No. 96859-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 50791-9-II
COURT OF APPEALS, DIVISION II
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.

PETITION FOR REVIEW
OF
EVERI PAYMENTS INC.

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I. IDENTITY OF PETITIONER.

The petitioner is Everi Payments Inc. ("Everi"), plaintiff in the trial court and appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION.

The Court of Appeals issued its published decision on December 11, 2018, *Everi Payments, Inc. v. Washington State Department of Revenue*, __ Wn. App. __, 432 P.3d 411 ("Opinion" or "Op.") (App. A), and denied a timely motion for reconsideration on January 17, 2019 (App. B).

III. ISSUES PRESENTED FOR REVIEW.

1. Does federal law preempt the taxing by the State of Washington ("State") Department of Revenue ("DOR") of gaming-related activities at tribal casinos, when such activities are performed by a tribally-licensed gaming service provider and pursuant to contract with a tribe?

2. Do the tribal-state gaming compacts in Washington authorize state taxes on gaming-related services and, if not, are such taxes nonetheless permissible?

3. May DOR impose business and occupational ("B&O") tax on the privilege of providing gaming services on tribal land, when that privilege to do on-reservation business is granted by tribes, not the State?

4. Is all fee revenue from casino cash-access transactions subject to B&O tax, even when the service provider acts as a collection agent—charging and collecting fees determined by the tribes—and most such revenue is passed through to the tribes, not retained by the service provider?

IV. STATEMENT OF THE CASE.

A. Everi Provides Cash Access and Related Services That Are Critical to Tribal Casino Gaming.

Everi provides products and services exclusively for the gaming industry and, in particular, casino gaming. (CP 946) Through kiosks, ATMs and other machines customized for casinos, Everi provides cash access services to the casino floor, including ATM withdrawal, credit card cash advances, debit card point-of-sale cash advances, and check cashing (collectively, "cash access services"). (Op. ¶ 4) Access to cash is critical for casinos because gambling is entirely a cash business. (CP 433, 946) Casino patrons cannot use credit, debit or ATM cards to place bets at slot machines or table games; bets must be made with cash, chips or gaming tokens, which can be purchased only with cash. (*Id.*) Cash access services allow patrons to obtain cash without leaving the casino. (Op. ¶ 4) Availability of cash on the casino floor is standard in the gaming industry, and patrons expect these services to be available. (CP 434) Each casino in Washington provides cash access services to their patrons through a vendor, either through Everi or another provider of similar services. (CP 435)

Besides allowing casino patrons to access cash, Everi's kiosks provide other gaming-related services that are important to casinos and their patrons. (CP 946-47) Everi kiosks provide "ticket-in, ticket-out" ("TITO") capability for gaming ticket redemption,[1] as well as other gaming-related

[1] Slot machines generally pay out winnings through tickets printed by the machine. (CP 946-47) When ready to cash out from a slot machine, a casino patron presses the "cash out" button, and the machine dispenses a ticket that shows the winnings; casino patrons then insert that ticket into an Everi kiosk to obtain cash, a service that standard ATMs cannot provide. (*Id.*)

functionality, which have become standard in the casino industry. (*Id.*) To allow redemption of gaming tickets for cash, Everi's kiosks are necessarily connected with the casino's "tribal lottery system"—the slot management and player tracking system used at tribal casinos—which take wagers and dispense tickets. (CP 448) Furthermore, the placement of Everi kiosks and machines throughout the casino floor (and integration with the tribal slot management system) takes pressure off the casino cashier's cage, which is otherwise responsible for cash-handling and ticket redemption. (CP 946-47)

B. Washington Tribes Contract for and Collaborate with Everi for Cash Access Services.

Everi provides cash access services at most tribal casinos in Washington, pursuant to contracts with more than a dozen federally recognized tribes in the State. (CP 346-47, 949, 991, 998-1001). Everi's business in Washington is almost entirely on-reservation: approximately 98-99% of the cash access transactions that Everi performs in the State are at tribal casinos on Indian lands. (CP 990-91, 998-1001)[2]

Tribes and Everi work together—through negotiation and consultation, before entering into contracts—to design the particular services to be offered at a tribal casino. (CP 662) Pursuant to their contracts, tribes collaborate with Everi in selecting, installing, maintaining and operating cash access services:

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[2] The remaining 1-2% are at card clubs or race tracks that are not on Indian land. (CP 990-91, 998-1001) Because Everi furnishes these services to non-tribal entities, and provided off-reservation, Everi does not dispute the State's authority to tax them. (CP 6-7)

- Design of Services. In consultation with Everi, the tribe selects what cash access services (e.g. ATM withdrawal, credit and debit card cash advance, check cashing) and other gaming related functionality (e.g. TITO, bill-breaking) the tribe desires to make available at its casino. (CP 662, 948)
- Installation and Maintenance. Everi supplies the equipment (e.g., kiosks) and the casinos provide physical space, security coverage, utilities, heating and lighting to support the cash access services. (CP 662, 950, 959)
- Integration with Gaming Floor. To maximize efficiency and profitability, cash access services must be integrated into the gaming floor, requiring coordination with the cashier's cage, tribal gaming regulators and other casino personnel. (CP 662)
- Transaction Processing and Completion. Everi and the tribe work together to ensure integrity of cash access transactions, including "Transaction Completion Procedures" to prevent fraudulent activity; tribal casinos must also perform other "Service Center Obligations." (CP 662-63, 972)

C. Tribes Determine the Fees for Cash Access Transactions; Everi and the Tribes Share the Resulting Revenue, with Tribes Receiving Most Revenue.

A patron who uses cash access services on the casino floor must pay a surcharge or transaction fee. (Op. ¶ 4; CP 948) The tribal casino (referred to as "Service Center" in contracts) sets the amount of the surcharge for each transaction. (CP 948; *see* CP 974 ("The Cardholder Fees shall be the property of the Service Center, and . . . Service Center . . . shall have the right to determine the Cardholder Fees") and CP 979 (same)) The tribal casinos make the strategic business decision—informed by each casino's goals and the tribe's revenue-raising objectives—on what fees to charge their patrons for ATM, credit card cash advance and debit card transactions. (CP 948) To promote more gaming, some tribes set lower fees on cash access transactions. (*Id.*) Other tribes seek to maximize direct revenue to the tribe by setting higher fees. (*Id.*)

As specified in their contracts, the tribes and Everi share the transaction surcharges and fees from cash access transactions completed at tribal casinos. (CP 948) In general, the tribes keep most or all surcharge paid by the patrons for ATM withdrawal transactions, and Everi retains only a small portion of the revenue produced by these transactions, plus monthly management, maintenance and processing fees. (*Id.*) Overall, tribes receive most of the revenue generated by all transactions completed using Everi kiosks or machines at tribal casinos. (CP 948-49) For example, in 2011 and 2012, 65% of all such revenue was paid to tribes as "commissions," pursuant to Everi's contracts with those tribes, while Everi retained approximately 35%. (CP 949, 955-56) In 2013, 67% of such revenue was paid to tribes.[3] (*Id.*)

D. Everi Is Licensed as a Gaming Service Provider by Each Tribe for Whom it Provides Cash Access Services.

Under the Washington Tribal-State Gaming Compact, any vendor of "gaming services" must be tribally licensed as a gaming service provider before providing services to a tribal casino. (CP 446, 509)[4] Licensing of gaming service providers is critical to ensure the legal compliance, integrity

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[3] While tribes and Everi share in transaction revenues, the tribal portion may be reduced—pursuant to Everi's contracts with tribes—if a governmental authority increases the rate, fees or costs imposed on Everi for providing cash access services (CP 959-60), thus impacting Everi and the tribes with whom it contracts and for whom it provides services.

[4] A complete copy of the Tribal-State Compact for Class III Gaming, between the Snoqualmie Indian tribe and the State of Washington (hereafter, "Gaming Compact"), is included in the Clerk's Papers at CP 494 to 618. The State's gaming compacts with other tribes are the same in all material respects. All of Washington's gaming compacts are publicly available on the website of the Washington State Gambling Commission, https://www.wsgc.wa.gov/tribal-gaming/gaming-compacts, *last visited Feb. 15, 2019.*

and reputation of the gaming operation. (CP 446) Tribal gaming commissions conduct background checks on gaming service providers, including their individual principals, to ensure that criminal or corrupting influences are not allowed in the casino. (CP 346, 446) Until a gaming vendor is licensed, it may not provide services at a tribal casino, nor receive payments from the tribe or casino. (CP 446, 509) To ensure the integrity of the tribal gaming operation, the Gaming Compact broadly defines "Gaming Services"—and requires licensure of "Gaming Services" suppliers—to include "the providing of any goods or services to the Tribe, whether on or off site, directly (or indirectly) in connection with the operation of Class III gaming[5] in a Gaming Facility . . . ." (CP 446, 502 (Gaming Compact, p. 3, § II.M))

Tribal gaming ordinances often are more stringent than compacts in their regulation of Class III gaming. (CP 447) Tribal gaming agencies may require licensure of individual employees of gaming vendors who provide on-site maintenance, who have access to sensitive areas of the casino floor or systems, or who are key persons in the gaming vendor's organization. (*Id.*) For example, the Snoqualmie Gaming Commission has licensed Everi as well as 11 individual employees of the company. (*Id.*)

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[5] "Class III" gaming is one of three categories of gaming established by IGRA. Class I gaming (social or traditional ceremonial games) is exclusively regulated by tribes. Class II gaming (primarily bingo, pull-tabs and similar games) must be conducted in conformance with IGRA and tribal law, and is subject to federal oversight by the National Indian Gaming Commission. Class III gaming is all forms of gaming that are not Class I gaming or Class II gaming. *See* 25 U.S.C. § 2703(6)-(8).

E. DOR Imposes B&O Tax on Cash Access Transactions at Tribal Casinos, and Everi Challenges the Tax.

DOR takes the unprecedented[6] position that it may tax revenues generated from cash access transactions at tribal casinos. (CP 991) In addition, DOR has assessed B&O tax on Everi for all cash access service revenues—even for the substantial majority of revenue that Everi simply collects for and pays to tribes. (CP 949, 955-56)

In December 2013, DOR's Audit Division assessed $375,222 in B&O tax against Everi. (CP 991) The audit stated the tax was imposed for "gambling" services provided by Everi from January 1, 2009 to June 30, 2012. (CP 991, 1003) In January 2014, Everi filed a petition to DOR, contesting assessment on the grounds the taxes were preempted by federal law. (CP 992) On June 25, 2015, DOR denied Everi's petition. (CP 992) While still disputing DOR's authority to tax the on-reservation, gaming-related services at issue, Everi paid the disputed amount on its 2014 appeal and has continued to pay B&O tax to DOR. (CP 992) From January 1, 2012 to December 31, 2015, Everi paid over $1,400,000 in B&O tax to DOR. (Op. ¶ 8; CP 997). Approximately 99% of these taxes—specifically, $1,421,582.18—were paid based on the cash access services that Everi provides to on-reservation tribal casinos ("on-reservation taxes").[7] (CP 990, 997)

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[6] Even DOR's tribal liaison was unable to cite any other instance when DOR imposed tax on gaming-related services provided at a tribal casino. (CP 319-20 (p. 60:4-61:4)).

