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.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Everi gambled that it could demonstrate that fees charged to non-Indians for getting cash from its ATM machines were exempt from the State's B&O tax. It has lost twice and rightly so. This Court should deny its petition for discretionary review, because it fails to satisfy the criteria necessary for review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does federal statutory or common law preempt Washington's B&O tax on Everi's non-gaming business activities of providing cash access services to non-Indians?

2. Is B&O taxation of Everi's ATM services in tribal casinos permitted where it is not expressly mentioned in gaming compacts between the State and the Tribe?

3. Are Everi's non-Indian business activities conducted on Indian reservations in the State of Washington subject to the B&O tax?

4. Is Everi precluded from excluding a percentage of revenue from its gross income that Everi claims it collected for the tribes, when the record lacks any evidence that Everi acted as the tribes' collection agent or that ATM customers owed those amounts to the tribes?

III. COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

Everi Payments is a Delaware for-profit corporation headquartered in Las Vegas, Nevada. CP 56. Everi's business focuses on casinos in the United States and internationally. CP 63. Its products, employees, and on-demand services are located at both tribal and non-tribal casinos in Washington. CP 1275-78.

This case seeks a tax refund of business and occupation tax paid by Everi on income from fees it earned from ATM transactions performed at tribal casinos. CP 6-11. The tax is measured by the gross income of Everi's business activities times the applicable tax rate. *See* RCW 82.04.220. The only income at issue in this tax refund action is income from fees Everi charged customers for accessing its cash services at ATMs or kiosks. CP 56-64. These "cash access services" include the following types of ATM transactions: (i) withdrawing cash, (ii) advancing cash from a credit card, or (iii) point-of-sale debit card. CP 6, 119-20.

Everi holds general business licenses from the State of Washington and also from some Indian tribes. CP 170-71, 173, *see* CP 66 ("non-gaming supplier" or "vendor" licenses where Everi provides only cash access services); CP 69 (State money transmitter licenses).

1. Everi's cash access services at ATMs in casinos

Everi provides cash access services at self-service ATM machines and multifunction kiosk cabinets that include cash access ATM services. CP 1384; *see* CP 1217-19 (machine diagrams); CP 1266-67. As Everi notes (Pet. at 2-3), there are other functions in the kiosks such as ticket redemption or bill breaking that interact with the casino's slot systems. But those functions are separate from the cash access systems. CP 1160-61. The two distinct sets of functions do not mix.

In particular, the systems use two computers: one that processes the ATM/cash access transactions and another dedicated to the ticketing and slot information. *See* CP 1146, 1194, 1272-73. Additionally, the telecommunications lines connecting the ATM computer to third-party processors are separate from the networking equipment connecting the computer dedicated to the casino slot systems. CP 1144-46. Everi admits that the devices providing cash access services, such as the multifunction kiosks, are not providing games of chance to casino patrons. CP 1373-75.

2. Customer fees paid to Everi for cash access

To initiate a cash access transaction with Everi on an ATM or kiosk, a customer swipes or inserts a debit or credit card. CP 1386. Once the terminal recognizes the card as valid, Everi's software initiates a program to start the cash access transaction process. CP 1163, 1386-87. If

using a debit card, the customer enters a PIN. CP 1387. The computer requests the customer enter the amount of money to be withdrawn. *Id.* After the customer enters the amount, the machine indicates a fee will be charged for the transaction and asks the customer if he or she agrees to this fee. CP 1388.

The fee varies by transaction type and casino. The fee assessed to customers for an ATM cash withdrawal is a fixed dollar amount per transaction (e.g., $5.00). CP 1279. For credit card cash access or point-of-sale debit card transactions, the fee could be a fixed dollar amount, a percentage of the amount requested, or some combination thereof depending on Everi's agreement with the casino. CP 57-58. Regardless, the ATM or kiosk informs the customer of the fee and asks the customer if he or she agrees to pay it. If the customer selects "no," the transaction is canceled. CP 1287-89. If the customer selects "yes," the transaction proceeds to the next step.

