No. _____

Court of Appeals No. 75423-8-I

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Appellant,

vs.

T-MOBILE WEST CORP.,

Respondent,

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Petitioner City of Seattle requests review by the Supreme Court of the Court of Appeals' published decision terminating review in this case.

II. DECISION TO BE REVIEWED

The City requests review of the published decision of the Court of Appeals, Division I, *City of Seattle v. T-Mobile West. Corp.*, __ Wn. App. __, 2017 WL 2229926 (2017) filed on May 22, 2017 (attached in appendix).

III. ISSUE PRESENTED FOR REVIEW

If review is accepted, the Court will be presented with this issue:

Whether the court of appeals erred in ruling that the City is not authorized under the Seattle Municipal Code 5.48.050.A, RCW 35.22.280(32), RCW 35.21.714, and the federal Mobile Telecommunications Sourcing Act, to impose a telephone utility tax on T-Mobile West Corporation based on the revenue from international incollect roaming charges from T-Mobile's customers whose primary place of use is in Seattle.

This Court should accept review under RAP 13.4 because the authority of all Washington cities to tax mobile telecommunications under RCW 35.21.714 and the Mobile Telecommunications Sourcing Act is an

issue of substantial public interest. In addition, the court of appeals' decision conflicts with a prior published decision of the court of appeals.

IV. STATEMENT OF THE CASE

The City of Seattle imposes a telephone utility tax on all persons that engage in telephone business in the City. SMC 5.48.050.A. (CP 262 ¶ 2, CP 292.) T-Mobile provides "mobile telecommunications services," commonly called cellular telephone service, to customers who reside in Seattle. (CP 262 ¶2.) The City audited T-Mobile and issued tax assessments for two periods during 2006-2014. The assessments required that T-Mobile pay additional taxes and interest, including $497,963 that is at issue in this appeal. (CP 262 ¶3; CP 297-309.)

T-Mobile contests the City's authority to levy a telephone utility tax based on revenue received by T-Mobile from its Seattle-resident customers. The contested charges are for mobile telephone communications that originate in a foreign jurisdiction and terminate in the United States. (CP 263 ¶5.) T-Mobile refers to these communications as "international incollect communications." (CP 263 ¶5.)

As part of the monthly service charge, T-Mobile's customers can send and receive wireless communications without any additional charge throughout the United States. (CP 263 ¶4.) To enable its customers to place

calls when traveling outside the United States, T-Mobile enters into "roaming agreements" with foreign mobile telecommunications providers. (CP 263 ¶4.) The international incollect calls of T-Mobile's customers originate outside the U.S. on the network of the foreign provider and terminate within the U.S. (CP 263 ¶5.) T-Mobile charges its subscribers a fee for roaming in foreign countries. (CP 263 ¶4.)

T-Mobile contends that Seattle does not have authority to tax this international incollect roaming revenue, and therefore the revenue should not be included in T-Mobile's gross receipts for calculating T-Mobile's telephone utility tax under SMC ch. 5.48. The City disagrees and included international incollect roaming revenue from T-Mobile's Seattle-resident customers in T-Mobile's gross receipts when calculating T-Mobile's utility tax under SMC ch. 5.48. (CP 264 ¶6.) The City asserts that under SMC ch. 5.48 and under the federal Mobile Telecommunications Sourcing Act, 4 USC §§ 116-126 ("MTSA"), all charges from mobile telecommunications services that T-Mobile provides to its customers who have Seattle as their primary place of use are subject to the City's tax. These charges include international incollect roaming revenue. (CP 264 ¶6.)

T-Mobile appealed the tax assessments to the City of Seattle Hearing Examiner. (CP 221.) The hearing examiner ruled in favor of T-Mobile on

August 18, 2015. (CP 221, 229-230.) The hearing examiner based the decision on the Seattle Municipal Code and did not rule on the taxability of the charges under the MTSA and state statutes. (CP 221-230.)

The City appealed the hearing examiner's ruling to the superior court through a writ of review under RCW 7.16.040. (CP 23-49, 59-177; RP 1-37.) The superior court ruled in T-Mobile's favor and, on June 7, 2016, issued findings and conclusions. (RP 37-41; CP 179-181.) The superior court concluded that under RCW 35.21.714 "the City is not authorized to levy a tax or license fee on the international roaming telecommunications at issue herein." (CP 181 ¶¶5-6.) The City appealed and the court of appeals affirmed the superior court's ruling on May 22, 2017. The City seeks discretionary rule of the court of appeals' decision.

V. ARGUMENT IN SUPPORT OF REVIEW

A. The Court of Appeals' Decision Involves An Issue Of Substantial Public Interest Because It Thwarts The Purpose Of The Mobile Telecommunications Sourcing Act That Was Intended To Simplify The Taxation Of Mobile Telecommunications By Creating A Mandatory National System That Did Not Require The Tracking Of The Origin, Destination, Or Route Of Mobile Telecommunications.

