NO. 96859-4

SUPREME COURT OF THE STATE OF WASHINGTON

EVERI PAYMENTS INC., successor in interest to, and formerly known as, GLOBAL CASH ACCESS, INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF INDIAN TRIBAL GOVERNMENTS PARTY TO TRIBAL-STATE GAMING COMPACTS

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I. INTRODUCTION

Everi Payments Inc. provides credit and debit card services through automated teller machines located in casinos. The casino patrons pay Everi a fee to use Everi's ATM services. Everi admits its ATM services are not Class I, II or III gaming under the Indian Gaming Regulatory Act (IGRA). Nonetheless, Amici Tribes argue that IGRA preempts state taxation of Everi's ATM business. Their arguments fail to demonstrate any legal flaw in the Court of Appeals' preemption analysis nor any reason for this Court to accept review.

Amici also argue that Everi's income was deductible under an exception to the general principle that non-Indians will be taxed on income from doing business in Indian country. The exception, articulated in the Department's rule, is for "income from the performance of services in Indian country for the tribe." Here, the record established that the ATM fee income is from patrons who pay fees to access cash from the ATMs, not from the Tribes.

The Court of Appeals properly applied the legal standards for IGRA preemption and the Department's rule. Amici's arguments do not provide a sound basis for further review because amici show no conflict with any case law, no significant constitutional question, and no broader public interest that requires review of the decision below.

II. ARGUMENT

Under well-settled United States Supreme Court precedent, states may impose nondiscriminatory, generally applicable taxes on non-Indians performing otherwise taxable functions within Indian reservations. *Ariz. Dep't of Rev. v. Blaze Constr. Co.*, 526 U.S. 32, 34, 119 S. Ct. 957, 143 L. Ed. 2d 27 (1999). Consistent with this rule, this Court has recognized that Washington's B&O taxation of non-Indians transacting business with other non-Indians in Indian Country is generally permitted. *Neah Bay Fish Co. v. Krummel*, 3 Wn.2d 570, 578, 101 P.2d 600 (1940). Amici Tribes agree that Washington generally may tax non-Indians in Indian County and that Everi, a non-Indian, bears the incident of the tax in this case, which significantly undermines their argument that this case warrants review. Amicus Br. at 2 n.1.

Amici, however, argue that this Court should review whether the Court of Appeals misapplied IGRA and WAC 458-20-192(7)(b) to conclude the B&O tax on Everi was valid. As explained below, the Court of Appeals was correct— neither IGRA nor Rule 192 bar the B&O tax from being imposed on Everi's ATM services. These issues do not meet the Court's criteria for review in RAP 13.4(b).

A. The Court of Appeal's Decision Was Consistent With Federal Cases Analyzing State Taxation After IGRA

The Court of Appeals correctly concluded the B&O tax imposed on Everi's cash access services is not preempted by IGRA, either expressly or by plain implication. Slip Op. at 11-15.[1] As federal authority reflects, IGRA does not preempt the B&O taxation of Everi's ATM services because the tax is not targeted at gaming, and taxation does not have an effect on or interfere with tribal governance of gaming. Slip Op. at 11-15, *see also id.* at 20 (no particular economic injury to Tribes).

Amici Tribes support review by arguing that the Court of Appeals wrongly construed IGRA.[2] IGRA's core objective is to regulate how Indian casinos function so as to assure the gaming is conducted fairly and honestly by both the operator and players. 25 U.S.C. § 2702(2); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008). Taxing Everi's income here does not undermine this core objective.

While a section of IGRA discusses state taxation (25 U.S.C. § 2710(d)(4)), both the Second and Ninth Circuits have explained that

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[1] *Everi Payments, Inc. v. Dep't of Rev.*, 6 Wn. App. 2d 580, 432 P.3d 411 (2018).

[2] Amici also argues that the Indian Commerce Clause (Article I, Section 8, Clause 3) preempts the B&O tax. Amici Br. at 5. Everi did not raise this argument; even if it did, the argument is without merit. The Indian Commerce Clause may be the source of Congress' authority to enact IGRA, but it has no "dormant" effect like the Interstate Commerce Clause to preclude state taxation. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189, 192, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1220-21 (1995).