Within seconds, the request for approval (the amount of cash to be withdrawn, plus Everi's fee), is transmitted from the Everi terminal to a third party processor in California with whom Everi contracts to process the transaction. CP 1289-90, 1388. The third-party processor requests approval from the credit card network associated with the customer's debit or credit card (VISA, MasterCard, etc.) before routing the transaction to

the customer's card issuing bank. CP 1293. The issuing bank validates its records to approve or decline the requested transaction. CP 1293. If approved, the bank transmits an approval message back through the credit card networks and the third-party processor. CP 1295-96. The customer's bank also sends the amount requested plus the fee to Everi's bank account. CP 1296.[1]

Once the ATM or kiosk receives the approved message, it dispenses the cash requested. CP 1295-97. Everi thus earns fees for each completed cash access transaction. In addition, Everi earns revenue from the transaction through reverse interchange fees paid by the customer's issuing bank to Everi. CP 1282-84.

During the period at issue in this appeal, 2012 through 2015, Everi grossed over $90 million in Washington ATM surcharges and interchange fees. *See* CP 15. Everi also earned income from its other business activities, which are not the subject of this dispute.[2]

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[1] The various credit card networks and state and federal banking regulations and standards govern the processing of the cash access transaction. CP 70, 1350. Tribes are not involved in regulating the transactions with card processing in the VISA or MasterCard networks, or at the banks. CP 1422-24.

[2]These other activities include: (i) selling, renting and maintaining casino gaming systems, casino games, mechanical reel gaming, gaming cabinets, gaming systems, ticket machines and lottery systems (CP 59-60, 61-62); (ii) credit reporting, anti-money laundering, and tax compliance (CP 60); (iii) selling, renting, maintaining and supplying hardware or software, including ATM machines or multifunction kiosk cabinets (CP 60-61, CP 1384); and (iv) "other" miscellaneous transactions such as processing fees (CP 120). *See generally*, CP 5-13 (complaint). For many of these activities, the revenue Everi received was from the casinos, not the casino patrons.

3. Everi's commissions paid to the tribes

In return "for the right to operate on its premises," Everi pays the casinos a commission. *See* CP 58, 1280-81. Everi negotiated the commission amounts, which vary by casino. CP 1282-84. The amounts are typically a percentage of the gross surcharge revenue, and sometimes include a portion of the reverse interchange fee income. *Id.* Everi's contracts with the casinos identify the different rates charged to the customer depending on whether the customer uses a credit card or debit card. CP 1229. The contracts do not describe the relationship between Everi and the casino as an agent/principal in collecting and remitting the amounts; rather, it is simply that Everi pays a portion of its revenue earned from ATM services to the casino. *See, e.g.*, CP 974-77, 1222-23, 1226-29.

The commissions Everi pays tribes are a significant cost of Everi's business at casinos, constituting approximately 65-67 percent of revenue generated by cash access transactions. CP 949. The contracts specifically state that Everi is not excused from federal and state taxes based on its "net income, capital or gross receipts." CP 960, 1240, 1257. Additionally, the tribes' commissions are calculated based on gross fees collected, without deduction for Everi's costs such as taxes.

B. Proceedings Below

Everi filed a tax refund suit in Thurston County Superior Court protesting B&O taxes paid to the Department from January 1, 2012 to December 31, 2015.[3] CP 7. Everi's complaint alleged the taxes assessed by the Department were preempted under federal statutes and case law. Although Everi included a state law claim under the Department's rule about taxation in Indian country (Rule 192 or WAC 458-20-192), Everi did not plead that it was acting as the tribe's agent in receiving cash access fees from customers or that the amount assessed was incorrect based on a "pass through" theory. CP 5-13. On cross motions for summary judgment, the Court granted the Department's motion. CP 939.

On appeal, Division II of the Court of Appeals affirmed the trial court's order granting the Department's motion for summary judgment. *Everi Payments, Inc. v. Dep't of Revenue*, ____ Wn. App. 2d ____, 432 P.3d 411, 426 (2018) (hereafter "Opinion") (¶ 75). The Court affirmed that the tax incident fell upon Everi, a non-Indian, and the business activity at issue was the cash access services between Everi and casino patrons.

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[3] Everi claims that the Department classified Everi's activities as "gambling" in its assessment. Pet. at 7. This is not true. The Department's assessment classified Everi's cash access services as "service and other" activities. CP 773-74, 777-78, 1003. The Department's on-line tax return form includes multiple categories subject to the same rates, including games of chance income totaling less than $50,000, in the same line item as "service and other activities." This does not mean the Department classified Everi's activity as "gambling."

