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Court of Appeals
Division I
State of Washington

No. 75423-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Appellant,

vs.

T-MOBILE WEST CORP.,

Respondent,

Opening Brief of Appellant City of Seattle

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I. INTRODUCTION

The City of Seattle imposes a utility tax on all persons engaged in telephone business in the City. The state legislature has authorized cities to impose a telephone utility tax since at least 1932. In 2002, Congress enacted the federal Mobile Telecommunications Sourcing Act (MTSA) to simplify the taxation of mobile telecommunications by creating a mandatory national system. The MTSA sources all revenue from mobile telecommunications services to the taxing jurisdiction where the customer resides. That taxing jurisdiction alone has authority to tax those services. This sourcing rule applies regardless of where the calls originate, terminate, or pass through. The City assessed taxes against T-Mobile based on the MTSA. The City based the assessment on revenue from T-Mobile's Seattle customers who placed calls into the United States while travelling in a foreign country. The MTSA and state law authorize the City to tax T-Mobile for these services.

T-Mobile appealed the assessment to the City's hearing examiner who erroneously read SMC 5.48.050.A to exclude revenue from calls that originate in a foreign country. The City brought a writ of review to the King County Superior Court who upheld the hearing examiner's decision on different grounds. The superior court erroneously concluded that the state legislature did not authorize the City to tax the calls at issue. The City now

appeals to this Court and asks the Court to rule that under the MTSA and the City's tax code that the City can tax any mobile calls placed by a customer whose primary place of use is in Seattle.

II. ASSIGNMENTS OF ERROR

1. The hearing examiner and the superior court erred in failing to affirm the City's tax assessment against T-Mobile and for awarding T-Mobile a tax refund. (CP 15; CP 181.)

2. The hearing examiner erred in concluding that the City lacks authority under SMC 5.48.050.A to levy a telephone utility tax based on revenue received by T-Mobile from its Seattle-resident customers for international incollect communications. (CP 14 ¶ 10.)

3. The hearing examiner and the superior court erred by failing to conclude that under the Seattle Municipal Code, Washington statutes, and the federal Mobile Telecommunications Sourcing Act, the City is authorized to tax T-Mobile based on the revenue from international incollect roaming charges from T-Mobile's customers whose primary place of use is in Seattle. (CP 14 ¶ 10; CP 180-181 ¶¶ 2-6.)

4. The superior court erred by concluding that the mobile telecommunications at issue are "toll" telephone services. (CP 180 ¶ 2.)

5. The superior court erred by concluding that the state of Washington was required to amend its statutes to conform to the MTSA with respect to telephone utility taxes imposed by cities. (CP 180 ¶3.)

6. The superior court erred by concluding that the legislature's 2002 amendment to RCW 35.21.714 was not clear and did not allow cities to tax mobile telecommunications based on the customers' primary place of use. (CP 180 ¶¶ 3-4.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether the City is authorized under the Seattle Municipal Code, Washington law, and the federal Mobile Telecommunications Sourcing Act, to tax T-Mobile based on the revenue from international incollect roaming charges from T-Mobile's customers whose primary place of use is in Seattle? (Assignments of Error 1 through 6.)

IV. STATEMENT OF THE CASE

The City of Seattle imposes a telephone utility tax on all persons carrying on a telephone business in the City. SMC 5.48.050.A. (CP 292.) Respondent T-Mobile West Corporation ("T-Mobile") is engaged in telephone business in the City. (Stipulation of Facts at CP 262 ¶ 2.)

T-Mobile provides “mobile telecommunications services,” commonly called cellular telephone service, to customers who reside in Seattle. (CP 262 ¶2.)¹

The City audited T-Mobile and, on January 29, 2015, issued two tax assessments, one for the period January 1, 2006 through December 31, 2007 (“audit period one”), and one for January 1, 2010 through June 30, 2014 (“audit period two”). The assessments required that T-Mobile pay additional taxes and interest totaling \$345,349 for audit period one and \$152,614 for audit period two. The taxes at issue in this appeal for both audit periods total \$497,963. (CP 262 ¶3; CP 297-309.)

The issue in this case involves the City’s authority to levy a telephone utility tax based on revenue received by T-Mobile from its Seattle-resident customers 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” and for ease of reference the parties are using this term. (CP 263 ¶5.) As part of its monthly service charge to consumers, T-Mobile’s customers are able to send and receive wireless communications without any additional charge throughout the United States. (CP 263 ¶4.) In order to

¹ The material facts are not in dispute.

enable its customers to place calls when travelling 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.) Pursuant to the roaming agreements, T-Mobile pays a roaming fee to the foreign provider to permit T-Mobile’s customers to initiate or receive mobile telephone communications while in the foreign provider’s country of operations. In turn, T-Mobile charges its subscribers a fee for roaming in foreign countries. (CP 263 ¶4.)

As an example of an international incollect communication, a Seattle-resident customer of T-Mobile might travel to Canada and place a call that terminates in the United States. This would generate international incollect roaming revenue for T-Mobile. (CP 263 ¶5.) T-Mobile contends that Seattle does not have authority to tax this international incollect roaming revenue, and therefore it should not be included in T-Mobile’s gross receipts for calculating T-Mobile’s telephone utility tax under SMC ch. 5.48. During the audit periods T-Mobile did not pay tax on international incollect roaming charges incurred by its Seattle-resident customers. (CP 264 ¶5.)

The City disagrees with T-Mobile 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 the under SMC ch. 5.48 and under the federal Mobile Telecommunications Sourcing Act, 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 tax by the City. These charges would include international incollect roaming revenue. (CP 264 ¶6.)