In 2000, the U.S. Congress passed the Mobile Telecommunications Sourcing Act ("MTSA") that altered the authority of all state and local jurisdictions to tax mobile telecommunications services. 4 USC §§ 116-

126. (CP 359-368.). The MTSA was a response to the popularity of cell phones and the difficulties that cities and states faced in taxing the cell phone business without running afoul of the Commerce Clause of the U.S. Constitution. In 1989, in a landmark case involving taxation of landline telephone service, the U.S. Supreme Court ruled that a state had nexus to tax interstate calls only if the call originated or terminated in the state and the call was either billed or paid in the state. *Goldberg v. Sweet*, 488 U.S. 252, 263, 109 S. Ct. 582 (1989). The *Goldberg* decision provided a workable formula for taxing landline services. But the test established by *Goldberg* did not work well with cell phone calls, which do not have stationary origins and destinations.

The state tax commenter Walter Hellerstein said that "the implications of *Goldberg v. Sweet* for the taxation of the wireless communications industry are troublesome to say the least." *See* 2 J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 18.07[1][a], 1807[3] (3d ed. 2002). (CP 406.) He describes a scenario where a person lives in one state, travels to a different state, and calls a third state. In addition to the technical difficulties of tracking the origin, destination, routing, and billing of the call, under *Goldberg,* none of those states would have nexus to tax that call because no state would satisfy two of the *Goldberg* factors. *Id.*

Congress responded to these problems by enacting the MTSA, to create a national uniform sourcing system that Hellerstein summarizes as follows:

> The difficulties involved in taxing mobile telecommunications under the regime the Court established in *Goldberg* led Congress, with the joint support of the telecommunications industry and the states, to enact legislation permitting the states to tax *all* mobile telecommunications charges (for services provided by the customer's "home service provider") at the customer's "place of primary use." The Mobile Telecommunications Sourcing Act (MTSA) defines the "home service provider" as the "facilities based carrier or reseller with whom the customer contracts for the provision of mobile telecommunications services." The MTSA defines the "place of primary use" as the "residential street address or the primary business street address of the customer." In practical terms, the MTSA eliminates the need to determine the precise location of the sale of mobile (wireless) telecommunications on a transaction-by-transaction basis. Instead, it permits the state of the customer's "place of primary use"—and *only* that state – to tax the aggregate charges for wireless telecommunications services. . . .
>
> The MTSA provides:
>
> > Notwithstanding the law of any State or political subdivision of any State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be provided by the customer's home service provider. [4 USC § 117(a).]

> The key operative language of the MTSA, which both grants and limits a state's power to tax charges for mobile telecommunications, provides:
>
> > All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under sections 116 through 126 of this title are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services. [4 USC § 117(b).]
>
> . . .
>
> Because the MTSA forbids the states from taxing wireless services except as provided under the Act, states have a strong incentive to amend their statues to provide for taxation of wireless services in conformity with the Act. Unless and until the states take such affirmative action, they will lose tax revenue, because the MTSA itself does not impose the tax; it simply "authorizes" the states to impose the tax in conformity with its provisions.

2 J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 18.07[3] (3d ed. 2002) (footnotes omitted) (emphasis added) (CP 409).

Thus, under the MTSA, all charges billed for mobile telecommunications services provided in a taxing jurisdiction are deemed to be provided by the customer's home service provider and those charges

are sourced to the customer's primary place of use. 4 USC §117(a)-(b). No taxing jurisdiction other than the taxing jurisdiction in which the customer's primary place of use is located can tax those charges. 4 USC § 117(b). The MTSA did away with the *Goldberg v. Sweet* sourcing method based on origin, destination, and billing. [1] The MTSA authorizes only one taxing jurisdiction to tax the services, regardless of where the services "originate, terminate, or pass through." *Id.* The MTSA authorizes cities and states to tax mobile telecommunications service without having to determine the place of origin, termination, or the route of the call.

In this case, under 4 USC § 117(b), Seattle is authorized to tax the charges at issue "regardless of where the telecommunications charges originate, terminate or pass through." Because the MTSA does away with taxation based on the origin and destination of the calls, it eliminates the need to categorize mobile telecommunications as interstate or intrastate. For tax purposes, cellular calls are no longer interstate or intrastate.

The court of appeals' decision is contrary to the MTSA, which creates a national, uniform, nationwide procedure to simplify the taxation

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[1] The MTSA's definition of "mobile telecommunications charges" reiterates the requirement that mobile telecommunications charges be sourced to the taxing jurisdiction where the customer's PPU is located, without regard for origin or termination. 4 USC §124(1)

of mobile telecommunications. Under the MTSA calls are no longer interstate or intrastate for tax purposes. But the court of appeals' decision forces the City to base its tax on the origin and destination of calls and only permits the City to tax calls that would have been considered "intrastate" calls prior to the MTSA.

The court of appeals decision will not just apply to Seattle, but will also affect taxation by the dozens of other Washington cities that currently impose a telephone utility tax and cities that might impose a tax in the future.[2] The widespread impact of a case involving taxes on wireless communications is demonstrated by *New Cingular Wireless PCS LLC* v. City of Bothell, 183 Wn. App. 1008 (2014) (unpublished). In *New Cingular*, plaintiff sued more than 100 Washington cities seeking a refund of telephone utility taxes paid on mobile telecommunications. Many Washington cities impose a telephone utility tax and the effect of the court of appeals' decision in this case reaches far beyond Seattle.