IGRA's express language does not bar taxation of non-Indians. *Cabazon Band of Mission Indians v. Wilson (Cabazon II)*, 37 F.3d 430, 432-33 (9th Cir. 1994) (section of IGRA is not a prohibition of state taxation); *see Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469 (2d Cir. 2013) (plain text of IGRA does not bar property taxation of non-Indians); *Barona Band of Mission Indians*, 528 F.3d at 1193 n.3 (IGRA's regulation of Indian gaming does not occupy the field with respect to sales tax imposed on non-Indian purchases of equipment used to construct tribal gaming facilities). Instead, courts apply the *Bracker* balancing test to determine whether federal interests preempt state taxes on non-Indians. *Mashantucket Pequot Tribe,* 722 F.3d at 470; *Barona Band of Mission Indians*, 528 F.3d at 1193; *see generally White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980).

Amici argue that the Court of Appeals improperly relied on *Mashantucket Pequot*, claiming that case "improperly distinguishes regulation from gaming operations." Amici Br. at 6. But *Mashantucket Pequot Tribe* is consistent with other holdings. The Ninth Circuit has also held IGRA does not preempt state taxation of non-Indians participating in the gaming operations. *See, e.g., Cabazon II,* 37 F.3d at 433-35. In that case, the taxable incident fell upon a non-Indian operating off-track betting on the reservation for the Tribe. *Id.* The Ninth Circuit held IGRA

did not preempt the taxation of off-track betting under IGRA. *Id.* Instead, it applied *Bracker*. *Id.* at 433-35.

Thus, the Court of Appeals applied the correct legal analysis and rejected Everi's argument that IGRA categorically preempts the B&O tax on Everi's ATM services. Consistent with *Mashantucket Pequot Tribe*, *Barona Band of Mission Indians* and *Cabazon II*, the Court of Appeals then properly applied *Bracker* balancing and considered whether the policies underlying IGRA and tribal economic and sovereign interests outweighed the State's interest in taxing Everi. It concluded they did not. *Everi Payments*, 6 Wn. App. 2d at 599-605. Since Amici do not take issue with that analysis, there is no significant legal issue presented here.

Abandoning appellate case law, Amici Tribes turn to a federal district court case (currently on appeal) for the proposition that IGRA directly preempts state taxation at tribal "enterprises" that promoted and facilitated gaming activities. Amici Br. at 6-7 (citing *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F. Supp. 3d 910 (D.S.D. 2017), *appeal pending,* 8th Circuit No. 18-1271. In *Flandreau*, a tribe challenged South Dakota's authority to impose state use taxes (akin to sales tax) on non-Indians who purchased goods and services *from the Tribe* at its casino, and to require *the Tribe* to remit the revenue to the state. *Id.* at 915. Additionally, South Dakota denied the Tribe's liquor licenses for failing to

remit the tax. *Id.* at 915-16. Because of Flandreau's remote location, "the Casino simply could not operate in order to further the self-sufficiency of the Tribe" without the associated goods and services the Tribe was providing. *Id.* at 925. For those fact-bound reasons, that trial court held IGRA preempted state use taxes on goods and services the Tribe provided to non-Indian patrons at its casino. *Id.* at 925.

The facts of *Flandreau* do not exist here. The taxed business activities are between Everi and non-Indian patrons at cash access machines. The Tribes are not the provider of the ATM services and the Tribes are not a party to the transactions. Slip Op. at 14. In fact, Everi's contracts with Indian tribes make Everi responsible for "complying with its own obligations with respect to payment of taxes," including taxes on its "gross receipts." CP 1240, 1257.

Amici Tribes then offer a vague argument that the B&O tax on Everi interferes with the Tribes' interest in regulating gaming under IGRA. But under IGRA, an activity is "gaming" only if it involves some type of game of chance. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (Class III gaming includes casino games, slot machines, and horse racing). The tax here is not on gaming. Patrons pay Everi fees to use its ATM services to withdraw cash, advance cash from their credit card, or perform a debit

card transaction. CP 6, 119-20. Federal and state banking laws and regulations, and credit card networks, govern these ATM transactions. CP 66, 69-70. Tribal gaming regulators have no involvement in regulating ATM transactions. *See* CP 1422-24.