As a result of the audit, the City issued assessments stating that international incollect roaming revenue should be sourced to Seattle under the MTSA and that such revenue is subject to the telephone utility tax. (CP 264 ¶ 6; CP 299.) The City therefore assessed the telephone utility tax on an additional \$5,755,822 in international incollect roaming revenue for audit period one and on an additional \$2,543,568 for audit period two. These assessed amounts were the basis for the City's claim of additional taxes and interest due totaling \$345,349 for audit period one and \$152,614 for audit period two. The financial data and the calculation of the assessed tax are not at issue. (CP 264 ¶ 6; CP 297-301.) The issue is whether T-Mobile must pay the City's telephone utility tax on international incollect roaming revenue

received from Seattle-resident customers for mobile telecommunications services that T-Mobile provided to those customers.

T-Mobile appealed the tax assessments to the City of Seattle Hearing Examiner under SMC 5.55.140. (CP 221.) The parties submitted briefs and exhibits and presented oral argument on August 3, 2015. The hearing examiner issued a ruling on August 18, 2015. (CP 221.) The hearing examiner ruled in favor of T-Mobile. (CP 229-230.) The decision can be divided into two parts. The hearing examiner first discusses the taxability of the charges under the MTSA and state statutes and implies that the City would prevail on this issue. (CP 221-228.) Then in the final paragraph of the decision, the hearing examiner rules that under the language of SMC 5.48.050.A that the City cannot tax calls that originate in a foreign country and terminate in the United States. (CP 229 ¶10.) The hearing examiner bases this ruling on the parenthetical phrase, “interstate or intrastate,” in SMC 5.48.050.A. (CP 229 ¶10.) As discussed below, the hearing examiner’s reading of the code is erroneous. The charges are subject to the tax. The parenthetical phrase “interstate or intrastate” emphasizes that both those types of calls are taxed, as opposed to landline calls for which the City does not tax interstate calls. The parenthetical phrase is not an exclusive list of

taxable calls and does not exclude roaming charges for “international incollect calls” for customers whose primary place of use is in Seattle.

Next, 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.) The parties submitted briefs and had oral argument on May 6, 2016. (CP 59-177; RP 1-37.) The superior court issued an oral ruling in T-Mobile’s favor. (RP 37-41.) Then on June 7, 2016 the superior court issued written findings and conclusions. (CP 179-181.) The superior court considered both the hearing examiner’s interpretation of SMC 5.48.050.A and also T-Mobile’s contention that the charges are not taxable under state statutes and the MTSA. (CP 179-181.) The superior court did not base its ruling on the hearing examiner’s interpretation of SMC 5.48.050. (CP 181 ¶ 6.) Instead, the court erroneously concluded that under state statutes “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 the superior court’s ruling and asks this Court to rule that T-Mobile’s international incollect roaming charges are subject to the City’s tax and affirm the City’s tax assessment. (CP 188.)

V. SUMMARY OF ARGUMENT

The City of Seattle imposes a utility tax on all persons engaged in telephone business in the City. The state legislature has authorized the City to impose the tax since at least 1932 and subsequently imposed limits on that authority. In 2002, the federal Mobile Telecommunications Sourcing Act (MTSA) simplified the taxation of mobile telecommunications by creating a mandatory national system. The MTSA sources all revenue from mobile telecommunications services to the taxing jurisdiction where the customer resides. That taxing jurisdiction alone has authority to tax those services.

This sourcing rule applies regardless of where the mobile telecommunications originate, terminate, or pass through. The City followed the MTSA and based its tax assessment of T-Mobile on revenue from T-Mobile's Seattle customers who placed calls into the United States while travelling in a foreign country. The MTSA and state law authorize the City to tax T-Mobile for these services. The Hearing Examiner erroneously read SMC 5.48.050.A to exclude revenue from calls that originate in a foreign country. Under the correct reading of SMC 5.48.050.A, the City can tax any calls placed by a customer whose primary place of use under the MTSA is in Seattle. The trial court erroneously ruled that although the calls at issue were

from customers with a primary place of use in Seattle, that the City was not authorized to tax those calls.

VI. ARGUMENT

A. Under The Standard Of Review On Appeal The Court Reviews Conclusions Of Law De Novo.

A taxpayer appeals a City tax assessment under SMC 5.55.140.B, which states that the assessment is prima facie correct, that the taxpayer bears the burden of proof, and that the taxpayer has the burden of establishing that the tax assessment is incorrect. SMC 5.55.140B; *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007); *Wedbush Securities, Inc. v. City of Seattle*, 189 Wn. App. 360, 363, 358 P.3d 422 (2015); *Getty Images (Seattle), Inc. v. City of Seattle*, 163 Wn. App. 590, 599-600, 260 P.3d 926 (2011).

In an appeal of a statutory writ, the court reviews the findings of fact for substantial evidence and whether the conclusions of law as applied are erroneous. *Getty Images*, 163 Wn. App. at 599. When, as here, the appellant does not assign error to the hearing examiner's findings of fact, they are verities on appeal. *General Motors Corp. v. City of Seattle, Fin. Dep't*, 107 Wn. App. 42, 47-48, 25 P.3d 1022 (2001).

The court of appeals in *Getty Images* summarized the standard for applying city tax codes:

The construction of a city tax ordinance is a question of law reviewed de novo. Municipal ordinances are construed according to the rules of statutory interpretation. *Ford*, 160 Wn.2d at 41, 156 P.3d 185. When interpreting statutory language, our goal is to carry out the intent of the legislative body. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 148, 3 P.3d 741 (2000). In determining legislative intent, the meaning of the language used is ascertained in the context of the statute. *Simpson*, 141 Wn.2d at 149, 3 P.3d 741. Where a statute is clear on its face, its plain meaning should be derived from the language of the statute alone. *Ford*, 160 Wn.2d at 41, 156 P.3d 185. A construction that would render a portion of a statute meaningless or superfluous should be avoided. *Ford*, 160 Wn.2d at 41, 156 P.3d 185. When construing a municipal ordinance, we give "considerable deference" to the construction of the ordinance by those officials charged with enforcement. *Ford*, 160 Wn.2d at 42, 156 P.3d 185 (quoting *Gen. Motors*, 107 Wn. App. at 57, 25 P.3d 1022).