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[2] These cities include but are not limited to: Bellevue (BCC 4.10.035); Bothell (BMC 5.08.085); Bremerton (BMC 3.50.050(h)); Centralia (CMC 5.72.050(B)); Edmonds (ECC 3.20.155); Everett (EMC 3.28.060); Kirkland (KMC 5.08.050(1)); Mercer Island (MICC 4.12.030(A)); Olympia (OMC 5.84.050(A) and 5.84.060); Redmond (RMC 5.44.105); Spokane (SMC 08.10.030(A)(6)); Tacoma (TMC 6A.40.080); Vancouver (VMC 5.68.030); Yakima (YMC 5.50.050).

B. The Court of Appeals' Decision Is Contrary To The Washington State Legislature's Intent That The MTSA Apply To Cities To Simplify The Taxation Of Mobile Telecommunications.

The court of appeals' decision is contrary to both the intent of the U.S. Congress and the intent of the Washington State Legislature. In 2002, the state of Washington passed SB 6539 to implement the federal MTSA for state and local taxes. SB 6539 §1. (CP 315-316.) The legislature made findings in the bill to acknowledge "the purpose of establishing uniform nationwide sourcing rules for state and local taxation of mobile telecommunications services." SB 6539 §1. (CP 316.) *See also* Final Senate Bill Report, p. 1. (CP 115.)

The bill adopted the MTSA's definitions and sourcing provisions for the state taxes then applicable to mobile telecommunications. SB 6539 §§ 4-5. (CP 319-320.) In addition, the legislature acknowledged the authority of cities to tax mobile telecommunications under the MTSA by amending RCW 35.21.714 to say that a city may not impose a tax on the portion of network telephone services that represents "charges for mobile telecommunications services provided to customers whose place of primary use is not within the city." SB 6539 § 10.

The court of appeals' decision is inconsistent with the legislature's intent as shown by legislature's findings in SB 6539 and the legislative

history of the bill. The Senate's final bill report recognizes the complexity of taxing mobile telecommunications pre-MTSA and the MTSA's resolution of that problem by creating a national uniform system for taxing wireless telecommunications. SB 6539, Final Senate Bill Report, p. 1 (CP 333, 338.) Nowhere in the bill report or the fiscal note for SB 6539 bill does it say that cities will be limited to taxing only intrastate mobile telecommunications services. (CP 333, 338.) Nowhere does it say that, despite the MTSA's intent to simply taxation of mobile telecommunications, that cities must continue to determine the origin, destination, and routing of mobile telecommunications. The legislature would have acknowledged such a significant departure from the MTSA's sourcing scheme that was designed to eliminate the need to determine origin/destination/routing. The court of appeals' decision imposes that requirement on cities despite the legislature's intent to the contrary.

C. The Court Of Appeals Is Erroneously Limiting The Longstanding Authority Of Washington Cities To Tax Telephone Business.

The court of appeals' decision improperly interprets RCW 35.21.714 to restrict the legislature's longstanding grant of taxing authority to cities. Under "Article 7, section 9 and article 11, section 12 of the Washington State Constitution the legislature may "grant municipal authorities the power to levy and collect taxes for local purposes." *King*

County v. City of Algona, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984); *T-Mobile*, at ¶6. Cities must have express authority from the legislature to levy a tax. *Id.*

The legislature has expressly authorized cities under RCW 35.22.280(32) to enact business license taxes, including a telephone utility tax. The City exercised this taxing authority more than eighty years ago to enact a telephone utility tax. (CP 311-313.) In 1933, the Washington Supreme Court upheld the City's authority to impose a telephone utility tax in *Pacific Telephone and Telegraph Co. v. City of Seattle,* 172 Wash. 649, 21 Pac. 721 (1933). The current version of the same statute authorizes first class cities to impose a telephone utility tax.

The court of appeals correctly acknowledges that, "[i]n the absence of restriction, [RCW 35.22.280(32)] is a comprehensive grant of power to impose license taxes either for the purpose of revenue or regulation." *T-Mobile v. City of Seattle*, at ¶6. But the court then erroneously interprets the restrictions on city taxing authority imposed by RCW 35.21.714(1). The statute states:

> Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from intrastate toll telephone services subject to the fee or

> tax: PROVIDED, That the city shall not impose the fee or tax on that portion of network telephone service which represents charges to another telecommunications company, as defined in RCW 80.04.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services, or charges for network telephone service that is purchased for the purpose of resale, or charges for mobile telecommunications services provided to customers whose place of primary use is not within the city.

RCW 35.21.714(1).

The first sentence of RCW 35.21.714 acknowledges that cities are authorized to tax telephone business. This sentence establishes, as the hearing examiner correctly ruled, that the legislature "was aware of cities' preexisting authority to tax the telephone business" and that RCW 35.21.714 did not supersede this longstanding authority. (CP 12 ¶3; CP 13-14 ¶8.) But under the court of appeals' holding, the legislature repealed the City's taxing existing authority under RCW 35.22.280(32) and granted severely restricted authority when it adopted RCW 35.21.714. Courts disfavor repeal by implication. *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656, 659 (2002).

