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NO. 93723-1

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

PHILIP WATSON, an Individual, et. al.,

Petitioners/Appellants,

vs.

CITY OF SEATTLE, a Municipality, et. al.,

Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS

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I. INTRODUCTION

Amicus, the Washington State Association of Municipal Attorneys (“WSAMA”), submits this brief to address one issue before the Court: The broad taxing power the state Legislature has granted cities and towns authorizes them to impose a range of excise taxes and is not limited to only business and occupation (gross receipts) taxes. Where the Legislature intended to narrow that broad authority, it has clearly done so. WSAMA does not take a position on whether the trial court’s order should be affirmed in its entirety.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSAMA is a non-profit organization of municipal attorneys throughout the state who represent Washington’s 281 cities and towns. All municipalities are authorized to impose a variety of excise taxes similar to the tax at issue in this case. The ability to impose these taxes is critical to the municipalities’ ability to provide essential public services. If the trial court’s decision were reversed, it would call into question the tax structure in many Washington cities and would adversely affect their ability to provide vital public services.

III. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as set forth in the City of Seattle’s Brief of Respondents.

IV. ISSUES PRESENTED

Amicus adopts the Statement of the Issues as set forth in the City of Seattle's Brief of Respondents.

V. ARGUMENT

1. Cities and towns are dependent on excise taxes to fund essential public services. The Legislature has recognized this need and over the years has authorized cities and towns to enact a variety of excise taxes.

The Association of Washington Cities' 2014 Municipal Survey of Taxes and Fees showed that 41 cities and towns impose a business and occupation tax, 193 impose a utility tax, 53 impose an amusement device fee, and 117 impose some sort of gambling tax. Similar to Seattle's excise tax in this case, 36 municipalities in Washington impose an excise tax on factors other than a business's gross receipts, such as the number of employees or square footage of a business.¹ These taxes form a vital part of the revenue structure for cities and towns and if the trial court's decision were reversed, many of these excise taxes may be called into question. If the Legislature wants to place a limit on that structure, it is free to do so. But, it has not yet done so.

¹See <https://www.awcnet.org/DataResources/resourcesbytopic/TaxandUserFeeSurvey.aspx> (last visited Dec. 21, 2016).

2. Since the beginning of statehood, the Washington State Legislature has granted broad authority to cities and towns to impose taxes. In the 1889-1890 legislative session, the Legislature provided first class cities with the authority "...to grant licenses for *any* lawful purpose, and to fix by ordinance the amount to be paid therefor" LAWS OF 1889-1890, p. 218, § 5(33), *codified as amended at* RCW 35.22.280(32) (emphasis added). In the same session, the Legislature similarly granted second class cities the authority to "fix and collect a license tax upon *all* occupations and trades, and *all and every kind* of business authorized by law not heretofore specified...." *Id.* p. 148, § 38, *codified as amended at* RCW 35.23.440(8) (emphasis added); *see also id.* § 153(10), *codified as amended at* RCW 35.27.370(9) (granting similar authority to fourth class cities); LAWS OF 1967, Ex. Sess., ch. 119, § 35A.82.010, *codified as amended at* RCW 35A.82.010) (extending authority to "collect, receive and share in the distribution of state collected and distributed excise taxes" to optional municipal code cities "to the same extent and manner as ... any class of city or town").

Washington courts have long recognized that these broad grants of taxing power authorize cities and towns "to impose license taxes either for the purpose of regulation or revenue." *Pac. Tel. & Tel. Co. v. Seattle*, 172

Wash. 649, 653, 21 P.2d 721 (1933) (citing cases). In *Pacific Telephone*, this Court upheld a City of Seattle tax by commenting, "The tax is an excise. It is levied upon the right to do business..." *Id.* at 654. Neither the Legislature nor this Court has specifically, or impliedly, limited the excise taxing authority to only a gross receipts tax.

3. Courts have repeatedly held that a restraint on a municipal taxing authority will be found only if there is "specific, express statutory language." *Enterprise Leasing, Inc. v. City of Tacoma*, 93 Wn. App. 663, 669, 970 P.2d 339 (1999) (citing *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 502 P.2d 1024 (1972)). For example, in *Enterprise Leasing*, the Court of Appeals upheld Tacoma's classification of a business under the "service" classification even though state law classified the business as a "retail sale." 93 Wn. App. at 668-69. This was consistent with *Commonwealth Title*: "[I]f the legislature had intended to make its business and occupation tax definitions binding on the cities of this state it would have done so specifically, as it did in RCW 82.14.030, 82.14.050, and 82.14.070 when it authorized the imposition of city sales taxes." *Commonwealth Title*, 81 Wn.2d at 394.