Getty, 163 Wn. App. at 599-600. This Court determines whether the hearing examiner and the superior court erred in applying the law to the facts.

B. The City's Telephone Utility Tax Applies To T-Mobile's Gross Income From Seattle-Resident Customers For Roaming Charges Incurred Outside The State.

The City imposes its telephone utility tax on anyone engaged in the telephone business in the City. The tax rate is six percent of the gross income of the business. SMC 5.48.050.A states:

Upon everyone engaged in or carrying on a telecommunications service or telephone business, a fee or tax equal to six (6) percent of the total gross income from such business provided to customers within the City. The tax liability imposed under this section 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 SMC 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.

(Emphasis added). (CP 292.) Under this section, the gross income of cellular providers includes charges from customers whose “primary place of use” is in the City. Under another section of the City’s tax code, SMC 5.48.260.A, that gross income specifically includes roaming charges of Seattle–resident customers:

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.

(Emphasis added.) (CP 295.) Under the plain language of the City's telephone utility tax code, T-Mobile's gross income includes all income from its Seattle-resident customers, including revenue from all roaming charges incurred outside the state as long as the customer's primary place of use is in Seattle.

C. The City Enacted Its Telephone Utility Tax More Than Eighty Years Ago Under Authority Granted By The State Constitution And The Washington Legislature.

The authority of Seattle and other cities to tax businesses comes from the state constitution and from statutes that authorize cities to implement the constitutional taxing power. It is well-settled that "Article 7, section 9 and article 11, section 12 of the Washington State Constitution

permit the state Legislature to 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). But this constitutional taxing authority is not self-executing and the Washington Supreme Court has “consistently held that municipalities must have express authority, either constitutional or legislative, to levy taxes.” *City of Algona*, 101 Wn.2d at 791. So, in order for cities to impose a telephone utility tax, or nearly any other tax, the legislature must first grant cities the authority for that tax.

The City enacted its telephone utility tax more than eighty years ago based on taxing authority granted by the state of Washington. In 1932, the City enacted Ordinance No. 62662, which imposed a tax of four percent of gross income “upon every person engaged in or carrying on a telegraph and/or telephone business.” Ord. 62662, § 5(a) (excerpts at CP 311-313.) The current version of that ordinance is SMC 5.48.050.A, which imposes the tax on “everyone engaged in or carrying on a telecommunications service or telephone business” and which is the basis for the assessments at issue. (CP 292.)

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). In *Pacific Telephone*,

the City of Seattle adopted an ordinance stating that, under its statutory grant of power to “license for revenue,” the City imposed “upon every person engaged in carrying on a telegraph or telephone business, a fee or tax equal to four per cent (4%) of the total gross income.” *Id.* at 651. Plaintiff taxpayer objected to the tax and argued, as T-Mobile does here, that “there is no grant of power from the state to the city to levy such a tax.” *Id.* at 652.

The supreme court disagreed with the taxpayer and ruled that the legislature had granted first class cities the power to tax telephone business under the statute authorizing cities “to grant licenses for any lawful purpose.” *Pacific Telephone*, 172 Wash. at 652 (*citing* Rem. Comp. Stat. §8966). The court said, “This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue.” *Pacific Telephone*, 172 Wash. at 653. The current version of the same statute authorizes first class cities “to license for any lawful purpose.” RCW 35.22.280(32).²

² The statute cited by the court, Rem. Comp. Stat. § 8966 was enacted by the legislature in 1890 and the current version was enacted in 1965. *See* Laws of 1890 p 218 § 5; Laws of 1965 c 7, §35.22.280.

The Legislature has directed that the taxing power granted to cities under RCW 35.22.280(32) is to “be liberally construed.” RCW 35.22.900. Thus, the legislature expressly authorized the City to enact business license taxes, including a telephone utility tax, and directed the courts to liberally construe that power. *Id.*; *Pacific Telephone*, 172 Wash. at 652. *See also* Mun. Research Servs Ctr, *Revenue Guide for Washington Cities and Towns*, p. 24 n.95 (2010) (statutory authority for city utility taxes is the same as for general business and occupation taxes).³ This longstanding grant of taxing authority is the basis of the City’s telephone utility tax.

D. The Federal Mobile Telecommunications Sourcing Act Authorizes The City To Use Its Taxing Authority To Impose The Telephone Utility Tax On All Charges For Mobile Telecommunications Provided To Customers Whose Place Of Primary Use Is Seattle.

In 2000, the U.S. Congress passed the Mobile Telecommunications Sourcing Act that altered the authority of all state and local jurisdictions to tax mobile telecommunications services beginning in 2002. 4 USC §§ 116-126. (CP 359-368.) The MTSA arose as a response to the popularity

³ An additional source of taxing authority is RCW 35.22.570, which grants first class cities all powers given to other Washington cities. Consequently, first class cities also have taxing authority under RCW 35.23.440(8) (second class cities may impose license taxes upon all businesses) and RCW 35A.82.020 (code cities may impose excise taxes on businesses). *See also Revenue Guide for Washington Cities and Towns*, p. 20 n. 80, p. 24 n. 96 (2010) (available at mrsc.org).

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 a landmark case involving taxation of landline telephone service, the U.S. Supreme Court ruled in *Goldberg v. Sweet*, 488 U.S. 252, 263, 109 S. Ct. 582 (1989) 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*, 252 U.S. at 263. *See* 2 J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 18.07[1][a] (3d ed. 2002), (CP 406.) 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.” *Id.* at ¶ 18.07[3], (CP 409.) 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, which 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 statutes 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 federal 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. Consequently, the federal MTSA

created an incentive for states and cities that tax cellular services to adopt the framework created by the MTSA.