The court of appeals overstates the restrictions in RCW 35.21.714 as limiting a city to taxing "revenue 'derived from intrastate toll telephone services.'" *T-Mobile v. City of Seattle*, at ¶7. Contrary to the court's

holding, the statute does not say that cities can tax *only* intrastate toll telephone services. Indeed, if that was the intent, then the remainder of the statute would be superfluous. The remainder of the statute places restrictions on cities' ability to tax certain access and connecting charges between carriers and also prohibits cities from taxing interstate services. But if, as T-Mobile argues, the statute permitted a City to tax only "intrastate toll telephone charges," then the rest of the statute would be superfluous because none of the charges listed after the proviso are intrastate toll charges. The court effectively inserts the extra word "only" into the first sentence of the statute. *T-Mobile v. City of Seattle*, at ¶7. Contrary to the court's holding, the statute does not say that cities can tax "only" intrastate toll telephone services.

Instead, the first sentence of RCW 35.21.714 authorizes cities to tax a specific type of service—intrastate toll telephone service—and does not restrict cities to taxing *only* intrastate toll telephone services. Cities can tax other types of services, such as mobile telecommunications services, a permitted by the remainder of RCW 35.21.714. But the statute does not say that cities can tax *only* intrastate toll telephone services.

Intrastate toll telephone service is a specific type of telephone service, i.e. is intrastate long distance service. A "toll call" is "any call that

incurs a fee" and historically tended to be long distance calls because those were the only calls that incurred a fee. *See Newton's Telecom Dictionary*, p. 937 (24th ed. 2008). (CP 79, 283.) Indeed there are other types of intrastate services besides toll service that cities are authorized to tax under their general taxing authority. The Washington Utilities and Transportation Commission has exclusive jurisdiction over intrastate telecommunications activity in Washington and regulates many types of intrastate telecommunications services. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 359, 166 P.3d 667 (2007); WAC 480-120-251 to -266. The WUTC broadly defines "telecommunications services" as the "offering of telecommunications for a fee." WAC 480-120-021. Within that broad definition, the WUTC consistently distinguishes between different types of intrastate services such as "basic telecommunications services" and toll services relating to separately charged long distance services. WAC 480-120-021, 480-120-083, 480-120-251-266; RCW 82.04.065, 80.36.100, 80.36.630. The legislature did not say in RCW 35.21.714 that cities could tax only a narrowly defined type of intrastate services.

The court misinterprets RCW 35.21.714 to limit cities' taxing authority to the narrow category of "intrastate toll telephone services,"

which are landline long distance services charged on a per call basis. That type of service has nothing to do with the international mobile telecommunications involved in this case. The legislature restricted taxation of mobile telecommunications in the last sentence of in RCW 35.21.714 that says that, consistent with the MTSA, cities cannot not tax mobile telecommunication services for customers whose PPU is outside the City. The City complies with that restriction. But the court's decision goes beyond the MTSA and RCW 35.21.714 and will force cities to use the system of taxing based on the origin and destination of calls that the MTSA replaced.

D. The Court's Decision Conflicts With Its Earlier Decision in *Vonage* Because *Vonage* Does Not Affect The City's Authority To Tax Mobile Telecommunications.

The court of appeals misapplies the holding in *Vonage America, Inc. v. City of Seattle*, 152 Wn. App. 12, 216 P.3d 1029 (2009). (CP 181.) In *Vonage,* the court ruled under RCW 35.21.714 cities cannot tax interstate "voice over internet protocol" (VoIP) services. But *Vonage* involved VoIP services and did not deal with taxation of mobile telecommunications that are governed by the MTSA. And the court in *Vonage* did not rule that cities could tax only intrastate toll telephone

services as the court of appeals now claims. *T-Mobile v. City of Seattle*, at ¶10.

The court in *Vonage* simply held that the City could not tax Vonage's interstate VoIP calls. The parties in *Vonage* agreed that under RCW 35.21.714 and SMC 5.48.050.A that the City could not tax interstate services. *Vonage*, 152 Wn. App. at 18 n. 3. This statutory restriction on the City's taxing authority was not in dispute because both the statute and City tax code provision said that charges for interstate services were exempt. *Id.* The taxpayer in *Vonage* argued that the services it provided were interstate services as a matter of law and therefore exempt from the City's tax. *Vonage*, 152 Wn. App. at 20-21.

The court disagreed and held that because the VoIP services were not subject to federal tariffs, they were not interstate as a matter of law. *Id.* The issue in *Vonage* was whether the VoIP services were interstate services as a matter of law, not whether the City had authority to tax only intrastate services as the court of appeals now portrays it. The City never intended to tax Vonage for anything other than intrastate services. The City's authority to tax mobile telecommunications services under the authority granted by RCW 35.22.280(32) was not at issue. Contrary to the

court of appeals' decision, the court in *Vonage* did not address whether a City could tax *only* intrastate toll telephone services.

