons” or “rebates” is the same as the State’s, taxing revenues from third-party programs. *See* [MCTC § 240](#).

<sup>4</sup> Selling tangible personal property at retail. [A.R.S. § 42-5061](#).

The Court rejected the argument that the program was a separate service that allowed revenue earned to be excluded from taxation since it was a marketing program. The Court reasoned as follows:

[W]e conclude that a service provided by Waldenbooks designed to encourage Program members to buy more merchandise is not a service “in addition to selling tangible personal property at retail.” Waldenbooks admits that the Program is aimed at encouraging its members to purchase its merchandise. In an answer to an interrogatory, Waldenbooks stated, “The primary purpose of the program was to develop customer loyalty which in turn would increase sales by providing an incentive for customers to buy books at our stores instead of competitors’ stores.” Such incentives cannot rationally be characterized as separate and apart from the sale of tangible personal property at retail. Services intended to induce customers to buy more goods are not provided “in addition to” selling goods; they are “a part of the sales” of those goods, and are included in retail “gross income” via subsections 42–5001(4) and (7).

198 Ariz. at 588, ¶ 18.

Similarly in *Arizona Rent-A-Car*, this Court held that gasoline sales were taxable under the rental classification because they were integral to the business.

182 Ariz. at 80 (applying the *Holmes & Narver* test for determining whether income can be separately treated).<sup>5</sup>

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<sup>5</sup> The test for treating income as being from a separate line of business is (1) the receipts from the separate business can be “readily ascertained”; (2) the income from the separate business is “not inconsequential” in relation to the taxpayer’s total income; and (3) the separate business is not “incidental” to the main business. *Holmes v. Narver*, 113 Ariz. at 169. Dove Mountain’s Rewards Program revenue was 2.05% of its lodging revenue. (IR 55, ¶ 11.)

Here, there is no separate charge to a customer for points when they are earned, with the lodging company paying 4.5% of its revenue to buy the points. This program is analogous to the one in *Walden Books*, which was a “customer loyalty” program, except that here is no identifiable separate revenue charged to customers to pay for it. And even if there were a separate charge for points, that revenue would be taxable.

### **III. The Court of Appeals Did Not Err by Deciding that *Consumers Market* Was Not Controlling Precedent.**

The *State Tax Commission v. Consumers Market, Inc.*, [87 Ariz. 376](#) (1960), program is perhaps best analogized to a “free sandwich” program, in which after ten sandwich purchases, the eleventh is free. Obviously, there is no revenue on the eleventh transaction. Such programs can be administered with punched or stamped cards, or with points. In all of these two-party programs, the merchant is simply giving something away as a loyalty bonus, not earning revenue.

Consumers Market “was a ‘self-redeemer’ of ‘trading stamps.’” [87 Ariz. at 377](#). In other words, it ran a two-party loyalty program in which it issued its own stamps to its customers and then redeemed them for free merchandise with no revenue on redemption. In contrast, when a program member pays using “points,” the Program pays Dove Mountain and Dove Mountain accordingly enters revenue on its books and records. There was no new gross income involved in Consumers Market’s program—unlike in a third-party rewards program that pays a business for redemption-paid purchases.

The Program is a complex third-party program with a third party issuing points to customers for transactions with any of innumerable participating businesses, including lodging, car rental, and credit card businesses. Customers can earn or even buy points in various ways. If they redeem points at Dove Mountain for lodging—wherever and however they earned those points—Dove Mountain is paid money. That is not equivalent to Dove Mountain giving away a free room for no payment. That is not analogous to *Consumers Market's* stamp program—where no revenue was received on redemption of its own stamps. Further, there is no evidence that any of the points redeemed and the associated payments made were earned at a prior Dove Mountain stay.

In *Consumers Market*, this Court analyzed the statutory definition of “sale” as “any transfer of title or possession, . . . of tangible personal property . . . for a consideration.” [A.R.S. § 42-5001\(18\)](#) (formerly codified at A.R.S. § 42-1301). The Court concluded that when the retailer gave something for free in exchange for stamps, the “‘consideration’ referred to in the [definition of sale] has already been paid by plaintiff’s customers.” *Id.* at [379](#). Thus there was no new revenue, only an imputed revenue “computed on the value of merchandise given as premiums.” *Id.* at [377](#).

In other words, Consumers Market got nothing of value, it had only a cost—the “free” to the consumer merchandise. Dove Mountain, conversely, got paid from the program. Giving away something for free is not analogous to new cash

consideration being paid to the merchant from a third party for a new item. In *Consumers Market*, the market was paid once, remitted its taxes on that transaction, and later on provided a deferred benefit in the form of a free item. Dove Mountain is paid by the program when it provides accommodations that are paid for by points and is also paid when a program member pays directly.<sup>6</sup> A “transient” includes “any person who either at the person’s own expense *or at the expense of another* obtains lodging space or the use of lodging space . . . .” [A.R.S. § 42-5070\(F\)](#) (emphasis added). Failing to tax third-party-paid stays is not consistent with the statute.