[7] For this same period (2012-2015), Everi paid $14,946.74 in B&O tax for cash access services provided to off-reservation card clubs or race tracks, which are not owned or operated by tribes. (CP 990, 997) These "off-reservation" taxes are not in dispute. (CP 7)

On December 31, 2015, Everi filed a Notice of Appeal and Complaint for Refund of Taxes in Thurston County Superior Court, seeking refund of the $1,421,582.18 in on-reservation taxes paid to DOR. (Op. ¶ 9; CP 5-15). The parties filed cross-motions for summary judgment. The trial court granted DOR's motion and denied Everi's. (CP 937-940) Everi appealed. (Op. ¶ 10)

F. The Court of Appeals Affirmed DOR's Authority to Tax On-Reservation, Gaming Related Services.

On December 11, 2018, the Court of Appeals issued a published decision affirming summary judgment to DOR. *Everi Payments, Inc. v. Washington State Department of Revenue*, __ Wn. App. __, 432 P.3d 411. The Court held that federal law does not preempt tax on cash access services at tribal casinos because "the State's B&O tax on Everi is neither prohibited nor preempted by IGRA [the Indian Gaming Regulatory Act]." (Op. ¶ 39) It also held the "Washington-Tribal compacts do not preempt the State's B&O tax" on the services Everi provides to tribal casinos (Op. ¶ 34) and the tax at issue was "not compactable and, as a result, not within a compact's preemptive power through IGRA." (Op. ¶ 38)

To support its holding, the Court of Appeals focused on the nature of the "transactions upon which the B&O tax is assessed" (Op. ¶ 36), even though the B&O tax is on the "privilege of engaging in business activities," RCW 82.04.220(1)—a privilege granted to Everi (and other gaming service providers) by tribes, not the State. The Court also held that Everi "was not

acting as the tribes' agent during its cash access services," and thus "cannot reduce its gross taxable income by the amount it owed to tribes." (Op. ¶ 74)

V. WHY THIS COURT SHOULD ACCEPT REVIEW.

A. This Court should accept review to decide the significant public issue of whether federal law preempts the State from taxing gaming-related activities at tribal casinos. (RAP 13.4(b)(4))

In holding that the IGRA does not preempt B&O tax on gaming-related services at issue here, the Court of Appeals assumed that if the tax was not prohibited by IGRA, then it must be allowed under IGRA and federal law. (Op. ¶¶ 28-33) Not so. Pursuant to controlling U.S. Supreme Court precedent that pre-dates IGRA, states lack authority to regulate or tax a tribal gaming enterprise, including involvement of non-Indians in that enterprise. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987) ("*Cabazon*"). *See Indian Country U.S.A., Inc. v. State ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 983 n.7 (10th Cir. 1987) (applying *Cabazon*, state lacked authority to tax bingo activity and that "preemption of state laws extends to the . . . bingo enterprise as a whole, which includes the involvement of non-Indians [such as Indian Country U.S.A., Inc.]").

The courts below failed to appreciate that IGRA was passed in response to *Cabazon* and—as the U.S. Supreme Court has repeatedly recognized—a state's authority over on-reservation gaming is limited to what is provided for under IGRA. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory

authority over gaming on Indian lands"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114 (1996) ("[IGRA] grants the States a power that they would not otherwise have, *viz.*, some measure of authority over gaming on Indian lands"); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 134 Wn.2d 734, 754, 958 P.2d 260 (1998) (Congress passed IGRA in response to *Cabazon*).

Congress left states "no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996).[8] *See also State of Washington v. Shale*, 182 Wn.2d 882, 893, n.7, 345 P.3d 776 (2015) (citing *Cabazon*, "states lack civil regulatory jurisdiction except as explicitly set forth by statute").[9]

Furthermore, *Cabazon* and *Indian Country U.S.A., Inc.* demonstrate why this issue—whether the State has regulatory and tax authority on gaming activities in Indian country—is of significant public interest. The *Cabazon* Court recognized the important federal and tribal interests in

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[8] Through IGRA, Congress definitively performed the "balancing" of interests for purposes of state authority over on-reservation gaming activities. *Gaming Corp. of Am.*, 88 F.3d at 546 ("rather than directing the federal courts to perform the balancing of interests between the state on the one side and the tribe and federal government on the other, Congress conducted the balancing itself"). But if this Court were to balance interests pursuant to *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*Bracker*"), the federal and tribal interests in Everi's gaming-related services outweigh the state interest. *See Cabazon*, 480 U.S. 221-22 (in *Bracker* balancing analysis, "compelling federal and tribal interests" in gaming are much greater than state interests).

[9] As discussed *infra*, Part V.B, the Washington Gaming Compacts do not provide any authority for the State to tax gaming services or gaming service providers.

Indian self-government, self-sufficiency and economic development, as well as the fact that tribes operating casinos were not merely "'market[ing] an exemption from state taxation to persons who would normally do their business elsewhere,'" but were "generating value on the reservations through activities in which they have a substantial interest." *Id.* at 216, 219. The Court held that "compelling federal and tribal interests" supported Indian gambling enterprises—including the high-stakes bingo and poker at issue in that case—and those interests outweighed the state's professed interest in regulation. *Id.* at 221-22. *See Indian Country U.S.A., Inc.*, 829 F.2d at 983 and n.7 (10th Cir. 1987) (under *Cabazon*, immunity from state regulation and taxation applies to tribal gaming enterprise as a whole, including non-Indian operator).[10]

In addition, the Supreme Court "has consistently recognized that Indian tribes retain attributes of sovereignty over both their members *and their territory*, . . . and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Cabazon*, 480 U.S. at 207 (emphasis added and internal quotations omitted; citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). The extent of the State's regulatory and taxing power over tribal casinos—and specifically, whether the State has any such power independent of the Gaming Compact—is an issue of important public

[10] Also, in the wake of *Cabazon*, IGRA itself acknowledges the public policy, including federal and tribal interests, in "operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," as well as tribal regulation of gaming. 25 U.S.C. § 2702(1),(2).

interest for every Washington tribe, for the State itself, and for anyone (Indian or non-Indian; Everi and others) that provides gaming-related services at on-reservation tribal casinos.

B. This Court should accept review to decide the significant public issue of whether the Gaming Compact authorizes State taxes on gaming-related services and, if not, whether such taxes are permissible. (RAP 13.4(b)(4))

In holding there is "No Preemption by Tribal-State Compacts" (Op. ¶¶ 34-39), Division II assumes that because taxes on gaming-related services are not expressly preempted in the Compact, then such taxes must be allowed. That is not the law. As discussed above, under *Cabazon* and *Indian Country U.S.A.*, the default rule is that states lack regulatory or tax authority over the tribal gaming enterprise as a whole (including involvement of non-Indians). Nothing in IGRA confers such tax authority on the State. *See* 25 U.S.C. § 2710(d)(4). And post-IGRA cases make clear that states have no regulatory role over gaming, except to the extent expressly authorized by tribal-state compact. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d at 546.

Washington's Gaming Compact addresses many issues, including the nature, size and scope of gaming (§ III, CP 504-08); licensing and certification requirements for gaming facilities, gaming employees and gaming service providers (§ IV, CP 508-09); tribal enforcement and regulation of gaming (§ VI, CP 514-16); law enforcement jurisdiction (§ IX, CP 518-19); and tribal reimbursement of regulatory fees and expenses incurred by the state gaming agency (§ XIII, CP 525). However, nowhere in

the Gaming Compact did the State obtain authority to tax gaming service providers at tribal casinos. This lack of tax authority in the Compact is glaring—and dispositive against the State. Because the Compact neither expressly prohibits nor permits tax on gaming services or service providers, the State has no such authority. 25 U.S.C. § 2710 (d)(4); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d at 546.

The Court of Appeals ignored[11] the pertinent provisions of the Gaming Compact, which show (i) Everi provides "Gaming Services" as defined in the Compact, (ii) Everi must be licensed by tribes as a Gaming Services provider, and (iii) the State will be reimbursed by the tribes for any regulatory fees and expenses, as well as paid for direct or indirect impacts of gaming. First, the Compact defines "gaming services" broadly:

> "Gaming Services" means the providing of any goods or services to the Tribe, whether on or off site, *directly (or indirectly) in connection with the operation of Class III gaming in a Gaming Facility*, including equipment, maintenance or security services for the Gaming Facility. Gaming services shall not include professional legal and accounting services.

(CP 502, § II.M, p. 3) (emphasis added) The Compact's definition of "Gaming Services" encompasses the services that Everi provides at tribal casinos, because cash access services are provided "in connection with the operation" of Class III gaming.[12] (CP 502, § II.M, p. 3)

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[11] In footnotes 3 and 9 of the Opinion, the Court of Appeals quoted the Compact's definition of "Gaming Services," but did not discuss or analyze it. (Op. n.3 and 9)

[12] As discussed above (Part IV.A), gaming is a cash business, access to cash is essential to tribal gaming, and casinos rely on Everi's services in this regard. (CP 432-33, 633, 946-47) Everi's kiosks are integrated into tribal casinos and provide other gaming-related functionality, such as ticket redemption and bill-breaking. (CP 448, 946-47)

Second, the "Gaming Services" definition governs what vendors must be licensed by the tribal gaming agencies. Any "manufacturer and supplier of gaming services" must be licensed by the tribe "prior to the sale of any gaming services." (CP 509, § IV.C, p. 10) Except to the extent a Compact expressly provides, IGRA does not confer any authority on states to impose tax on an Indian tribe or "entity authorized by an Indian tribe to engage in a class III activity."[13] 25 U.S.C. § 2710(d)(4). But the Court of Appeals failed to consider the significance of the licensing requirement and evidence that Everi is licensed by tribes to provide Class III gaming services. (*See, e.g.*, CP 371-82, 394-98)

Third, while the Compact broadly defines "Gaming Services" and requires tribal licensing of gaming service providers, it does not authorize the State to tax such services or providers. (*See* CP 494-530) The Court's Opinion ignores that—separate and apart from the tax system—the Compact already ensures the State will be reimbursed for all "regulatory fees and expenses incurred by the state gaming agency" in connection with gaming activities authorized under the Compact. (CP 525, § XIII, p. 26). The Opinion also ignores that, pursuant to Compact, tribes must pay up to 2% of "net win" into an "impact mitigation fund" for direct and indirect impacts on law enforcement, emergency services, traffic and transportation, water, sanitary sewer and other agencies. (CP 525-26, §§ XIII and XIV, pp. 26-27) The Compact addressed these regulatory expenses and other impacts of

[13] Because IGRA does not define "class III activity," the Court must look to the Compact's definition of "Gaming Services," to which the State agreed. (CP 502)

gaming through tribal reimbursement and payment of a portion of "net win," *not* by taxes.

