No. 50791-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EVERI PAYMENTS INC.,
successor in interest to, and formerly known as,
GLOBAL CASH ACCESS, INC.

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE JAMES J. DIXON

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Everi Payments Inc. ("Everi") supplies gaming-related services to tribal casinos in the State of Washington. Specifically, Everi provides cash access services—cash withdrawals from ATMs and kiosks, credit card cash advances, debit card transactions and check cashing—that are critical to the operations of tribal casinos in Washington. Everi contracts with tribes to provide these services at on-reservation casinos, and Everi is licensed and regulated by tribal gaming commissions as a gaming service provider. The tribes determine the surcharges and fees that casino patrons must pay for cash access transactions. In turn, the tribes and Everi share the revenue generated from these cash access transactions. Most of that revenue is paid to the tribes, while Everi retains the remainder as payment for the services it provides.

The Washington Department of Revenue ("DOR") takes the position—unprecedented according to DOR's own tribal liaison[1]—that it may tax revenues generated from these cash access transactions at tribal casinos. DOR has assessed business and occupation tax ("B&O Tax") on Everi for all cash access service revenues (even for the substantial majority of revenues that Everi simply collects for and pays to tribes). Everi disputes DOR's authority to impose tax on these gaming-related, on-reservation services, and it seeks the refund of approximately $1.4 million in taxes it has paid to DOR from 2012 to 2015.

[1] DOR's tribal liaison was unable to cite any other instance, when a non-tribal company was subject to tax for services provided at a tribal casino. CP 319-20 (60:4-61:4).

The fundamental issue on appeal is whether DOR has authority to tax the gaming-related, on-reservation services that Everi provides to tribal casinos. On cross-motions for summary judgment, the trial court held DOR has this authority. The trial court erred. Under federal law, DOR's tax is preempted for each of three independent reasons:

- Tax on Gaming Services. The Indian Gaming Regulatory Act ("IGRA") comprehensively regulates tribal gaming activities, "beyond just pure gameplay at a casino."[2] A state may impose a "tax, fee, charge, or other assessment" on gaming activities only pursuant to a Tribal-State gaming compact and, even then, only to the extent needed to defray the costs incurred by the state in regulating such activities. 25 U.S.C. § 2710(d), subds. (3) and (4).[3] While Washington's compacts require vendors of "gaming services" such as Everi to be licensed by tribes—and Everi is tribally licensed as a gaming service provider—the compacts do not grant the State any authority to tax these services, and the taxes are thus impermissible under IGRA. 25 U.S.C. § 2710(d)(4) (except as agreed to in a gaming compact, a state lacks authority

[2] *Flandreau Santee Sioux Tribe v. Gerlach*, 155 F.Supp.3d 972, 992 (D. S.D. 2015).

[3] *See Flandreau Santee Sioux Tribe v. Gerlach*, 2017 WL 4124242, *10 (D. S.D. Sept. 15, 2017) (holding that food and beverage services at the casino are "directly related to class III gaming," that "regulation and taxation is, therefore, compactable between a tribe and a state" under 25 U.S.C. § 2710(d)(3)(C)(vii), and—because the state did not compact for taxation of these services—the state's tax on the sale of "such amenities" to non-Indians at the casino "is preempted by IGRA").

to tax a tribe or anyone authorized by a tribe to engage in a class III activity).

- Tax on Services Provided to Tribes On-Reservation. Under the Indian Trader statutes (25 U.S.C. §§ 261-264) and U.S. Supreme Court case law, as well as under Washington Administrative Code 458-20-192(7) ("Rule 192"), the state has no authority to tax income from the performance of services for a tribe on Indian land. Here, the tribes contract for Everi to provide the kiosks, charge and collect surcharges from casino patrons, and complete the processing of cash access transactions. The tribes determine the amount of surcharges on cash access transactions, and the tribes are paid the majority of transaction revenues, while Everi retains a portion as payment for the services it provides.
- Balancing of Federal, Tribal and State Interests. The federal government and tribes have strong interests in the gaming-related services that Everi provides, while the state interest is minimal. Tribes benefit economically in two ways: making cash available to the casino floor is critical to the success of gaming, and tribes also benefit directly from sharing in transaction revenues. In addition, tribes have a strong regulatory interest: tribes are the primary regulators of Indian gaming; the services provided by Everi are gaming-related; and the tribes license and regulate those services. The federal interests are similarly strong. As Congress recognized in adopting IGRA, "a principal goal of Federal Indian

> policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). IGRA's purpose is to provide for tribal and federal regulation of gaming on Indian lands, promoting tribal economic development and self-sufficiency. 25 U.S.C. § 2702. In contrast, the state of Washington regulates tribal gaming only to the extent provided for in the gaming compacts, and all state regulatory costs are reimbursed by the tribes pursuant to those compacts.[4] Because the federal and tribal interests outweigh state interests in the gaming services that Everi provides, tax is preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*Bracker*").

Furthermore, under the State's own rule regarding taxation of non-tribal members in Indian country, the tax on revenue from Everi's services is preempted because it taxes gaming services (Rule 192(7)(a)), it taxes the provision of services to tribes in Indian country (Rule 192(7)(b)), and it taxes "value generated on the reservation" (Rule 192(7)(c)) for which federal and tribal interests outweigh the state's interest.

Because the B&O Tax is preempted under federal law (for each of the three reasons noted above) and contrary to Rule 192, the Court should reverse the grant of summary judgment to DOR and, instead, order that summary judgment be entered for Everi.

[4] Tribal-State Compact for Class III Gaming, Section XIII (CP 525).

Alternatively, if this Court agrees with DOR that the B&O Tax is not preempted, the Court should still reverse summary judgment because there are disputed factual issues as to the income that was actually retained by Everi and may be subject to tax: in particular, DOR has improperly assessed tax on all revenue from casino cash-access transactions processed by Everi, although the substantial majority of that revenue is paid to the tribes, not retained by Everi.

II. ASSIGNMENT OF ERROR

1. The trial court erred in entering its Order Granting Department of Revenue's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. CP 937-40 (attached as Appendix A).

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Is DOR's tax on gaming services—which Everi performs as a tribally-licensed gaming service provider, at on-reservation casinos—preempted by IGRA?

2. Is DOR's tax on services—which Everi provides to tribes on their reservations, and for which Everi is paid pursuant to contracts between each tribe and Everi—preempted by the Indian Trader statutes and Supreme Court case law?

3. Is DOR's tax on gaming services provided to tribal casinos preempted under the *Bracker* balancing test?

4. Is the tax at issue here improper under DOR's own Rule 192(7) (attached as Appendix B) that specifically addresses "Nonmembers in Indian country—preemption of state tax"?

5. Are all revenues from casino cash-access transactions "gross revenues" to Everi that are subject to B&O Tax, even though Everi is contractually required to pay—and has paid—most such revenues to the tribes?

IV. STATEMENT OF THE CASE

As described below, the material facts are not in dispute. The State's Gaming Compact broadly defines "gaming services" to include services used directly or indirectly in connection with operation of gaming. Cash access is critical to the gaming industry, and tribes contract for Everi to provide cash access services at their casinos. Tribes determine the fees that Everi must charge to and collect from patrons on cash access transactions, and the tribes and Everi share in the resulting revenues. The tribes license and regulate Everi as a gaming service supplier under the Gaming Compact, granting Everi the "privilege" of doing business on-reservation. DOR is taxing revenue from activities—cash access transactions at tribal casinos—which the State does not license or regulate, and which embody significant on-reservation value created by the tribes.

A. Cash Access Services Are Critical To The Gaming Industry, And Casinos Depend On These Services.

Everi provides products and services exclusively for the gaming industry and, in particular, casino gaming. CP 946. Through kiosks, ATMs and other machines customized for casinos, Everi provides multiple cash access services: ATM withdrawal, credit card cash advances, debit card point-of-sale cash advances, and check cashing (collectively, "cash access

services"). CP 432-33, 663, 946-47. These services enable secure transactions, streamline credit and debit card processing, and help protect against money-laundering threats. CP 345, 946-47. Casinos depend on cash access services to make cash available for gaming. CP 433, 946.

Cash is critical to casinos because casino gambling is entirely a cash business. CP 433, 946. Casino patrons cannot use credit, debit or ATM cards to place bets at slot machines or table games. *Id.* Bets can only be made with cash, chips or gaming tokens—and chips or gaming tokens can be purchased only with cash. *Id*. Many gamblers do not bring cash to the casino, or need to access additional cash to continue gambling. CP 433. Cash access services fill that need. *Id.*

Profitability in casino gaming depends on the amount of time that a casino patron spends at the gambling machine ("time on device") and the amount gambled. CP 433. By allowing patrons to access obtain more cash without leaving the casino, cash access services allow longer "time on device," while also increasing the overall amount of cash on the floor and, thus, the total the amount gambled. *Id.*

Furthermore, the availability of cash access on the casino floor is standard in the gaming industry. CP 434. Casino patrons expect these services will be available. *Id.* Every casino in Washington provides cash access services to their patrons through a vendor—either through Everi or another provider of similar services. CP 435.

B. Everi's Kiosks Are Integrated Into Tribal Casinos, And the Kiosks Provide Other Gaming-Related Functionality.

Besides allowing casino patrons to access cash and credit, Everi's kiosks provide other gaming-related services that are important to casinos and their patrons. CP 946-47. For example, Everi kiosks provide so-called ticket-in, ticket-out ("TITO") functionality to facilitate gaming ticket redemption. *Id.* Slot machines generally pay out winnings through tickets printed by the machine. *Id.* When ready to cash out from a machine, a casino patron presses the "cash out" button and the machine dispenses a ticket that shows the winnings. *Id.* Casino patrons then insert that ticket into an Everi kiosk to obtain cash—a service that standard ATMs cannot provide. *Id.* In addition, unlike standard ATMs, Everi kiosks provide other gaming-related functionality like bill-breaking (e.g. breaking a $100 bill into $20s, $20s into $5s, etc.). *Id.*

These cash-and-ticket handling functions have become standard in the casino industry and are expected by gaming patrons. CP 663, 946-47. Over the last decade, most tribal casinos in Washington have switched to using gaming-related kiosks (enabled with gaming ticket redemption and bill-breaking), rather than stand-alone ATMs for cash access transactions. CP 946-47. Most cash access transactions completed by Everi in Washington are performed on these kiosks. *Id.*

Furthermore, to allow redemption of gaming tickets for cash, Everi's kiosks are necessarily connected with the casino's "tribal lottery system"—the slot management and player tracking system used at tribal casinos—i.e. the system of slot machines that take wagers and dispense tickets. CP 448. In addition, the placement of Everi kiosks and machines throughout the casino

floor (and integration with the tribal slot management system) takes pressure off the casino cashier's cage, which is otherwise responsible for cash-handling and ticket redemption. CP 946-47.

C. Everi Contracts And Collaborates With Tribes In Washington To Supply Casino Cash Access Services.

Everi has entered into long-term contracts with many tribes in Washington to provide cash access services and other gaming-related functionality at on-reservation tribal casinos. CP 346-47, 949, 991, 998-1001. Approximately 98-99% of the cash access transactions that Everi performs in the State of Washington are at tribal casinos on Indian lands. CP 990-91, 998-1001.[5]

Everi's products and services require long-term relationships with tribes to ensure the proper function of the machines and continuous availability of cash to the casino floor. CP 662. Everi and the tribes work together—through negotiation and consultation, before entering into contracts—to design the particular services to be offered at the tribal casino. *Id.* Everi does not negotiate, consult or contract with casino patrons; Everi's customers are tribal casinos, rather than individual gamblers. *Id.*

The contracts between Everi and its tribal partners establish extensive obligations on both parties. CP 662. Pursuant to their contracts, Everi and tribal casinos closely collaborate in selecting, installing,

[5] The remaining 1-2% of cash access transactions processed by Everi in Washington take place at card clubs or race tracks that are not on Indian land. CP 990-91, 998-1001. Because Everi furnishes these services to non-tribal entities—and these services are provided outside Indian land—Everi does not dispute the State's authority to tax them. CP 6-7.

maintaining and operating cash access services at the casino (CP 662, 948-49):

- Design of Services. In consultation and negotiation with Everi, the tribe selects what cash access services (e.g. ATM withdrawal, credit and debit card cash advance, check cashing) and other gaming related functionality (e.g. TITO, bill-breaking) the tribe desires to make available at its casino. CP 662, 948.
- Installation and Maintenance. Everi supplies the equipment (e.g., kiosks) to tribal casinos, and the casinos provide physical space, security coverage, utilities, heating and lighting to support the cash access services. CP 662, 950, 959.
- Integration with Gaming Floor. To maximize efficiency and profitability, cash access services must be integrated into the gaming floor, requiring coordination with the cashier's cage, tribal gaming regulators and other casino operations personnel. CP 662.
- Transaction Processing and Completion. Everi and the tribe must work together closely to ensure integrity of cash access transactions, including "Transaction Completion Procedures" to prevent fraudulent activity and the tribes' performance of other "Service Center Obligations." CP 662-63, 972.