Opinion ¶¶ 10, 19, 36. In a methodical and thoughtful manner, the Court of Appeals addressed and rejected each of Everi's federal preemption and state law arguments. *Id.*, ¶¶ 14-70.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

The courts below correctly applied federal Indian law and state B&O tax law to the undisputed facts in the record to hold that Everi's earnings from providing cash access services are taxable, and not preempted by federal law. Nothing in the Court of Appeals opinion contradicts federal statutes or case law or this Court's decisions addressing taxation of non-Indians doing business on tribal reservations. Everi pares down its issues in seeking review, but each of the issues lack merit and were competently addressed by the Court of Appeals. Further review is not warranted.

A. The Court of Appeals Applied Established Federal Preemption Standards in Ruling the State May Tax Everi's Gross Receipts from Cash Access Services

Everi's preemption issue does not warrant this Court's review because the Court of Appeals' ruling follows well-established rules regarding state authority to tax non-Indians and presents no conflict or significant question requiring this Court's review.

Everi does not contest the general framework that states may generally impose taxes on non-Indians for activities on tribal reservations

if the legal incidence of the tax falls on the non-Indian. Opinion ¶¶ 18-19 (citing *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995)).[4] Everi also does not take issue with the Court of Appeals' ruling that for generally applicable state taxes on non-Indians to be preempted under IGRA (the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*), the tax must interfere with the tribe's ability to regulate its gambling operations. Opinion ¶¶24-27. Similarly, Everi does not dispute that IGRA does not expressly preempt the B&O tax on Everi's gross receipts from cash access fees. *See* Opinion ¶¶ 23-31. Nor does it question the Court of Appeals' ruling that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, do not apply or otherwise preempt the B&O tax on cash access fee revenue. *See* Opinion ¶¶ 40-44. And, other than a bare mention in footnote 8 of the petition, Everi does not address the particularized inquiry the Court of Appeals undertook to determine that taxation in this instance survives under the balancing inquiry in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). Opinion ¶¶45-60.

[4] States have jurisdiction to impose nondiscriminatory, generally applicable taxes on non-Indians performing otherwise taxable functions within Indian reservations unless expressly or impliedly preempted. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

Instead, Everi asks this Court to review whether Washington has authority to impose the B&O tax based on a handful of passages taken out of context from pre-IGRA cases. *See* Pet. at 9-11 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (*Cabazon I*) (California could not apply its own laws regulating bingo prize limits and card games to Indian gaming). Everi's arguments about these cases imply that states are categorically barred from taxing the non-gaming services of non-Indian vendors transacting with non-Indian customers. That question does not warrant review because the Supreme Court in *Cabazon I* rejected that same per se rule. 480 U.S. at 214-16. Instead, it decided a question about state regulation of tribal high stakes bingo based on a *Bracker*-type examination of federal, tribal, and state interests. *Id.* at 216-22.[5]

Everi's argument for review based on *Cabazon I* also fails for the simple fact that IGRA now explicitly addresses congressional intent regarding the role of states in tribal gaming operations. Furthermore, the Court of Appeals' evaluation of preemption under IGRA does not warrant review because Everi had no valid argument for preemption. Everi's cash

[5] Everi supports its argument with a passage from *State v. Shale*, 182 Wn.2d 882, 893 n.7, 345 P.3d 776 (2015), and implies that the passage supports its erroneous reading of *Cabazon*. Pet. at 10. The footnote from *Shale*, however, concerns authority over an Indian within Indian Country, not state authority over non-Indians or gaming.

access services undisputedly are *not* gaming activities under IGRA or for any other purpose. Pet. at 12. Gaming involves some type of game of chance for a prize or award of value. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024, 2032, 188 L. Ed. 2d 1071 (2014). Everi admitted cash access services are *not* "games of chance" or "class I, II or III" playable games or gaming. CP 1373-75.[6] Accordingly, the Court of Appeals properly applied preemption analysis on whether IGRA expressly preempts the B&O tax on Everi's non-gaming activity. Opinion ¶¶28-33. The Court then properly balanced federal policies and tribal interests associated with tribal gaming operations in its *Bracker* balancing inquiry. Opinion ¶¶ 48-54.