E. RCW 35.21.714 Does Not Apply To International Calls Such As The Calls At Issue In This Case.

Even if the City was required to tax based on the origin and destination of cellular calls, then the international calls at issue here would be taxable. The court of appeals agrees that the calls at issue are international calls and are not interstate or intrastate calls. *T-Mobile v. City of Seattle*, at ¶8. *See also* Department of Revenue Tax Determination No. 02-0030E, 24 WTD 108 (2005) (international calls are distinct from interstate and intrastate services). RCW 35.21.714 does not prohibit the taxation of international calls. The court of appeals' decision is based on its erroneous holding that RCW 35.21.714 that restricts cities to taxing only intrastate toll services. Even if the City is required to tax services based on origin and destination, the revenue from international calls would not be exempt.

VI. CONCLUSION

The court of appeals' decision involves a matter of substantial public interest that the Supreme Court should review. The court of appeals' decision would thwart the adoption of the Mobile Telecommunications Sourcing Act, which created a mandatory national system under which all

revenue from mobile telecommunications services is sourced to the taxing jurisdiction where the customer resides. The court of appeals' decision also erroneously restricts cities' statutory taxing authority by misinterpreting RCW 35.21.714 and by incorrectly interpreting the decision in *Vonage.* The decision would adversely affect the many cities in Washington that impose a telephone utility tax. This Court should accept review of the court of appeals decision under RAP 13.4.

DATED this 21 day of June, 2017.

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Appendix 1

Seattle Municipal Code

SMC 5.48.050.A - Occupations subject to tax—Amount

There are levied upon, and shall be collected from everyone, including The City of Seattle, on account of certain business activities engaged in or carried on, annual license fees or occupation taxes in the amount to be determined by the application of rates given against gross income as follows:

A. Upon everyone engaged in or carrying on a telecommunications service or telephone business, a fee or tax equal to six percent of the total gross income from such business provided to customers within the City. The tax liability imposed under this Section 5.48.050 shall not apply for that portion of gross income derived from charges to another telecommunications company, as defined in RCW 80.04.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services, or charges for telecommunication service or telephone business that is purchased for the purpose of resale. (Such charges, except for interstate service, shall be taxed under Chapter 5.45.) The total gross income shall also include all charges by the provider of cellular or cellular mobile telephone services provided to its customers in any taxing jurisdiction (intrastate or interstate), which are billed to a "place of primary use" located in Seattle by or for the home service provider, irrespective of whether the services are provided by the home service provider.

SMC 5.48.260.A - Allocation of revenues—Cellular telephone service.

A. In determining the total gross income from telephone business in the City for purposes of Section 5.48.050 A, there shall be included all gross income from cellular telephone service (including roaming charges incurred by Seattle customers outside this state) provided to customers whose "place of primary use" is in the City, regardless of the location of the facilities used to provide the service. The customer's "place of primary use" is, with respect to each telephone: (a) the customer's address; or (b) the customer's place of residence if the telephone is for personal use, and in both cases must be located within the licensed service area of the home service provider. Roaming charges and cellular telephone charges to customer whose principal service address is outside Seattle will not be taxable even though those mobile services are provided within Seattle.

RCW

RCW 35.21.714 - License fees or taxes on telephone business—Imposition on certain gross revenues authorized—Limitations.

(1) Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from intrastate toll telephone services subject to the fee or tax: PROVIDED, That the city shall not impose the fee or tax on that portion of network telephone service which represents charges to another telecommunications company, as defined in RCW 80.04.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services, or charges for network telephone service that is purchased for the purpose of resale, or charges for mobile telecommunications services provided to customers whose place of primary use is not within the city.

(2) Any city that imposes a license tax or fee under subsection (1) of this section has the authority, rights, and obligations of a taxing jurisdiction as provided in RCW 82.32.490 through 82.32.510.

(3) The definitions in RCW 82.04.065 and 82.16.010 apply to this section.

U.S.C.

4 U.S.C.A. § 116. Rules for determining State and local government treatment of charges related to mobile telecommunications services

(a) Application of this section through section 126.--This section through 126 of this title apply to any tax, charge, or fee levied by a taxing jurisdiction as a fixed charge for each customer or measured by gross amounts charged to customers for mobile telecommunications services, regardless of whether such tax, charge, or fee is imposed on the vendor or customer of the service and regardless of the terminology used to describe the tax, charge, or fee.

(b) General exceptions.--This section through 126 of this title do not apply to--

(1) any tax, charge, or fee levied upon or measured by the net income, capital stock, net worth, or property value of the provider of mobile telecommunications service;

(2) any tax, charge, or fee that is applied to an equitably apportioned amount that is not determined on a transactional basis;

(3) any tax, charge, or fee that represents compensation for a mobile telecommunications service provider's use of public rights of way or other public property, provided that such tax, charge, or fee is not levied by the taxing jurisdiction as a fixed charge for each customer or measured by gross amounts charged to customers for mobile telecommunication services;

(4) any generally applicable business and occupation tax that is imposed by a State, is applied to gross receipts or gross proceeds, is the legal liability of the home service provider, and that statutorily allows the home service provider to elect to use the sourcing method required in this section through 126 of this title;

(5) any fee related to obligations under section 254 of the Communications Act of 1934; or

(6) any tax, charge, or fee imposed by the Federal Communications Commission.