D. Tribes Set The Surcharges For Cash Access Transactions, And Everi And The Tribes Share In The Resulting Revenue, With The Tribes Receiving Most Of The Revenue.

A casino patron who uses cash access services on the casino floor must pay a "surcharge" or transaction fee. CP 948. The tribal casino

(referred to as "Service Center" in the parties' contracts), in consultation with Everi, sets the amount of the surcharge for each transaction. *Id.*; *see* CP 974 ("The Cardholder Fees shall be the property of the Service Center, and . . . Service Center . . . shall have the right to determine the Cardholder Fees") and CP 979 (same).

The tribal casinos make the strategic business decision—informed by each casino's goals and the tribe's revenue-raising objectives—on what fees to charge their patrons for ATM, credit card cash advance and debit card transactions. CP 948. Some tribes seek to maximize the amount of cash on the casino floor to facilitate more gaming; those tribes set lower fees on cash transactions. *Id.* Other tribes prefer to maximize direct revenue to the tribe; those tribes set higher fees in order to generate higher direct revenue from transactions. *Id.*

Based on their contracts, the tribes and Everi share the transaction surcharges and fees resulting from cash access transactions completed at tribal casinos. CP 948. Under most Everi contracts, the tribe keeps the entire surcharge paid by the patrons for ATM withdrawal transactions, and Everi retains only a small portion (part of the bank interchange fees) of the revenue generated by these transactions, plus monthly management, maintenance and processing fees. *Id.*; *see* CP 977 and CP 982. In addition, under the terms of a typical contract for ATM services, the tribes are paid a portion of the bank interchange fee. CP 948; *see* CP 977 and CP 982.

Overall, the tribes receive most of the revenue generated by all transactions—ATM withdrawal, credit card cash advance and debit card

point-of-sale—completed using Everi kiosks or machines at tribal casinos. CP 948-49. For example, in 2011 and 2012, 65% of all such revenue was paid to tribes as "commissions," pursuant to Everi's contracts with those tribes, while Everi retained approximately 35%. CP 949, 955-56. In 2013, 67% of such revenue was paid to tribes. *Id.*

E. As Required By The Tribal-State Gaming Compacts And Tribal Gaming Ordinances, Everi Has Been Licensed As A Gaming Service Provider By Each Tribe It Works With.

Under the Washington Tribal-State gaming compacts, any vendor of "gaming services" must be tribally licensed as a gaming service provider before providing services to a tribal casino. CP 446, 509.[6] Licensing of gaming service providers is critical to ensure the legal compliance, integrity and reputation of the gaming operation. CP 446. Tribal gaming commissions conduct background checks on gaming service providers, including their individual principals, to ensure that criminal or corrupting influences are not allowed in the casino. CP 346, 446. Until a gaming vendor is licensed, it may not provide services at a tribal casino, nor receive payments from the tribe or casino. CP 446, 509. To ensure the integrity of the tribal gaming operation, the Washington Tribal-State gaming compacts broadly define "Gaming Services"—and require licensure of gaming service providers—to include "the providing of any goods or services to the Tribe, whether on or off site,

[6] A complete copy of the Tribal-State Compact for Class III Gaming, between the Snoqualmie Indian tribe and the State of Washington (hereafter, "Gaming Compact"), is included in the Clerk's Papers at CP 494 to 618. The State's gaming compacts with other tribes are the same in all material respects. All of Washington's gaming compacts are publicly available on the website of the Washington State Gambling Commission, www.wsgc.wa.gov/tribal/docs/tribe-update.pdf.

directly (or indirectly) in connection with the operation of Class III gaming[7] in a Gaming Facility, including equipment, maintenance or security services for the Gaming Facility. Gaming services shall not include professional legal and accounting services." CP 446, 502 (Gaming Compact, p. 3, § II.M).

Tribal gaming ordinances often are more stringent than compacts in their regulation and licensure of Class III gaming. CP 447. Tribal gaming agencies may require licensure of individual employees of gaming vendors who provide on-site maintenance or otherwise have access to sensitive areas of the casino floor or systems. *Id.* For example, the Snoqualmie Gaming Commission has licensed Everi as well as 11 individual employees of the company. *Id.*

Each tribe that Everi works with has licensed Everi as a gaming service provider pursuant to the requirements of the Gaming Compact.[8] CP 346-47. Everi has also been licensed by the Washington State Gambling Commission. CP 347, 429.

F. In 2013, DOR Audited Everi And Assessed B&O Tax For "Gambling" Services; Everi Appealed That Decision.

In assessments by its Audit Division and administrative determinations by its Appeals Division, DOR has taken the position that all

[7] "Class III" gaming is one of three categories of gaming established by IGRA. Class I gaming (social or traditional ceremonial games) is exclusively regulated by tribes. Class II gaming (primarily bingo, pull-tabs and similar games) must be conducted in conformance with IGRA and tribal law, and is subject to federal oversight by the National Indian Gaming Commission. Class III gaming is all forms of gaming that are not Class I gaming or Class II gaming. *See* 25 U.S.C. § 2703(6)-(8).

[8] Copies of all tribal gaming licenses issued to Everi from 2012 to 2015 are included in the Clerk's Papers at CP 351 to 427.

of the cash access transactions processed by Everi in the State of Washington for Native American tribes at on-reservation casinos are subject to the B&O Tax. CP 991. In December 2013, DOR's Audit Division assessed $375,222.00 in B&O Tax against Everi. *Id.* The audit specifically stated that the B&O Tax was imposed for "gambling" services provided by Everi for the period January 1, 2009 through June 30, 2012. CP 991, 1003.

On January 10, 2014, Everi filed a petition to DOR's Appeals Division, contesting DOR's $375,222.00 assessment on the grounds the taxes were preempted by federal law. CP 992. In response, DOR claimed that taxes on Everi's services were not preempted because those services are not "imperative to the operations of the casino." CP 327. DOR contrasted Everi's cash access services with other types of services that DOR claimed were more imperative. *Id.* Specifically, DOR claimed that "restaurants, dry goods, parking and hotel rooms" are "imperative" to the operation of the casino but cash access services are not. *Id*. DOR's Appeals Division heard the 2014 appeal on July 15, 2014 and, on June 25, 2015, DOR denied Everi's petition. CP 992.

G. The Trial Court Granted Summary Judgment To DOR, Dismissing Everi's Complaint For Refund Of Approximately $1.4 Million In On-Reservation Taxes At Issue.

While still disputing DOR's authority to tax the on-reservation, gaming-related services at issue, Everi paid the amount in dispute on its 2014 appeal and has since continued to pay B&O Tax to DOR. CP 992. From January 1, 2012 to December 31, 2015, Everi paid a total of

$1,436,528.92 in B&O Tax to DOR. CP 997. Approximately 99% of these taxes—specifically, $1,421,582.18—were paid based on the cash access services that Everi provides to on-reservation tribal casinos ("On-Reservation Taxes"). CP 990, 997.[9]

On December 31, 2015, Everi filed its Notice of Appeal and Complaint for Refund of Taxes, seeking refund of the $1,421,582.18 in On-Reservation Taxes paid by Everi to DOR, on grounds the taxes are preempted under federal law (IGRA, Indian Trader statutes, and *Bracker* balancing) and contrary to Rule 192. CP 5-15. These are the taxes at issue on this appeal.

After the parties filed cross-motions for summary judgment, on April 14, 2017, Thurston County Superior Court Judge James J. Dixon granted DOR's motion and denied Everi's. CP 937-940; *see also* 4/14/17 RP 85-86. The court held federal law does not preempt the On-Reservation Taxes at issue here. CP 939; 4/14/17 RP 85. The court did not explain how the tax was permissible under IGRA and the Indian Trader statutes, nor did the court address (much less balance) the federal, tribal and state interests as required by *Bracker*. *Id.* The court also failed to address Rule 192 and cited no other authority for its ruling. *Id.* In addition to its ruling on preemption, the court held that all Everi's revenue from on-reservation, tribal casino cash access services is "gross income" of Everi (4/14/17 RP

[9] The remaining $14,946.74 in B&O Tax paid by Everi for the period 2012-2015 was for cash access services provided to off-reservation, non-Indian card clubs or race tracks (CP 990, 997), which are neither authorized under IGRA, nor owned or operated by tribes. Everi does not challenge DOR's authority to assess these taxes. CP 7.

85), even though Everi is contractually required to pay (and has paid) most of this revenue to the tribes with whom it does business.[10] CP 948-49, 955-56.

The court entered its summary judgment order on April 28, 2017. CP 937. Everi timely appealed. CP 934.

ARGUMENT

V. STANDARD OF REVIEW

Summary judgment rulings are reviewed *de novo*, with the Court of Appeal engaging in the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The burden is on the moving party to demonstrate that there are no genuine issues of material fact. *Folsom*, 135 Wn.2d at 663.

All facts and reasonable inferences from the facts must be viewed in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). All questions of law are reviewed *de novo*. *Mountain Park Homeowners Ass'n*, 125 Wn.2d at 341.

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[10] The court also held Everi lacks standing to assert "infringement on tribal sovereignty." CP 939. Everi alleged "improper infringement on tribal sovereignty" as a separate basis for preemption in its refund complaint (CP 10, ¶ 12.d), but Everi does not pursue this ground on appeal.

VI. DOR'S TAX ON THE GAMING-RELATED, ON-RESERVATION SERVICES PROVIDED BY EVERI AT TRIBAL CASINOS IS PREEMPTED BY FEDERAL LAW.

There is a presumption against state jurisdiction on tribal lands. Generally, state laws—including a state's regulatory and taxing authority—may reach into Indian country only if Congress has expressly provided. Prior to the enactment of IGRA, the U.S. Supreme Court held that states lack regulatory authority over gaming on Indian lands. In addition, under the Indian Trader statutes and U.S. Supreme Court precedents, the State lacks authority to tax income from the performance of services for a tribe on Indian land.[11] Furthermore, even if the B&O Tax were not barred by IGRA and the Indian Trader statutes, it would still be preempted under the *Bracker* balancing test because the federal and tribal interests in Everi's cash access services greatly outweigh the State's interests in those services.

[11] Washington's own Rule 192 is to the same effect, and directly on point: "Income from the performance of services [by non-Indians] in Indian country for the tribe or for tribal members is not subject to the B&O . . . tax." WAC 458-20-192(7)(b)(2).

A. There Is A Presumption Against State Regulatory And Tax Authority On Indian Land.

The Supreme Court "has consistently recognized that Indian tribes retain attributes of sovereignty over both their members and their territory, . . . and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987) (emphasis added and internal quotations omitted; citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)).

"There is a presumption against state jurisdiction in Indian country." *Indian Country U.S.A., Inc. v. State ex rel. Oklahoma Tax Comm'n,* 829 F.2d 967, 976 (10th Cir. 1987); *see also California v. Cabazon*, 480 U.S. at 216, n.18. "The usual preemption approach in fields where states traditionally have broad authority presumes that state jurisdiction will prevail unless sufficient contrary congressional intent can be found. But the opposite presumption prevails in Indian law because the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history[.]" *Cohen's Handbook of Federal Indian Law*, § 6.03[2][a], at 519 & 2015 Supp. at 19 (Nell Jessup Newton, ed., 2012) (footnotes and internal quotation marks omitted).

Sovereignty applies not just to tribes and their members, but also to their land. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Bracker*, 448 U.S. at 142 (emphasis added). Because of their sovereign status, tribes' "reservation lands are insulated in some respects by an historic immunity

from state and local control [citation omitted], and tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), citing *Washington v. Confederated Tribes of Colville*, 447 U.S. at 153. The sovereignty retained by tribes includes "the power of regulating their internal and social relations," as well as the power "to exclude nonmembers entirely or to condition their presence on the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332-33. Each tribe has "the power to manage the use of its territory and resources by both members and nonmembers." *Id.* at 335 (emphasis added; citing *Bracker*, noting tribal sovereignty contains a "significant geographical component").

A state has no pre-existing or default authority to tax or regulate non-Indians engaged in business on tribal land, and a state may assert such authority only if not preempted by federal law. *New Mexico v. Mescalero Apache*, 462 U.S. at 336; *Bracker*, 448 U.S. at 142; *Indian Country U.S.A.*, 829 F.2d at 986. "The tradition of Indian sovereignty over the reservation" must inform the determination of whether federal law preempts "the exercise of state authority" over on-reservation activity by non-Indians. *Bracker*, 448 U.S. at 143.

Preemption does not require "an express congressional statement to that effect." *Bracker*, 448 U.S. at 144. State authority to tax non-Indians is preempted by federal law "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are

sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache*, 462 U.S. at 334, citing *Bracker*, 448 U.S. at 145.

Furthermore, the Supreme Court has repeatedly held that "although tax exemptions generally are to be construed narrowly, in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 n.4 (1985) (citing *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).[12] This construction in favor of tribal independence is consistent with "traditional notions" of Indian self-government. The Court has made this clear:

> traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop" . . . against which vague or ambiguous federal enactments must always be measured.