Everi shows no conflict in the Court of Appeals' approach to its post-IGRA era claim, where IGRA informs an implied preemption analysis under *Bracker*, which provides the controlling preemption standards for state taxation of non-Indians doing business in Indian country. To suggest conflict, Everi relies on a Tenth Circuit case barring Oklahoma from either directly regulating or imposing a sales tax on

[6] Under federal law, the customer using the machine is the "consumer" of the electronic fund transfer and Everi is the "operator" of the machine. Electronic Fund Transfer Act (EFTA), Pub. L. No. 90-321, 92 Stat. 3728 (1978) (codified as amended at 15 U.S.C. §§ 1693-1693r (2006)); Regulation E, 12 C.F.R. pt. 205, 12 C.F.R. § 205.2(e), (g), 12 C.F.R. § 205.3(b), 12 C.F.R. § 205.16(a), (c)(1), (e); *see also* 12 C.F.R. § 205.1(b) (purpose of Regulation E); CP 69 (EFTA requires Everi to notify casino patrons of fees).

revenues from a tribal bingo enterprise. Pet. at 9-11; *Indian Country, U.S.A., Inc. v. State ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 981-87 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). But *Indian Country* is a pre-IGRA decision and readily distinguishable because the state was taxing actual gaming activities.

Everi also relies on a post-IGRA circuit court case. But that case does not concern state taxes—it addressed claims by casino management companies against a law firm representing a tribe during the tribal casino's licensing process, after the tribe's gaming commission denied applications for permanent gaming licenses to the management companies. Consistent with IGRA's allocation of authority between tribes, the federal government, and states, the court held IGRA supplanted the state common law causes of action. *See Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544-45, 550 (8th Cir. 1996). This unsurprising holding casts no shadow on the Court of Appeals' decision in this case, which concerns taxes on a non-Indian's cash access business.

In sum, Everi's cases fail to show an issue worth review. But this Court should also deny review in light of the numerous decisions holding that IGRA does not preempt generally applicable, non-discriminatory regulation or taxation of non-Indian activities, including those closely associated with gaming. *See, e.g., Mashantucket Pequot Tribe v. Town of*

Ledyard, 722 F.3d 457, 470-77 (2d Cir. 2013) (state's personal property tax on non-Indian lessors of slot machines used at tribal casino not preempted under IGRA or *Bracker*); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190-94 (9th Cir. 2008) (state sales tax on construction material purchased by non-Indian contractor and delivered to tribal land for tribal casino expansion not preempted under IGRA or *Bracker*); *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 438–40 (8th Cir. 2001) (IGRA did not preempt state law claims between non-tribal general contractor and subcontractor); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 756, 958 P.2d 260 (1998) (IGRA did not preempt Washington public records act as applied to records related to tribal-state gaming compacts). In short, Everi's theory that it may evade taxation based on IGRA or a "default rule" precluding regulation of non-Indians "involved" in tribal gaming (Pet. at 12) is not supported by case law and provides no reason for review.

B. The Tribal-State Gaming Compacts Do Not Preclude State Taxation of Everi's Cash Access Fee Receipts

Everi argues that the Court of Appeals erred in rejecting its argument that gaming compacts preclude the tax. The Court of Appeals correctly held that a B&O tax on Everi's case access services is "not compactable and, as a result, not within a compact's preemptive power

through IGRA." Opinion, ¶ 38. This holding does not raise an issue of substantial public importance requiring review.

Everi argues that even though IGRA-authorized tribal-state contracts do not mention state taxes on non-Indian vendors of non-gaming services, and IGRA does not preempt such taxes expressly or otherwise, the compacts preclude the taxes. Everi's compact argument, however, relies on the false premise that its cash access services constitute "gaming" under IGRA. Pet. at 12. Everi also points to a portion of the Snoqualmie compact, claiming its cash access services fall within that definition of "Gaming Services." Pet. at 13; CP 502; *see also* CP 481 ("Gaming Vendors" are persons who sell "Gaming Services" to the Tribe).[7] The plain compact language dictates the opposite conclusion: "Gaming Services" includes only "the providing of any goods or services *to the Tribe* . . . ." CP 502 (emphasis added). Everi earned revenue providing cash access services *to casino patrons* under contracts between Everi and those patrons, independent of Everi's contract with the Tribe. *See* Opinion, ¶¶ 36-37.