Interpretation and application of the Compact—and specifically, whether the State has taxing power over gaming activities the Compact covers—is an important issue for every Washington tribe, for the State itself, and for any "Gaming Service" suppliers the State seeks to tax. IGRA permits tribes and states to negotiate compact provisions for "the assessment by the State of such [gaming-related] activities in such amounts as are necessary to defray the costs of regulating such activity," 25 U.S.C. § 2710(d)(3)(C)(iii), which the State did here (CP 525). This Court has previously recognized the regulatory and other issues that may be addressed in a gaming compact, further illustrating how applying the Compact is an important public issue. *Confed. Tribes of Chehalis Reservation*, 134 Wn.2d at 755, 958 P.2d 260 (citing IGRA, 25 U.S.C. § 2710(d)(3)(C)). *Cf. Cougar Den, Inc. v. Washington State Department of Licensing*, 188 Wn.2d 55, n.6, 392 P.3d 1014 (2017), *cert. granted June 25, 2018, review pending* (Fairhurst, C.J., in dissent, noting tribes and State have entered into tax sharing arrangements in wholesale fuel context).

C. This Court should accept review because the Opinion conflicts with this Court's cases on the nature of B&O tax—a tax on the privilege of doing business—which is an important issue for tribes who grant the privilege to do business on their land. (RAP 13.4(b)(1) and (4))

In holding DOR may impose B&O tax on Everi for the cash access services it provides to tribal casinos, the Court of Appeals focused on the nature of the "transactions upon which the B&O tax is assessed." (Op. ¶ 36) *See also* Op. ¶ 16 (a taxed entity on tribal lands bears the burden "to

distinguish which transactions are taxable"). This is the wrong focus because the B&O tax is not a tax on transactions; rather, it is "a tax for the act or privilege of engaging in business activities." RCW 82.04.220(1).

As this Court explained in *Ford Motor Co. v. City of Seattle,* 160 Wn.2d 32, 39-40, 156 P.3d 185 (2007):

> A B & O tax is an excise tax imposed for "the privilege of doing business" in a particular jurisdiction. 1B Kelly Kunsch et al., Washington Practice: Methods Of Practice § 72.7, at 452 (1997). . . . Unlike a sales tax, which taxes a specific sale of a good or service, *the B & O tax is imposed on the general privilege of engaging in business*.

(emphasis added). *See also Steven Klein, Inc. v. State, Dep't of Rev.*, 183 Wn.2d 889, 899, 357 P.3d 59 (2015) (B&O tax is "on the privilege of doing business," not an income tax); *Tyler Pipe Indus, Inc. v. Department of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986) ("B&O taxes are for the privilege of engaging in business during a certain time frame"). Here, this "privilege" is conferred only by the tribes: business is conducted on tribal land, through tribal contracts (CP 949-86), and as authorized by tribal gaming licenses (CP 350-427).

Division II reasons that "the taxed business activities are between Everi, a non-Indian, and non-Indian patrons at cash access machines. [Citation.] The tribes are not parties to the transactions upon which the B&O tax is assessed." (Op. ¶ 36) However, even if Everi entered into a separate contract with each individual patron for every cash access

transaction,[14] the relevant contracts are those with the tribes, which grant the privilege of engaging in on-reservation business, because the B&O Tax is not like a "sales tax" on each "individual transaction," but on "the privilege of engaging in the [] business." *Ford Motor Co.*, 160 Wn.2d at 44. *Compare* RCW 82.04.220 (B&O Tax is on privilege of doing business, not each sale or transaction) *with* RCW 82.08.020 (sales tax is on "each retail sale") and RCW 82.08.195 (describing "transactions" and "bundled transactions" subject to sales tax).

When courts have considered taxes on gross income or receipts from the "act or privilege" of doing business on-reservation, those taxes have been preempted. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 844 (1982) (State's "gross receipts tax is intended to compensate the State for granting the 'privilege of engaging in business,'" which the State did not grant in this case; tax on non-Indian company working on-reservation was preempted); *Bracker*, 448 U.S. at 139-140 & 148 (motor carrier licensing tax based on carrier's on-reservation gross receipts preempted); *Warren Trading Post Co. v. Ariz. State Tax Comm'n,* 380 U.S. 685, 687-89 (1965) (tax on gross proceeds preempted on reservation); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 161-63 (1980) (state's "transaction privilege tax" based on gross

[14] There is no evidence of any separate contract between Everi and non-Indian patrons. The only contracts in the record are between Everi and the tribes with whom it does business. (CP 945-86)

receipts on reservation was preempted). The Court of Appeals' Opinion conflicts with these Washington and federal authorities.[15]

D. This Court should accept review because the Opinion conflicts with this Court's cases holding that pass-through payments are not gross income subject to B&O tax, and whether a taxpayer acts as an agent is an issue of fact, not law. (RAP 13.4(b)(1))

The Court of Appeals acknowledged that the vast majority of fees collected by Everi on cash access transactions is paid over to tribes, not retained by Everi. Op. ¶ 7 (65%-67% of revenue goes to tribes). However, the Court found that "Everi, not the tribes, contracted with casino patrons for the services" (Op. ¶ 74), and it held, "as a matter of law, Everi was not acting as the tribes' agent during its cash access services." (Op. ¶ 71) The Opinion is contrary to this Court's cases in two ways.

First, when a taxpayer merely passes through money it receives as an agent for another entity, that money is not considered part of the taxpayer's

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[15] The Opinion also conflicts with DOR's own regulation regarding taxation in Indian country. WAC 458-20-192 ("Rule 192"). Rule 192 provides (bolding in original):

> (7) **Nonmembers in Indian country—preemption of state tax. . . .**
>
> (b) **Preemption of B&O and public utility tax—sales of tangible personal property or provision of services by nonmembers in Indian country. . . .**
>
> (ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. . . .

The tribes grant Everi the privilege of doing business on-reservation (*supra*, Part IV.D and V.C), and Everi contracts and collaborates with tribes to provide gaming services at their casinos (*supra*, Part IV.B and C). The Court of Appeals held Rule 192(7)(b) does not apply to Everi because "B&O tax is not applied to services Everi provides to the tribes [but to] service to the patrons." (Op. ¶ 67) But, as discussed in the main text above (Part V.C), the B&O tax is directed at the "act or privilege" of doing business—a privilege granted by the tribes—not directed at cash access transactions with patrons.

"gross income." *Walthew, Warner, et al. v. Dep't of Rev.*, 103 Wn.2d. 183, 186, 691 P.2d 559 (1984) ("pass-through payments" are not "contemplated for inclusion in gross income for services" and thus are not taxable); *First Am. Title Ins. Co v. State, Dep't of Rev.*, 144 Wn.2d 300, 305, 27 P.3d 604 (2001) ("Where the business acts only as a pass-through for funds, the pass-through funds are not included as income"); *Wash. Imaging Servs., LLC v. Dep't of Rev.*, 171 Wn.2d 548, 557, 252 P.3d 885 (2011) (taxpayer acts as collection agent when collecting money "owed" to principal).

Second, whether a taxpayer is acting as an agent of another entity cannot be decided "as matter of law" (as the Opinion purported to do, Op. ¶ 71), but must be determined by the facts and circumstances—i.e. the substance of the relationship. *See Rho Co., Inc. v. Dep't of Rev.*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989) ("[A]n agency can be implied, if the facts so warrant, not only if the contracts are silent as to agency, but even if the parties execute contracts expressly disavowing the creation of an agency relationship"). Here, contrary to the lower court's Opinion, the record shows the tribes determine the terms on which Everi must provide cash access services, the tribally-dictated surcharge fees are owned by the tribes and collected by Everi on their behalf, and Everi remits a majority of these fees to the tribes. (*Supra*, Part IV.D) Through their contracts with Everi, the *tribes* dictate the surcharges—the sole term to which casino patrons are asked to agree in order to access cash—that Everi must charge and collect on each transaction. (CP 948, 966, 974, 979) Surcharges are owned by the tribes, and Everi must collect and pay them to the tribes on a monthly basis.

(CP 974, 979 ("Cardholder Fees shall be the property of Service Center [tribal casino], and at all times the Service Center, in its sole discretion shall have the right to determine the Cardholder Fees"))

Based on this factual record, Everi is acting as a collection agent. Accordingly, if any B&O tax is permitted as to Everi's on-reservation services, the case should be remanded for the trial court to determine B&O tax on the portion of transaction revenue actually retained by Everi for the relevant taxing period.

VI. CONCLUSION.

This Court should accept review, reverse the Court of Appeals, and order that summary judgment be entered for Everi because federal law preempts tax on the gaming-related services provided to tribes on their reservations, and B&O tax is properly directed to the privilege of doing business, not individual transactions. If, however, this Court determines that B&O tax on Everi is permissible, it should remand for the trial court to determine taxes due solely on the portion of revenues actually retained by Everi, consistent with this Court's decisions.

Dated this 19th day of February, 2019.

SMITH GOODFRIEND, P.S.
By: _____
Catherine W. Smith, WSBA No. 9542

PILLSBURY WINTHROP SHAW PITTMAN LLP
By: _____
Blaine I. Green
Admitted *pro hac vice*
Attorneys for Petitioner

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 19, 2019, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
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DATED at Seattle, Washington this 19th day of February, 2019.

Andrienne E. Pilapil

APPENDIX A

432 P.3d 411
Court of Appeals of Washington, Division 2.

EVERI PAYMENTS, INC., Successor in Interest to, and Formerly Known as, Global Cash Access, Inc., Appellant,
v.
WASHINGTON STATE DEPARTMENT OF REVENUE, Respondent.

No. 50791-9-II
|
Filed December 11, 2018

Synopsis

Background: Taxpayer brought action seeking business and occupational (B&O) tax refund. The Superior Court, James Dixon, J., 2017 WL 3317325, granted summary judgment in favor of the Department of Revenue, and taxpayer appealed.

Holdings: The Court of Appeals, Worswick, J., held that:

[1] State was not categorically barred from levying a B&O tax on taxpayer;

[2] Indian Gaming Regulatory Act (IGRA) did not expressly preempt B&O tax imposed on taxpayer;

[3] cash access services provided by taxpayer at tribal casinos fell outside the realm of the IGRA, and were, therefore, capable of being subject to generally-applicable state tax laws, including a B&O tax;

[4] Washington-Tribal Compacts did not operate to preempt B&O tax imposed on taxpayer;

[5] Indian Trader Statutes did not apply, and thus, did not preempt imposition of a B&O tax on taxpayer;

[6] B&O tax was not preempted by federal law; and

[7] Department of Revenue rule governing taxation of nonenrolled persons doing business in Indian county did not apply to prevent the Department from assessing a B&O tax on taxpayer.