(c) Specific exceptions.--This section through 126 of this title--

(1) do not apply to the determination of the taxing situs of prepaid telephone calling services;

(2) do not affect the taxability of either the initial sale of mobile telecommunications services or subsequent resale of such services, whether as sales of such services alone or as a part of a bundled product, if the Internet Tax Freedom Act would preclude a taxing jurisdiction from subjecting the charges of the sale of such services to a tax, charge, or fee, but this section provides no evidence of the intent of Congress with respect to the applicability of the Internet Tax Freedom Act to such charges; and

(3) do not apply to the determination of the taxing situs of air-ground radiotelephone service as defined in section 22.99 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999.

4 U.S.C.A. § 117. Sourcing rules

(a) Treatment of charges for mobile telecommunications services.-- Notwithstanding the law of any State or political subdivision of any State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be provided by the customer's home service provider.

(b) Jurisdiction.--All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under sections 116 through 126 of this title are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services

4 U.S.C.A. § 118. Limitations

Sections 116 through 126 of this title do not—

(1) provide authority to a taxing jurisdiction to impose a tax, charge, or fee that the laws of such jurisdiction do not authorize such jurisdiction to impose; or

(2) modify, impair, supersede, or authorize the modification, impairment, or supersession of the law of any taxing jurisdiction pertaining to taxation except as expressly provided in sections 116 through 126 of this title.

. . .

4 U.S.C.A. § 122. Determination of place of primary use

(a) Place of primary use.--A home service provider shall be responsible for obtaining and maintaining the customer's place of primary use (as defined in section 124). Subject to section 121, and if the home service provider's reliance on information provided by its customer is in good faith, a taxing jurisdiction shall--

(1) allow a home service provider to rely on the applicable residential or business street address supplied by the home service provider's customer; and
(2) not hold a home service provider liable for any additional taxes, charges, or fees based on a different determination of the place of primary use for taxes, charges, or fees that are customarily passed on to the customer as a separate itemized charge.

(b) Address under existing agreements.--Except as provided in section 121, a taxing jurisdiction shall allow a home service provider to treat the address used by the home service provider for tax purposes for any customer under a service contract or agreement in effect 2 years after the date of the enactment of the Mobile Telecommunications Sourcing Act as that customer's place of primary use for the remaining term of such service contract or agreement, excluding any extension or renewal of such service contract or agreement, for purposes of determining the taxing jurisdictions to which taxes, charges, or fees on charges for mobile telecommunications services are remitted

4 U.S.C.A. § 123. Scope; special rules

(a) Act does not supersede customer's liability to taxing jurisdiction.--Nothing in sections 116 through 126 modifies, impairs, supersedes, or authorizes the modification, impairment, or supersession of, any law allowing a taxing jurisdiction to collect a tax, charge, or fee from a customer that has failed to provide its place of primary use.

(b) Additional taxable charges.--If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for nontaxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

(c) Nontaxable charges.--If a taxing jurisdiction does not subject charges for mobile telecommunications services to taxation, a customer may not rely upon the nontaxability of charges for mobile telecommunications

services unless the customer's home service provider separately states the charges for nontaxable mobile telecommunications services from taxable charges or the home service provider elects, after receiving a written request from the customer in t he form required by the provider, to provide verifiable data based upon the home service provider's books and records that are kept in the regular course of business that reasonably identifies the nontaxable charges.

4 U.S.C.A. § 124. Definitions

In sections 116 through 126 of this title:

(1) Charges for mobile telecommunications services.--The term "charges for mobile telecommunications services" means any charge for, or associated with, the provision of commercial mobile radio service, as defined in section 20.3 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999, or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, that is billed to the customer by or for the customer's home service provider regardless of whether individual transmissions originate or terminate within the licensed service area of the home service provider.

(2) Customer.--

(A) In general.--The term "customer" means--
(i) the person or entity that contracts with the home service provider for mobile telecommunications services; or
(ii) if the end user of mobile telecommunications services is not the contracting party, the end user of the mobile telecommunications service, but this clause applies only for the purpose of determining the place of primary use.
(B) The term "customer" does not include--
(i) a reseller of mobile telecommunications service; or
(ii) a serving carrier under an arrangement to serve the customer outside the home service provider's licensed service area.

(3) Designated database provider.--The term "designated database provider" means a corporation, association, or other entity representing all the political subdivisions of a State that is--

(A) responsible for providing an electronic database prescribed in section 119(a) if the State has not provided such electronic database; and

(B) approved by municipal and county associations or leagues of the State whose responsibility it would otherwise be to provide such database prescribed by sections 116 through 126 of this title.

(4) Enhanced zip code.--The term "enhanced zip code" means a United States postal zip code of 9 or more digits.

(5) Home service provider.--The term "home service provider" means the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services.

(6) Licensed service area.--The term "licensed service area" means the geographic area in which the home service provider is authorized by law or contract to provide commercial mobile radio service to the customer.

(7) Mobile telecommunications service.--The term "mobile telecommunications service" means commercial mobile radio service, as defined in section 20.3 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999.

(8) Place of primary use.--The term "place of primary use" means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be--

(A) the residential street address or the primary business street address of the customer; and

(B) within the licensed service area of the home service provider.

. . .

(11) Serving carrier.--The term "serving carrier" means a facilities-based carrier providing mobile telecommunications service to a customer outside a home service provider's or reseller's licensed service area.