In the present case, the MTSA authorizes the City to tax T-Mobile's roaming charges for international incollect communications. First, the MTSA applies: "to any tax, charge, or fee levied by a taxing jurisdiction . . . measured by gross amounts charged to customers for mobile telecommunications services." 4 USC §116(a). The MTSA defines a "taxing jurisdiction" as "any of the several States, the District of Columbia, or any territory or possession of the United States, any municipality, city, . . . or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee." 4 USC §124(12). The City is a taxing jurisdiction under this definition because it is a city with the authority to impose a telephone utility tax. As discussed above, the state has authorized the City to impose, and the City does impose, a tax on telephone business in the City.

Second, as stated by the MTSA in 4 USC §116(a), the City's tax is "measured by gross amounts charged to customers for mobile telecommunications services." The City imposes the tax on everyone engaged in the telephone business and the tax is measured by gross income from that business, including income from mobile

telecommunications services. SMC 5.48.050.A; 5.48.260. The City's tax is the type of tax covered by the MTSA.

Third, for taxing jurisdictions that impose a tax on mobile telecommunications services, the MTSA specifies how those taxing jurisdictions must treat charges for those services. 4 USC § 117(a) states:

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.

Under this section, no matter what the state or local law says, all mobile telecommunications services are deemed to be provided by the customer's home service provider. Consequently, all the mobile telecommunications services that T-Mobile bills its Seattle-resident customers are deemed to be provided by T-Mobile.

The next section of the MTSA says that the taxing jurisdiction where the home service provider is located is "authorized" to tax those charges and no other taxing jurisdiction has that authority:

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 USC §117(b). Importantly, this section authorizes only one taxing jurisdiction to tax the services, regardless of where the services "originate, terminate, or pass through." This provision, along with 4 USC §117(a), eliminates the inherent difficulties of taxing cellular service that existed before the MTSA. Now, 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. And only one jurisdiction--the jurisdiction where the customer has its PPU--can tax the calls.

So in this case, under 4 USC §117(a), all the mobile telecommunications services for which T-Mobile charges its Seattle-resident customers are deemed provided by T-Mobile. And under 4 USC § 117(b), only the taxing jurisdiction where the customer PPUs are located, Seattle, is authorized to tax those mobile telecommunications charges. Under 4 USC § 117(b), Seattle is authorized to tax those charges "regardless of where the telecommunications charges originate, terminate or pass through." No other taxing jurisdiction but Seattle may impose taxes on those charges. 4 USC § 117(b).

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:

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, . . . 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.

4 USC §124(1) (emphasis added). Under the MTSA, the charges for mobile telecommunications services are, by definition, determined regardless of where the individual transmissions originate or terminate. The MTSA does away with the taxation of mobile telecommunications services based on the origin and destination of the calls, thereby eliminating the categorization of mobile telecommunications as interstate or intrastate.

Finally, the MTSA acknowledges that it changes the taxation of state and mobile telecommunication services for those jurisdictions that tax such services. 4 USC § 118 states:

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 USC § 118 (emphasis added). These sections say that sections 116 through 126 of the MTSA do modify, impair, and supersede the law of state and local jurisdictions that have chosen to tax mobile telecommunications—but only to the extent expressly provided.

This does not mean, as T-Mobile contends, that the MTSA has no effect on the taxation of cellular calls. On the contrary, the MTSA fundamentally changed the taxation of mobile telecommunications from the origin/destination/billing formula under *Goldberg v. Sweet* to a system that requires all taxing jurisdictions to source all charges, regardless of origin, destination, or routing, to the customer's home service provider. For tax purposes, cellular calls are no longer interstate or intrastate.

In this case, under the MTSA, all of the services that T-Mobile bills to its Seattle-resident customers are deemed provided by T-Mobile. The City of Seattle, as a city authorized by the state to tax telephone business, is a taxing jurisdiction authorized by the MTSA to tax those charges “regardless of where the mobile telecommunications services

originate, terminate, or pass through.” 4 USC § 117(b). The MTSA does not distinguish between roaming charges or other charges. In fact, the definition of mobile telecommunication services says that any charge billed to the customer by the home service provider is covered by the MTSA, regardless of the origination or termination of the individual transmission. 4 USC § 124(1).

Here is a summary of the MTSA’s statutory provisions as they apply to this case:

- The MTSA expressly controls how all state and local “taxing jurisdictions” source “mobile telecommunications services” and who can tax those services. 4 USC § 117.
- Seattle is a “taxing jurisdiction” authorized to tax telephone business under RCW 35.22.280(32). As the taxing jurisdiction whose territorial limits encompass the PPU of T-Mobile’s customers, Seattle is authorized under the MTSA to tax those charges, “regardless of where the mobile telecommunication services originate, terminate, or pass through.” 4 USC § 117(b), § 124(1). No other taxing jurisdiction can impose taxes on those charges. *Id.*
- T-Mobile provides “mobile telecommunications services” to “customers” whose “primary place of use” is in Seattle. (CP 262 ¶¶ 2-4; CP 264 ¶7.) T-Mobile, therefore, is the “home service provider” to those “customers” and, under the MTSA, is deemed to be the provider of services charged to those customers. 4 USC § 117(a). (CP 263 ¶4.)

T-Mobile wants to disregard the MTSA’s requirements for sourcing mobile telecommunications charges and instead require that the City look to the origination and destination of individual transmissions.

T-Mobile's position is contrary to the MTSA, which creates a national, uniform procedure to simplify the taxation of mobile telecommunications. Under the MTSA, cities and states no longer tax mobile communications based on the origin or termination or route of the services. For tax purposes, under the MTSA calls are no longer interstate or intrastate. Instead, only the taxing jurisdiction where the customer's PPU is located can tax charges to that customer.

But T-Mobile wants the City to base its tax on the origin and destination of calls and only permit the City to tax calls that would have been considered "intrastate" calls prior to the MTSA. T-Mobile would also prohibit any other city from taxing the services because if the City of Seattle cannot tax those services, then no other city can tax those services. T-Mobile's position is contrary to the intent and language of the MTSA.