Bracker, 448 U.S. at 142. Thus, "ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* at 143, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174–75 (1973). *See also Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982) ("ambiguities in federal law should be construed generously" in favor of

[12] This is consistent with the general canon of construction, in matters involving Indian law or tribal land, that "[S]tatutes are to be liberally construed in favor of Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confed. Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 259 (1992) (citing *Montana v. Blackfeet Tribe*).

tribal independence, and "federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity").

With that background—the presumption that the State has no pre-existing authority to tax on the reservation, and the rule that ambiguities in federal law are construed in favor of preemption of on-reservation state taxation—it is clear the trial court erred in holding the B&O Tax is not preempted. The On-Reservation Taxes at issue are preempted under federal law for each of three independent reasons: preemption by IGRA (*infra*, Part VI.B), preemption under the Indian Trader statutes and related case law (*infra*, Part VI.C), and preemption under the *Bracker* balancing test (*infra*, Part VI.D).

B. IGRA Preempts Tax On The Gaming Services Provided By Everi At Tribal Casinos.

1. Prior To IGRA, States Had No Authority To Regulate Gaming On Indian Land.

Employing the *Bracker* balancing test, the Supreme Court confirmed in 1987 that Indian tribes had the right to conduct gaming in Indian country, free from state regulation. *California v. Cabazon*, 480 U.S. at 221-22. The *Cabazon* Court noted the important federal and tribal interests in Indian self-government, self-sufficiency and economic development, as well as the fact that tribes operating casinos were not merely "'market[ing] an exemption from state taxation to persons who would normally do their business elsewhere,'" but were "generating value on the reservations through activities in which they have a substantial

interest." *Id.* at 216, 219. The Court held that "compelling federal and tribal interests" supported Indian gambling enterprises—including the high-stakes bingo and poker at issue in that case—and those "compelling" interests outweighed the state's professed interest in preventing organized crime. *Id.* at 221-22.

Also in 1987, shortly after the Court decided *Cabazon* (and before Congress enacted IGRA), the Tenth Circuit applied *Cabazon* to state taxation of tribal gaming in *Indian Country U.S.A.*, 829 F.2d. 967. There, the manager of the tribe's bingo enterprise, Indian Country U.S.A., Inc., sued the state of Oklahoma to block the state's sales tax on bingo activity sales. *Id.* at 970. The court held "the state's interest in taxing Creek bingo and related activities is minimal, and is incompatible with and outweighed by federal and tribal interests." *Id.* at 987. Furthermore, the court held that "preemption of state laws extends to the . . . tribal bingo enterprise as a whole, which includes the involvement of non-Indians [such as Indian Country U.S.A., Inc.]." *Id.* at 983, n.7.

2. By Enacting IGRA, Congress Left No Regulatory Or Taxing Role For The States Except To The Extent Provided For In A Tribal-State Gaming Compact.

Cabazon and *Indian Country U.S.A.* provided the backdrop against which Congress enacted IGRA in October 1988. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands"). In IGRA's first section, Congress recited the rule that "Indian tribes have the exclusive right to regulate

gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

IGRA allows Indian tribes to engage in "class III"[13] gaming activities (e.g. slot machines and certain card games) if such activities are: (1) authorized by a federally-approved Tribal gaming ordinance and (2) conducted in conformance with a federally-approved Tribal-State compact entered into by the Indian tribe and the state. 25 U.S.C. § 2710(d)(1). Indian tribes enjoy the unimpaired right to regulate class III gaming on tribal lands "except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact…." 25 U.S.C. § 2710(d)(5). Through the compacting process, IGRA granted states a way to negotiate with tribes for limited rights to participate in regulating tribal gaming activities in Indian country.

The preemptive purpose of IGRA is well-recognized. "Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law." *Gaming Corp. of Am.*, 88 F.3d at 544. "Congress . . . left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state

[13] For the distinction between Class I, Class II and Class III gaming, *see supra* note 7.

compact." *Id.* at 546. *See also* SENATE REP. 100-446, 1988 U.S.C.C.A.N. 3071, 3075-76, 1988 WL 169811 (Leg.Hist.) (only "mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact"). Thus, a tribal-state compact is the beginning and end of a state's ability to regulate Indian gaming.

Congress has already definitively performed the "balancing" of interests for purposes of state authority over on-reservation gaming activities; thus, post-adoption of IGRA, there is no need for a court to engage in a *Bracker* analysis (as the *Cabazon* Court did pre-IGRA) to decide whether a state may tax such activities. By enacting IGRA, Congress "established the preemptive balance between tribal, federal, and state interests in the governance of gaming operations on Indian lands." *Casino Resource Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001). IGRA represents "the scheme Congress developed to balance the interests of the federal government, the states, and the tribes." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996). "[R]ather than directing the federal courts to perform the balancing of interests between the state on the one side and the tribe and federal government on the other, Congress conducted the balancing itself." *Id.*; *see also Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003) ("IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state

governments, and Indian tribes"). Congress "created a fixed division of jurisdiction," under which "courts are not to conduct a *Cabazon* balancing analysis," and which "left the states without a significant role under IGRA unless one is negotiated through a compact." *Gaming Corp. of Am.*, 88 F.3d at 547. Thus, state taxation of gaming activities is preempted as incompatible with IGRA, regardless of interests asserted by the State.

3. IGRA Allows State Taxes And Fees On Gaming Activities Only If Authorized By Compact—And Even Then, Only To Defray Costs Of State Regulation.

In 25 U.S.C. § 2710(d)(3)(C), IGRA lists the subjects (numbered (i) through (vii)) that a tribal-state compact for Class III gaming activities may address, including "the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. § 2710(d)(3)(C)(iii). Immediately following this list of subjects that may be addressed by compact, IGRA states that it does not "confer[] upon a State . . . authority to impose any tax" on a class III activity. 25 U.S.C. § 2710(d)(4). In full, section 2710(d)(4) provides:

> Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

25 U.S.C. § 2710(d)(4) (emphasis added).

Section 2710(d)(4) is directly on point. As discussed immediately below, the State's Gaming Compact with Washington tribes does not authorize state taxation of gaming activities. And, while the Compact requires gaming service providers such as Everi to be tribally licensed, the Compact does not empower the State to tax a tribally-authorized gaming service provider. Accordingly, pursuant to 25 U.S.C. § 2710(d)(4) and applicable case law, the State's tax on gaming services at issue here is unauthorized and preempted.

4. The Compact Requires That Gaming Service Providers Be Tribally Licensed, But Does Not Authorize Taxation Of A Tribally-Licensed Gaming Service Provider.

Washington's Gaming Compact (CP 494-530) addresses many issues, including the nature, size and scope of gaming (§ III, CP 504-08); licensing and certification requirements for gaming facility, gaming employees and gaming service providers (§ IV, CP 508-09); tribal enforcement and regulation of gaming (§ VI, CP 514-16); law enforcement jurisdiction (§ IX, CP 518-19); and tribal reimbursement of regulatory fees and expenses incurred by the state gaming agency (§ XIII, CP 525). However, nowhere in the Gaming Compact did the State obtain authority to tax gaming service providers at tribal casinos.

Given the Compact's definition of gaming service providers, and the fact the State did compact for tribal reimbursement of regulatory fees, this lack of tax authority is glaring—and dispositive. The Compact defines "gaming services" broadly:

> "Gaming Services" means the providing of any goods or services to the Tribe, whether on or off site, directly (or indirectly) in connection with the operation of Class III gaming in a Gaming Facility, including equipment, maintenance or security services for the Gaming Facility. Gaming services shall not include professional legal and accounting services.

CP 502 (§ II.M, p. 3) (emphasis added). The "Gaming Services" definition governs what vendors must be licensed by the tribal gaming agencies and certified by the State. Any "manufacturer and supplier of gaming services" must be certified by the State and licensed by the tribe "prior to the sale of any gaming services." CP 509 (§ IV.C, p. 10).

The Compact's definition of "gaming services" encompasses the services that Everi provides at tribal casinos, since cash access services are provided "in connection with the operation" of Class III gaming. CP 502 (§ II.M, p. 3). Gaming is a cash business, access to cash is essential to tribal gaming, and casinos rely on Everi's services in this regard. *Supra*, Part IV.A. Furthermore, Everi's kiosks are integrated into tribal casinos and provide other gaming-related functionality (e.g. gaming ticket redemption and bill-breaking). *Supra*, Part IV.B. And, as required by the Compact (CP 509, § IV.C, p. 10), Everi is licensed as a gaming service provider by each tribe for whom it provides services. *Supra*, Part IV.E.

While the Compact broadly defines "gaming services" and requires licensing of gaming service providers, the Compact does not authorize the State to tax gaming services or providers.[14] *See* CP 494-530. The State had

[14] The absence of any authority in the Compact to tax gaming services or gaming service providers is even more noteworthy because the Compact does require the tribes to (1) reimburse the state for "regulatory fees and expenses incurred by the state gaming agency" and (2) pay up to 2% of "net win" into an "impact mitigation fund" to assist with the direct

the ability to compact for tax authority over those services, but failed to do so. Because the Compact does not authorize taxes on the gaming-related services provided by Everi, DOR has no authority to impose them. 25 U.S.C. § 2710(d)(4).

5. The *Flandreau* Decision Is Directly On Point, Holding That A State May Not Tax Services That Facilitate Or Complement Gaming At A Tribal Casino.

No court has held that a state may tax a tribally-licensed gaming-related service provided inside a casino where, as here, the tax is not authorized by the gaming compact. The series of recent opinions in *Flandreau Santee Sioux Tribe v. Gerlach*—including the final decision issued during pendency of this appeal—are directly on point, and held just the opposite.

At issue in *Flandreau* was whether South Dakota could impose state use tax on non-Indians' purchases of goods and services, including alcohol sales, at a tribal casino. *Flandreau Santee Sioux Tribe v. Gerlach,* 2017 WL 4124242 (D. S.D. Sept. 15, 2017), *1. In its first decision, the district court found that "alcohol availability" can be "directly related to class III gaming," and "pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii), regulation and taxation is, therefore, compactable between a tribe and a state." *Flandreau Santee Sioux Tribe v. Gerlach,* 155 F.Supp.3d 972, 992 (D. S.D. 2015). In

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and indirect impacts of gaming operations on law enforcement, emergency services, traffic and transportation, water, sanitary sewer and other agencies. CP 525-26 (Compact, §§ XIII and XIV, pp. 26-27). These regulatory expenses and other impacts of gaming—direct and indirect—were addressed by tribal reimbursement and payment of a portion of "net win," not by taxes.

its second decision, the court held that "IGRA covers activity beyond just pure gameplay at a casino," and "there is a factual issue . . . [as] to which goods and services sold at the Casino relate to class III gaming. Alcohol is sold, entertainment is provided, meals are eaten, rooms are rented, and other activities take place." *Flandreau Santee Sioux Tribe v. Gerlach*, 162 F.Supp.3d 888, 892 (D. S.D. 2016).

Leading to the final *Flandreau* decision, issued September 15, 2017, plaintiff asserted that goods and services sold to non-Indians at the casino, including alcohol, are "directly related to the operation of gaming activities" (25 U.S.C. § 2710(d)(3)(C)(vii)) because they "are intended to attract and retain gaming guests and ultimately generate gaming revenue." 2017 WL 4124242, *5. The court agreed and held those activities fall within IGRA's preemptive scope:

> we must look to whether the regulated activity has a direct connection to the Tribe's conduct of class III gaming activities. . . . *See* 25 U.S.C. § 2710(d)(3)(C)(vii). To the extent such activities are 'directly related to the operation of gaming activities,' however, Federal courts need not balance the competing federal, tribal, and state interests involved, as Congress already completed the balancing test with respect to those activities in enacting IGRA. *See Gaming Corp of Am.*, 88 F.3d at 544 (citing S.Rep. No. 445, 100th Cong., 2d Sess. 6 (1988)).

Id. The court then distinguished several cases that rejected IGRA preemption where "taxes and regulations . . . were only tangentially related to tribal gaming,"[15] whereas "[i]n this case, most of the transactions the

[15] *Id.* at *6-7, distinguishing *Casino Resource Corp*., 243 F.3d at 438-39, *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008), *Confed. Tribes of Siletz*

State seeks to tax are not merely tangentially related to tribal gaming, but would not exist but for the Tribe's operation of a casino." *Id.* at *7. The court ultimately found that food and beverage services at the casino (including alcohol sales) are "directly related to class III gaming," that "regulation and taxation is, therefore, compactable between a tribe and a state," and—because the state did not compact for taxation of these services—the state's tax on the sale of "such amenities" to non-Indians at the casino "is preempted by IGRA." *Id.* at *10.

Here, as in *Flandreau*, the cash access services that Everi provides to tribal casinos "are intended to attract and retain gaming guests and ultimately generate gaming revenue" (*id*. at *5); are "not merely tangentially related to tribal gaming, but would not exist but for the Tribe's operation of a casino" (*id*. at *7); cash access services "facilitate," "reinforce" and are "complementar[y]" to gaming activities (*id*. at *9), even more so than alcohol sales; and the State failed to compact for taxation of these services under 25 U.S.C. § 2710(d)(3)(C). Just as in *Flandreau*, the State's tax on on-reservation, gaming-related services is preempted by IGRA here.