Arizona treats “points”-type reward/consumer loyalty programs such as the Rewards Program like it treats coupons. Coupons that the same business issues and redeems are treated as nontaxable price reductions because they act just like cash discounts off the price and provide no revenue. Third-party coupons that result in payment to the business upon redemption generate revenues that are taxable. Arizona Administrative Code [R15-5-129](#) states as follows:

- C. When coupons issued by a manufacturer are redeemed by a retailer the amounts refunded to the purchaser are not permissible as deductions from the selling price of articles sold by the retailer. In these cases, the gross selling price is taxable.
- D. Coupons issued by a retailer and later redeemed by the retailer as a discount on the price of merchandise

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<sup>6</sup> And notably even if Dove Mountain was given credit for “taxes paid” by another business for a lodging transaction, there is no evidence that Arizona TPT, much less Marana TPT, was paid on such a transaction.

sold by him are considered a reduction of the selling price. In such cases the net selling price is subject to tax.

Points programs for which the business gets a consideration from a third party generate taxable revenue because the business receives consideration from a third party when customers redeem their points, like the consideration that retailers receive for coupons under [A.A.C. R15-5-129\(C\)](#) . This is so even if the merchants that participate in the coupon or points program bear some of its costs.

As *State Taxation* notes, Arizona’s approach is typical of other states’ approaches:

## 17.12 Customer Loyalty Programs

### [1] Overview

Customer loyalty programs have many forms, from the simple punch card issued by the local ice cream shop to the frequent flyer miles and credit card reward points. Although they vary in their details, these programs usually share two essential features: (1) the customer is awarded a “point” (or “mile” or similar unit of measure) upon making a purchase, usually tied to the amount of the purchase; and (2) upon accumulating a certain number of points, the customer may redeem them for a purchase price discount or something else of value, either from the retailer or from a third party. Thus customer loyalty programs may involve several discrete transactions for purposes of sales and use tax analysis: (1) the transaction giving rise to the award of points; (2) the redemption of points in exchange for a purchase-price discount or an item of value; and in some cases, (3) a payment made by a third party to the retailer in consideration for allowing the purchaser to enjoy the value of the points.

In general, states have treated customer loyalty points as analogous to retailers' and manufacturers' coupons. Thus states that treat both retailers' and manufacturers' coupons as equivalent to purchase price discounts will treat customer loyalty points similarly and reduce the taxable sales price of an item by the amount of the price reduction. However, in states that treat the value of manufacturers' coupons as includable in the sales price, third-party reimbursement of a retailer honoring customer loyalty points will usually be included in the measure sales price.

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* § 17.12 [1] (3d ed. 2015) (footnotes omitted).

The Department's approach is the same as that of many other states. *Choice Hotels Int'l, Inc. v. S.D. Dep't of Revenue & Regul.*, 711 N.W.2d 926, 930 (S.D. 2006) (revenue from rewards program to reimburse franchisee for cost of guests room is taxable); Georgia Letter Ruling, LR SUT-2015-22 (Dec. 16, 2015), <https://dor.georgia.gov/lr-sut-2015-22> ("Even though a party other than the purchaser provides the reimbursement, the reimbursement amount is included in the taxable sales price of the accommodation as consideration received from a third party."); Ill. Letter Ruling, ST-16-0030-GIL (Jul. 21, 2016), <https://tax.illinois.gov/content/dam/soi/en/web/tax/research/legalinformation/letterulings/st/documents/2016/st-16-0030-gil.pdf> ("The taxability of the transaction depends on whether the store receives any reimbursement whatsoever from any source for the purchases made through the use of the reward coupon."); Policy Statement 2007(5), Conn. Dep't of Revenue, <https://portal.ct.gov/>

/media/DRS/Publications/pubsp/2007/PS075pdf.pdf?la=en (self-issued points are treated like a cash discount; third-party points such as credit card points are treated as a cash equivalent); Wash. Excise Tax Advisory 3191, <https://taxpedia.dor.wa.gov/documents/current%20eta/3191.pdf> (“[i]f a seller receives third-party consideration for a sale, the seller must include the value of the third-party consideration in the sales price of the sale” and including a third-party consideration from a rewards program administrator as taxable).

Administratively knowing what amount of tax to charge is impossible if there is an ever-changing monthly offset percentage ratio of payments in and out of a program. Florida established a complicated regulation using a two-year prior annual ratio to avoid the problem (*see* AB at 12), but Arizona has no statutory authorization to reduce the tax base using some past ratio. While a New York case held that some revenue from a third-party program is not taxable, that case turns on whether it was “consideration received for occupancy” and the court found that it was not under different statutory language and facts. (*In re Marriott Int’l, Inc.*, No. 821079 (N.Y. Trib. Jan. 14, 2010), <https://www.dta.ny.gov/pdf/archive/decisions/821078.dec.pdf>). Because Dove Mountain receives revenue from a third party when “points” are used to pay for rooms, it has taxable revenue.

## **CONCLUSION**

For the foregoing reasons and those stated in the Department’s Response to Petition for Review, this Court should affirm the court of appeals’ Opinion.

Respectfully submitted this 5th day of December, 2023.

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