E. RCW 35.21.714 Does Not Prevent A City From Taxing All Mobile Telecommunications Charged To Customers Whose Primary Place Of Use Is In The City.

Although cities have long had taxing authority under RCW 35.22.280(32), the legislature has imposed restrictions on that taxing authority in other statutes. For example, under RCW 35.21.870(1), the legislature has capped some utility tax rates, including telephone taxes, at six percent. And non-utility gross receipt taxes are subject to a model

ordinance under ch. 35.102 RCW. Similarly, the statute at issue in this case--RCW 35.21.714--imposes limits on the City's authority to tax interstate long distance landline calls and mobile telecommunications from customers residing outside the City. But RCW 35.21.714 only limits, and does not eliminate, the City's authority to tax telephone business under the specific legislative authority in RCW 35.22.280(32).

The superior court acknowledged that "RCW 35.22.280(32) is a general grant of authority to the City of Seattle to levy taxes" and that "RCW 35.21.714 is a limitation on that general authority to tax." (CP 180 ¶1.) The first portion of RCW 35.21.714 acknowledges that some cities already tax telephone business. 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:

As noted, the first sentence of RCW 35.21.714 appears to acknowledge that some cities already impose a tax on the activity of engaging in the telephone business. Nor are the two statutes so clearly inconsistent that they cannot be reconciled and both given effect. They are easily reconciled, with RCW 35.22.280(32) granting a broad authority to tax the telephone business, and RCW 35.21.714 imposing some restrictions on that authority.

(CP 12 ¶3; CP 13-14 ¶8.) The courts strongly disfavor repeal by implication and, as the hearing examiner concluded, the legislature did not repeal the longstanding taxing authority granted to cities. (CP 13-14); *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656, 659 (2002). The City is authorized to tax telephone business in accordance with RCW 35.21.714.

F. In 2002 The State Legislature Amended RCW 35.21.714 To Recognize That The MTSA Requires States and Cities That Tax Mobile Telecommunications To Base The Tax On The Customers' Primary Place Of Use.

In 2002, the state of Washington passed SB 6539 to implement the federal MTSA for state and local taxes. SB 6539 §1. (CP 315.) The section amending RCW 35.21.714 reads:

Sec. 9. RCW 35.21.714 and 1989 c 103 s 1 are each amended to read as follows:

(1) Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business(~~(, as defined in RCW 31-82.04.065,)~~) 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(~~(, as defined in RCW 82.04.065,)~~) 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 sections 11 through 15 of this act.

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

SB 6539 §9 (CP 323-324).

The legislature did not, as T-Mobile claims, restrict in SB 6539 the City's taxing authority to permit only taxation of intrastate mobile telecommunications services. The bill adopted the MTSA's definitions and sourcing provisions for the state taxes then applicable to mobile telecommunications: the state B&O tax (RCW ch. 82.04) and the state sales tax (RCW ch. 82.08). SB 6539 §§ 4-5. (CP 319-320.) Under SB 6539 the state would impose its B&O and sales tax on mobile telecommunications by following the MTSA and taxing only the charges billed to customers who have a PPU in Washington. SB 6539 §§ 4-5. (CP 319-320.)

In addition, the legislature in SB 6539 acknowledged the authority of cities to tax mobile telecommunications under the MTSA. The legislature amended 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. Implicit in this amendment is a city’s authority under state law and the MTSA to tax mobile telecommunications services provided to customers whose PPUs are inside the city.⁴ Any other interpretation is contrary to the MTSA.

In its interpretation of RCW 35.21.714, T-Mobile disregards the fact that the MTSA imposed on states and cities a change in the way that they could tax mobile telecommunication services. Indeed, the opening sentence of the sourcing rules created by the MTSA says “notwithstanding the law of any State or political subdivision” 4 USC § 117(a). The MTSA mandated that, despite any local laws to the contrary, all mobile telecommunications services “shall be deemed to be provided by the customer’s home service provider.” 4 USC § 117(a). By imposing this

⁴ Recognizing that the MTSA affected the City’s taxing authority without any new action by the state, the City implemented the MTSA prior to the state’s passage of SB 6539 by passing Ordinance 120668 in December 2001. (CP 343.) The state bill implementing the MTSA for state taxes did not go into effect until July 2002.

sourcing system, the MTSA eliminated the need for cities or states to look to origin, destination, or the route of the call. In effect, the MTSA removed mobile telecommunications from the realm of interstate/intrastate calls and origin/destination/routing taxation necessitated by *Goldberg v. Sweet*.

T-Mobile's position is contrary to the MTSA because it would force cities to continue using the complex system of looking to the origin and destination of individual calls. The state adopted the MTSA for its own taxes and also amended RCW 35.21.714 to say that, consistent with the MTSA, cities could not tax mobile telecommunication services for customers whose PPU is outside the City.

G. The *Qwest* And *Vonage* Cases Do Not Affect The City's Authority To Tax Mobile Telecommunications.

The superior court mistakenly concluded that the ruling in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 368, 166 P.3d 667 (2007) affects cities authority to tax mobile telecommunications. (CP 181 ¶5.) But as the hearing examiner recognized, the court in *Qwest* never considered the taxation of mobile telecommunications. (CP 13 ¶5.) In *Qwest*, Bellevue attempted to tax interstate landline services and the court ruled that Bellevue could not tax those services. The court reviewed the history of the amendments to RCW 35.21.714 and found that they arose

after the breakup of AT&T to prevent double taxation on long distance. *Id.* at 367-368. Consequently, the legislature prohibited cities under RCW 35.21.714 from taxing interstate services and various charges between carriers. The legislature also specifically authorized taxes on intrastate long distance. But the legislature did not say that cities could tax only intrastate long distance. The legislature did not preempt the longstanding authority of cities to tax telephone business under the authority to license for revenue granted by RCW 35.22.280(32). The legislature merely sought to prevent the double taxing of long distance calls that occurred after the breakup of AT&T and the formation of separate local and interstate carriers.

