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No. 93723-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PHILIP WATSON, an Individual, et al.,

Petitioners/Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

Appeal from the Superior Court of Washington
for King County
No. 15-2-20613-3 SEA

**APPELLANTS' RESPONSE TO BRIEF OF AMICUS
CURIAE WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS**

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The Washington State Association of Municipal Attorneys (“WSAMA”) entirely miss the thrust of Appellants’ arguments, which in no way challenge a city’s general authority to enact excise taxes and regulatory fees. Appellants request only that this Court enforce the restrictions RCW 35.21.710 places on the taxation of the retail sale of tangible personal property. Seattle has passed a new kind of “tax” that has no equal in any other municipality; not because no one ever thought about imposing an additional tax on retail sales before, but because it violates State law. There is simply no basis for WSAMA’s fear that a reversal of the trial court in this case will put an end to all municipal excise taxes and regulatory fees. A reversal will only enforce the bar against the excessive and double taxation of specific retail sales of tangible personal property.

WSAMA also fails to recognize that at least one of the municipal taxes it seeks to protect is rendered unworkable if Seattle’s argument prevails. Utility taxes on natural gas companies directly incorporate the highest rate imposed by a city on the sale of tangible personal property. A proper reading of RCW 35.21.710 makes this incorporation straightforward since the statute sets a maximum uniform rate imposed on the sale of tangible personal property. However, under Seattle’s reasoning, determining the rate applied to natural gas companies would be chaotic at best and likely impossible. An additional tax on the sale of firearms and ammunition directly increases the highest tax rate paid on the sale of tangible personal property as all retailers are already paying the maximum rate permitted by RCW 35.21.710. That new highest rate

would then serve as the maximum rate charged to natural gas companies, even though it would be constantly changing and unpredictable by virtue of being dependent on how many firearms and rounds of ammunition were sold in any given year. Ultimately, WSAMA’s argument that the Court should not impinge on other municipal taxes only underscores why Seattle’s arguments undermine and destabilize the legislature’s municipal taxing structure.

ARGUMENT

WSAMA recognizes that RCW 35.21.710 and RCW 35.102 *et seq.* restrict business and occupation (“B&O”) taxes, but argues that those restrictions have no bearing on “any other kind of excise tax” such as those on utilities, amusement devices, gambling, number of employees, or square footage.¹ *See* WSAMA Amicus at 2 & 5-6. Appellants agree; indeed, Appellants have already pointed out that the trial court’s conflation of excise taxes in general and B&O taxes in particular was one of the fundamental errors in granting summary judgment. *See* Appellants’ Opening Brief at 27 to 30.

And, unlike Seattle and the Attorney General, WSAMA concedes that a city’s B&O taxes are limited to gross receipts taxes and are subject

¹ The amicus does not address the *Covell* factors, so it is worth noting that some of the “taxes” it uses as examples are fees enacted under a city’s regulatory power and are thus not subject to restrictions on the City’s taxing authority. *See, e.g.,* SMC 5.32.170 (Seattle’s license fee for amusement devices). The propriety of regulatory fees is brought into question only where, as is the case here, the State has preempted those regulatory activities.

to RCW 35.21.710. *See* WSAMA Amicus at 5 (“As it relates to business and occupation taxes, the Legislature specifically limited cities’ and towns’ authority on more than one occasion,” such as through the enactment of RCW 35.21.710.) & 6 (“In fact, while there is mention of uniformity of business and occupation taxes in the legislative history of Chapter 35.102, there is no evidence that the legislature intended to address any other kind of excise tax.”). WSAMA’s true quarrel is not with Appellants’ arguments against the Ordinance, but with the trial court’s overbroad order.