(12) Taxing jurisdiction.--The term "taxing jurisdiction" means any of the several States, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political

subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

2017 WL 2229926
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 1.

CITY OF SEATTLE, Director of the Department of Finance and Administrative Services, Appellant,
v.
T-MOBILE WEST CORP., Respondent.

No. 75423-8-I
|
FILED: May 22, 2017

Appeal from King County Superior Court, No. 15-2-21111-1, Honorable Jean A. Rietschel.

Attorneys and Law Firms

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Opinion

Becker, J.

***1** ¶1 The subject of this appeal is municipal taxation of roaming charges. For purposes of this appeal, roaming charges are charges for mobile telephone communications that originate in a foreign jurisdiction. The issue is whether appellant city of Seattle may levy a utility tax based on revenue received by respondent T-Mobile West Corp. from Seattle customers who incur roaming charges. The city hearing examiner and the superior court correctly refused to allow the tax. Because the roaming charges are not for intrastate telephone services, they are beyond the scope of the taxing authority the legislature has granted to the city.

¶2 A city audit revealed that T-Mobile West did not pay taxes on income derived from roaming charges during two time periods between 2006 and 2014. The monthly service charge covered wireless communications throughout the United States. Roaming charges, as defined during the periods covered by the audit, were extra charges imposed by T-Mobile West on customers who used their cell phones while in a foreign country. For example, a T-Mobile West customer who called home while traveling in Canada would pay a roaming charge.

¶3 The city issued assessments requiring that T-Mobile pay $497,963 in back taxes based on roaming charge revenue. T-Mobile appealed the assessments to a city hearing examiner. The hearing examiner determined that the city code did not authorize taxation of roaming charges. The code authorizes the city to tax "all charges by the provider of cellular or cellular mobile telephone services provided to its customers in any taxing jurisdiction (intrastate or interstate), which are billed to a 'place of primary use' located in Seattle." SEATTLE MUNICIPAL CODE 5.48.050(A). The hearing examiner reversed the assessments on the basis that T-Mobile's international services are neither intrastate nor interstate.

¶4 The city obtained a writ of review in King County Superior Court as permitted by RCW 7.16.040. The court affirmed the hearing examiner's decision to reverse the assessments but for a different reason. The court's reasoning was based on a state statute, RCW 35.21.714, not on the city code. The city appeals and argues that both the hearing examiner and the superior court misconstrued applicable law.

¶5 In this writ proceeding, we review the hearing examiner's decision. Getty Images (Seattle), Inc. v. City of Seattle, 163 Wash.App. 590, 599, 260 P.3d 926 (2011), review denied, 173 Wash.2d 1014, 272 P.3d 246 (2012). Because neither party disputes the facts found by the hearing examiner, they are verities on appeal. Getty Images, 163 Wash.App. at 599, 260 P.3d 926. We are asked to review only the conclusion that the city lacked authority to tax roaming charge revenue. The question is whether this conclusion is contrary to law. RCW 7.16.120(3); Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wash.2d 22, 29, 891 P.2d 29 (1995). Because the legal conclusion involves statutory interpretation, our review is de novo. Qwest Corp. v. City of Bellevue, 161 Wash.2d 353, 358, 166 P.3d 667 (2007).

***2** ¶6 Municipalities must have express legislative authority to levy taxes. King County v. City of Algona, 101 Wash.2d 789, 791, 681 P.2d 1281 (1984); Vonage Am., Inc. v. City of Seattle, 152 Wash.App. 12, 20, 216 P.3d 1029 (2009). The city contends the legislature's grant of authority is found in RCW 35.22.280(32). That statute authorizes cities of the first class "to grant licenses for any

lawful purpose, and to fix by ordinance the amount to be paid therefor." It authorized a Seattle ordinance enacted in 1932 to tax business activities, including the telephone business. Pac. Tel. & Tel. Co. v. City of Seattle, 172 Wash. 649, 651, 21 P.2d 721 (1933), aff'd, 291 U.S. 300, 54 S.Ct. 383, 78 L.Ed. 810 (1934). In the absence of restriction, the statute is a comprehensive grant of power to impose license taxes either for the purpose of regulation or revenue. Pac. Tel. & Tel. Co., 172 Wash. at 653, 21 P.2d 721.

¶7 A more recent statute, RCW 35.21.714, imposes a restriction. It was first enacted in 1981 as a general grant of authority to tax "the business activity of engaging in the telephone business." LAWS OF 1981, ch. 144, § 10. Two years later, an amendment inserted the word "intrastate" as a limitation. LAWS OF 1983, 2d Ex. Sess., ch. 3, § 37. Since then, the first clause of the statute (before the proviso) has stated that when a city taxes the telephone business, it is limited to taxing revenue "derived from intrastate toll telephone services." The statute provides as follows:

> Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from *intrastate* toll telephone services subject to the fee or tax: PROVIDED, That the city shall not impose the fee or tax on that portion of network telephone service which represents charges to another telecommunications company, as defined in RCW 80.04.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services, or charges for network telephone service that is purchased for the purpose of resale, or charges for mobile telecommunications services provided to customers whose place of primary use is not within the city.

RCW 35.21.714(1) (emphasis added).