[7] Everi's compact argument is also unsuited for this Court's review because Everi merely provided one compact between the State and the Snoqualmie Tribe to argue all compacts preempt taxation. Everi did not submit specific language from any other tribal compacts, even though it provides ATM services at 17 other tribal casinos. CP 6-7, 1320-21, 1329.

The fact that Everi engages in multiple business activities, including some Gaming Services to tribes, does not mean all of Everi's activities are Gaming Services under the compact. Indeed, Everi admits that cash access services are not gaming. CP 1373-75. Additionally, in places where Everi provides solely cash access services, Everi is a "non-gaming supplier or vendor" CP 66; *see* CP 370 (example of annual "non-gaming" vendor license).[8]

Ultimately, Everi tries to avoid the factual and legal barriers to its compact argument by arguing that because the Compact "neither expressly prohibits nor permits tax on gaming services or service providers, the State has no such authority." Pet. at 13. That is not the law. Everi cites 25 U.S.C. § 2710(d)(4) for that proposition, but subsection (d) expressly governs Class III gaming activities and compacting regarding the same, not ATM services. Everi's claim that the absence of express authority in a state-tribal compact precludes state taxation of non-gaming activities is unsupportable. As explained above and in the Court of Appeals decision, no such categorical bar or per se rule against such taxation exists. Opinion, ¶¶ 17-19. Given the lack of legal or factual support for Everi's claim that

[8] Treating cash access services as B&O taxable non-gaming services also is consistent with Everi's contracts with Tribes, which contemplate that Everi will pay taxes based on gross receipts. CP 960, 1240, 1257.

gaming compacts displace this tax, the issue does not meet the criteria for review in RAP 13.4(b).

C. The Court of Appeal's Decision Correctly Applies This Court's Precedent on the Nature of the B&O Tax

The legal incidence of the B&O tax is "the act or privilege of engaging in business activities" in the State of Washington. RCW 82.04.220. Each business activity is separate, each activity is taxed at a rate according to its classification, and the amount of tax due is measured by taking the gross revenues from each separate business activity engaged in and multiplying it by the applicable tax rate. *Steven Klein, Inc. v. Dep't of Revenue*, 183 Wn.2d 889, 896-98, 357 P.3d 59 (2015).[9]

For service activities, the tax is assessed on the gross income of the business. *See* RCW 82.04.290(2). "Gross income of the business" is defined as "the value proceeding or accruing by reason of the *transaction* of the business engaged in," without deduction for business expenses. RCW 82.04.080(1) (emphasis added). Thus, the measure of the tax focuses on taxable amounts generated by *transactions*. In claiming that the Court of Appeals incorrectly focused on transactions, rather than the

[9] Taxpayers may deduct from the measure of tax amounts derived from business that the State is prohibited from taxing under federal law. RCW 82.04.4286. A taxpayer claiming a tax exemption bears the burden of proving it qualifies. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149-50, 3 P.3d 741 (2000).

privilege of doing business, Everi confuses the *incident* with the *measure* of the tax.

Everi argues the decision's focus on the transactions between Everi and the patrons conflicts with *Ford Motor Co.*, Pet. at 16 (quoting *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 39-40, 156 P.3d 185 (2007)). Not so. That case explains that the B&O taxable incident is on the act or the privilege of engaging in business activities within the State. *Ford Motor Co.,* 160 Wn.2d at 40. Providing cash access services to casino patrons is both the "act" and "privilege" of engaging in a service business activity conducted within the State of Washington. Tribal reservations are part of the State in "both a jurisdictional and territorial sense" for purposes of the state B&O tax. *Neah Bay Fish Co. v. Krummel*, 3 Wn.2d 570, 578, 101 P.2d 600 (1940).

