COLORADO COURT OF APPEALS

DATE FILED: October 22, 2015
CASE NUMBER: 2014CA1597

Court of Appeals No. 14CA1597
Jefferson County District Court No. 13CV31253
Honorable Randall C. Arp, Judge

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Comcast of Colorado IX, LLC,

Plaintiff-Appellee and Cross-Appellant,

v.

City of Golden, a Colorado home rule municipal corporation; and Jeff Hansen, in his official capacity as Finance Director for the City of Golden,

Defendants-Appellants and Cross-Appellees.

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JUDGMENT AFFIRMED
AND CROSS-APPEAL DISMISSED

Division II
Opinion by JUDGE BOORAS
Dailey and Navarro, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**
Announced October 22, 2015

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Silverstein & Pomerantz LLP, Neil I. Pomerantz, Michelle Bush, Mark E. Medina, Denver, Colorado, for Plaintiff-Appellee and Cross-Appellant

Williamson & Hayashi, LLC, David S. Williamson, Matthew M. Munch, Denver, Colorado, for Defendants-Appellants and Cross-Appellees

Defendants, City of Golden and Jeff Hansen, in his official capacity as Finance Director for the City of Golden (collectively, the City), appeal the trial court's judgment in favor of plaintiff, Comcast Of Colorado IX, LLC (Comcast). We affirm.

## I. Background

In 2012, the City issued to Comcast a tax assessment in connection with its sale of Internet access services from January 2006 through December 2008.

Comcast appealed the tax assessment in the Jefferson County District Court. It contended that the tax violated the Internet Tax Freedom Act (ITFA), 47 U.S.C. § 151 note, § 1101(a) (2012), which imposes a moratorium on state and local taxation of the provision of Internet access services. The City asserted, however, that its tax assessment was exempt from the general moratorium under the ITFA's grandfathering provision (Grandfather Clause). § 1101(d)(1)-(2).

The ITFA grandfathered taxes imposed by states and local municipalities on sales of Internet access services if two requirements were met. First, the state or municipality must show

that a tax on Internet access was authorized by statute prior to October 1998. § 1101(a). Second, the state or municipality must show that, prior to October 1998, either

- "a provider of Internet access services had a reasonable opportunity to know by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services" (the rule or other public proclamation requirement); or
- "a State or political subdivision thereof generally collected such tax on charges for Internet access."

§ 1101(d)(1)-(2).

Before trial, the City and Comcast submitted cross-motions for summary judgment. Comcast contended that the City could not establish any of the Grandfather Clause's requirements so as to exempt its tax from the ITFA's general moratorium.

The City asserted that prior to October 1998, its tax on Comcast's provision of Internet access services was authorized by

City of Golden Ordinance 1139 (Dec. 27, 1991) (defining telecommunications services), and City of Golden Ordinance 1144 (Feb. 14, 1992) (levying a sales tax on telecommunications services). It further contended that it had satisfied the rule or other public proclamation requirement. Alternatively, the City maintained that it had generally collected a tax on the sale of Internet access services.

With respect to the rule or other public proclamation requirement, the City asserted that it was an administrative agency; therefore, its publication of Ordinances 1139 and 1144 in the City's tax code gave Comcast a reasonable opportunity to know that it had interpreted and applied the tax on telecommunications services to Internet access services.

The trial court granted Comcast's motion for summary judgment on the rule or other public proclamation requirement. It reasoned that the City was not an "appropriate administrative agency" under the plain language of the Grandfather Clause.

The trial court concluded that genuine issues of material fact precluded it from granting summary judgment, however, as to the

City's contention that the tax was authorized by statute and that it had generally collected such a tax. Accordingly, the parties proceeded with a bench trial on those two issues.

After trial, the court found that the City's tax was authorized by statute, but that it had failed to establish that it had generally collected such a tax.[1] Thus, although the City's tax was authorized by statute, it was not exempt under the Grandfather Clause because the City had failed to establish either

- the rule or other public proclamation requirement — the issue resolved on summary judgment; or
- that it had generally collected a tax on sales of Internet access services — the issue resolved after the bench trial.

So the trial court entered judgment in favor of Comcast. It ordered the City to (1) return Comcast's deposit of the disputed amount and (2) pay Comcast interest on the returned deposit at the rate set forth in section 39-21-110.5(2), C.R.S. 2015.

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[1] The City is not appealing the trial court's finding on this issue.

The City appeals the trial court's conclusion, on summary judgment, that the City's publication of Ordinances 1139 and 1144 did not satisfy the Grandfather Clause's rule or other public proclamation requirement. It also appeals the trial court's award of interest to Comcast at the statutory rate set out in section 39-21-110.5(2).

Comcast cross-appeals the trial court's determination that Comcast's provision of Internet services were taxable under the City's definition of telecommunications services.

## II. The City's Appeal

### A. The Grandfather Clause

The City contends that the trial court erred when it interpreted the phrase "made by the appropriate administrative agency" to require the "rule or other public proclamation" to have come from an "agency like the Finance Department." We disagree.