¶8 The parties agree that "toll" services are services that incur a fee. Intrastate means services, traffic, or facilities that originate and terminate within the same state. Qwest Corp., 161 Wash.2d at 357 n.6, 166 P.3d 667. The roaming charges at issue here provide revenue derived from toll telephone services, but the telephone services are not intrastate. They are international.

¶9 The city argues that because RCW 35.21.714 does not say that cities can tax *only* intrastate toll telephone services, it should not be interpreted to have that effect. To give the first clause of the statute that construction makes the proviso superfluous, the city argues, because none of the charges listed in the proviso are intrastate toll services. This is a strained argument. A statutory proviso does not have to state an exception to the clause that precedes it. The most natural reading is that the proviso explains how the first clause operates in particular circumstances. For example, the proviso clarifies that a city may not tax charges for services that are part of an interstate communication network even when the actual use of the network is for communications within the state of Washington. Qwest, 161 Wash.2d at 359-61, 166 P.3d 667. Another part of the proviso bars taxation of "charges for mobile telecommunications services provided to customers whose place of primary use is not within the city." RCW 35.21.714(1). In other words, if a Bellevue resident was in Seattle and used her T-Mobile West cellular service to call someone in Bellevue, this would constitute an intrastate communication, but Seattle could not tax it because the customer's place of primary use would not be within Seattle. Because the proviso illuminates the meaning of the first clause, it is not superfluous.

***3** ¶10 The city's attempt to tax a telephone service that is not an intrastate toll service is inconsistent with Vonage. There, the city sought to tax revenue derived from Vonage's provision of a service referred to as Voice over Internet Protocol (VoIP). Vonage, 152 Wash.App. at 15, 216 P.3d 1029. We explained that under RCW 35.21.714, "*cities have the option of taxing the intrastate component*" of telephone services, and we held that "Vonage is subject to the City's telephone utility tax but *the assessment must be based on the intrastate component of Vonage's service.*" Vonage, 152 Wash.App. at 24, 216 P.3d 1029 (emphasis added).

¶11 The city argues that the assessments should be upheld because its taxing method is authorized by a federal statute effective in 2002, the Mobile Telecommunications Sourcing Act. The federal statute creates a system whereby mobile telecommunications services may be taxed based on a customer's "place of primary use":

> All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under sections 116 through 126 of this title are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate, or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.

4 U.S.C. § 117(b). The city praises the regulatory regime created by the federal statute as a simpler, more efficient taxation system that does away with the complex task of determining the origin and destination of individual transmissions. The city's ordinance complies with the federal directive by taxing all of T-Mobile's services that are provided to customers whose place of primary use is within Seattle.

¶12 But it is not enough that the city's method of taxation by place of primary use is authorized by the federal statute. The federal statute does not "provide authority to a taxing jurisdiction to impose a tax, charge, or fee that the laws of such jurisdiction do not authorize such jurisdiction to impose," and it does not modify, impair, or supersede any law of any taxing jurisdiction pertaining to taxation except as expressly provided in the act. 4 U.S.C. § 118. Thus, while the federal statute authorizes the *method* of taxing by place of primary use, it does not authorize the *imposition of* a tax on roaming charges. A municipal corporation's authority to tax must be delegated by the state legislature. Vonage, 152 Wash.App. at 20, 216 P.3d 1029. Implementing legislation is necessary.

¶13 In response to the federal statute, our legislature amended RCW 35.21.714 in 2002 by adding the proviso stating that cities may not tax "charges for mobile telecommunications services provided to customers whose place of primary use is not within the city." LAWS OF 2002, ch. 67, § 9. But the legislature did not delete the term "intrastate," which we later construed in Vonage as limiting taxation to intrastate services. The fact that the legislature has prohibited the city from taxing mobile telecommunications services provided to customers whose place of primary use is *outside* the city does not mean that the legislature has expressly permitted the city to tax all mobile telecommunications services provided to customers whose place of primary use is *inside* the city.

***4** ¶14 Because the roaming charges at issue here involve communications originating in a foreign country, they are not intrastate. Following Vonage, we conclude the legislature has not delegated to the city the authority to tax revenue derived from the roaming charges. We do not address the hearing examiner's conclusion that the taxation is unauthorized by Seattle's own ordinance. We affirm the hearing examiner's conclusion that the city lacked authority to tax roaming charge revenue, but like the superior court, we base that conclusion on the absence of specific statutory authority.

¶15 The hearing examiner's decision reversing the assessments against T-Mobile West is affirmed.

WE CONCUR:

Mann, J.

Schindler, J.

All Citations

--- P.3d ----, 2017 WL 2229926

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CERTIFICATION OF SERVICE

The undersigned certifies that she caused to be filed with the court and served on this day, the foregoing City of Seattle's Petition for Discretionary Review to:

Michael E. Kipling, WSBA #7677 Timothy M. Moran, WSBA #24925 KIPLING LAW GROUP PLLC 4464 Fremont Ave N., Suite 300 Seattle, WA 98103 (206) 545-0345	To be served via email and legal messenger: kipling@kiplinglawgroup.com moran@kiplinglawgroup.com

DATED this 21st day of June, 2017.

Lisë M.H. Kim