Indians v. Oregon, 143 F.3d 481, 487 (9th Cir. 1998), and *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469-71 (2d Cir. 2013). The court summarized: "Ownership of slot machines by non-Indians [*Mashantucket*], the purchase of construction materials by non-Indian subcontractors [*Barona*], and the state law claims of a non-Indian company against another non-Indian company arising out of a management contract between the two companies [*Casino Resource Corp*.] are all events that could arise in spite of the tribe's ownership and operation of a casino." *Id.* at *7.

C. DOR's Taxation Of On-Reservation Services That Everi Provides To Tribes Is Preempted By The Indian Trader Statutes, Related Case Law And Rule 192(7).

The Indian Trader statutes, 25 U.S.C. §§ 261-64, preempt taxes on non-Indians selling goods or providing services to a tribe on its reservation. From the first days of the federal union, Congress has authorized "sweeping" and "comprehensive federal regulation" over "persons who wish to trade with Indians and Indian tribes." *Warren Trading Post Co. v. Ariz. State Tax Comm'n,* 380 U.S. 685, 687-89 (1965). "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 163-64 (1980).

The comprehensive federal regulatory scheme imposed by the Indian Trader statutes and regulations precludes a state from imposing a tax on an "Indian trader," i.e. a non-Indian selling or leasing goods or services to Indians in Indian Country. *Central Machinery Co.*, 448 U.S. at 165-66 (prohibiting state transaction privilege tax on farm machinery dealer who sold equipment to a tribal enterprise on the reservation); *Warren Trading Post,* 380 U.S. at 690 (prohibiting state gross receipts taxes on an Indian trader).[16]

[16] The scope of the statutes is so broad that preemption bars state authority to tax regardless of whether an entity is a licensed Indian trader because it "is the existence of the Indian Trader Statutes, not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Central Machinery Co.*, 448 U.S. at 165-66.

Under federal regulations, "Trading," is defined broadly in the Indian Trader regulations as "buying, selling, bartering, renting, leasing, permitting and any other transaction involving the acquisition of property or services." 25 CFR § 140.5(a)(6). Furthermore, Washington's own regulation regarding taxation in Indian country is directly on point. Rule 192 provides:

> (7) **Nonmembers in Indian country—preemption of state tax**. . . .
>
> (b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** . . .
>
> (ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. Services performed outside of Indian country are subject to tax. In those instances where services are performed both on and off of Indian country, the activity is subject to state tax to the extent that services are substantially performed outside of Indian country.

Rule 192(7)(b) (attached as Appendix B; bolding in original). Here, Everi provides its cash access services to tribes at tribal casinos, pursuant to contracts negotiated with and executed by tribes. CP 949-52. The tribes and Everi coordinate with each other to provide cash access services, with the tribes—in consultation with Everi—setting the surcharges and fees that casino patrons must pay. CP 948. The tribes receive the majority of transaction revenues, while Everi retains a portion (as negotiated and agreed

to in Everi's contracts with tribes) as payment for the on-reservation services it provides. CP 948; *see* CP 977, 982.

The licensing requirements of the State's Gaming Compact—together with the fact Everi has been licensed by all the gaming commissions for tribes to which it provides services—underscore that Everi provides its services to the tribes. The Compact requires the licensing of gaming service providers "prior to the sale of any gaming services to the Tribe." CP 509 (Compact, § IV.C, p. 10). And in fact, Everi has been licensed as a gaming services provider by all the Washington tribes with whom it does business. CP 346-47, 449-50.

DOR argued below that Everi merely provides services to individual casino patrons, not tribes. CP 32-33, 887-88. Not only is this argument contrary to the facts—Everi negotiates, contracts with, and provides its cash access services on behalf of tribes (CP 662, 948-49); Everi processes transactions and charges fees in the amounts set by each tribe (CP 948, 974, 970-71, 979); and Everi has no contracts with individual casino patrons (CP 662)—DOR's position is defeated by its own admissions. In response to discovery, DOR conceded it "follows the privity relationship to determine for who (whether it is a tribe, tribal member, or nonmember) a given service is performed." CP 169-70. DOR's tax policy specialist, Wan Chen, who

has primary DOR responsibility for interpreting and applying Rule 192, elaborated:

> Q: How do you determine, for purposes of Rule 192(7), when a service is provided for the tribe?
>
> A: Well, it depends on sort of the relationship. Are you providing for the tribe the privity between the two parties? If they [non-member company] contract to provide service and get payment, then you are providing service for the tribe.

CP 213 (Tr. 93:16-23). DOR's admissions are dispositive: Because Everi contracts with tribes (not individual gamblers) to provide cash access services, and the parties' contracts allow Everi to retain a portion of transaction revenues as payment for these services, B&O Tax is preempted under Rule 192(7).

D. DOR's Taxation Of On-Reservation, Gaming-Related Services Is Preempted Under *Bracker* Balancing.

Even if the tax at issue here was authorized by the State's Compact (it is not), permissible under IGRA (it is not) and allowed under the Indian Trader cases (it is not), it would still be preempted by the Supreme Court's *Bracker* balancing test. The tribal and federal interests in the cash access services provided by Everi far outweigh the state interests.

1. *Bracker* And Its Balancing Test.

State taxation of non-Indians on a reservation has long been guided by the balancing test set forth in *Bracker*, which calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." 448 U.S. at 145. In *Bracker*, the Supreme Court considered "the extent of state authority over the activities of non-Indians engaged in commerce on an

Indian reservation." *Id*. at 137. There, the state of Arizona sought to impose a gross receipts tax on a non-Indian logging company which the Fort Apache Tribe had contracted with to harvest timber for processing on the tribe's reservation. *Id.* at 139-40.

Citing federal statutes and regulations, the Court found that federal regulatory scheme over and interests in the harvesting of Indian timber was pervasive, and state taxes would threaten the federal and tribal interests in timber management and revenues. *Id.* at 148-50. By contrast, the state interest was negligible because the state did not authorize or regulate the on-reservation, timber-harvesting activity, nor was it assessing taxes to pay for the costs of regulation or impacts of the activity. *Id.* at 150. The Court explained:

> [T]his is not a case in which the State seeks to assess taxes for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest for the taxes they seek to impose. . . . Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law.

Id. at 150-51. Finding there was "no room for these taxes in the comprehensive federal regulatory scheme," and that Arizona was "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes," the Court held the taxes preempted. *Id*. at 148-49. The Court also held that a state's "general desire to raise revenue" was insufficient to avoid preemption. *Id.* at 150.

DOR's Rule 192, based on *Bracker*, describes the pertinent balancing test:

> (c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** . . . The U.S. supreme court [sic] has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. . . .

Rule 192(7)(b) (attached as Appendix B; bolding in original) . In sum, the balancing test weighs federal, state, and tribal interests to determine whether state taxation of non-Indian activities in Indian country is preempted. *Bracker*, 448 U.S. at 145.

2. Federal Interests Strongly Favor Preemption Because Indian Gaming Is Authorized And Regulated By Federal Law.

Certain "broad considerations" guide the assessment of federal and tribal interests, including traditional notions of Indian sovereignty which provide a "crucial backdrop [citations omitted] against which any assertion of State authority must be assed." *New Mexico v. Mescalero Apache*, 462 U.S. at 334, citing *Bracker*, 448 U.S. at 143. The Court has repeatedly emphasized the strong federal interest in tribal economic development:

> [B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. [Footnote omitted] We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging

> tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." *Bracker*, *supra*, 448 U.S., at 143, 100 S.Ct., at 2583 [footnote omitted].

New Mexico v. Mescalero Apache, 462 U.S. at 334-35. Thanks to the federal "overriding goal" of encouraging "tribal self-sufficiency and economic development,"

> [W]hen a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose. *See generally Bracker*, *supra*, 448 U.S., at 143, 100 S.Ct., at 2583 [footnote omitted].

Id. at 336.

In adopting IGRA, Congress likewise expressly acknowledged "a principal goal of Federal Indian policy is to promote tribal economic development," 25 U.S.C. § 2701(4); *see also* 25 U.S.C. § 2702(1) (listing as one of IGRA's purposes "promoting tribal economic development, self-sufficiency, and strong tribal governments"). In addition, the federal government is heavily involved in the regulation of tribal gaming through the National Indian Gaming Commission's Minimum Internal Control Standards, which apply to all aspects of gaming operations, including cash access, handling and kiosks. *See* 25 CFR Part 543, FR 63873; CP 447-48, 619-22. *See also* 25 U.S.C. § 2702(3) (another purpose of IGRA is to establish "Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission").

Without the pervasive federal regulatory scheme enacted by IGRA, there would be no Indian casinos for tribes to operate and for Everi to provide cash access to. *See* 25 U.S.C. § 2702 (IGRA provides statutory basis for tribal operation of gaming, as well as regulation of gaming by tribes and federal government). Courts have consistently recognized strong federal interests when, as here, federal law establishes or regulates the activity burdened by the tax. *See Ramah*, 458 U.S. at 841-44 (holding state gross receipts tax on non-Indian company constructing a school preempted, noting federal government's comprehensive regulation of Indian education); *Bracker*, 448 U.S. at 151 (holding state gross receipts tax on non-Indian hauling timber to a tribal sawmill preempted, noting federal government's comprehensive regulation of reservation timber activities); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994) (finding state's interest weak in comparison to federal government's, court held California was preempted from taxing non-Indian's off-track betting activities on tribal land).

3. Tribal Interests Strongly Favor Preemption Because The Tribes Authorize, Regulate, Participate In And Benefit From Casino Cash Access Services, Which Arise From Value Generated On-Reservation.

The tribes, like the federal government, have strong economic and regulatory interests in gaming and the cash access services that facilitate gaming. Indeed, the tribal interests are even more direct. Tribes have an obvious, direct interest in tribal economic development and tribal self-government. The tribes benefit economically from Everi's cash access

activities in two ways: first, cash access is essential to the success and maximizing profitability of tribal casinos (*supra*, Part IV.A, and CP 432-35); second, tribes benefit from Everi's cash access services by sharing with Everi in the resulting revenues (*supra*, Part IV.D). Tribes also participate significantly in the provision of cash access services (*supra*, Part IV.C and IV.D), while tribal gaming agencies license and regulate how the services are carried out. *Supra*, Part IV.E. *See also* CP 445-48, 457-92.

Furthermore, it is the tribes—not the State—that grant Everi the "privilege" of doing on-reservation business, pursuant to tribal gaming licenses and contracts entered into between the tribes and Everi. *Supra*, Part IV.C and IV.E. Significantly, the "Business & Occupations" tax at issue here is not a tax on transactions, like a sales tax; rather, it is "a tax for the act or privilege of engaging in business activities." RCW § 82.04.220(1). *See also Tyler Pipe Indus, Inc. v. Department of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986) ("B&O taxes are for the privilege of engaging in business during a certain time frame") (emphasis added). While measurement of the tax depends on the "gross income of the business" (RCW § 82.04.220(1)), the tax itself is on the "privilege" of doing business. This is an important distinction[17] where, as here, the privilege of doing

[17] The trial court failed to appreciate this distinction. In granting summary judgment, the trial court adopted DOR's mischaracterization of the B&O Tax as a tax on transactions ("the transactions at issue," 4/14/17 RP 85) in which the tribes were not involved ("transactions are [not] between Everi and the tribe," *id.*). This description is wrong in law and fact. Legally, as discussed in the body, the B&O Tax is on the "privilege" of doing business, not on transactions. RCW § 82.04.220(1). Factually, Everi contracts with tribes—not with individual patrons—to provide cash access services (*supra*, Part IV.C);

business is provided by the tribes with whom Everi contracts and by whom it is licensed—not the State—and Everi's business is conducted on tribal land.

Indeed, federal law does not allow the State to grant Everi the privilege to engage in business on tribal land. As the United States Supreme Court has explained, "the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government." *Ramah*, 458 U.S. at 844; *see Montana v. Blackfeet Tribe*, 471 U.S. at 764 ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."). Nonmembers' presence on the reservation at all is a privilege within a tribe's authority to give or withhold. *New Mexico v. Mescalero Apache*, 462 U.S. at 333 (noting that a "tribe's power to exclude nonmembers entirely" is "well established"). A state's interest in assessing tax is "particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within tribal lands," as is true for Indian gaming. *Indian Country U.S.A.*, 829 F.2d at 987. *See also Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1330, 1335 (11th Cir. 2015) (rental tax on "privilege" of doing business on reservation land was preempted by federal law).

Last, tribal interests are especially strong when the revenues being taxed are derived from value generated "on-reservation" by activities in

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the tribes set the surcharges and receive most of the transaction revenues (*supra*, Part IV.D); and the tribes and Everi jointly make cash access available to patrons at tribal casinos (*supra*, Part IV.C and IV.E).

which tribal members have a significant interest. In *California v. Cabazon*, the Supreme Court distinguished *Washington v. Confederated Tribes of Colville*, 447 U.S. at 155 (holding state could tax cigarettes sold by tribal smokeshops to non-Indians because tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere"), explaining that gaming-related activities at a tribal casino present the classic case of "on-reservation" value:

> Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. . . . [The Tribes] are generating value on the reservations through activities in which they have a substantial interest.

