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No. 84101-2

Court of Appeals No. 38247-4-II

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STATE OF WASHINGTON

WASHINGTON STATE SUPREME COURT

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WASHINGTON STATE DEPARTMENT OF REVENUE,

Petitioner,

v.

WASHINGTON IMAGING SERVICES, LLC,

Respondent.

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ANSWER TO CITY OF SEATTLE'S AMICUS BRIEF

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## I. INTRODUCTION

The City of Seattle's two arguments in support of the Department of Revenue's petition for review in this case share a common flaw.

Both arguments ignore factual and legal reality. The City of Seattle's avoidance of these realities simply highlights the absence of any basis under RAP 13.4(b) for the Department of Revenue's Petition for review.

1. The Court Of Appeals Decision At Issue Does Not Raise An Issue Of Substantial Public Interest.

Following in the speculative footsteps of the Department of Revenue, the City of Seattle asserts that the Court of Appeals decision in *Washington Imaging Services, LLC v. Washington State Department of Revenue*, 153 Wn. App. 281, 222 P.3d 801 (2009) ("WIS Decision") could interfere with the efforts of Washington cities to collect B&O taxes and could subject these cities to refund claims. What the City of Seattle ignores is that the legal bases for the Court of Appeals WIS Decision were established decades ago.

Although the City of Seattle apparently contends that the WIS Decision applied a novel interpretation to RCW 82.04.080, it completely fails to discuss this Court's decision in *Walthew, Warner, Keefe, Arron*,

*Costello & Thompson v. Dep't of Revenue*, 103 Wn.2d 183, 691 P.2d 559 (1984) on which the Court of Appeals relied in its WIS Decision. In *Walthew*, this Court expressly rejected the "cost of doing business" argument advanced both by the Department of Revenue and the City of Seattle, stating that the obvious intent of RCW 82.04.080 was to tax compensation received for the rendition of services.

Thirteen years after this Court's decision in *Walthew*, the Court of Appeals issued its decision in *Medical Consultants, Inc. v. State*, 89 Wn. App. 39, 947 P.2d 784 (1997). Relying in part on the *Walthew* decision, it concluded that because the taxpayer did not, and could not, render the services for which the compensation at issue was paid, and because the taxpayer had neither primary nor secondary liability to pay that compensation, the funds that the taxpayer obtained from its customers and then paid over to physicians with whom it contracted as compensation for independent medical examinations was not part of the taxpayers' gross income. In the WIS Decision, the Court of Appeals observed that the *Medical Consultants* decision was based on virtually identical facts and, therefore, informed the WIS Decision.

Now, thirteen years after the decision in *Medical Consultants*, the City of Seattle speculates that the WIS Decision could adversely affect municipal collection of B & O taxes and could give rise to refund suits. Surely if there were any substance whatsoever to the City of Seattle's arguments in this regard, it could provide facts and examples of such adverse impacts and refund claims at least since the *Medical Consultants* decision in 1997. The inability of the City of Seattle to supply any empirical factual information over the thirteen year period since the *Medical Consultants* decision that is supportive of the City of Seattle's dire predictions of the effect of the WIS Decision belies the argument that the WIS Decision involves an issue of substantial public interest.<sup>1</sup>

2. The Court Of Appeals WIS Decision Does Not Conflict With Decisions Of This Court.

The City of Seattle suggests that the WIS Decision conflicts with this Court's decision in *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 60 P.3d 79 (2002). It does not.

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<sup>1</sup> One fact the City of Seattle does make clear in its Amicus Curiae Memorandum is that it apparently already has responded to the *Walthev* and *Medical Consultants* decisions by adopting rules and regulations substantially different than WAC 458-20-111. *Amicus Curiae Memorandum* at 4 n. 3. Although the City of Seattle describes SMC 5.45.040C as similar to WAC 458-20-111, the provisions are significantly different.

This Court's decision in *City of Tacoma* illustrates that this Court has drawn a very clear line between cases in this area in which the taxpayer provides its customers the services of others. As illustrated by the *City of Tacoma*, if the taxpayer is primarily obligated to pay those others for the services they render to the taxpayer's customers, regardless of whether the customer ever pays the taxpayer for those services, then these payments are a cost of doing business and may not be excluded from the taxpayer's gross income. Although the dissent in *City of Tacoma* argued at length that the *Medical Consultants* decision should apply to this case, the majority clearly rejected that argument.

The *City of Tacoma* decision also illustrates the fallacy of the City of Seattle's speculative argument that the WIS Decision could adversely impact the ability of Washington cities to collect B & O taxes and could subject them to successful refund suits. The *City of Tacoma* decision was a taxpayer refund suit against a Washington municipality filed after the Court of Appeals decision in *Medical Consultants* and after the Department of Revenue determined that the taxpayer payments at issue

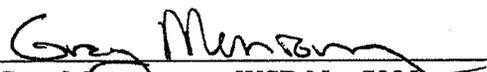
were properly excluded from the taxpayer's gross income under state law.  
The taxpayer did not prevail.

## II. CONCLUSION

The WIS Decision is consistent with this Court's decision in *Walthew* and with the Court of Appeals' decision in *Medical Consultants*. It is not in conflict with this Court's decision in *City of Tacoma*. Further, as the *City of Tacoma* decision illustrates, the WIS Decision will not adversely impact the B & O tax collection efforts of Washington cities or subject them to successful refund suits. There are no bases under RAP 13.4(b) for granting the Department of Revenue's Petition for Review.

Dated this 19<sup>th</sup> day of April, 2010.

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