Affirmed.

West Headnotes (37)

[1] **Licenses**
Nature of license for or tax on occupation or privilege

A "business and occupational" (B&O) tax is an excise tax on gross income imposed for the privilege of doing business.

Cases that cite this headnote

[2] **Licenses**
License Fees and Taxes

The taxable event for a business and occupational (B&O) tax is the act of engaging in a business activity.

Cases that cite this headnote

[3] **Taxation**
Presumptions and burden of proof

The taxpayer bears the burden of proving it qualifies for an exemption from a business and occupational (B&O) tax.

Cases that cite this headnote

[4] **States**
Occupation of field

States have no regulatory authority in areas preempted by federal law.

Cases that cite this headnote

[5] **Indians**
Preemption

In the area of tribal law, courts apply unique standards to determine whether federal law preempts the state's authority, and without an express grant of authority from Congress, federal preemption regarding Indian affairs

prevents a state from applying state law to tribal members on tribal land.

Cases that cite this headnote

[6] **Indians**
Preemption

The application of nondiscriminatory state laws to third parties on tribal lands is not automatically preempted by federal law.

Cases that cite this headnote

[7] **Taxation**
Indians and persons dealing with Indians on Indian lands

A taxed entity on tribal lands bears the burden of recording transactions with tribal members and with nontribal members to distinguish which transactions are taxable.

Cases that cite this headnote

[8] **States**
Revenue and taxation

Taxation
Indians and persons dealing with Indians on Indian lands

When a state tax imposed on a nontribal party is not categorically barred or explicitly preempted by federal laws, a court conducts a balancing analysis, weighing the federal, tribal, and state interests at stake to determine whether the state tax is implicitly preempted.

Cases that cite this headnote

[9] **Licenses**
States

State was not categorically barred from levying a business and occupational (B&O) tax on taxpayer, a for-profit corporation that provided cash access services at tribal casinos; because taxpayer did not claim to be a federally recognized Indian tribe or tribal member, it was a non-Indian for tax preemption purposes. Wash. Rev. Code Ann. §§ 82.04.220(1), 82.04.500.

Cases that cite this headnote

[10] **Taxation**
Indians

A state is without power to tax reservation lands and reservation Indians unless there is a cession of jurisdiction or some federal statutes permitting it.

Cases that cite this headnote

[11] **Taxation**
Indian lands and other property

The United States Supreme Court applies a "categorical approach" to cases where parties allege the State is taxing reservation lands or Indians.

Cases that cite this headnote

[12] **Taxation**
Indian lands and other property

In cases where parties allege the State is taxing reservation lands or Indians, it is critical to first determine the entity being taxed; this determination is done by examining who bears the legal incidence of a tax, and if the legal incidence of the tax rests on a tribe or its members inside Indian country, such tax is unenforceable without congressional authorization; if, however, the legal incidence of the tax falls on non-Indians, no categorical bar prevents the tax.

Cases that cite this headnote

[13] **Indians**
Preemption

The IGRA expressly preempts the governance of gaming on tribal lands. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA).

Cases that cite this headnote

[14] **Indians**

Preemption

Generally-applicable laws as applied to non-Indians are not preempted by IGRA when the laws' effects are de minimis on a tribe's ability to regulate its gambling operations. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA).

Cases that cite this headnote

[15] **States**

Revenue and taxation

Taxation

Indians and persons dealing with Indians on Indian lands

For IGRA to preempt a generally-applicable state tax imposed on a nontribal party, the tax must interfere with a tribe's ability to regulate its gambling operations. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA).

Cases that cite this headnote

[16] **Taxation**

Indians and persons dealing with Indians on Indian lands

When neither the Tribal-State compact at issue nor IGRA explicitly forbid nor permit the state to assess a generally-applicable tax to non-Indians, the compact and IGRA do not bar the tax. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(1).

Cases that cite this headnote

[17] **Licenses**

States

States

Revenue and taxation

IGRA did not expressly preempt business and occupational tax imposed on taxpayer, a for-profit corporation that provided cash access services at tribal casinos; taxpayer's cash access services were not a class III gaming activity. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(4).

Cases that cite this headnote

[18] **Licenses**

States

Cash access services provided by taxpayer at tribal casinos fell outside the realm of the IGRA, and were, therefore, capable of being subject to generally-applicable state tax laws, including a business and occupational (B&O) tax, regardless of whether or not the services would have existed without the casinos; the B&O tax did not interfere with the tribes' ability to govern their gaming. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA); Wash. Rev. Code Ann. § 82.04.500.

Cases that cite this headnote

[19] **States**

Revenue and taxation

Taxation

Particular estates or interests in property

Taxation

Indian lands and other property

The test for whether IGRA preempts a tax is not whether the tax affects a contract that exists only because of a tribal casino; for IGRA to preempt a generally-applicable state tax imposed on a nontribal party, the test is whether the tax interferes with a tribe's ability to regulate its gambling operations. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA).

Cases that cite this headnote

[20] **Licenses**

States

States

Compacts between states

States

Revenue and taxation

Washington-Tribal Compacts did not operate to preempt business and occupational (B&O) tax imposed on taxpayer, a for-profit corporation that provided cash access services at tribal casinos; the taxed business activities were between the taxpayer, a non-Indian, and non-Indian patrons at cash access machines, the tribes were not parties to the transactions upon which the B&O tax was assessed, the tax did not interfere with the tribes' governance or regulation of gaming, and a B&O tax on taxpayer's cash access services was not compactable, and as a result, not within any compact's preemptive power through the IGRA. Indian Gaming Regulatory Act § 11, 25 U.S.C.A. § 2710(d)(3)(C)(vii); Wash. Rev. Code Ann. §§ 82.04.080, 82.04.140.

Cases that cite this headnote

[21] **Licenses**

States

States

Revenue and taxation

Indian Trader Statutes did not apply, and thus, did not preempt imposition of a business and occupational (B&O) tax on taxpayer, a for-profit corporation that provided cash access services at tribal casinos, where taxpayer, a non-Indian, provided cash access services to non-Indian casino patrons, not to the tribes or tribe members. 25 U.S.C.A. § 261, et seq.; Wash. Rev. Code Ann. § 82.04.500.

Cases that cite this headnote

[22] **States**

Revenue and taxation

Taxation

Indians and persons dealing with Indians on Indian lands

Courts must examine the person taxed and where the taxed activity occurred to determine the Indian Trader Statutes' preemptive effect, and when a non-Indian provides goods or services to other non-Indians on tribal lands, the Indian Trader Statutes do not apply. 25 U.S.C.A. § 261, et seq.

Cases that cite this headnote

[23] **States**

Revenue and taxation

The State interest in the business and occupational (B&O) tax imposed on taxpayer, a for profit corporation that provided cash access services at tribal casinos, outweighed the federal and tribal interests, and thus, the B&O tax was not preempted by federal law; no class III or any other class of gaming regulated by the IGRA was directly impacted by the B&O tax, the taxed business activity was not gaming, the tax did not interfere with the policies supporting tribal self-sufficiency, economic independence, or tribal governance, and thus, had only a minor effect on any federal interest or any tribal economic or sovereignty interest, and the State had a strong interest in assessing the tax against taxpayer to generate revenue to support the variety of governmental services it provided to taxpayer and its employees. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA).; Wash. Rev. Code Ann. § 82.04.500.

Cases that cite this headnote

[24] **States**

Revenue and taxation

Taxation

Power of State

Although a state tax may not be specifically barred by a federal statute, the tax might still unlawfully infringe on tribal sovereignty or the objectives of federal legislation and require preemption.

Cases that cite this headnote

[25] **States**

Revenue and taxation

Taxation

Indians and persons dealing with Indians on Indian lands

Federal law will preempt a state tax if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the interest-balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136.

Cases that cite this headnote

[26] **States**

Revenue and taxation

Taxation

Indians and persons dealing with Indians on Indian lands

The balancing test for whether federal law will preempt a State tax, as set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, applies when a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.

Cases that cite this headnote

[27] **Indians**

State regulation

To determine whether the exercise of state authority over the conduct of non-Indians in engaging in activities on the reservation violates federal law, a court will: (1) make a particularized inquiry into the nature of the state, federal, and tribal interests at stake; (2) examine relevant federal law in terms of the underlying broad policies as well as historical notions of tribal independence and sovereignty; (3) weigh the two independent but related barriers to the exercise of state authority over a commercial activity on an Indian reservation, [i] state authority may be pre-empted by federal law, or [ii] it may interfere with the tribe's ability to exercise its sovereign functions; and (4), examine and give weight to the State's interest in exercising its regulatory authority over the activity in question.

Cases that cite this headnote

[28] **Indians**

Preemption

The IGRA was enacted to expressly preempt the field of tribal gaming on tribal lands. Indian Gaming Regulatory Act, § 2 et seq., 25 U.S.C.A. § 2701 et seq. (IGRA).

Cases that cite this headnote

[29] **Indians**

Establishment and Regulation in General

The core objective of the IGRA is assuring fairness and honesty in gaming. Indian Gaming Regulatory Act § 3, 25 U.S.C.A. § 2702(1).

Cases that cite this headnote

[30] **Taxation**

Indians and persons dealing with Indians on Indian lands

Where a state seeks to impose a tax on a transaction between a tribe and non-Indians, the state must point to an interest beyond generally raising revenues; however, the state need not point to a specific interest in assessing a tax on activities between non-Indians.

Cases that cite this headnote

[31] **States**

Revenue and taxation

Taxation

Indians and persons dealing with Indians on Indian lands

In determining whether federal law preempts a state tax on goods and services provided at an Indian casino, when the goods and services sold are non-Indian, and the legal incidence of the state's taxes falls on non-Indians, the balance tips in a state's favor; a state has a legitimate interest in raising revenue to provide general government services, and a state's interests are strongest when non-Indians are taxed, and those taxes are used to provide those non-Indians with government services.

Cases that cite this headnote

[32] **Licenses**

States

Department of Revenue rule governing taxation of nonenrolled persons doing business in Indian county did not apply to prevent the Department from assessing a business and occupational (B&O) tax on taxpayer, a for-profit corporation that provided cash access services at tribal casinos; taxpayer was not engaged in gaming, and the services were provided to casino patrons, not tribal members. Wash. Admin. Code 458-20-192(7)(a), 458-20-192(7)(b), 458-20-192(7)(c).

Cases that cite this headnote

[33] **Taxation**

Presumptions and burden of proof

Any person claiming a tax benefit, exemption, or deduction from a taxable category concerning a business and occupational (B&O) tax has the burden of showing that they qualify.