California v. Cabazon, 480 U.S. at 219-20. Similarly, in *Cabazon Band v. Wilson*, 37 F.3d 435, the Ninth Circuit held California was preempted from taxing non-Indian's off-track betting activities on tribal land because the tribes had "made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others." *Id*. at 435; *see also Indian Country U.S.A.*, 829 F.2d at 986-87 (tax on non-Indian bingo operator was preempted because, unlike in *Washington v. Confederated Tribes of Colville*, "Patrons do not travel onto Creek lands to play bingo in order to avoid sales taxes" and the "product of value is not a

tax exemption," but the availability of bingo which is "created, sold and consumed" on-reservation).

Here, as in *Indian Country U.S.A.* and the two *Cabazon* cases, the tribes have generated "on-reservation" value through development of their casinos, and they have a strong interest in gaming-related services that support their casino operations.

4. State Interests Do Not Justify Taxing The On-Reservation, Cash Access Services Provided By Everi.

Where, as here, the federal government has authorized and extensively regulated an activity on Indian lands, the state must establish a close nexus between the tax at issue and the activity being taxed in order to avoid preemption. *See, e.g., Stranburg*, 799 F.3d at 1342 ("Both *Bracker* and *Ramah* note that the state tax must be sufficiently connected to the particular activity taxed to amount to more than just a generalized interest in raising revenue;" holding rental tax was preempted because Florida did not show it was "critically connected" to taxed activity); *Cabazon v. Wilson*, 37 F.3d at 435 ("this court has required that the State demonstrate a close relationship between the taxed imposed on the on-reservation activity and the state interest asserted to justify such tax"); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) (holding state tax on timber not justified by general state services provided to "residents of the reservation and the surrounding area" but not connected to the timber industry). In a case such as here, "where strong federal and tribal interests exist," a state may avoid preemption of its taxing authority

"only if its taxes are narrowly tailored to funding the services it provides in connection with the activities taking place on tribal land." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1412 (9th Cir. 1992) (internal quotations omitted); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901 (9th Cir. 1987) ("Even if Montana's interests are sufficiently legitimate . . . the coal taxes are not narrowly tailored to support them.").

A state interest is at its weakest when the tax does not compensate for state regulation or on-reservation services provided in connection with the taxed activity. *Ramah,* 458 U.S. at 843 (tax preempted in case where "the State does not seek to assess its tax in return for the government functions it provides to those who must bear the burden of paying this tax"). As the *Ramah* Court explained, "a general desire to increase revenues" by levying a tax "is insufficient to justify" imposing a burden on federally encouraged reservation activities. *Id.*, citing *Bracker,* 448 U.S. at 150. Rather, a state must show a "specific, legitimate regulatory interest to justify the imposition of its gross receipts tax." *Id*. at 843.

Here, the tax at issue does not defray the costs of state regulation, nor support any specific regulatory interest. Indeed, pursuant to the Gaming Compact, the State has no unreimbursed expenses from tribal gaming regulation. CP 525. As the Ninth Circuit recognized in *Cabazon v. Wilson*, 37 F.3d at 435, IGRA "establishes a mechanism—the compacts—by which [Tribes] can reimburse the State for regulatory costs, outside of the State tax structure." That is exactly what the State negotiated with Washington tribes: tribes "shall reimburse the State

Gaming Agency for all reasonable costs and expenses actually incurred by the State Gaming Agency in carrying out its responsibilities as authorized under the provisions of this Compact." CP 525 (Compact, § VIII, p. 26).[18] When balanced against the weighty federal and tribal interests, the State's general interest in raising revenue—which is not "critically connected" or narrowly tailored to the on-reservation cash access activity—cannot justify the tax.

VII. DOR'S TAX ON GAMING-RELATED, ON-RESERVATION SERVICES THAT EVERI PROVIDES TO TRIBAL CASINOS IS CONTRARY TO DOR'S OWN RULE 192.

Under the State's own rule, titled "Nonmembers in Indian country - preemption of state tax" (Rule 192, attached as Appendix B), the tax at issue is preempted because it is a tax on gaming services (Rule 192(7)(a)),[19] a tax on the provision of services to tribes in Indian country (Rule 192(7)(b)),[20]

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[18] The Compact also requires that tribes pay up to 2% of "net win" into an "impact mitigation fund" to assist with the direct and indirect impacts of gaming operations on law enforcement, emergency services, traffic and transportation, water, sanitary sewer and other agencies. CP 526 (Compact, § XIV.C, p. 27).

[19] With regard to gaming, Rule 192(7)(a) provides:

> (a) **Preemption of tax on nonmembers - gaming**. Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax) . . . .

[20] With regard to services provided to tribes, Rule 192(7)(b) provides:

> (b) **Preemption of B&O and public utility tax -- . . . provision of services by nonmembers in Indian country. . . .**
>
> (ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. . . .

and a tax on "value generated on the reservation" for which tribal and federal interests predominate. Rule 192(7)(c).[21]

DOR has admitted that Rule 192 provides its interpretation of federal Indian law on taxation in Indian country. CP 883. Furthermore, Rule 192 was adopted by DOR pursuant to statutory authority and, thus, has the force and effect of law. RCW 82.32.300 (DOR shall publish rules and regulations which shall have same force and effect as statutes); *Bercier v. Kiga*, 127 Wn.App. 809, 817-18, 103 P.3d 232 (2004) (noting DOR has "specifically addressed" the issue of taxation of non-Indians under the Legislature's grant of authority under RCW 82.32.300). Rule 192 reflects "the harmonizing of federal law, Washington state tax law, and the policies and objectives of the Centennial Accord and the Millennium Agreement, and it is consistent with the Department's mission to achieve equity and fairness in the application of the law." *Van Mechelin v. State of Wash. Dept. of Revenue*, 2009 WL 979712 (Wash.Bd.Tax.App. 2009), *17 (citing Rule 192(1)(c)).

[21] With regard to the balancing test, Rule 192(7)(c) provides:

> (c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** . . . The U.S. supreme court [sic] has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. . . .

Indeed, in matters involving taxation in Indian country, both DOR and courts have relied on[22] Rule 192 as grounds for decision. *Bercier v. Kiga*, 127 Wn.App. at 817-18; *Matheson v. Washington State Liquor Control Board*, 132 Wn.App. 280, 285, 130 P.3d 897 (2006); *Gord v. State of Wash. Dept. of Revenue*, 50 Wn.App. 646, 653, 749 P.2d 678 (1987). *Cf. Washington v. Confederated Tribes of Colville*, 447 U.S. at 141-42 (discussing how Rule 192 applies to sales of cigarettes to non-Indians). Because Rule 192 is clear that state tax on non-members in Indian country is preempted in the context of gaming (Rule 192(7)(a)) and on-reservation services provided to tribes (Rule 192(7)(b)), the court should hold the taxes at issue here are preempted under Rule 192. *Bercier v. Kiga*, 127 Wn.App. at 818 ("Because the rule's plain meaning is clear, we need not look further to determine its meaning"). Furthermore, to the extent there is any ambiguity in Rule 192, that ambiguity should be construed in favor of preemption. *See supra*, Part VI.A (presumption against state regulatory and tax authority on Indian land); *Indian Country U.S.A.*, 829 F.2d at 976; *California v. Cabazon*, 480 U.S. at 216, n.18. *See also Van Mechelin v. State of Wash. Dept. of Revenue*, 2009 WL 979712, *17 ("Where the Indian law liberal construction canon conflicts with other principles of judicial construction, the Indian law canon takes precedence. The doctrine of deference to administrative decisions falls before the federal requirement of liberal construction in favor of Indians").

[22] Taxpayers should be able to rely on Rule 192 too. *See* Rule 192(1)(c) (rule intended to achieve fairness in application of the law).

VIII. EVEN IF THIS COURT AGREES WITH DOR THAT THE B&O TAX IS NOT PREEMPTED, THE CASE SHOULD BE REMANDED FOR THE TRIAL COURT TO DETERMINE TAXES DUE SOLELY ON THE PART OF REVENUE ACTUALLY RETAINED BY EVERI.

The B&O Tax at issue here is assessed "for the act or privilege of engaging in business activities . . . [and] is measured by the application of rates against . . . gross income of the business . . . ." RCW 82.04.220. "Gross income" is defined as "value proceeding or accruing by reason of the transaction of the business engaged in and includes . . . compensation for the rendition of services." RCW 82.040.080. In turn, the phrase "Value proceeding or accruing" means "the consideration, whether money, credits, rights, or other property expressed in terms of money, actually received or accrued." RCW 82.040.090 (emphasis added).

Where a taxpayer merely passes through the money it receives as an agent for another entity, that money is not considered part of the taxpayer's "gross income." *Walthew, Warner, et al. v. State of Wash. Dept. of Revenue*, 103 Wn.2d. 183, 186, 691 P.2d 559 (1984) ("pass-through payments" are not "contemplated for inclusion in gross income for services"); *City of Tacoma v. William Rogers Co., Inc.*, 148 Wn.2d 169, 175, 60 P.3d 79 (2002), as amended (Jan. 8, 2003) (amounts that merely "pass through" a business in its capacity as an agent cannot be attributed as income to the business of agent, and thus are not taxable).[23]

[23] Whether a taxpayer is acting as an agent of another entity is determined by the facts and circumstances—the substance of the relationship—and does not depend on specific language in the contracts. *See Rho Co., Inc. v. Dep't of Revenue*, 113 Wn.2d 561, 570, 782 P.2d 986 (1989) ("[A]n agency can be implied, if the facts so warrant, not only if the contracts are silent as to agency, but even if the parties execute contracts expressly disavowing the creation of an agency relationship."). While the language of Everi's

When a service provider only retains a portion of the money it collects on behalf of a third party, B&O Tax applies solely as to the portion of money retained. For example, a personal service corporation which had an agreement to handle patient-billing for a medical partnership was not liable for B&O Tax on the "amounts it collected on behalf of [the partnership]" from patients. Det. No. 88-377, 6 WTD 439 (1988), p. 1 (Appendix C).[24] Rather, the service company was only liable for B&O Tax on the amount it "retained" for its billing and other management services (5% of gross receipts), because "the taxpayer does not have a right to retain the full amount of the invoiced amount." *Id.* at p. 4. Similarly, a solicitor of magazine subscription renewals does not owe tax on the amounts it collects and remits—as required to do—to the publisher pursuant to their contract:

> the taxpayer is not entitled to keep the receipts except for the predetermined commission percentages. The payments received from subscribers and passed on to the publishers are a deductible cost of the taxpayer's doing business. Therefore, the taxpayer is not liable for B&O taxes for money received from subscribers for magazine and newspaper subscriptions if the money is remitted to the publishers.

Det. No. 91-210, 11 WTD 389 (1992), pp. 5-6 (Appendix D).

Here, similar to a medical biller or magazine subscription solicitor, Everi acts on behalf of tribes in providing cash access services at tribal

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agreements with tribes is not identical, it is the substantive nature of the relationship (as described in CP 662-63; see also CP 946-52) which controls.

[24] This and other Determinations by DOR's Interpretation and Appeals Division are available online at http://taxpedia.dor.wa.gov/zipfiles.aspx.

casinos. Pursuant to their contracts with Everi, the tribes determine the amount of surcharge on cash access transactions; Everi imposes and collects that surcharge (in the amount specified by contract with each tribe) on each cash access transaction it processes; and Everi remits the majority of transaction revenues to tribes, retaining only a small portion of such revenues, as dictated by the applicable Everi-Tribe contract. *Supra*, Part IV.D. In substance, the tribes provide cash access services to their casino patrons, while contracting with Everi to provide the kiosks and perform the financial network services needed to complete transactions.

Accordingly, if this Court finds that the B&O Tax on Everi's gaming-related, on-reservation services is not entirely preempted, then the case should be remanded for the trial court to determine B&O Tax on the portion of transaction revenues actually retained by Everi for the relevant taxing period ("Tax on Retained Revenue"). Having made that determination, the court should subtract the Tax on Retained Revenues from the total On-Reservation Tax paid by Everi from 2012 to 2015 ($1,421,582.18), and then enter the result as the refund due to Everi.

IX. CONCLUSION

The trial court erred in finding that DOR's tax on Everi's gaming-related, on-reservation services is not preempted by federal law. The trial court further erred by ignoring Rule 192, which governs taxation of non-Indians for on-reservation activities, and does not permit the B&O Tax at issue here. And, even if its ruling on preemption was correct, the trial court also erred by failing to determine the taxes due on the portion of tribal casino cash access revenue actually retained by Everi.

For all the foregoing reasons, this Court should reverse the summary judgment order in favor of DOR and, instead, order summary judgment be entered for Everi. If this Court agrees with the trial court's ruling on preemption, the case should be remanded to determine taxes due solely on the portion of revenues actually retained by Everi, consistent with RCW 82.040.090 and other pertinent Washington authority.

Dated this 8th day of November, 2017.