Then, in 2002, after the federal MTSA passed, the legislature added the last phrase to RCW 35.21.714(1), stating that cities must exempt “charges for mobile telecommunications services provided to customers whose primary place of use is not within the city.” This amendment, read in context with the longstanding statutory authority for cities to tax telephone business and with the MTSA’s requirement that mobile telecommunications be taxed based on the customer’s primary place of use regardless of origin or destination, is entirely consistent with the legislature’s intent that cities must tax mobile telecommunications in

accordance with the MTSA. The final amendment to RCW 35.21.714 recognized that the MTSA removed mobile telecommunications from local taxation based on origin/destination/routing and, instead, required that cities tax mobile telecommunications based on the customer's PPU.

The superior court also erroneously bases its conclusions on *Vonage America, Inc. v. City of Seattle*, 152 Wn. App. 12, 216 P.3d 1029 (2009). (CP 181.) That case agrees with *Qwest* that under RCW 35.21.714 cities cannot tax interstate telephone services. But that case involved VoIP services and did not deal with taxation of mobile telecommunications that are governed by the MTSA. The holding in *Vonage* does not apply here.

H. The Overall Statutory Scheme Shows That In Amending RCW 35.21.714 The Legislature Intended For Cities To Tax Mobile Communications Under The MTSA.

In order to determine the meaning of the amendment to RCW 35.21.714 under SB 6539, it is important to look at the overall statutory scheme. *Assoc. of Washington Spirits and Wine Distributors v. Washington State Liquor Control Bd*, 182 Wn.2d 342, 351-352, 340 P.3d 849 (2015) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)) (when interpreting a statute, court looks to its placement within the entire statutory scheme). When examining tax statutes, a court will find that a tax applies unless the legislature has

expressed a clear intent to provide an exemption. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 296-97, 242 P.3d 810 (2010); *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 455, 210 P.3d 297 (2009) (court construes tax exemptions narrowly).

Here, the overall statutory scheme includes the longstanding authority of Washington cities to tax telephone business. The legislature has placed restrictions on that authority. In the 1980s the legislature amended RCW 35.21.714 to restrict cities' authority by excluding certain interstate and intrastate revenues. The legislature specifically authorized taxes on a special type of service, "intrastate toll telephone services." In other words, the statute specifically authorizes taxes on intrastate long distance service.⁵

But 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.

⁵ 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. Newton's Telecom Dictionary, p. 937 (24th ed. 2008). (CP 79, 283.)

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.

I. The Legislative History of SB 6539 Establishes That The State Intended That Mobile Telecommunications Services Be Based On Customer PPU In Accordance With The MTSA.

T-Mobile relies on legislative history to argue its case. But courts look at legislative history only if a statute is ambiguous. *G-P Gypsum Corp. v. State, Dept. of Revenue*, 169 Wn.2d 304, 315, 237 P.3d 256 (2010). And if a court finds ambiguity or doubt in a provision providing for a tax exemption or deduction, the court must strictly though fairly construe the provision against the taxpayer. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 149–50, 3 P.3d 741 (2000). But in this case, neither the MTSA nor state law is ambiguous. The state has granted the City the authority to tax telephone business and both the federal MTSA and RCW 35.21.714 require that the taxation of mobile telecommunications services be based on the customers' PPU.

But even if the Court considers legislative history, T-Mobile's position is inconsistent with the history of SB 6539 and the MTSA. 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. Nowhere does it say that cities will need to continue to look to origin, destination, and routing of calls. Nowhere does it say that, despite the MTSA's intent to simply taxation of mobile telecommunications, the state is going to continue to require cities to determine the origin/destination/routing of mobile telecommunications.

On the contrary, the Senate's final bill report recognizes the complexity of taxing mobile telecommunications pre-MTSA and the MTSA's resolution of that problem:

State and local governments tax mobile telecommunication services in a variety of ways. Due to the mobility of wireless equipment, determining which state and local taxes apply to a wireless call is complicated. The process of determining where a transaction is taxable is commonly referred to as "sourcing." There are several methods for sourcing wireless calls, including using the location of the originating cell site, the billing address, or the switch that processes the call. However, the different sourcing methods can give rise to multiple claims on the same tax revenue.

In order to create a more uniform system for taxing wireless telecommunications, Congress enacted the federal Mobile Telecommunications Sourcing Act. The new federal law requires that all charges for mobile telecommunication services must be sourced to the customer's "primary place of use." The federal law defines

“primary place of use” as either the residential or primary business street address of the customer within the licensed service area of the provider.

SB 6539, Final Senate Bill Report, p. 1 (CP 333.) The Washington legislature recognized the complexity of taxing cellular calls and confirms that the new federal law requires that all charges be sourced to the customer’s PPU. Similarly, the fiscal note says that the state is adopting the MTSA’s uniform sourcing requirements. SB 6539 Fiscal Note, p. 2, (CP 338).⁶ The fiscal note acknowledges that the MTSA requires all taxing jurisdictions to abide by its terms and preempts any jurisdiction other than the taxing jurisdiction where the customer has its PPU from taxing that customer’s service.

Nowhere in the fiscal note nor in the bill report is there any mention that cities are restricted to taxing only intrastate cellular calls. There is no mention that the bill will permit cities to tax only cellular customers with PPUs in the city and that cities will have to continue to divide up the calls from that group based on origin, destination, and routing to sort out the interstate from the intrastate calls. That would have

⁶ The fiscal note also says that “The changes in this bill will be imposed on the state by federal law, regardless of the passage of this bill.” SB 6539 Fiscal Note, p. 2 (CP 338.)

been a significant departure from the MTSA's sourcing scheme that was designed to eliminate the need to determine origin/destination/routing. The bill reports and fiscal note would certainly have mentioned that cities would not benefit from the MTSA's simplification measures and would still need to undertake the complex tax of determining the origin/destination/routing of cellular calls. The reason that it is not mentioned is that the MTSA eliminated the need to determine the origin/destination of calls. The MTSA preempts cities or states that attempt to tax based on those factors.