Cases that cite this headnote

[34] **Administrative Law and Procedure**

Construction

Courts interpret regulations using the same rules it uses to interpret statutes.

Cases that cite this headnote

[35] **Administrative Law and Procedure**

Construction

When interpreting a regulation, courts examine first the plain language; if the plain language is subject to only one reasonable interpretation, it is unambiguous and the court's inquiry ends.

Cases that cite this headnote

[36] **Licenses**

Amount

Taxpayer, a for-profit corporation that provided cash access services at tribal casinos, was not acting as the tribes' agent during its cash access services, as required to allow taxpayer to exclude any "pass through" payments from gross income subject to business and occupational (B&O) tax; taxpayer, not the tribes, contracted with casino patrons for cash access services, and patrons, when they agreed to pay the fee, paid it to taxpayer. Wash. Admin. Code 458-20-111.

Cases that cite this headnote

[37] **Licenses**

Amount

For rule to apply, excluding "pass through" payments from gross income subject to business and occupational (B&O) tax, there must be a true agency relationship, where both parties consent to the control of one over the other, and the amount "passing through" cannot be attributable to the agent's business activities; where the patrons create a contractual relationship promising to pay one entity and have no knowledge of commissions paid to another entity, the amount is attributed to business activities and the entity cannot be acting solely as a collection agent. Wash. Rev. Code Ann. § 82.04.080; Wash. Admin. Code 458-20-111.

Cases that cite this headnote

***414** Appeal from Thurston Superior Court, Docket No: 15-2-03048-2, Honorable James J. Dixon, Judge

Attorneys and Law Firms

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PUBLISHED OPINION

Worswick, J.

***415** ¶ 1 Everi Payments Inc., (Everi), a corporation that provides cash access services at tribal casinos, appeals a superior court summary judgment order dismissing Everi's complaint for a business and occupational (B&O) tax refund. Everi argues that the B&O tax at issue is improper because the tax is preempted by federal law through the Indian Gaming Regulatory Act (IGRA), the Indian Trader Statutes, and the *Bracker*[1] balancing test, and that the tax is inconsistent with Department of Revenue Rule 192(7). Alternatively, Everi argues that if the B&O tax is not completely preempted, there is a question of material fact as to the amount of B&O tax Everi is obligated to pay because it was acting as the tribes' agent when it received some of its revenue.

¶ 2 We hold that the B&O tax assessed against Everi is neither preempted by federal law nor inconsistent with Department Rule 192(7). Additionally, we hold that, as a matter of law, Everi was not acting as the tribes' agent when it collected revenue. Accordingly, we affirm the order granting summary judgment to the Department of Revenue.

FACTS

¶ 3 Everi, formerly known as Global Cash Access Inc., is a Delaware for-profit corporation headquartered in Las Vegas, Nevada. It is not a federally recognized Indian tribe or member of a tribe. For its operations in the state, Everi employs Washington residents and also employs nonresident employees who visit Washington and use Seattle-Tacoma airport and Washington roads.

¶ 4 Everi provides cash access services to tribal casinos in the form of self-service kiosks located on the casino floor.[2] Cash access services include ATM (automatic teller machine) withdrawals, credit card cash advances, debit card points-of-sale, and check cashing. Cash access services allow patrons to obtain cash without leaving the casino floor. A casino patron using cash access services pays a surcharge or transaction fee for the service. Everi acknowledges that its cash access services and the kiosks are not games of chance or class I, II, or III gaming. Everi also acknowledges that for the relevant time periods here, it did not track whether kiosk patrons were Indian or non-Indian.

¶ 5 To use one of Everi's kiosks to access cash, a casino patron swipes or inserts his or her debit or credit card. After validating the card, the machine requests the patron enter an amount of cash to withdraw. Once the amount is entered, Everi's kiosk notifies the patron that a fee will be charged for the transaction and asks the patron if he or she agrees to pay the fee. If the patron does not agree, the transaction is cancelled. No fee is collected if the transaction is cancelled. If, however, the patron agrees to the fee, Everi then sends a request for approval for the cash and fee to be withdrawn. The Everi kiosk sends the request for approval for the cash and fee to be withdrawn to its third-party processor located in California.

¶ 6 The third-party processor obtains approval from the patron's issuing financial institution through the appropriate network (Visa, MasterCard, etc.). Once an approval message is received, the patron's financial ***416** institution sends the amount requested by the patron, plus the fee, to Everi's bank account, and the kiosk dispenses the requested cash to the patron. Everi earns additional revenue from reverse interchange fees paid by the patron's issuing bank to Everi.

¶ 7 Everi maintains contracts with a number of Indian tribes in Washington.[3] These contracts govern the types of services Everi provides and the amount of the fees Everi charges the casino patrons for the cash access services. The contracts also determine what portion of the fees are kept by Everi and what portion Everi distributes to the tribes as commissions. Depending on the contract, the commissions taken by the tribes were between 65 and 67 percent of the revenue generated by all cash access transactions. The contracts stated that Everi was not exempt from federal and state taxes based on its "net income, capital or gross receipts." Clerk's Papers (CP) at 1240. The contracts did not expressly establish an agent/principal relationship between the tribes and Everi.

¶ 8 The Department of Revenue audited Everi for the period of January 1, 2009 through June 30, 2012 and assessed $375,222 in B&O tax. Everi filed an appeal to the Department's Appeals Division, disputing the Department's authority to tax the transaction. Everi's appeal was denied. Everi continued to pay B&O tax. From January 1, 2012 to December 31, 2015 Everi paid a total of over $1,400,000 in B&O tax to the Department. The Department did not tax the tribes on their gross revenue from commissions.

¶ 9 Everi then filed a Notice of Appeal and Complaint for Refund of Taxes in superior court, seeking a refund of over $1,400,000 for the B&O tax assessed toward its on-reservation cash access transactions. Everi contended that the tax was preempted by federal law and contrary to the Department's Rule 192. Everi filed a motion for summary judgment, and the Department filed a cross motion for summary judgment. In its response brief to the Department's cross motion for summary judgment, Everi alleged that there was an issue of material fact regarding the amount of gross income because it was acting as the tribes' agent.

¶ 10 The trial court ruled that the B&O tax was not preempted by federal law because the transactions at issue were between Everi and casino patrons, denied Everi's motion for summary judgment, and granted the Department's cross motion for summary judgment. Everi appeals the trial court's summary judgment order.

ANALYSIS

I. LEGAL PRINCIPLES

¶ 11 We review the grant of a motion for summary judgment de novo and perform the same inquiry as the trial court. *Wash. Imaging Servs., LLC v. Dep't of Revenue*, 171 Wash.2d 548, 555, 252 P.3d 885 (2011). When reviewing a grant of summary judgment, we consider all facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. *Wash. Imaging Servs.*, 171 Wash.2d at 555, 252 P.3d 885. Summary judgment is appropriate when there is no genuine issue of material fact and the nonmoving party is entitled to judgment as a matter of law. CR 56(c).

[1] [2] ¶ 12 A B&O tax is an excise tax on gross income imposed for the " 'privilege of doing business.' " *Ford Motor Co. v. City of Seattle*, 160 Wash.2d 32, 39, 156 P.3d 185 (2007) (quoting 1B KELLY KUNSCH ET AL., WASH. PRACTICE: METHODS OF PRACTICE § 72.7, at 452 (1997)). The taxable event for a B&O tax is the act of engaging in a business activity. *Ford Motor*, 160 Wash.2d at 40, 156 P.3d 185. A business engaging in business activities within the State bears the burden of a B&O tax on the gross income from its activities. RCW 82.04.220(1). " 'Business' *417 includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." RCW 82.04.140. " 'Engaging in business' means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers ...." RCW 82.04.150. "Gross income of the business" is "the value proceeding or accruing by reason of the transaction of the business engaged in" without deductions of business services. RCW 82.04.080. Gross income includes "compensation for the rendition of services." RCW 82.04.080.

[3] ¶ 13 The B&O tax "shall be levied upon, and collectable from, the person engaging in the business activities ... [and] shall constitute a part of the operating overhead of such persons." RCW 82.04.500; *see Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 180, 157 P.3d 847 (2007). The taxpayer bears the burden of proving it qualifies for a tax exemption. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wash.2d 139, 149-50, 3 P.3d 741 (2000).

II. FEDERAL PREEMPTION

¶ 14 Everi argues that for its business activities on tribal lands, federal law preempts B&O taxation by the State. Specifically, it argues that the tax is preempted by IGRA,[4] the Indian Trader Statutes,[5] and the *Bracker* balancing test. We disagree.

[4] [5] ¶ 15 States have no regulatory authority in areas preempted by federal law. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). In the area of tribal law, courts apply unique standards to determine whether federal law preempts the state's authority. *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 (9th Cir. 1998). Without an express grant of authority from Congress,

federal preemption regarding Indian affairs prevents a state from applying state law to tribal members on tribal land. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wash.2d 734, 754, 958 P.2d 260 (1998).

[6] [7] [8] ¶ 16 But, the application of nondiscriminatory state laws to third parties on tribal lands are not automatically preempted by federal law. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). A taxed entity on tribal lands bears the burden of recording transactions with tribal members and with nontribal members to distinguish which transactions are taxable. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-61, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). When a state tax is not categorically barred or explicitly preempted by federal laws, a court conducts a *Bracker* balancing analysis, weighing the federal, tribal, and state interests at stake to determine whether the state tax is implicitly preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 471 (2nd Cir. 2013).

A. *State Not Categorically Barred from Levying a B&O Tax*

[9] [10] [11] ¶ 17 A state is without power to tax reservation lands and reservation Indians unless there is a cession of jurisdiction or some federal statutes permitting it. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 132 L.Ed.2d 400 (1995). The United States Supreme Court applies a "categorical approach" to cases where parties allege the State is taxing reservation lands or Indians. *Chickasaw Nation*, 515 U.S. at 458, 115 S.Ct. 2214.

[12] ¶ 18 It is critical to first determine the entity being taxed. *Chickasaw Nation*, 515 U.S. at 458, 115 S.Ct. 2214. This determination is done by examining who bears the "legal incidence of a tax." *Chickasaw Nation*, 515 U.S. at 458, 115 S.Ct. 2214. The "legal incidence of a tax" falls on the person or entity who has the legal obligation to pay the tax. *Canteen Serv., Inc., v. State*, 83 Wash.2d 761, 762, 522 P.2d 847 (1974). If the legal incidence of the tax rests on a tribe or its members inside Indian country, such tax is unenforceable without congressional authorization. ***418** *Chickasaw Nation*, 515 U.S. at 459, 115 S.Ct. 2214. If, however, the legal incidence of the tax falls on non-Indians, no categorical bar prevents the tax. *Chickasaw Nation*, 515 U.S. at 459, 115 S.Ct. 2214.