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith, WSBA No. 9542

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: _____
Blaine I. Green
Admitted *pro hac vice*

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 8, 2017, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Blaine I. Green Allen Brandt Pillsbury Winthrop Shaw Pittman LLP Four Embarcadero Center, 22nd Floor San Francisco, CA 94111-5998 blaine.green@pillsburylaw.com allen.brandt@pillsburylaw.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
David M. Hankins Andrew Krawczyk Fronda C. Woods Office of the Attorney General 7141 Cleanwater Drive SW P.O. Box 40123 Olympia, WA 98504-0123 davidh1@atg.wa.gov andrewk1@atg.wa.gov frondaw@atg.wa.gov JulieJ@ATG.WA.GOV; REVOlyEF@atg.wa.gov;	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 8th day of November, 2017.

Peyush Soni

APPENDIX A

☐ EXPEDITE
☐ No Hearing Set
☒ Hearing is Set
Date: April 14, 2017
Time: 9:00 am
Judge James Dixon /Civil

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

EVERI PAYMENTS INC.
(SUCCESSOR IN INTEREST TO, AND FORMERLY KNOWN AS, GLOBAL CASH ACCESS, INC.),

Plaintiff,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant.

NO. 15-2-03048-34

ORDER GRANTING DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER coming on for hearing on cross motions for summary judgment, the Plaintiff appearing by Christopher Weiss and Brett Durbin of Stoel Rives, LLP, Blaine Green and Allen Brandt, *Pro hac vice* of Pillsbury Winthrop Shaw Pittman LLP, and Defendant State of Washington Department of Revenue appearing by ROBERT W. FERGUSON, Attorney General for the State of Washington, David M. Hankins and Fronda Woods, Senior Counsel, and Andrew Krawczyk, Assistant Attorney General. The following documents and evidence were called to the attention of the Court:

1. Defendant State of Washington Department of Revenue's Motion for Summary Judgment filed January 6, 2017 (Dkt. 36).

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2. Plaintiff Everi Payments Inc.'s Motion for Summary Judgment filed on January 9, 2017 (Dkt. 38).
3. Defendant State of Washington Department of Revenue's Memorandum in Support of Summary Judgment filed on March 17, 2017 (Dkt. 49).
4. Declaration of Andrew Krawczyk and Exhibits A through J attached in support of Defendant's Motion and Memorandum for Summary Judgment dated March 17, 2017 (Dkt. 50).
5. Declaration of Blaine I. Green and Exhibits 1-8 attached in support of Plaintiff's Motion for Summary Judgment dated March 17, 2017 (Dkt. 58).
6. Declaration of Kacy Drury and Exhibits 1-2 attached in support of Plaintiff's Motion for Summary Judgment dated March 16, 2017 (Dkt. 59).
7. Declaration of Jon T. Jenkins and Exhibit 1attached in support of Plaintiff's Motion for Summary Judgment dated March 17, 2017 (Dkt. 60).
8. Declaration of Daniel Hanson and Exhibits 1-4 attached in support of Plaintiff's Motion for Summary Judgment dated March 17, 2017 (Dkt. 61).
9. Plaintiff's Motion for Summary Judgment dated March 17, 2017 (Dkt. 62).
10. Declaration of David Shinsky (Dkt. 63) and the Updated Redacted Declaration of David Shinsky (Dkt. 86), including Exhibits 1-6 attached thereto.
11. Declaration of John Trenton Postma and Exhibits 1-5 attached in support of Plaintiff's Motion for Summary Judgment dated March 16, 2017 (Dkt. 64).
12. Declaration of Gene Elder in Support of Plaintiff's Motion for Summary Judgment (Dkt. 65).
13. Notice of Errata regarding Plaintiff's Motion for Summary Judgment and attached Exhibit A filed on March 20, 2017 (Dkt. 66).

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14. Second Declaration of Andrew Krawczyk and Exhibits K through X attached in support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment dated April 3, 2017 (Dkt. 74).

15. Defendant's Opposition to Plaintiff's Motion for Summary Judgment filed April 3, 2017 (Dkt. 76).

16. Plaintiff's Memorandum in Opposition to Defendant's Motion and Memorandum for Summary Judgment dated April 3, 2017 (Dkt. 77).

17. Defendant's Reply Brief in support of Defendant's Motion and Memorandum for Summary Judgment filed April 10, 2017 (Dkt. 78).

18. Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment dated April 10, 2017 (Dkt. 80).

The Court having considered the documents filed by the parties in support and opposition to the parties' cross motions for summary judgment, including the documents identified above and the records and files herein, and having heard argument of counsel and being fully advised in the premises, concludes that federal law does not pre-empt the B&O tax imposed here and the Plaintiff lacks standing to assert infringement on tribal sovereignty. The Court further concludes that there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment is GRANTED;
2. Plaintiff's Motion for Summary Judgment is DENIED;
3. Plaintiff's Notice of Appeal and Complaint for Refund of Taxes (Business and Occupation Tax) is hereby DISMISSED with prejudice;
4. Each side shall bear their own attorney's fees and costs; and

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5. This Order shall constitute the Judgment of the Court.

DATED this 28th day of April, 2017.

JAMES J. DIXON

The Honorable Judge James Dixon

Presented by:

ROBERT W. FERGUSON
Attorney General

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Notice of Presentation Waived
Approved as to form only:

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APPENDIX B

WAC 458-20-192

Indians—Indian country.

(1) **Introduction.**

(a) Under federal law the state may not tax Indians or Indian tribes in Indian country. In some instances the state's authority to impose tax on a nonmember doing business in Indian country with an Indian or an Indian tribe is also preempted by federal law. This rule only addresses those taxes administered by the department of revenue (department).

(b) The rules of construction used in analyzing the application of tax laws to Indians and nonmembers doing business with Indians are:

(i) Treaties are to be construed in the sense in which they would naturally have been understood by the Indians; and

(ii) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

(c) This rule reflects the harmonizing of federal law, Washington state tax law, and the policies and objectives of the Centennial Accord and the Millennium Agreement. It is consistent with the mission of the department of revenue, which is to achieve equity and fairness in the application of the law.

(d) It is the department's policy and practice to work with individual tribes on a government-to-government basis to discuss and resolve areas of mutual concern.

(2) **Definitions.** The following definitions apply throughout this rule:

(a) "Indian" means a person on the tribal rolls of an Indian tribe. A person on the tribal rolls is also known as an "enrolled member" or a "member" or an "enrolled person" or an "enrollee" or a "tribal member."

(b) "Indian country" has the same meaning as given in 18 U.S.C. 1151 and means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

(c) "Indian tribe" means an Indian nation, tribe, band, community, or other entity recognized as an "Indian tribe" by the United States Department of the Interior. The phrase "federally recognized Indian tribe" and the term "tribe" have the same meaning as "Indian tribe."

(d) "Indian reservation" means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the use and occupancy of Indian tribes by treaty, law, or executive order and that are areas currently recognized as "Indian reservations" by the United States Department of the Interior. The term includes lands within the exterior boundaries of the reservation owned by non-Indians as well as land owned by Indians and Indian tribes and it includes any land that has been designated "reservation" by federal act.

(e) "Nonmember" means a person not on the tribal rolls of the Indian tribe.

(f) "State sales and use tax" includes local sales and use tax.

(3) **Federally recognized Indian tribes.** As of the effective date of this rule there are twenty-eight federally recognized Indian tribes in the state of Washington. You may contact the governor's office of Indian affairs for an up-to-date list of federally recognized Indian tribes in the state of Washington at its web site, www.goia.wa.gov or at:

Governor's Office of Indian Affairs
531 15th Ave. S.E.
P.O. Box 40909
Olympia, WA 98504-0909
360-753-2411

(4) **Recordkeeping.** Taxpayers are required to maintain appropriate records on the tax exempt status of transactions. For example, in the case of the refuse collection tax, the refuse collection company must substantiate the tax-exempt status of its customers. This could be done, for example, one of two ways. The tribe can provide the refuse collection company with a list of all of the tribal members living in Indian country or the individual members can provide exemption certificates to the company. A buyer's retail sales tax exemption certificate that can be used for this purpose is located on the department's web site (www.dor.wa.gov/forms/other.htm) or may be obtained by contacting the department. The company must then keep the list or the certificates in its files as proof of the tax exempt status of the tribe and its members. Individual businesses may contact the department to determine how best to keep records for specific situations.

(5) **Enrolled Indians in Indian country. Generally.** The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term "Indian" includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. An enrolled member's spouse is considered an "Indian" for purposes of this rule if this treatment does not conflict with tribal law. This exclusion from tax includes all taxes (e.g., B&O tax, public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of this rule). "Incidence" means upon whom the tax falls. For example, the incidence of the retail sales tax is on the buyer.

(a)(i) **Retail sales tax - tangible personal property - delivery threshold.** Retail sales tax is not imposed on sales to Indians if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. For example, if the sale to the member takes place at a store located on a reservation, the transaction is automatically, exempt from sales tax and there is no reason to establish "delivery."

(ii) **Retail sales tax - services.** The retail sales tax is not imposed if the retail service (e.g., construction services) is performed for the member or tribe in Indian country. In the case of a retail service that is performed both on and off Indian country, only the portion of the contract that relates to work done in Indian country is excluded from tax. The work done for a tribe or Indian outside of Indian country, for example road work that extends outside of Indian country, is subject to retail sales tax.

(b) **Use tax.** Use tax is not imposed when tangible personal property is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(c) **Tax collection.** Generally, sales to persons other than Indians are subject to the retail sales tax irrespective of where in this state delivery or rendition of services takes place.

Sellers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them to nonmembers in Indian country. A tribe and the department may enter into an agreement covering the collection of state tax by tribal members or the tribe. (See also the discussion regarding preemption of tax in subsection (7) of this rule.)

In order to substantiate the tax-exempt status of a retail sale to a person who is a tribal member, unless the purchaser is personally known to the seller as a member, the seller must require presentation of a tribal membership card or other suitable identification of the purchaser as an enrollee of the Indian tribe. A tribe and the department may enter into an agreement covering identification of enrolled members, in which case the terms of the agreement govern.

A person's tax status under the Revenue Act does not change simply because he or she is making a tax-exempt sale to a tribe or tribal member. For example, a person building a home for a nonmember/consumer is entitled to purchase subcontractor services and materials to be incorporated into the home at wholesale. See RCW **82.04.050**. A person building a home for a tribal member/consumer in Indian country is similarly entitled to purchase these services and materials at wholesale. The fact that the constructing of the home for the tribal member/consumer is exempt from retail sales tax has no impact on the taxability of the purchases of materials, and the materials continue to be purchased for resale.

(d) **Corporations or other entities owned by Indians.** A state chartered corporation comprised solely of Indians is not subject to tax on business conducted in Indian country if all of the owners of the corporation are enrolled members of the tribe except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be considered as satisfying the "comprised solely" criteria if at least half of the owners are enrolled members of the tribe.

(6) **Indians outside Indian country.**

(a) **Generally.** Except for treaty fishery activity, Indians conducting business outside of Indian country are generally subject to tax (e.g., the B&O, the public utility tax, retail sales tax). Indians or Indian tribes who conduct business outside Indian country must register with the department as required by RCW **82.32.030**. (See also WAC **458-20-101** for more registration information.)

(b) **Treaty fishery - preemption.** For the purpose of this rule, "treaty fishery" means the fishing and shellfish rights preserved in a tribe's treaty, a federal executive order, or an act of Congress. It includes activities such as harvesting, processing, transporting, or selling, as well as activities such as management and enforcement.

(i) **Indians - B&O tax.** The gross income directly derived from treaty fishing rights related activity is not subject to state tax. This exclusion from tax is limited to those businesses wholly owned and operated by Indians/tribe who have treaty fishing rights. If a business wholly owned and operated by Indians/tribe deals with both treaty and nontreaty fish, this exclusion from tax is limited to the business attributable to the treaty fish. "Wholly owned and operated" includes entities that meet the qualifications under 26 U.S.C. 7873, which requires that:

(A) Such entity is engaged in a fishing rights-related activity of such tribe;

(B) All of the equity interests in the entity are owned by qualified Indian tribes, members of such tribes, or their spouses;

(C) Except as provided in the code of federal regulations, in the case of an entity which engages to any extent in any substantial processing or transporting of fish, ninety percent or more of the annual gross receipts of the entity is derived from fishing rights-related activities of one or more qualified Indian tribes each of which owns at least ten percent of the equity interests in the entity; and

(D) Substantially all of the management functions of the entity are performed by members of qualified Indian tribes.

(ii) **Indians - sales and use tax.** The retail sales tax and use tax do not apply to the services or tangible personal property for use in the treaty fishery, regardless of where delivery of the item or performance of the service occurs. Gear, such as boats, motors, nets, and clothing, purchased or used by Indians in the treaty fishery is not subject to sales or use tax. Likewise, retail services in respect to property used in the treaty fishery, such as boat or engine repair, are not subject to sales tax.

(iii) **Sales to nonmembers.** Treaty fish and shellfish sold by members of the tribe are not subject to sales tax or use tax, regardless of where the sale takes place due to the sales and use tax exemption for food products.