WSAMA’s brief also misses the point that one of the very municipal taxes it seeks to protect depends on the single uniform maximum rate for the taxation of the retail sale of tangible personal property set by RCW 35.21.710. *See* WSAMA Amicus at 5 (discussing public utility taxes and their relationship to B&O taxes). WSAMA highlights the municipal utility tax, which is governed in part by RCW 35.21.870. Among other things, RCW 35.21.870 sets a maximum tax rate for conducting a natural gas business, mandating that such rate cannot be set “at a rate higher than [a city’s] business and occupation tax rate on the sale of tangible personal property” RCW 35.21.870(4). Thus, determining the maximum municipal tax rate on natural gas businesses is as simple as determining the highest rate imposed by the city’s B&O tax on the sale of tangible personal property.

Under the Appellants’ reading of RCW 35.21.710, there is no difficulty in applying RCW 35.21.870(4) because a single uniform rate is

mandated for all sales of tangible personal property. The maximum tax on the retail sale of tangible personal property under RCW 35.21.710 is .002 and that is the maximum tax rate that could be applied to natural gas businesses under RCW 35.21.870(4). Notably, RCW 35.21.870(4) recognizes that not all cities impose a B&O tax on the sale of tangible personal property, and thus includes a catchall maximum rate if none is available to be incorporated. The amount of that rate is .002, which is not coincidentally identical to the rate contained in RCW 35.21.710. *See* RCW 35.21.870(4).

In contrast, Seattle's interpretation of RCW 35.21.710 and the rate on the sale of tangible personal property renders RCW 35.21.870(4) an unworkable moving target. Seattle claims that it may impose additional B&O taxes on the sale of tangible personal property so long as it does not measure the tax by gross receipts. Accordingly, the highest rate applied by the City to sales of tangible personal property would vary year by year and quarter by quarter based on rates paid by each retailer subject to the firearms and ammunition tax. For example, a firearm retailer would pay \$2 under RCW 35.21.710 if it sold 10 firearms at \$100 (*i.e.* the .002 maximum rate on \$1000 in gross receipts). But the retailer is then required to also pay an additional \$250 in taxes on those same sales (*i.e.* \$25 per firearm). Altogether, the retailer has paid \$252 in taxes on those sales, setting a total rate of 25.2% on the sale of tangible personal property for that retailer. Of course, every retailer would have its own unique rate for the sale of tangible personal property depending on the number of

firearms and rounds of ammunitions sold. The existence of the firearm and ammunition tax already makes it impossible to determine the maximum rate that would be adopted into RCW 35.21.870(4) in Seattle, but the problem would only spread and multiply if the Court allows other municipalities to join Seattle in their new-found power to increase the highest rate paid on the sale of tangible personal property.

WSAMA's desire to preserve its ability to impose local utility taxes and other excise taxes like it is understandable, but its argument ignores the fact that it is Seattle who is undermining those taxes by seeking to limit RCW 35.21.710 only to taxes it chooses to expressly apply to "gross receipts." Just as in *Okeson v. City of Seattle*—which notably analyzed the rates set by RCW 35.21.870—any additional tax on the sale of tangible personal property is improper no matter how it is measured because it adds to a tax burden on the same activity that has already been taxed at the statutory maximum. 150 Wn.2d 540, 556, 78 P.3d 1279 (2003). Seattle has abused its power by attempting to impose a charge on sales that cities are not authorized to impose and that abuse should be rejected to allow other municipalities to continue their proper excise taxes.

CONCLUSION

Ultimately, the argument in the amicus brief is not so much incorrect as it is inapposite. WSAMA seeks to ensure that a restriction on B&O taxes does not impact a municipality's authority to impose taxes in areas beyond the retail sale of tangible personal property. WSAMA will

hear nothing to the contrary from Appellants. There is no danger that longstanding taxes and fees imposed by other municipalities will be overturned if this Court holds that Seattle exceeded its taxing authority in passing the Ordinance. In fact, rejecting Seattle's illogical stance on its taxing power will ensure that the municipal taxing power set out by the State is properly exercised.

RESPECTFULLY SUBMITTED this 2nd day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

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2. On this date, I caused a true and correct copy of the foregoing document to be served via Email on the following parties:

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I declare under penalty of perjury under the laws of the state of
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DATED: February 2, 2017, at Seattle, Washington.

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