The Legislature has provided specific, express statutory limitation in other areas of excise taxation. For example: RCW 82.14A.010 states that the rate of any tax on financial institutions imposed by cities and

towns cannot exceed the rate imposed on any other service-type business; RCW 35.21.860 *et.seq.* allows cities and towns to impose a public utility tax, but it is in lieu of a business and occupation tax; Chapter 9.46 RCW allows cities and towns to impose taxes on gambling activities, but places multiple restrictions on the incident, measure, and rate of the tax.²

As it relates to business and occupation taxes, the Legislature specifically limited cities' and towns' authority on more than one occasion. For example, in 1972, the Legislature first required cities imposing a tax on retail sales measured by gross receipts to use a single uniform tax rate. LAWS OF 1972, 1st Ex. Sess., ch. 134, § 6, *codified as amended at* RCW 35.21.710). In 2002, House Bill 1031 amended this section and required the tax rate a city imposes upon providers of competitive telephone and payphone services be the same as the tax rate imposed on those making retail sales of tangible personal property. LAWS OF 2002, ch. 179, § 1, *codified at* RCW 35.21.710. Nothing in RCW 35.21.710 limits the broad grant of excise taxing authority to cities and towns, except imposing restrictions on the tax rates for some gross receipts tax rates.

² "A tax statute has three basic elements: First, there must be an incident that triggers the tax. The 'taxable incident' is the 'activity that the legislature has designated as taxable.' *Id.* Second, there must be a base that represents the value of the taxable incident. This is known as the 'tax measure.' Third, there must be a 'tax rate,' which, when multiplied by the tax measure, determines 'the amount of tax due.'" *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 39, 156 P.3d 185 (2007) (citations omitted).

Neither does Chapter 35.102 RCW, "Municipal Business and Occupation Tax," restrict a municipality's excise taxing authority other than the business and occupation gross receipts tax authority. In 2003, as part of a state-wide business effort for uniformity among the cities that imposed business and occupation taxes, the state enacted Chapter 35.102 RCW, which does not restrict excise taxes other than business and occupation gross receipts taxes. There is nothing in the legislation itself or the legislative history that indicates the Legislature intended Chapter 35.102 to limit the cities' or towns' other broad excise tax authority, and Appellants have not identified anything to the contrary. In fact, while there is mention of uniformity of business and occupation taxes in the legislative history of Chapter 35.102 RCW, there is no evidence that the Legislature intended to address any other kind of excise tax. *See generally* House Bill Analysis on HB 2030 (Finance Committee 2/27/2003); House Bill Report on EHB 2030 3/11/2003; Senate Bill Report EHB 2030 (Senate Ways and Means Committee dated 3/26/2003); Final Bill Report on EHB 2030 and, Final Bill Digest. Therefore, nothing in RCW 35.102 limits a city's or town's authority to impose an excise tax that is based on something other than gross receipts.

VI. CONCLUSION

Appellants' attempt to limit the taxing authority of Washington's municipalities must be rejected, even if the Court ultimately reverses the trial court's decision. For all of the foregoing reasons, WSAMA asks this Court to uphold municipalities' authority to impose taxes by using a measure of tax other than gross receipts.

Respectfully submitted this 27th day of December, 2016.



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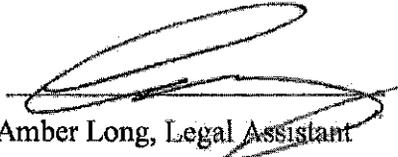
CERTIFICATE OF SERVICE

I certify that on this 27th day of December, 2016, I caused a copy of the Brief of Amicus Curiae Washington State Association of Municipal Attorneys to be mailed by first class mail, postage prepaid and sent by e-mail (unless otherwise noted) to the parties listed below:

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Dear Clerk,

Please find attached for filing in *Philip Watson v. City of Seattle*, No. 93723-1, the following documents on behalf of the Washington State Association of Municipal Attorneys:

1. Motion for Leave as to File Brief As Amicus Curiae by Washington State Association of Municipal Attorneys; and
2. Brief of Amicus Curiae Washington State Association of Municipal Attorneys.

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