#### 1. Standard of Review

In reviewing a taxpayer appeal, we defer to the trial court's findings of fact "and will disturb them only if they are clearly erroneous and not supported by the record." *Noble Energy, Inc. v.*

*Colo. Dep't of Revenue*, 232 P.3d 293, 296 (Colo. App. 2010). But "[w]e review its application of law, including any questions of statutory construction, de novo." *Creager Mercantile Co. v. Colo. Dep't of Revenue*, 2015 COA 10, ¶ 6.

2. Legal Principles

Our main goal in interpreting a statute is to give effect to the intent of the legislature. *Id.* at ¶ 8. To do so, we first look to "the statutory language, giving words their plain and ordinary meanings, and taking into account their context within the statute as a whole." *Id.* We also "reject interpretations that render words or phrases superfluous, and harmonize potentially conflicting provisions, if possible." *Castle Rock Bank v. Team Transit, LLC*, 2012 COA 125, ¶ 17.

If the statute's language is unambiguous, "we apply it as written." *Creager*, ¶ 8. If the language is ambiguous, we employ other rules of statutory interpretation. *Id.*

The Grandfather Clause provides a limited exception to the ITFA's general moratorium. Accordingly, we must "read the exception narrowly in order to preserve the primary operation of the

[moratorium] provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Indeed, "[g]iven that Congress has enacted a general rule . . . we should not eviscerate that legislative judgment through an expansive reading of . . . [the] exception." *Id.* In light of these principles, the City had the burden of establishing that its tax on Internet access services was grandfathered under the ITFA. *See Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992).

3. Analysis

Based upon the plain language of the Grandfather Clause, we agree with the trial court's conclusion that the City, via the City Clerk, was not "the appropriate agency" to have issued the "rule or other public proclamation."

First, as the trial court noted, the City is not an administrative agency under the plain language of the Grandfather Clause. Indeed, that clause states that the rule or other public proclamation must come from "the appropriate administrative agency *of the State or political subdivision thereof*." § 1101(d)(1) (emphasis added). Here, the City is the "political subdivision" of the state. Thus, under the plain language of the Grandfather Clause, the City

cannot be an administrative agency of itself. Otherwise, under the City's construction, the statute would read "rule or other public proclamation made by the [City] of the [City]." *See Reno v. Marks*, 2015 CO 33, ¶ 20 ("We avoid interpretations that would lead to an absurd result.").

Second, even assuming that the City is an administrative agency, and the City Clerk its agent, it would not be an *appropriate* agency under the plain terms of the Grandfather Clause. The *appropriate* agency is one that "has interpreted and applied such tax to Internet access services." § 1101(d)(1); *see also City of Eugene v. Comcast of Or. II, Inc.*, 333 P.3d 1051, 1067 (Or. Ct. App. 2014) (rejecting the City of Eugene's contention that publication of an ordinance "broad enough to encompass Internet access services" satisfied the rule or other public proclamation requirement because the Grandfather Clause requires "notice that the city 'interpreted and applied' its tax to Internet access services"). And, as the trial court noted, the "administration of the tax chapter is vested in the finance director and gives the director the authority to issue administrative interpretations regarding tax assessment and

liability." *See* Golden Mun. Code 3.06.010. The City's Clerk, on the other hand, is the "custodian of the city seal and . . . keep[s] a journal of council proceedings and record[s] in full all ordinances, motions, and resolutions." Golden Charter § 7.6. Thus, reading the phrase "appropriate agency" in the context of the entire Grandfather Clause, *Creager*, ¶ 8, the City, via the City Clerk, was not "the appropriate agency."

Third, we are not persuaded by the City's contention that the trial court interpreted the Grandfather Clause too narrowly in requiring the appropriate agency to be one "like the Finance Department." The plain terms of the ITFA refute the City's assertion. Indeed, the Grandfather Clause states that the rule or other public proclamation must come from *the appropriate* administrative agency. So, contrary to the City's assertion, Congress intended notice to the taxpayer to come from a specific agency; namely, one with authority to "interpret[] and appl[y] [an existing] tax to Internet access services." § 1101(d)(1). Here, the agency with that authority is the Finance Department. Moreover, the Grandfather Clause is an exception to the general moratorium;

thus, the trial court was correct to construe it narrowly. *See Clark*, 489 U.S. at 739.

### B. Interest on Comcast's Deposit

The City contends that the trial court erred when it awarded Comcast interest on its deposit at the rate set forth in section 39-21-110.5(2). We disagree.

#### 1. Additional Background

When a taxpayer files an appeal of a tax assessment, sections 29-2-106.1(8)(d) and 39-21-105(4)(a)-(b), C.R.S. 2015, require the taxpayer to "file with the district court a surety bond in twice the amount of taxes, interest, and other charges." § 39-21-105(4)(a). In lieu of that requirement, a taxpayer may "deposit the disputed amount" with the taxing entity. § 39-21-105(4)(b). Comcast elected this second option and deposited the disputed tax assessment with the City.