¶ 19 Here, the parties agree that legal incidence of the B&O tax rested on Everi. Because Everi does not claim to be a federally recognized Indian tribe or tribal member, it is a non-Indian for tax preemption purposes. *See Ariz. Dep't of Rev. v. Blaze Constr. Co.*, 526 U.S. 32, 34, 119 S.Ct. 957, 143 L.Ed.2d 27 (1999). Thus, the Department is not categorically barred from imposing the B&O tax on Everi.

B. *Indian Gaming Regulatory Act (IGRA)*

¶ 20 Everi argues that the B&O tax assessed against it is preempted by IGRA because (1) the express language of IGRA requires preemption, (2) cash access services are so closely related to gaming as to fall within IGRA, and (3) the tax was not addressed in the Washington-Tribal gaming compacts. We disagree that IGRA preempts the B&O tax assessed against Everi.

1. *IGRA Legal Principles*

¶ 21 Congress's broad power to regulate tribal affairs under the Indian Commerce Clause,[6] together with the "semi-independent position" of Indian tribes, create two barriers to state regulatory authority over tribal land and tribal members. *Bracker*, 448 U.S. at 142, 100 S.Ct. 2578. But when Congress passed IGRA, it granted the states some role in regulating Indian gaming. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003). IGRA was passed to allow tribes to operate gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments and to shield tribal gaming from corrupting influences to ensure that the tribes were the primary beneficiaries of the gaming operations. 25 U.S.C. § 2702(1), (2); *Artichoke Joe's*, 353 F.3d at 715.

¶ 22 IGRA requires an approved Tribal-State compact regulating gaming before a tribe may operate class III gaming.[7] 25 U.S.C. § 2710(d)(1). IGRA describes the provisions that states are allowed to include in a compact. 25 U.S.C. § 2710(d)(3)(C). The compact between a tribe and a state may include provisions addressing "subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).

[13] [14] ¶ 23 IGRA expressly preempts the governance of gaming on tribal lands. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). Generally-applicable laws as applied to non-Indians are not, however, preempted by IGRA when the laws' effects are *de minimis* on a tribe's ability to regulate its gambling operations. *Mashantucket Pequot*, 722 F.3d at 470; *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 440 (8th Cir. 2001); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008).

[15] [16] ¶ 24 For IGRA to preempt a generally-applicable state tax imposed on a nontribal party, the tax must interfere with a tribe's ability to regulate its gambling operations. *Mashantucket Pequot*, 722 F.3d at 470. When neither the Tribal-State compact at issue nor IGRA explicitly forbid nor permit the state to assess a generally-applicable tax to non-Indians, the compact and IGRA do not bar the tax. *Mashantucket Pequot*, 722 F.3d at 469. Several federal cases discussing IGRA's application to specific taxes are illustrative of these principles.

***419** ¶ 25 In *Casino Res. Corp.*, the Eighth Circuit held that civil claims against a subcontractor regarding gaming management and service contracts with tribes were not within IGRA's preemptive structure, even though the contracts were closely related to class III gaming. *Casino Res. Corp.*, 243 F.3d at 438-39. The Eighth Circuit stated, "Although IGRA addresses management and services contracts to some degree, it was not designed to deal with disputes like this, which, despite [the litigant's] creative characterization, is essentially a dispute between a non-tribal general contractor and non-tribal sub-contractor." *Casino Res. Corp.*, 243 F.3d at 438-39 (footnote omitted).

¶ 26 Similarly, in *Mashantucket Pequot*, the Second Circuit held that IGRA did not preempt a town's generally-applicable personal property tax against non-Indian owners of slot machines who leased the machines to tribal casinos. *Mashantucket Pequot*, 722 F.3d at 463. And in *Barona Band*, the Ninth Circuit held that a state tax on construction materials for a tribal casino assessed against a nontribal contractor was not preempted by IGRA. *Barona Band*, 528 F.3d at 1193. The court also refused to expand an IGRA provision addressing class III gaming to preempt a tax on a construction contractor building a tribal casino. *Barona Band*, 528 F.3d at 1193 n.3; 25 U.S.C. § 2710(d)(4). The *Barona Band* court stated that broadening an IGRA preemption to include any commercial activity related to tribal gaming such as employment contracts, food service contracts, or innkeeper codes, "stretches the statute beyond its stated purpose." *Barona Band*, 528 F.3d at 1193.

¶ 27 Conversely, in *Flandreau*, the South Dakota district court held that IGRA preempted a state regulation. *Flandreau Santee Sioux Tribe v. Gerlach*, 269 F.Supp.3d 910, 925 (D.S.D. 2017). There, a gift shop, hotel, recreational vehicle park, food and beverage services, and live entertainment events, provided *by the tribe* to nonmembers, were determined to be so closely associated with Class III gaming that the state's ability to regulate them was preempted by IGRA. *Flandreau*, 269 F.Supp.3d at 925. The *Flandreau* court emphasized that the tribe's ancillary activities were closely associated with the tribe's sovereignty and self-governance of its own gaming. *Flandreau*, 269 F.Supp.3d at 925. The court held that the imposition of a state tax on tribe-sold alcohol, or other tribal amenities directly related to tribal gaming, interfered with the tribe's ability to govern its own gaming and, thus, fell within the scope of IGRA preemption. *Flandreau*, 269 F.Supp.3d at 925.

2. *IGRA Does Not Preempt the B&O Tax*

[17] ¶ 28 Everi argues that (1) the express language of IGRA preempts the B&O tax, (2) the services are so closely related to gaming as to fall within IGRA, and (3) the services it provides are compactable and thus preempted if not addressed in the Washington Tribal-State compacts. As assessed against Everi, we conclude that IGRA does not preempt the B&O tax because the tax does not impact tribal governance and is not targeted at gaming.

a. *No Preemption by IGRA Express Language*

¶ 29 Everi contends that the Department lacks authority to tax Everi because cash access services are gaming activities. We hold that the Department's authority to tax is not expressly preempted by IGRA because Everi's cash access services are not a class III gaming activity.

¶ 30 IGRA states that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4).

¶ 31 The B&O tax here is not a tax on class III activities. The tax is assessed upon Everi for providing cash access services. Such services are not class III gaming themselves and Everi admits as much. As a result, 25 U.S.C. § 2710(d)(4) is inapplicable. The Ninth Circuit refused to extend this IGRA subsection beyond its words, and we likewise decline to extend it here. *See Barona Band*, 528 F.3d at 1193 n.3.

*420 b. *No Preemption by Close Association with Gaming*

[18] ¶ 32 Everi cites *Flandreau* to argue that if a service contract exists only because of tribal gaming operations, it must fall within the preemption of IGRA.[8] We disagree.

[19] ¶ 33 The test for whether IGRA preempts a tax is not whether the tax affects a contract that exists only because of a tribal casino. For IGRA to preempt a generally-applicable state tax imposed on a nontribal party, the test is whether the tax interferes with a tribe's ability to regulate its gambling operations. *Mashantucket Pequot*, 722 F.3d at 470. Here, that Everi's cash access services would not have existed without tribal casinos is of no legal effect. The B&O tax does not interfere with the tribes' ability to govern their gaming. Everi's cash access services fall outside the realm of IGRA and are, therefore, capable of being subject to generally-applicable state tax laws.

c. *No Preemption by Tribal-State Compacts*

[20] ¶ 34 Everi contends that it provides "Gaming Services" as defined in the Washington Tribal-State compacts[9] and that these services are "directly related to the operation of gaming activities" as defined in 25 U.S.C. § 2710(d)(3)(C)(vii). Br. of Appellant at 27. Consequently, Everi argues that any tax on its gaming services was compactable between the State and the tribes. Because the Washington compacts do not authorize the State to assess a B&O tax on non-Indians, Everi argues that such tax is preempted by IGRA and the resulting compacts. Everi cites *Flandreau*[10] for support. We disagree with Everi and hold that the Washington-Tribal compacts do not preempt the State's B&O tax.

¶ 35 Everi relies heavily on *Flandreau*'s discussions about ancillary activities being closely associated with class III gaming to argue that the case is "directly on point." Br. of Appellant at 28. In fact, *Flandreau* does not apply here. *Flandreau* involved a *tribe's own* business activities that were directly associated with its class III gaming activities. *Flandreau*, 269 F.Supp.3d at 925. The court held that state tax was preempted by the compact and IGRA because it interfered with tribal governance. *Flandreau*, 269 F.Supp.3d at 925. The question here is whether a non-Indian's business activities, which are ancillary to class III gaming, interfere with a tribe's ability to regulate its gambling operations as to be compactable.

¶ 36 Here, Everi is not a tribe or tribal member, but rather a contractor operating within tribal lands. Everi emphasizes its relationships to the tribes as well as its licenses from tribes and the State to operate, but the taxed business activities are between Everi, a non-Indian, and non-Indian patrons at cash access machines. *See Colville*, 447 U.S. at 160-61, 100 S.Ct. 2069. The tribes are not parties to the transactions upon which the B&O tax is assessed.

¶ 37 For B&O tax purposes, the "business" that Everi engaged in was cash access services provided to casino patrons. This involved the patron agreeing to pay a fee to receive cash and, once approved, the dispensing of cash to the patron. The fee collected by Everi is part of Everi's gross income. RCW 82.04.080. The tribes do not create a fee agreement with patrons or route financial transactions through a variety of channels. The tribes merely received a percentage of Everi's revenues. Everi was able to engage in these cash access services because of its contracts with tribes. However, these contractual relationships between the tribes and Everi do not affect the nature of Everi's separate contracts with individual patrons who chose to use cash access services.

*421 ¶ 38 Much like the circumstances in *Mashantucket Pequot*, the tax here is entirely dependent on Everi's ownership and operation of the cash access services. *See Mashantucket Pequot*, 722 F.3d at 460-63. Because Everi provided cash access services, its revenues from service fees remained separate from a tribe or a tribe's governance of its gaming. The B&O tax is generally applicable to a business engaging in business activities and is not targeted at gaming. *See* RCW 82.04.140, .150, .220(1), .500; *Nelson*, 160 Wash.2d at 180, 157 P.3d 847. Further, there is no evidence that the B&O tax had an effect on or interfered with tribal governance. The B&O tax was assessed against Everi directly for its business activities, not against any

of the tribes with whom it contracted, and the tax did not interfere with the tribes' governance or regulation of gaming. A B&O tax on Everi's cash access services was not compactable and, as a result, not within a compact's preemptive power through IGRA.

¶ 39 Accordingly, we hold that the State's B&O tax on Everi is neither prohibited nor preempted by IGRA.

C. *Indian Trader Statutes*

[21] ¶ 40 Everi further argues that the Indian Trader Statutes preempt the Department's B&O tax because Everi provides services to tribes. We hold that the Indian Trader Statutes do not apply to Everi's cash access services.