Everi also argues that because it is licensed by the Tribe, the state is attempting to tax that "privilege." Everi's focus on its tribal business licenses obfuscates the fact that the State also has licensed Everi to do business in Washington, which includes reservations within its boundaries. CP 170-71, 173. Moreover, the fact that a business was conducted on reservation under licenses "from the United States Commissioner of Indian Affairs and the Makah tribe of Indians" did not dissuade this Court

from holding that the B&O tax was valid on business transacted between non-Indians on the reservation. *Neah Bay Fish Co.*, 3 Wn.2d at 571, 578.

Finally, Everi cites four cases where the United States Supreme Court held state taxes on gross income to be preempted. Pet. at 17. These cases offer no reason for review because they are not applicable here. Two were decided under the Indian Trader Statutes, which do not apply here. *See Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S. Ct. 2592, 2595, 65 L. Ed. 2d 684 (1980). The Supreme Court decided the other two by applying a full *Bracker*-type inquiry, and in both cases, compelling federal and tribal interests outweighed the states' interests in taxing the non-Indian entities. *See Bracker*, 448 U.S. at 150-52; *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 103 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982) (state's abdication from educating tribal children and federal regulation of independent tribal schools weighed in favor of preemption). None of these cases holds that taxes on gross income are generally preempted. In fact, the weight of federal authority contravenes Everi's argument.[10]

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[10] Contrary to the misimpression given by Everi's arguments, federal courts have frequently upheld privilege taxes and taxes using gross receipts as its measure. *See, e.g., Gila River Indian Cmty. v. Waddell,* 91 F.3d 1232, 1240 (9th Cir. 1996) (privilege

D. The Court of Appeals Decision Correctly Applies This Court's Decisions on Everi's "Pass-Through" Income Argument

Because the B&O tax is a tax on gross income, not on net income, a service provider may not deduct its own costs of doing business, including its labor and administrative costs, from its gross income unless an express statutory deduction applies. RCW 82.04.080(1). Everi argues it acts only as a collection agent for the Tribes on 65%-67% of its fees because the Tribes set the fee in a contract. Everi claims only the portion it retains after paying the Tribes should be taxed.[11] Pet. at 19-20.

This Court recently addressed what is necessary to show a person is acting "only as a collection agent" for another entity. *Washington Imaging Servs., LLC v. Dep't of Revenue,* 171 Wn.2d 548, 556-57, 252 P.3d 885 (2011). To be acting only as a collection agent, the taxpayer "must have collected money owed to" the claimed principal. *Id.* at 557. As in *Washington Imaging*, as a matter of law, Everi cannot show it acts only

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tax on non-Indian sale of tickets and concessionary items on reservation not preempted); *Yavapai-Prescott Indian Tribe v. Scott,* 117 F.3d 1107, 1113 (9th Cir. 1997), *cert. denied,* 522 U.S. 1076 (1998) (privilege taxes on room rentals and food and beverage sales not preempted); *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734, 739 (9th Cir.), *cert. denied,* 516 U.S. 868 (1995) (sales tax on gross receipts from sales not preempted); *Mescalero Apache Tribe v. O'Cheskey,* 625 F.2d 967, 968 (10th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981) (state tax on the privilege of engaging in the business not preempted); *see also Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 482, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) (*Warren Trading* did not stand for the proposition that "the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians").

[11] This "collection agent claim" was clearly an afterthought. Everi failed to plead it in the Complaint and never asked to amend the Complaint. Nevertheless, the lower courts considered Everi's argument on the merits and rejected it. Opinion ¶ 71, n.13.

as collection agent in collecting cash access fees from customers when it presented no evidence of any customer liability to the Tribes for those fees. Everi's separate contractual obligation to the Tribes confirms this conclusion. *See id.* at 557, 567.[12] The Court of Appeals decision is entirely consistent with *Washington Imaging*. Opinion ¶¶ 73-74.

V. CONCLUSION

Everi's petition for review does not meet the criteria of RAP 13.4(b)(1) or (4), and should be denied.

RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

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[12] Everi also characterizes the contract as assigning ownership over the fees collected, but B&O tax obligations cannot be avoided merely because of how a contract discusses billing ownership. *See Washington Imaging Servs., LLC.*, 171 Wn.2d at 556.

PROOF OF SERVICE

I certify that on March 22, 2019, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of March, 2019, at Tumwater, WA.

Carrie A. Parker

Carrie A. Parker, Legal Assistant

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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