Amici Tribes point to the fact that they issue licenses to Everi under their IGRA authority. Amici Br. at 7. But ATM services with casino patrons should not be confused with Everi's other business activities. Everi sells and leases games, gaming machines, and gaming systems such as *The Money Man Big Cash Spin*, and the *TournEvent*® slot tournament system to casinos. CP 59, 61-62. Selling slot games, in particular, required Everi to obtain manufacturing licenses from the Washington Gaming Commission and the Tribes. CP 65-67. Washington does not tax Everi's income from these activities.

Amici also criticize the Court of Appeals for focusing in part on the tax incident falling on Everi and not the Tribes in its IGRA analysis. Amici Br. at 8. This is as it should be. The "initial and frequently dispositive question in Indian tax cases" is who bears the legal incidence of a tax. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995). Therefore, it was entirely appropriate for the Court to consider who bears the tax, along with what activity is being taxed and other relevant facts.

In summary, Amici Tribes provide no sound basis for categorical preemption under IGRA of state taxation of all non-Indian vendors who conduct business inside Tribal casinos. No appellate case has ever found congressional intent in IGRA to preempt state taxation of non-gaming activities engaged in by non-Indians. Accordingly, Amici's IGRA argument does not meet the criteria for this Court's review.

B. The Court of Appeals' Decision Properly Applies Rule 192(7)

Amici Tribes argue that the general population has an interest in the application of Rule 192(7), the Department rule that sets forth its interpretation of state and federal law with respect to taxation of nonmembers of Tribes. Amici Br. at 8. The rule explains that, generally, a non-enrolled person doing business in Indian country is subject to tax. It then provides specific situations in which the Department will consider the business activity preempted, and consistent with *Bracker* balancing, provides that the Department will review transactions on a case-by-case basis to determine whether the tax applies. WAC 458-20-192(7).

Subsections (7)(a)-(e) of the rule provide specific descriptions of when income is not taxed. The Court of Appeals analyzed the relevant subsections, (7)(a)-(c). Slip Op. at 23-25. Amici take issue only with the analysis of subsection (7)(b). Amici Br. at 10. That subsection states, in relevant part: "*Income from* the performance of services in Indian country

for the tribe or for tribal members is not subject to the B&O . . . tax." WAC 458-20-192(7)(b) (emphasis added). Amici argue that the Court of Appeals erred in applying the exemption. Amici Br. at 10. However, Amici overlook the plain language of subsection (7)(b), which excludes only the "*income from* the performance of services . . . for the tribe[.]"

"Rules of statutory construction apply to administrative rules and regulations." *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). If the meaning is plain on its face, then the Court gives effect to that plain meaning. *See Tracfone Wireless, Inc. v. Dep't of Rev.*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Here, giving Rule 192(7)(b) its plain meaning, none of the income at issue comes *from* the casino or tribe. The ATM fee income came from casino patrons and interchange income came from the patrons' banks.

Amici argue the service provided to patrons is nevertheless a service "for" the casino. Amici Br. at 9-10. This strains the language and ignores the fact that Everi is providing its ATM services for the patrons. The patron inserts their card into the ATM, the patron requests Everi perform the transaction and agrees to a designated fee, and the patron pays Everi the fee.[3] Amici also argue that the activity would not exist "but for"

[3] Amici also point to the fact that Everi markets a suite of services to the casino. This argument conflates Everi's business with Tribes with Everi's business with casino patrons. But Everi provides the ATM transaction for patrons, and only that latter activity

the casino. But Rule 192(7) contains no "but for" exception to taxation, either in the plain text of Rule 192(7)(b) or elsewhere. A "but for" test for preempting state taxation of non-Indians is contrary to federal law and would swallow the general rule that such taxation is appropriate.

Amici show no reason for this Court's review of whether Everi can exempt the income in question under Rule 192(7)(b). The income is neither *from* the Tribe nor *for* services performed for the Tribe. There is not public interest served by further appellate review of this straightforward issue.

III. CONCLUSION

For all the reasons above and in the Department's prior briefs, this case does not present issues requiring further review by this Court, and the Court should deny Everi's petition.

RESPECTFULLY SUBMITTED this 14th day of May, 2019.

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is at issue in this case. Under the B&O tax, each type of business activity engaged in by a business may be evaluated to determine taxes that apply. *See Impecoven v. Dep't of Rev.*, 120 Wn.2d 357, 364, 841 P.2d 752 (1992).

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DATED this 14th day of May, 2019, at Tumwater, WA.

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