(iv) **Government-to-government agreement.** A tribe and the department may enter into an agreement covering the treaty fishery and taxable activities of enrolled members, in which case the terms of the agreement govern.

(7) **Nonmembers in Indian country - preemption of state tax.** Generally, a nonenrolled person doing business in Indian country is subject to tax. Unless specifically described as preempted by this rule, the department will review transactions on a case-by-case basis to determine whether tax applies. A nonmember who is not taxable on the basis of preemption should refer to WAC **458-20-101** (tax registration) to determine whether the person must register with the department.

(a) **Preemption of tax on nonmembers - gaming.** Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax), and to sales and use tax on the property used in Indian country to conduct the activity. Sales tax will apply if delivery of property is taken outside of Indian country.

Nonmembers who purchase tangible personal property at a gaming facility are subject to retail sales or use tax, unless:

(i) The item is preempted based on the outcome of the balancing test. For example, depending on the relative state, tribal, and federal interests, tax on food at restaurants or lounges owned and operated by the tribe or a tribal member or sales of member arts and crafts at gift shops might be preempted. See the balancing test discussion in subsection (c) below; or

(ii) The item is purchased for use in the gaming activity at the facility, such as bingo cards or daubers.

(b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** As explained in this subsection, income from sales in Indian country of tangible personal property to, and from the performance of services in Indian country for, tribes and tribal members is not subject to B&O

(chapter **82.04** RCW) or public utility tax (chapters **82.16** and **54.28** RCW). The taxpayer is responsible for maintaining suitable records so that the taxpayer and the department can distinguish between taxable and nontaxable activities.

(i) **Sales of tangible personal property.** Income from sales of tangible personal property to the tribe or to tribal members is not subject to B&O tax if the tangible personal property is delivered to the buyer in Indian country and if:

(A) The property is located in Indian country at the time of sale; or

(B) The seller has a branch office, outlet, or place of business in Indian country that is used to receive the order or distribute the property; or

(C) The sale of the property is solicited by the seller while the seller is in Indian country.

(ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is not subject to the B&O or public utility tax. Services performed outside of Indian country are subject to tax. In those instances where services are performed both on and off of Indian country, the activity is subject to state tax to the extent that services are substantially performed outside of Indian country.

(A) It will be presumed that a professional service (e.g., accounting, legal, or dental) is substantially performed outside of Indian country if twenty-five percent or more of the time taken to perform the service occurs outside of Indian country. The portion of income subject to state tax is determined by multiplying the gross receipts from the activity by the quotient of time spent outside of Indian country performing the service divided by total time spent performing the service.

For example, an accountant with an office outside of Indian country provides accounting services to a tribal member. The accountant performs some of the work at the office and some work at the business of the tribal member in Indian country. If at least twenty-five percent of the time performing the work is spent outside of Indian country, the services are substantially performed outside of Indian country and therefore a portion is subject to state tax. As explained above, the accountant must maintain suitable records to distinguish between taxable and nontaxable income in order to provide for a reasonable approximation of the amount of gross income subject to B&O tax. In this case, suitable records could be a log of the time and location of the services performed for the tribal matter by the accountant, his or her employees, and any contractors hired by the accountant.

(B) For services subject to the retailing and/or wholesaling B&O tax (e.g., building, installing, improving, or repairing structures or tangible personal property), the portion of income relative to services actually performed outside of Indian country is subject to state tax.

For example, a contractor enters into a contract with a tribe to install a sewer line that extends off reservation. Only the income attributable to the installation of the portion of the sewer line off reservation is subject to state tax.

(C) For public utility services under chapters **82.16** and **54.28** RCW it will be presumed that the service is provided where the customer receives the service.

(c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** In certain instances state sales and use tax may be preempted on nonmembers who purchase goods or services from a tribe or tribal members in Indian country. The U.S. supreme court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. See *Salt River Pima-Maricopa Indian Community v. Waddell*, 50 F.3d 734, (1995). This

analysis is known as the "balancing test." This preemption analysis does not extend to subsequent transactions, for example if the purchaser buys for resale the tax imposed on the consumer in the subsequent sale is not preempted. However, because these balancing test determinations are so fact-based, the department will rule on these issues on a case-by-case basis. For such a ruling please contact the department at:

Department of Revenue
Executive
P.O. Box 47454
Olympia, WA 98504-7454

(d) **Federal contractors.** The preemption analysis does not extend to persons who are doing work for the federal government in Indian country. For example, a nonmember doing road construction for the Bureau of Indian Affairs within an Indian reservation is subject to state tax jurisdiction.

(e) **Indian housing authorities.** RCW **35.82.210** provides that the property of housing authorities and the housing authorities themselves are exempt from taxes, such as state and local sales and use taxes, state and local excise taxes, state and local property taxes, and special assessments. This covers tribal housing authorities and intertribal housing authorities both on and off of Indian land. Please note that tribal housing authorities, like all other housing authorities, are exempt from tax anywhere in the state, and the delivery requirement and other geographic thresholds are not applicable.

Not all assessments are exempted under RCW **35.82.210**. See *Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District*, 112 Wn2d 262 (1989).

For the purposes of the exemption:

(i) "Intertribal housing authority" means a housing authority created by a consortium of tribal governments to operate and administer housing programs for persons of low income or senior citizens for and on behalf of such tribes.

(ii) "Tribal government" means the governing body of a federally recognized Indian tribe.

(iii) "Tribal housing authority" means the tribal government or an agency or branch of the tribal government that operates and administers housing programs for persons of low income or senior citizens.

(8) **Motor vehicles, trailers, snowmobiles, etc., sold to Indians or Indian tribes.** Sales tax is not imposed when a motor vehicle, trailer, snowmobile, off-road vehicle, or other such property is delivered to an Indian or the tribe in Indian country or if the sale is made in Indian country. Similarly, use tax is not imposed when such an item is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(a) **Registration of vehicle, trailer, etc.** County auditors, subagencies appointed under RCW **46.01.140**, and department of licensing vehicle licensing offices must collect use tax when Indians or Indian tribes apply for an original title transaction or transfer of title issued on a vehicle or vessel under chapters **46.09**, 46.10, 46.12, or **88.02** RCW unless the tribe/Indian shows that they are not subject to tax. To substantiate that they are not subject to tax the Indian/tribe must show that they previously paid retail sales or use tax on their acquisition or use of the property, or that the property was acquired on or delivered to Indian country. The person claiming the exclusion from tax must sign a declaration of delivery to or acquisition in Indian country. A statement in substantially the following form will be sufficient to establish eligibility for the exclusion from sales and use tax.

(b) **Declaration.**

DECLARATION OF DELIVERY OR ACQUISITION IN INDIAN COUNTRY

The undersigned is (circle one) an enrolled member of the tribe/authorized representative of the tribe or tribal enterprise, and the property was delivered/acquired within Indian country, for at least partial use in Indian country.

name of buyer

date of delivery/acquisition

address of delivery/acquisition

(9) **Miscellaneous taxes.** The state imposes a number of excise taxes in addition to the most common excise taxes administered by the department (e.g., B&O, public utility, retail sales, and use taxes). The following is a brief discussion of some of these taxes.

(a) **Cigarette tax.** The statutory duties applicable to administration and enforcement of the cigarette tax are divided between the department and the liquor control board. Enforcement of nonvoluntary compliance is the responsibility of the liquor control board. Voluntary compliance is the responsibility of the department of revenue. See chapter **82.24** RCW for specific statutory requirements regarding purchase of cigarettes by Indians and Indian tribes. For a specific ruling regarding the taxability of and stamping requirements for cigarettes manufactured by Indians or Indian tribes in Indian country, please contact the department at:

Department of Revenue
Executive
P.O. Box 47454
Olympia, WA 98504-7454

Where sales of cigarettes are the subject of a government-to-government cooperative agreement, the provisions of that agreement supersede conflicting provisions of this subsection.

(i) Sales of cigarettes to nonmembers by Indians or Indian tribes are subject to the cigarette tax. The wholesaler is obligated to make precollection of the tax. Therefore, Indian or tribal sellers making sales to non-Indian customers must (A) purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales or (B) they may make purchases of cigarettes from licensed cigarette distributors for resale to qualified purchasers or (C) may purchase a stock of untaxed unstamped cigarettes for resale to qualified purchasers if the tribal seller gives advance notice under RCW **82.24.250** and Rule 186.

For purposes of this rule, "qualified purchaser" means an Indian purchasing for resale within Indian country to other Indians or an Indian purchasing solely for his or her use other than for resale.

(ii) Delivery or sale and delivery by any person of stamped exempt cigarettes to Indians or tribal sellers for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the seller. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the seller's place of business, records indicating the percentage of such trade that has historically been realized by the seller, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of stamped exempt cigarettes to Indian country or to any Indian or tribal

seller thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the resident enrolled membership of the affected tribe.

(iii) Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal seller without advance notice to the department will result in the treatment of those cigarettes as contraband and subject to seizure. In addition, the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. See chapter **82.24** RCW.

Approval for sale or delivery to Indian or tribal sellers of stamped exempt cigarettes will be denied where the department finds that such Indian or tribal sellers are or have been making sales in violation of this rule.

(iv) Delivery of stamped exempt cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to Indian country. Delivery of stamped exempt cigarettes outside of Indian country at the distributor's dock or place of business or any other location outside of Indian country is prohibited unless the cigarettes are accompanied by an invoice.

(b) **Refuse collection tax.** Indians and Indian tribes are not subject to the refuse collection tax for service provided in Indian country, regardless of whether the refuse collection company hauls the refuse off of Indian country.

(c) **Leasehold excise tax.** Indians and Indian tribes in Indian country are not subject to the leasehold excise tax. Leasehold interests held by nonenrolled persons are subject to tax.

(d) **Fish tax.** Chapter **82.27** RCW imposes a tax on the commercial possession of enhanced food fish, which includes shellfish. The tax is imposed on the fish buyer. The measure of the tax is the value of the enhanced food fish at the point of landing. A credit is allowed against the amount of tax owed for any tax previously paid on the same food fish to any legally established taxing authority, which includes Indian tribes. Transactions involving treaty fish are not subject to the fish tax, regardless of where the transaction takes place.

(e) **Tobacco tax.** The tobacco tax is imposed on "distributors" as that term is defined in RCW **82.26.010**. Tobacco tax is not imposed on Indian persons or tribes who take delivery of the tobacco in Indian country. Effective July 1, 2002, persons who handle for sale any tobacco products that are within this state but upon which tax has not been imposed are subject to the tobacco tax. Chapter 325, Laws of 2002. Thus, persons purchasing tobacco products for resale from Indians who are exempt from the tobacco tax are subject to tobacco tax on the product. See WAC **458-20-185**, Tax on tobacco products.

(f) **Real estate excise tax.** The real estate excise tax is imposed on the seller. A sale of land located in Indian country by a tribe or a tribal member is not subject to real estate excise tax. A sale of land located within Indian country by a nonmember to the tribe or to a tribal member is subject to real estate excise tax.

(g) **Timber excise tax.** Payment of the timber excise tax is the obligation of the harvester. The tribe or tribal members are not subject to the timber excise tax in Indian country. Generally, timber excise tax is due from a nonmember who harvests timber on fee land within Indian country. Timber excise tax is not due if the timber being harvested is on trust land or is owned by the tribe and located in Indian country, regardless of the identity of the harvester. There are some instances in which the timber excise tax might be preempted on non-Indians harvesting timber on fee land in Indian country due to tribal regulatory authority. For such a ruling please contact the department at:

Department of Revenue
Executive

P.O. Box 47454
Olympia, WA 98504-7454

[Statutory Authority: RCW **82.32.300**. WSR 02-14-133, § 458-20-192, filed 7/2/02, effective 8/2/02; WSR 00-24-050A, § 458-20-192, filed 11/30/00, effective 1/1/01; WSR 80-17-026 (Order ET 80-3), § 458-20-192, filed 11/14/80; Order ET 76-4, § 458-20-192, filed 11/12/76; Order ET 74-5, § 458-20-192, filed 12/16/74; Order ET 70-3, § 458-20-192 (Rule 192), filed 5/29/70, effective 7/1/70.]

APPENDIX C

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment . . .	D E T E R M I N A T I O N No. 88-377 Registration No. . . . . . . /Audit No. . . .

RULE 159 AND RULE 224: B&O TAX -- GROSS INCOME -- AGENT -- BILLING FEE. A personal service corporation which had an agreement with an affiliate, a partnership, to do the billing for itself and the partnership and retain a portion of the amount collected on behalf of the partnership as a billing fee is liable for Service B&O on the amount received for its charges for services rendered and for the billing fees retained from the partnership's charges. The corporation is not liable for Service B&O on amounts collected for the partnership.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .
. . .

DATE OF HEARING: August 9, 1988

NATURE OF ACTION:

The taxpayer protests the assessment of Service B&O on amounts it collected on behalf of an affiliate.

FACTS AND ISSUES:

Roys, A.L.J. -- The taxpayer's records were examined for the period January 1, 1983 through December 31, 1986. The audit disclosed taxes and interest owing in the amount of $ X . Assessment No. . . . in that amount was issued on October 15, 1987.