¶ 41 To protect Indians from fraud when engaging in business with non-Indians, Congress passed the Indian Trader Statutes. 25 U.S.C. § 261-64; *Mashantucket Pequot*, 722 F.3d at 468. These statutes state that the Commissioner of Indian Affairs has "the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.

[22] ¶ 42 Although broadly interpreted initially, the modern Supreme Court has held the Indian Trader Statutes' preemptive power is more limited, rejecting the argument that the statutes bar "any and all state-imposed burdens on Indian traders." *Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 74, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). Similar to IGRA preemption, we examine the person taxed and where the taxed activity occurred to determine the Indian Trader Statutes' preemptive effect. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1173 (10th Cir. 2012). When a non-Indian provides goods or services to other non-Indians on tribal lands, the Indian Trader Statutes do not apply. *See Muscogee (Creek) Nation*, 669 F.3d at 1172-73.

¶ 43 Here, Everi is a non-Indian whose cash access services occurred on tribal lands. Everi provided the cash access services to non-Indian casino patrons, not to the tribes or tribe members. Everi bears the burden of showing it traded with Indians when it provided cash access services. *See Simpson Inv.*, 141 Wash.2d at 149-50, 3 P.3d 741.

¶ 44 Everi acknowledges that for the relevant time periods, it did not track whether kiosk patrons were Indian or non-Indian. Because this case presents a taxed non-Indian providing services to other non-Indians on tribal lands, we hold that the Indian Trader Statutes are not applicable and, accordingly, do not expressly preempt the B&O tax.

D. *The* Bracker *Balancing Test*

[23] ¶ 45 Everi next argues that the B&O tax is implicitly preempted. Specifically, Everi asserts that a *Bracker* balancing test would show that "[t]he tribal and federal interests in the cash access services provided by Everi far outweigh the state interests" and, thus, implicitly preempt the B&O tax applied to Everi. We hold that, after balancing federal, tribal, and state interests, the B&O tax here is not implicitly preempted by federal law. [11]

*422 **[24]** **[25]** **[26]** ¶ 46 Although a state tax may not be specifically barred by a federal statute, the tax might still unlawfully infringe on tribal sovereignty or the objectives of federal legislation and require preemption. *Bracker*, 448 U.S. at 142, 149, 100 S.Ct. 2578. Federal law will preempt a state tax "if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005). The *Bracker* balancing test applies when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." *Bracker*, 448 U.S. at 144, 100 S.Ct. 2578.

[27] ¶ 47 To determine whether the exercise of state authority violates federal law, a court makes "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145, 100 S.Ct. 2578. A court examines relevant federal law in terms of the underlying broad policies as well as historical notions of tribal independence and sovereignty. *Bracker*, 448 U.S. at 144-45, 100 S.Ct. 2578. A court weighs the "two 'independent but related' barriers to the exercise of state authority over a commercial activity on an Indian reservation: [1] state authority may be pre-empted by federal law, or [2] it may interfere with the tribe's ability to exercise its sovereign functions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982); *Mashantucket Pequot*, 722 F.3d at 471. Last, a court examines and gives weight to "[t]he State's interest in exercising its regulatory

authority over the activity in question." *Ramah*, 458 U.S. at 838, 102 S.Ct. 3394; *Mashantucket Pequot*, 722 F.3d at 471. Preemption is not limited to explicit congressional expressions and ambiguities in federal law are to be construed generously. *Ramah*, 458 U.S. at 838, 102 S.Ct. 3394. Where the state interest in the tax is stronger than the federal and tribal interests against it, the tax will not be preempted. *Mashantucket Pequot*, 722 F.3d at 476-77; *see Bracker*, 448 U.S. at 152, 100 S.Ct. 2578.

1. *Federal Interests*

[28] **[29]** ¶ 48 To determine the federal interests at stake, we examine relevant federal law in terms of the underlying policies as well as historical notions of tribal independence and sovereignty. *Bracker*, 448 U.S. at 144-45, 100 S.Ct. 2578. IGRA was enacted to expressly preempt the field of tribal gaming on tribal lands. *Gaming Corp.*, 88 F.3d at 544. The policies underlying IGRA are: (1) "promoting tribal economic development, self-sufficiency, and strong tribal governments;" (2) shielding Indian gaming "from organized crime and other corrupting influences;" (3) ensuring "that the Indian tribe is the primary beneficiary of the gaming operation;" and (4) assuring "that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702(1), (2). Of these, the core objective is assuring fairness and honesty in gaming. *Barona Band*, 528 F.3d at 1193.

¶ 49 Here, the B&O tax is assessed against Everi, a non-Indian doing business on Indian land. Everi admits its cash assess services are not gaming, but contends that they are so integral to tribal gaming as to fall within the parameters of IGRA. However, no class III or any other class of gaming regulated by IGRA is directly impacted by a B&O tax on Everi. Policies concerning tribes retaining control and autonomy over their gaming are not affected, nor are policies regarding the fairness of gaming. The taxed cash access services are between Everi and non-Indian individuals who are accessing their cash using Everi's machines. The taxed business activity is not gaming. Although the State receives a tangential benefit from tribal gaming through the B&O tax on Everi, the tribes remain the primary beneficiaries of their gaming operations. As such, the B&O tax does not interfere with policies supporting tribal self-sufficiency, economic independence, and tribal governance. The B&O tax ***423** has a minor effect on the federal interest involved.

2. *Tribal Interests* [12]

[30] ¶ 50 To determine tribal interests, we consider both tribal economic development and tribal sovereignty. *Ramah*, 458 U.S. at 837, 102 S.Ct. 3394; *Mashantucket Pequot*, 722 F.3d at 471. "[C]ourts have been quick to dismiss challenges to generally-applicable laws with *de minimis* effects on a tribe's ability to regulate its gambling operations." *Mashantucket Pequot*, 722 F.3d at 470. Where a state seeks to impose a tax on a transaction between a tribe and non-Indians, the state must point to an interest beyond generally raising revenues. *Mescalero*, 462 U.S. at 336, 103 S.Ct. 2378. However, the state need not point to a specific interest in assessing a tax on activities between non-Indians. *See Mescalero*, 462 U.S. at 336, 103 S.Ct. 2378.

¶ 51 Because a significant component of tribal sovereignty includes geography, whether the taxed activity occurs on or off tribal lands is an important factor to weigh. *Bracker*, 448 U.S. at 151, 100 S.Ct. 2578. Where the tax burden ultimately falls on the tribe, and the actions being taxed are within a wholly preemptive area of federal law, such as the education of Indian children, a state B&O tax was preempted even without an express statutory provision. *Ramah*, 458 U.S. at 843-45, 102 S.Ct. 3394. However, "under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations." *Mescalero*, 462 U.S. at 333, 103 S.Ct. 2378.

a. *Economic Interest*

¶ 52 Considering the tribes' economic interests, the B&O tax's effect is minimal. The contracts between Everi and the tribes do not indemnify Everi if the State were to tax its activities. Rather, the inverse is true. The tribes specifically disclaimed tax liability and stated that Everi was responsible for any taxes assessed against Everi's "net income, capital or gross receipts." CP at 1240. Further, the amount Everi paid to the tribes in commissions was not affected by the B&O tax. The contracts specified the commission was based on gross surcharges and interchange fees collected by Everi. Everi does not point to any particular injury to tribal revenues resulting from the tax. Further, the State need not point to a specific interest in assessing the tax against Everi because the B&O tax concerns business activities between non-Indians. *See Mescalero*, 462 U.S. at 336, 103 S.Ct. 2378. Accordingly, the tribal economic interest is weak.

b. *Sovereignty Interest*

¶ 53 Considering tribal sovereignty, the B&O tax on Everi again has minimal effect. Everi cites *Ramah* for the proposition that the federal government has exclusive control over the privilege of doing business on tribal lands. *Ramah*, 458 U.S. at 844, 102 S.Ct. 3394. Everi further argues that because the B&O tax is a tax on this privilege, it interferes with tribal sovereignty. But in *Ramah*, the court dealt with a tax burden that ultimately fell on the tribe and the activity being taxed, the construction of a school to educate Indian children, fell within a completely preemptive area of federal law. *Ramah*, 458 U.S. at 843-45, 102 S.Ct. 3394.

¶ 54 But here, the tribes are in control of their relationships and contracts with Everi, determining the fees and commissions associated with cash access services. The tribes are not subject to the B&O tax and the legal incidence of the tax falls on Everi. *See Nelson*, 160 Wash.2d at 180, 157 P.3d 847. However, the taxed activity occurred within the geographic boundaries of tribal lands. As a result, the tax here has only a modest potential to encroach on tribal sovereignty.

3. *State Interests*

[31] ¶ 55 We examine and give weight to the State's interest in regulating the taxed ***424** activity. *Ramah*, 458 U.S. at 837, 102 S.Ct. 3394; *Mashantucket Pequot*, 722 F.3d at 471. When "the goods and services sold are non-Indian, and the legal incidence of [the state's] taxes falls on non-Indians," the balance tips in a state's favor. *Salt River Pima-Maricopa Indian Cmty. v. Waddell*, 50 F.3d 734, 737 (9th Cir. 1995). A state has a legitimate interest in raising revenue to provide general government services. *Barona Band*, 528 F.3d at 1192-93. A state's interests are "strongest when non-Indians are taxed, and those taxes are used to provide [those non-Indians] with government services." *Salt River*, 50 F.3d at 739; *Colville*, 447 U.S. at 157, 100 S.Ct. 2069.

¶ 56 Here, the taxed activity is the cash access service that Everi, a non-Indian, provides to non-Indians. In doing business within Washington, Everi and its employees use a variety of government services. When providing cash access services, Everi used Washington's telecommunication infrastructure to communicate with Everi's processor in California. Everi employed Washington residents and also employed nonresidents who travelled to Washington, using Seattle-Tacoma Airport resources and Washington roads. As a result, the State has a strong interest in assessing the B&O tax against Everi to generate revenue to support the services it provides to Everi and its employees.

4. *Analysis of Federal, Tribal, and State Interests*

¶ 57 We hold that the State's interests outweigh the interests of the tribes and federal government. Although IGRA preempts state gaming laws, it does not preempt, through its language or underlying policies, cash access services of non-Indians to non-Indians in tribal casinos. The federal interest here is low. Tribal economic independence is not affected by this B&O tax because the legal incidence falls on Everi by law and by contract.

¶ 58 Tribal sovereignty interests are moderate because the activity occurred on tribal lands, but the tax does not interfere with a tribe's governance of its own gaming, nor does it prevent the tribes from doing business with Everi. Here, tribal economic interests are low and sovereignty interests are moderate.

¶ 59 Conversely, the state interest in taxing Everi for its cash access services is strong. The B&O tax assessed against Everi raised general revenue to support government services in Washington. In turn, Everi and its employees utilized those services.