In the event that a taxpayer is successful in its appeal, section 39-21-105(4)(b) requires that "the funds deposited shall be . . . returned in whole or in part to the taxpayer with interest at the rate imposed under section 39-21-110.5." *Id.* Section 39-21-110.5(2),

in turn, sets out an annual rate of interest at "the prime rate . . . plus three points, rounded to the nearest full percent."

The City's municipal code similarly allows a taxpayer to deposit the disputed amount with the City. The City's code differs from the state's statutes, however, in two important respects. First, the City's code requires the Finance Director to deposit the disputed amount in a segregated account. Golden Mun. Code 3.09.050(c). Second, and most importantly for the purposes of this appeal, the municipal code states that interest on any returned deposit will be "based on the rate of interest earned in the segregated account," rather than at the prime rate plus three points as required under section 39-21-110.5(2). *Id.*

The City asserts that the rate of interest on any returned deposit should be controlled by its municipal code because (1) the rate of interest is a substantive matter and (2) local ordinances supersede state statutes where they conflict on a substantive matter of purely local concern.

### 2. Legal Principles

"[H]ome rule cities may regulate matters of local concern," but only "the General Assembly may regulate matters of statewide concern." *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1045 (Colo. 1991); *see also MDC Holdings, Inc. v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010) ("Local government legislation that purports to supplant or undercut provisions of superseding state statutes is inoperative.").

"The General Assembly declared that dispute resolution of locally imposed use and sales taxes was a matter of statewide concern . . . ." *Walgreen*, 819 P.2d at 1046. Based on that declaration, it has mandated "that appellate procedures [used to resolve such conflicts] shall be uniformly applied throughout the state." *Id.* "Underlying the General Assembly's demonstrated interest in uniform, statewide appeals in district courts for contested use or sales taxes is the Colorado constitutional requirement that all laws relating to state courts shall be uniform in their application." *Id.* (citing Colo. Const. art. VI, § 19).

### 3. Analysis

The trial court did not err when it awarded Comcast interest on its deposit at the rate set forth in section 39-21-110.5(2).

The uniform application of the appellate procedures governing resolution of tax-payer disputes is a matter of statewide concern. *See* § 29-2-106.1(1); *Walgreen*, 819 P.2d at 1046. As part of those procedures, the General Assembly has enacted a statute that sets forth the rate at which interest accrues on any disputed amount deposited with the taxing municipality. *See* §§ 29-2-106.1(8)(d), 39-21-105(4)(b), 39-21-110.5(2). That interest rate is therefore part of the appellate procedures for resolution of tax-payer disputes whose uniform application is a matter of statewide concern. So here, where the applicable interest rate is a matter of "statewide concern, the state statute supersedes [the] conflicting home-rule provision." *MDC Holdings, Inc.*, 223 P.3d at 717.

Indeed, "[w]ere we to adopt [the City's] argument, we would essentially invite each local statutory or home rule government to specify its own" interest rate applicable to deposits of disputed amounts. *See Walgreen*, 819 P.2d at 1046-47. And that result

would violate the General Assembly's mandate that the appellate procedures governing resolution of tax-payer disputes be "applied uniformly throughout the state." § 29-2-106.1(8)(d).

We are not persuaded by the City's contention that the rate of pre-judgment interest is a substantive matter of purely local concern. As we have set forth above, the applicable interest rate is part of the appellate procedures governing resolution of taxpayer disputes — procedures whose uniform application are a matter of statewide concern. *See Walgreen*, 819 P.2d at 1046. Furthermore, the only case cited by the City as authority for its position is a federal case that notes that pre-judgment interest is a substantive matter for choice of law purposes where a federal court's subject matter jurisdiction is based upon diversity of the parties. *See Webco Indus., Inc. v. Termatool Corp.*, 278 F.3d 1120, 1134 (10th Cir. 2002). That case does not stand for the proposition that the rate of interest is a matter of purely local concern.

## III. Comcast's Cross-Appeal

Comcast filed a cross-appeal contending that the trial court erred when it concluded that Internet access was a

telecommunications service under the City's uniform definition. In light of our holding affirming the trial court's judgment, Comcast's cross-appeal is dismissed as moot because our resolution of it would have no practical effect on an existing controversy. *See Schupper v. Smith*, 128 P.3d 323, 327 (Colo. App. 2005) (declining to address an issue on cross-appeal where the cross-appellant prevailed at trial, and the court of appeals affirmed the judgment of the trial court); *Kellum v. RE Servs., LLC*, 30 P.3d 875, 876 (Colo. App. 2001) (noting that where cross-appellant prevailed at trial, and the court of appeals affirmed the trial court's judgment, "any ruling we make on [the cross-appeal] issue will have no effect on [the] disposition of th[e] case, and thus the issue is moot").

## IV. Conclusion

The judgment is affirmed, and the cross-appeal is dismissed.

JUDGE DAILEY and JUDGE NAVARRO concur.

# Court of Appeals

**STATE OF COLORADO**
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**CHRIS RYAN**
**CLERK OF THE COURT**

**PAULINE BROCK**
**CHIEF DEPUTY CLERK**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 8, 2015

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