. . . (hereinafter referred to as the taxpayer) is a personal service corporation. An affiliate, . . . is a partnership which was formed in 1986. (hereinafter referred to as the partnership). At the time the partnership was formed, the taxpayer and the partnership entered into an agreement which provided, inter alia, that:

> [Taxpayer] shall read, interpret and evaluate all scans and x-ray films and other materials exposed by [partnership]. [Taxpayer] shall also provide full management services for [partnership], including but not limited to hiring, firing and supervising employees subject to the direction of [partnership]. [Taxpayer's] services shall include billing and bookkeeping for [partnership's] business.
>
> . . .
>
> [Partnership] shall pay [taxpayer] for management services rendered by [taxpayer] to [partnership] five percent (5%) of all gross receipts collected by [partnership] for x-ray and magnetic imaging services rendered to patients by [partnership] with the assistance of [taxpayer]. Payment shall be made by [partnership] to [taxpayer] once each month on or before the 10th day of each month based on receipts collected during the immediately preceding month. Payment shall be made pursuant to a report of gross receipts prepared by [taxpayer] and reviewed by [partnership's] business manager.
>
> [Taxpayer] shall charge patients for reading, interpreting and evaluating scans performed by [partnership] technicians using [partnership's] technicians using [partnership's] equipment on the basis of [taxpayer's] regular fee schedule for the same or comparable services.

As agreed, the taxpayer bills a patient for its professional services and for the partnership's services. During the audit period, the invoices did not break out the amounts due each entity. The auditor assessed Service B&O on the total amount

received. He relied on the fact the invoice stated to make the check payable to the taxpayer and the patient did not know the portion of the invoiced amount that was due for the partnership's services.

The taxpayer was advised that for the future it could avoid Service B&O on the payments collected for the partnership if the billings to the patients clearly indicated the amount due each entity. In addition, the taxpayer was advised that the written agreement between itself and the partnership must indicate how the funds are to be split and that the taxpayer will be the collection agent for the partnership as well as itself.

The taxpayer protests the assessment of Service B&O (Schedule II) on payments it collected on behalf of the partnership. The taxpayer contends it merely acts as the collection agent for the partnership. The partnership's revenue is kept separate and submitted to the partnership at least monthly. The taxpayer stated that both its name and the partnership's name appear on the invoice and on the doors to the medical center.

DISCUSSION:

RCW 82.04.080 defines the "gross income of the business" as

> . . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses. (Emphasis added.)

The issue is whether the amounts billed and collected by the taxpayer for the partnership represent gross proceeds of the taxpayer's business. We agree with the taxpayer that the fact that the customer may not have known the portion of the bill that was due for the partnership's services and the amount that was due the taxpayer for its services is not dispositive. Nor does the fact that the billing invoices state that payment

is to be made to the taxpayer mean that the total amount received is gross income of the taxpayer's business.

This case is distinguishable from those where a business pays costs on behalf of a customer and receives payment from the customer for the costs. In such a case, the amounts received are included as part of the gross proceeds of the business unless the costs are not part of the businesses' costs in performing its services and the business is not primarily or secondarily liable for payment of the costs, other than as agent of the customer. WAC 458-20-111.

In the present case, the agreement between the taxpayer and the partnership provides that the taxpayer shall do the billing for the partnership and be entitled to 5% of the partnership's gross receipts for its billing and other management services. The taxpayer does not have a right to retain the full amount of the invoiced amount. Nor is the taxpayer liable to the partnership if the patient fails to pay the bill. The taxpayer only is liable for service B&O upon the gross income derived from its business--in this case the amount received for its services to patients and the amount received or retained from the partnership's gross receipts for management services. The partnership is liable for B&O tax on 100% of its gross receipts with no deduction for the five percent paid to the taxpayer.

DECISION AND DISPOSITION:

The taxpayer's petition is granted. The assessment of Service B&O on amounts collected by the taxpayer for the partnership shall be cancelled.

DATED this 7th day of October 1988.

APPENDIX D

Cite as Det. No. 91-210, 11 WTD 389 (1992).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 91-210
. . .	)	Registration No. . . .
	)	Balance Due Notices:
	)	. . . , . . . ,
	)	. . . , . . . ,
	)	. . . , . . .

[1] **RULES 111, 159 AND 224:** SERVICE B&O TAX -- GROSS INCOME -- DEDUCTIONS -- AGENT. Taxpayer acting as an agent who solicits subscription renewals on behalf of magazines is liable for Service B&O tax on amounts it receives from subscribers and retains as its commissions and on amounts, if any, it receives directly from publishers for its services. The taxpayer does not owe the tax on amounts collected and remitted to the publishers where the taxpayer is not primarily or secondarily liable for subscription payments to the publishers other than as agent and where it is not entitled to retain the full amount of receipts. Accord: Det. No. 88-377, 6 WTD 439 (1988), Det. No. 91-155, 11 WTD 197 (1991).

[2] **RULES 224 AND 108:** SERVICE B&O TAX -- GROSS INCOME -- REFUNDS -- DEDUCTIONS. Amounts taxpayer magazine subscription service refunds to subscribers due to overpayment are deductible if overpayments were reported as gross income. Overpayments are not gross income because they are not consideration for services rendered. Cancellation refunds in full or part are deductible because sales were not finally completed.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .

DATE OF TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

The taxpayer petitions to cancel balance due notices by claiming the Department improperly disallowed deductions it had taken.

FACTS:

De Luca, A.L.J. -- The balance due notices concern Service business and occupation (B&O) tax for Q2-88, Q4-88 and Q1 through Q4-89. The Department's Taxpayer Account Administration division (TAA) issued all the notices [in February 1991], except . . . which was issued [a few days later]. They total $ . . . and are unpaid.

On behalf of various magazines and newspapers, the Washington-based taxpayer contacts current subscribers nationwide about renewing their subscriptions. If the subscribers do renew, the taxpayer bills them. The taxpayer claims it holds the funds it receives from the subscribers in trust for the respective magazines. The taxpayer states it retains a predetermined percentage of such money (ranging from 3% to 90% depending on the publication) and then transfers the balances to the respective publishers. The taxpayer notes it is not liable to the publishers, other than as an agent, for the subscription receipts. Thus, if a subscriber defaults in paying, the taxpayer is not liable to the publisher for the debt.

The taxpayer reported the gross income it received from the subscribers. However, it deducted from that gross income the amounts it remitted to the magazine publishers and the amounts it refunded to subscribers due to overpayment or cancellation.

The Department denied the deductions and assessed tax on the gross incomes the taxpayer reported.

ISSUE:

Should the taxpayer be allowed to deduct from gross income the amounts it remits to the magazine publishers and the amounts it refunds to the subscribers?

TAXPAYER'S EXCEPTIONS:

The taxpayer claims it acts merely as an agent for the publications and therefore should be permitted to take the deductions for amounts it remits to them. The taxpayer also asserts it should be allowed to deduct the refunds.

DISCUSSION:

The B&O tax is imposed by RCW 82.04.120 which provides:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sale or gross income of the business, as the case may be. (Emphasis supplied.)

Gross income of the business is defined by RCW 82.04.080 in pertinent part to mean:

> . . . the value proceeding or accruing by reason of the transaction of the business engaged in and includes . . . compensation for the rendition of services, . . . fees, . . . and other emoluments however designated, all without any deduction on account of . . . labor costs, . . . delivery costs, taxes, or any other expenses whatsoever paid or accrued and without any deduction on account of losses. (Emphasis supplied.)

However, deductions are permitted in certain instances. Det. No. 88-377, 6 WTD 439 (1988) ruled on a similar matter.

> The issue is whether the amounts billed and collected by the taxpayer [management provider] for the partnership represent gross proceeds of the taxpayer's business. ...
>
> This case is distinguishable from those where a business pays costs on behalf of a customer and receives payment from the customer for the costs. In such a case, the amounts received are included as part of the gross proceeds of the business unless the costs are not part of the businesses' costs in performing its services and the business is not primarily or secondarily liable for payment of the costs, other than as agent of the customer. WAC 458-20-111.
>
> In the present case, the agreement between the taxpayer and the partnership provides that the taxpayer shall do the billing for the partnership and be entitled to 5% of the partnership's gross receipts for its billing and other management services. The taxpayer does not have a right to retain the full amount of the invoiced amount. Nor is the taxpayer liable to the partnership if the patient fails to pay the bill. The taxpayer only is liable for service B&O upon the gross income derived from its business--in this case ... the amount received or retained from the partnership's gross receipts for management services. The partnership is liable for B&O tax on 100% of its gross receipts with no deduction for the five percent paid to the taxpayer.

WAC 458-20-111 (Rule 111) provides:

> The words "advance" and "reimbursement" apply only when the customer or client [subscriber] alone is liable for payment of the fees or costs and when the taxpayer making the payment [to the publishers] has no personal liability therefor, either primarily or secondarily, other than as agent for the customer or client. (Bracketed words and emphasis supplied.)
>
> There may be excluded from the measure of tax amounts representing money or credit received by a taxpayer as reimbursement of an advance in accordance with the regular and usual custom of his business or profession. The foregoing is limited to cases wherein the taxpayer, as an incident to the business, undertakes, on behalf of the customer, guest or client, the payment of money, either upon an obligation owing by the customer, guest or client to a third person, or in procuring a service for the customer, guest or client which the taxpayer does not or cannot render and for which no liability attaches to the taxpayer. It does not apply to cases where the customer, guest or client makes advances to the taxpayer upon services to be rendered by the taxpayer or upon goods to be purchased by the taxpayer in carrying on the business in which the taxpayer engages.

WAC 458-20-159 (Rule 159) pertains to the Service B&O tax classification for agents promoting sales for their principals. The rule also addresses the record keeping requirements placed on agents to permit them to avoid paying tax on gross sales rather than on just their commissions or other incidental income.

> AGENTS AND BROKERS. Any person who claims to be acting merely as agent or broker in promoting sales for a principal or in making purchases for a buyer, will have such claim recognized only when the contract or agreement between such persons clearly establishes the relationship of principal and agent and when the following conditions are complied with:
>
> (1) The books and records of the broker or agent show the transactions were made in the name and for the account of the principal, and show the name of the actual owner of the property for whom the sale was made, or the actual buyer for whom the purchase was made.
>
> (2) The books and records show the amount of gross sales, the amount of commissions and any other incidental income derived by the broker or agent from such sales.

> SERVICE AND OTHER BUSINESS ACTIVITIES. Every consignee, bailee, factor, agent or auctioneer who makes a sale in the name of the actual owner, as agent of the actual owner, or who purchases as agent of the actual buyer, is taxable under the service and other business activities classification upon the gross income derived from such business.

[1] In the present matter, the taxpayer is not liable to compensate the publishers for the subscriptions other than as an agent. Thus, the taxpayer has no primary or secondary liability to the publishers. Furthermore, the taxpayer is not entitled to keep the receipts except for the predetermined commission percentages. The payments received from subscribers and passed on to the publishers are a deductible cost of the taxpayer's doing business. Therefore, the taxpayer is not liable for B&O taxes for money received from subscribers for magazine and newspaper subscriptions if the money is remitted to the publishers.

However, any amounts the taxpayer retains from such payments, or which it receives directly from the publishers for its services are taxable as gross income. 6 WTD 439.

[2] The next items concerns the deductions for refunds made to subscribers due to overpayments or cancellations. It is important to determine who is reporting the income as taxable and who is giving the refund. Refunds are deductible by the taxpayer if the taxpayer reported the subscription payments as taxable gross income. If a publisher gives a refund, with no adjustment in the taxpayer's commission, then the taxpayer may not adjust its return. If the taxpayer is refunding the subscriptions in whole or part from its own money, then proportionate refunds are deductible by the taxpayer. The refunds are deductible under the same tax classifications as reported on the returns. Refunds in full or part are deductible because the sales were not finally completed. Under WAC 458-20-108 (Rule 108), a taxpayer is entitled to deduct the refunds from the gross amount of income it reports on its tax return.

DECISION AND DISPOSITION:

The taxpayer may deduct from its gross income the amounts it collects and remits to the publishers where the taxpayer is not primarily or secondarily liable for subscription payments to them other than as an agent and where it is not entitled to retain the full amount of receipts.

The taxpayer may also deduct subscription refunds from its gross income to the extent the refunds constitute the taxpayer's commissions, provided the taxpayer had reported the income

previously and had not deducted it. If the taxpayer is not refunding amounts from its own money then it may not deduct the refunds. Refund amounts are deductible under the same classifications as reported on the tax returns.

The taxpayer should pay Service B&O tax on its commissions.

The taxpayer's petition is granted to the extent the taxpayer may deduct income remitted to the publishers or refunded to the subscribers. The petition and Balance Due Notices in Document Numbers . . . , . . . , . . . , . . . , . . . , . . . are remanded to TAA in accordance with this decision.

DATED this 31st day of July 1991.

SMITH GOODFRIEND, PS

November 08, 2017 - 2:49 PM

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