¶ 60 Accordingly, after conducting a *Bracker* balancing test, we hold that the state interest in the tax outweighs the federal and tribal interests and the B&O tax assessed against Everi is not preempted by federal law.

III. DEPARTMENT OF REVENUE RULES

[32] ¶ 61 Everi contends that Department Rule 192(7) prevents it from assessing a B&O Tax against Everi's cash access services at tribal casinos. Specifically, Everi argues that Rule 192(7)(a), (b), and (c) prevents the Department from collecting the B&O tax against Everi. We disagree.

[33] ¶ 62 The Department may prescribe regulations to enforce the tax code. RCW 82.32.300. Any person claiming a tax benefit, exemption, or deduction from a taxable category has the burden of showing that they qualify. *Simpson Inv.*, 141 Wash.2d at 149-50, 3 P.3d 741.

Rule 192 is intended to interpret federal Indian law and apply such precedent to the Department's enforcement of the tax code. WAC 458-20-192(1)(c). Rule 192(7) states:

> Generally, a nonenrolled person doing business in Indian country is subject to tax. ...
>
> (a) **Preemption of tax on nonmembers - gaming.** Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax) ....
>
> (b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** As explained *425 in this subsection, income from sales in Indian country of tangible personal property to, and from the performance of services in Indian country for, tribes and tribal members is not subject to B&O (chapter 82.04 RCW) ....
>
> (ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. ....
>
> (c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** In certain instances state sales and use tax may be preempted on nonmembers who purchase goods or services from a tribe or tribal members in Indian country. The U.S. [S]upreme [C]ourt has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. See *Salt River Pima-Maricopa Indian Community v. Waddell*, 50 F.3d 734, ([9th Cir.]1995). This analysis is known as the 'balancing test.' ...

WAC 458-20-192(7).

A. *Rule 192(7)(a)*

¶ 63 Everi argues that Rule 192(7)(a) applies to cash access services in addition to gaming. We disagree.

¶ 64 Rule 192(7)(a) states that "Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country." WAC 458-20-192(7)(a). As discussed above, Everi's services, while helpful to gaming, are not gaming themselves. Because Everi was not engaged in gaming, Rule 192(7)(a) is inapplicable. Accordingly, we hold that Rule 192(7)(a) does not prevent the assessment of the B&O tax against Everi.

B. *Rule 192(7)(b)*

¶ 65 Everi argues that the on-reservation services it provides to the tribes fall within Rule 192(7)(b) and are not subject to B&O taxation. We disagree.

[34] **[35]** ¶ 66 This court interprets regulations using the same rules it uses to interpret statutes. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wash.2d 310, 322, 190 P.3d 28 (2008). When interpreting a regulation, we examine first the plain language. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wash.2d 868, 881, 154 P.3d 891 (2007). If the plain language is subject to only one reasonable interpretation, it is unambiguous and the court's inquiry ends. *Skagit County Pub. Hosp. Dist. No. 1 v. Dep't of Revenue*, 158 Wash. App. 426, 437, 242 P.3d 909 (2010).

¶ 67 Rule 192(7)(b) states that "Income ... from the performance of services in Indian country for ... the tribe or for tribal members is not subject to the B&O ... or public utility tax." WAC 458-20-192(7)(b). Here, the B&O tax is not applied to services Everi provides to the tribes. It is the service to the patrons, which Everi does not establish are tribal members, not to the tribes, that was subject to the B&O tax. As a result, Rule 192(7)(b) does not apply to Everi.

C. *Rule 192(7)(c)*

¶ 68 Everi argues that because it believes tribal and federal interests prevail in a *Bracker* balancing test, Rule 192(7)(c) also preempts the B&O tax. However, because the language of the section does not apply to Everi, we disagree.

¶ 69 Rule 192(7)(c) states that "state sales and use tax may be preempted on nonmembers who purchase goods or

services from a tribe or tribal members in Indian country." WAC 458-20-192(7)(c). Here, however, the cash access services are from Everi, not purchased from a tribe or tribal member as the rule prescribes. Rule 192(7)(c) is unambiguous in requiring that the purchased services be from a tribe or tribal members on tribal land and, as a result, inapplicable to Everi. We hold that Rule 192(7)(c) does not preempt the B&O tax as assessed against Everi.

¶ 70 Accordingly, Rule 192(7) does not prevent the enforcement of a B&O tax on Everi.

*426 IV. REMAND FOR ASSESSMENT OF AMOUNT, PASS-THROUGH CONSIDERATION

[36] ¶ 71 Finally, Everi argues that if the B&O tax is not preempted, we should remand to the trial court to determine Everi's "gross income" for the tax. Br. of Appellant at 47. Specifically, it argues that because a large percentage of the "gross income" assessed by the Department for the B&O tax was actually pass-through income for the tribes, we should remand to ascertain the correct income to be taxed. [13] We hold that as a matter of law, Everi was not acting as the tribes' agent during its cash access services.

¶ 72 A business engaging in business activities within the State bears the burden of a B&O tax on the gross income from its activities. RCW 82.04.220(1). "Gross income" of the business is "the value proceeding or accruing by reason of the transaction of the business engaged in" without deductions of business services. RCW 82.04.080(1). Gross income includes "compensation for the rendition of services." RCW 82.04.080(1).

[37] ¶ 73 In specific circumstances, a taxpayer can exclude "pass through" income from its "gross income" for B&O tax purposes. *Wash. Imaging Servs.*, 171 Wash.2d at 561-62, 252 P.3d 885; WAC 458-20-111. For this exception to apply, there must be a true agency relationship, where both parties consent to the control of one over the other, and the amount "passing through" cannot be attributable to the agent's business activities. *Wash. Imaging Servs.*, 171 Wash.2d at 562, 252 P.3d 885. Where the patrons create a contractual relationship promising to pay one entity and have no knowledge of commissions paid to another entity, the amount is attributed to business activities and the entity cannot be acting solely as a collection agent. *Wash. Imaging Servs.*, 171 Wash.2d at 561-62, 252 P.3d 885.

¶ 74 Here, Everi, not the tribes, contracted with casino patrons for cash access services. The casino patrons, when they agreed to pay the fee, paid it to Everi. There is no indication that the patrons were aware of Everi's contractual obligations to provide the tribes commissions, nor did the cash access services create contractual privity between the patrons and the tribes for the fees. Accordingly, Everi was not a collection agent of the tribes and cannot reduce its gross taxable income by the amount it owed the tribes.

¶ 75 We affirm the order granting the Department's motion for summary judgment.

We concur:

Maxa, C.J.

Melnick, J.

All Citations

432 P.3d 411

Footnotes

1 The *Bracker* test balances federal, tribal, and state interests to determine whether federal law preempts state authority over conduct on tribal lands. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

2 Everi's only business activity at issue here is cash access services. Everi's kiosks also provided "ticket-in, ticket out" for slot machine earnings redemption and bill-breaking. Clerk's Papers (CP) at 946. Further, Everi was authorized by the Washington State Gambling Commission to sell gambling devices and games of chance.

3 Everi was licensed by the Washington State Gambling Commission. As required by Washington-Tribal gaming compacts, Everi was a licensed gaming service provider for each tribe it contracted with. Washington-Tribal gaming compacts define "Gaming Services" as "the providing of any goods or services to the Tribe, whether on or off site, directly (or indirectly)

in connection with the operation of Class II gaming in a Gaming Facility, including equipment, maintenance or security services for the Gaming Facility. Gaming Services shall not include professional legal and accounting services." CP at 502.

4 25 U.S.C. § 2701-21 (2012).

5 25 U.S.C. § 261-64 (2012).

6 U.S. CONST. art. I, § 8.

7 IGRA established three classes of gaming and these three classes are regulated differently. *See* 25 U.S.C. § 2703. "Class I gaming covers 'social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations.' 25 U.S.C. § 2703(6). Class II gaming includes bingo and card games that are explicitly authorized by a state or 'not explicitly prohibited by the laws of the State and are legally played at any location in the State.' [25 U.S.C.] § 2703(7)(A)(ii) ... Class III gaming includes 'all forms of gaming that are not class I gaming or class II gaming.' [25 U.S.C.] § 2703(8). It includes the types of high-stakes games usually associated with casino-style gambling, as well as slot machines and parimutuel horse-wagering." *Artichoke Joe's*, 353 F.3d at 715 (first alteration in original).

8 In discussing the tax at issue, the *Flandreau* court said, "[M]ost of the transactions the State seeks to tax are not merely tangentially related to tribal gaming, but would not exist but for the Tribe's operation of a casino." *Flandreau*, 269 F.Supp.3d at 922.

9 " 'Gaming Services' means "the providing of any goods or services to the Tribe, whether on or off site, directly (or indirectly) in connection with the operation of Class III gaming in a Gaming Facility, including equipment, maintenance or security services for the Gaming Facility. Gaming Services shall not include professional legal and accounting services." CP at 502.

10 *Flandreau*, 269 F.Supp.3d 910.

11 The Department argues that the *Bracker* balancing test does not apply here because the test does not apply to transactions between non-Indians on Indian land, particularly when no tribe has joined the proceeding. We disagree. Courts utilize the *Bracker* test to analyze transactions between non-Indians on Indian land. *See Bracker*, 448 U.S. at 144, 100 S.Ct. 2578 (holding that the test applies when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation"); *Barona Band*, 528 F.3d at 1190. The action at issue here falls squarely within the *Bracker* court's category of state action to be balanced. Because Everi's cash access services are between non-Indians on Indian lands, the *Bracker* balancing test applies.

12 The Department argues that Everi lacks standing to assert tribal interests. We disagree. An underlying policy of IGRA is "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Federal preemption claims necessarily consider tribal sovereignty and economic self-sufficiency. Accordingly, we fully consider these interests in a *Bracker* analysis.

13 The Department argues that Everi failed to plead both that it was acting as the tribes' agent and that the amount assessed was incorrect. When reviewing an order granting summary judgment, an appellate court will consider only issues called to the trial court's attention. RAP 9.12. The trial court heard and considered the gross income argument before its decision below to grant the Department's motion. Because this issue was called to the trial court's attention and ruled upon, we consider the merits of Everi's argument.

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APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

January 17, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EVERI PAYMENTS, INC., successor in interest to, and formerly known as, GLOBAL CASH ACCESS, INC., Appellant, v. WASHINGTON STATE DEPARMENT OF REVENUE, Respondent.	No. 50791-9-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed December 11, 2018 in the above entitled matter. After review, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Worswick, Melnick

FOR THE COURT:

JUDGE

SMITH GOODFRIEND, PS

February 19, 2019 - 11:52 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	Everi Payments Inc., Appellants v WA State Dept of Revenue, Respondent
Superior Court Case Number:	15-2-03048-2

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