T-Mobile also incorrectly argues that the City's tax is contrary to the MTSA because the MTSA was intended to be "revenue neutral." SB 6539 does say that the MTSA's sourcing rules will be "revenue-neutral among the states" and "likely in fact to be revenue-neutral at the state level." SB 6539 § 1, (CP 316.) This simply means that on an overall basis, the amount of taxes paid by the industry will be unchanged because states and cities will lose the ability to tax some calls and gain the ability to tax others. It means that some states and some cities will gain overall and some will lose overall.

Moreover, the fiscal note recognizes that the actual effect on cities is unknown:

While the provisions of the bill are intended to be revenue neutral, it is unknown how distribution of taxes to local jurisdictions will be affected by taxing wireless calls based on a callers address, rather than on the location of where the call is made.

SB 6539 Local Govt. Fiscal Note, p. 1 (CP 340.) The fiscal note informed the legislature that the effect on local governments could not be estimated with certainty because the revenue distributions would change in unknown ways.

Although Seattle gained the ability to tax some calls under the MTSA, Seattle (and other cities) lost the ability to tax some calls as well. This is demonstrated by the City's pre-MTSA telephone utility tax code provisions. Prior to amending SMC 5.48.050.A and 5.48.260 to tax mobile telecommunications in accordance with the MTSA, Seattle adopted sourcing methods in 1994 in Ordinance 117401 to tax mobile telecommunications service in compliance with *Goldberg v. Sweet*. (Ordinance 117401 (CP 353); Ordinance 120688 sec. 20, 27 (CP 346.)) Under the prior version of SMC 5.48.260.C, the City taxed cellular phone service for customers who lived outside of Seattle for calls that used switching facilities located in the City. In other words, the City taxed services provided to customers who did not reside in Seattle only if their calls were routed through the City. Now, under the post-MTSA SMC

5.48.050, the City cannot and does not tax calls from customers whose PPU's are outside the City. So under the MTSA the City lost as well as gained tax revenue.

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

Even if the City was required, as T-Mobile contends, to look at the origin and destination of cellular calls, then T-Mobile's international incollect calls would still be taxable. RCW 35.21.714 does not prohibit the taxation of international calls. A call from a foreign country to or from the United States is not an interstate or intrastate call. The state of Washington dealt with the distinction between interstate and international telephone service in Tax Determination No. 02-0030E, 24 WTD 108 (2005). In that case, a company that provided international telecommunications services protested the assessment of the state's retail sales tax. The Department of Revenue ruled that the definition of "network telephone services" under RCW 82.04.065(2) included international calls. The Department said that, "[The statute] does not limit the toll services or transmissions over toll lines subject to tax only to interstate and intrastate services as opposed to international services." 24 WTD at 111.

In this case, the City was, prior to the enactment of the MTSA, barred under RCW 35.21.714 from taxing interstate services and the

City's tax code reflected that fact. But the state statute did not apply to international calls, which are not the same as interstate or intrastate calls. So even under T-Mobile's argument that the City still must look to origin and destination to determine what revenue is taxable, the revenue from international calls would not be exempt.

K. The City's Tax Code Does Not Exclude Revenue From International Incollect Calls.

The hearing examiner implied, but did not conclusively rule, that the City is authorized under state law and the MTSA to tax international incollect calls. (CP 221-229.) But instead of deciding that issue, the hearing examiner ruled that the parenthetical phrase, "intrastate or interstate," in SMC 5.48.050.A exempted international incollect calls. (CP 229.) This ruling is erroneous and the court should not follow it.⁷ The organization of the City's tax code shows that the City did not intend to exempt international cellular calls. The parenthetical phrase cited by the hearing examiner merely emphasizes that, unlike landline calls whose taxation is based on their status as interstate or intrastate, cellular calls are

⁷ The trial court did not reach this issue because it based its ruling on RCW 35.21.714 and the MTSA. (CP 181 ¶6.)

based on the customer's PPU regardless of their interstate or intrastate nature.

Under the first sentence of SMC 5.48.050.A, the City imposes a tax on everyone engaged in a telephone business "equal to six (6) percent of the total gross income from such business provided to customers in the City." Then the next sentence subtracts from this broad grant of authority by specifically stating that the tax liability "shall not apply" to income from various types of services, including interstate services. This is because the state legislature restricted cities' taxing authority by excluding revenue from interstate landline calls under RCW 35.21.714. But the MTSA simplified the taxation of cellular calls by allowing cities to look only to the customer's primary place of use. The MTSA did away with the need to look at origin, destination, or routing. The state added a sentence to RCW 35.21.714 to acknowledge the MTSA's sourcing of income based on customers' PPU and the City did the same thing by adding the third sentence to SMC 5.48.050.A:

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.

The parenthetical phrase emphasizes the fact that, unlike the traditional interstate exemption for landline calls discussed in the preceding sentence, both intrastate and interstate calls are subject to the tax because cellular calls are now sourced to the primary place of use under the MTSA. The parenthetical phrase does not exclude any other type of call.

This interpretation is confirmed by SMC 5.48.260, which says:

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.

This section says that all gross income from customers' who have PPUs in Seattle is subject to the tax. In fact, it specifically says that gross income includes "roaming charges incurred by Seattle customers outside this state." That is exactly the type of revenue at issue in this case. A Seattle customer who is in a foreign country is still a customer "outside this state" and that customer's call into the United States is taxable. The hearing examiner misinterpreted this section to limit it to interstate calls, but the code says no such thing. The code says in SMC 5.48.050.A that "all gross

income” from Seattle PPU is taxable and emphasizes, in a parenthetical, that the income includes roaming charges incurred by Seattle customers outside the state. Then the code confirms that in SMC 5.48.260. The code does not exclude international incollect calls.

The City did not casually exempt international cellular calls with a parenthetical phrase. When the City wants to exempt something from taxation, it does so expressly and there are many such examples in the code. *See* SMC 5.48.070 (utility tax exceptions and deductions), 5.56.040 (leasehold excise tax exemptions); 5.40.028 (admission tax exemption); 5.35.050 (parking tax exemptions); 5.45.090 business license tax exemptions). With respect to tax exemptions, the Washington Supreme Court has held that, “taxation is the rule and exemption is the exception, and where there is an exception, the intention to make one should be expressed in unambiguous terms.” *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn. 2d 273, 296-97, 242 P.3d 810, 822 (2010) (*citing Columbia Irrigation. Dist. v. Benton County*, 149 Wn. 234, 240, 270 P. 813 (1928); *Homestreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 455, 210 P.3d 297 (2009); *Budget Rent-A-Car v. Dep't of Revenue*, 81 Wn.2d 171, 174, 500 P.2d 764 (1972)). Only clear language that “ ‘plainly and unmistakably’ ” intends a tax exemption is sufficient to create an

exemption. *Grays Harbor Energy, LLC v. Grays Harbor County*, 175 Wn. App. 578, 586, 307 P.3d 754 (2013).

The hearing examiner is creating a tax exemption based on a parenthetical phrase that would undo the efficiencies of the MTSA and the intent of the City to tax all gross receipts from telephone business in the City. Under the hearing examiner's ruling, cities and taxpayers will need to examine the origin and destination of all cellular calls to determine whether the call originated in a foreign country and then exclude the revenue from that call. The holding will reintroduce all the uncertainties and burdens that the MTSA was intended to remove. The City adopted the MTSA sourcing rule and did not voluntarily forgo its authority to tax international incollect calls thereby reducing tax revenue and preserving the burden of sifting international incollect calls from other calls that are sourced to PPU.

Courts have held that parentheticals in statutes operate as descriptive summaries and do not limit the reach of the statute. In *United States v. Hope*, 608 F.Appx. 831, 836 (11th Cir. 2015), the defendant appealed a conviction of health care fraud and aggravated identity theft. The aggravated identity theft offense occurred if a person committed identity theft while engaged in "any provision contained in chapter 63

(relating to mail, bank, and wire fraud)” *Id.* at 835. Defendant argued that although health care fraud was contained in chapter 63, she could not be convicted because the parenthetical phrase limited the offense to circumstances involving only “mail, bank, and wire fraud.” *Id.* The court disagreed and found that the parenthetical “serves only an explanatory or descriptive purpose and does not limit the scope of predicate felonies under chapter 63.” *Id.* at 836. The court found that defendant’s interpretation would undermine the purpose of the statute and that if congress had intended to exclude health care fraud from the statute, it would have done so expressly. *Id.* See also *U.S. v. Harrell*, 637 F.3d 1008, 1012 (9th Cir. 2011) (parenthetical is a descriptive term, not a limiting principle); *United States v. Monjaras-Castaneda*, 190 F.3d 326, 330 (5th Cir. 1999) (“A parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of the statute.”).

In this case, the City enacted SMC 5.48.260, which is devoted solely to the allocation of cellular telephone revenues. And that section specifically says that gross income includes “roaming charges incurred by Seattle customers outside this state.” The hearing examiner is using the parenthetical phrase from SMC 5.48.050 to nullify the City’s intent to tax all revenue from customers with Seattle PPU’s. The parenthetical phrase

merely emphasizes the fact that unlike landlines, cellular calls are sourced and taxed using PPU, not by whether they are interstate or intrastate. The hearing examiner's ruling is contrary to the language and intent of the City's tax code and the intent of the MTSA.

VII. CONCLUSION

The state legislature has authorized cities to impose a utility tax on telephone businesses. The MTSA created a mandatory national system under which all revenue from mobile telecommunications services is sourced to the taxing jurisdiction where the customer resides. The City of Seattle is authorized to tax all cellular calls, including the international incollect calls that T-Mobile sells to its Seattle customers. SMC 5.48.260 specifically says that all gross income from cellular telephone service, including revenue from out-of-state roaming, is taxed. The City complied with local, state, and federal law when it assessed T-Mobile's taxes. This court should affirm that assessment.

The state legislature has authorized the City to impose a utility tax on telephone business. In 2002, the federal Mobile Telecommunications Sourcing Act simplified the taxation of mobile telecommunications by creating a mandatory national system under which all revenue from mobile telecommunications services is sourced to the taxing jurisdiction where the customer resides. As the taxing jurisdiction for T-Mobile West's Seattle-

resident customers, the City is authorized to tax the international incollect roaming services that T-Mobile West provides to those customers. Under RCW 35.21.714, a City cannot tax mobile telecommunications services provided to customers whose PPU is outside the City. But in this case, Seattle is taxing services provided to customers whose PPU is in the City. T-Mobile West's position is inconsistent with the language and the intent of the MTSA and the state statute and would require that cities and taxpayers continue to tax mobile telecommunications based on the origin, destination, and routing of the communications. The MTSA did away with that system. In addition, SMC 5.48.050.A and 5.48.260 specifically say that all gross income from cellular telephone service, including revenue from out-of-state roaming, is taxed. The City complied with federal, state, and local law when it assessed T-Mobile West's taxes. This court should affirm that assessment.

DATED this 28 day of September, 2016.

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By:



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Appendix to City's Opening Brief

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 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.

CERTIFICATION OF SERVICE

The undersigned certifies that she caused to be filed with the court and served on this day, the foregoing Opening Brief of Appellant City of Seattle to:

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DATED this 28th day of September, 2016.



Lisé M.H. Kim