Consolidated Cases No. 23940 & 23941

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, SOMETIMES ALSO KNOWN AND REFERRED TO AS THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, AND ROBERT B. KEATING, JOHN F. KELLY, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH A. MacINTOSH, CARL N. DeTEMPLE, EDWARD F. BURKE, JR., ELVIN R. CALDWELL, ERNEST P. MARRANZINO, AS THE MEMBERS OF AND BEING AND CONSTITUTING THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, SOMETIMES ALSO KNOWN AND REFERRED TO AS THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, AND CHARLES L. TEMPLE, AS MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER,

Plaintiffs in Error,

-vs-

DUFFY STORAGE AND MOVING CO.; JAMES A DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; AND RIDGE ERECTION CO.,

Defendants in Error.

No. 23940

DUFFY STORAGE AND MOVING CO.; JAMES A DUFFY; GEORGE V. SIMONE; DENVER AUTO TRIMMING SUPPLY CO.; HOUSTON GIBSON; WINSLOW CRANE SERVICE CO.; THOMAS & SON TRANSFER LINE, INC.; AND RIDGE ERECTION CO.,

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THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION; THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, SOMETIMES ALSO KNOWN AND REFERRED TO AS THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, AND ROBERT B. KEATING, JOHN F. KELLY, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH A. MacINTOSH, CARL N. DeTEMPLE, EDWARD F. BURKE, JR., ELVIN R. CALDWELL, ERNEST P. MARRANZINO, AS THE MEMBERS OF AND BEING AND CONSTITUTING THE BOARD OF COUNCILMEN OF THE CITY AND COUNTY OF DENVER, SOMETIMES ALSO KNOWN AND REFERRED TO AS THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, AND CHARLES L. TEMPLE, AS MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER,

Defendants in Error.

No. 23941

Error to the District Court of the City and County of Denver

Honorable Edward J. Keating Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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INTRODUCTION

The undersigned attorney, representing the Colorado Municipal League as Amicus Curiae, appears in support of Plaitiffs in Error, the City and County of Denver, et al., in Case No. 23940 relating to the "earnings tax" and in support of Defendants in Error, the City and County of Denver, et al., in Case No. 23941 relating to the "business occupational privilege tax" and the "employee occupational privilege tax." The Colorado Municipal League represents some two hundred thirteen (213) member cities and towns throughout the State of Colorado, at least one hundred eight (108) of which as of 1966 levied some form of general or specific occupation tax. Among the cities represented by the Colorado Municipal League are some thirty-four (34) home rule cities, all vitally concerned with maintaining broad taxing powers granted by Article XX of the Colorado Constitution as construed by this Court.

This Court is respectfully requested to reaffirm the authority of the City and County of Denver as well as other home rule and statutory municipalities to levy occupational taxes and to overrule its holding in Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958), preventing home rule cities from levying income taxes.

Because of severe time limitations in the preparation of this brief and because of the comprehensive brief being filed by the City and County of Denver, the Colorado Municipal League as Amicus Curiae tenders this short brief and further adopts the brief filed by the City and County of Denver.

STATEMENT OF THE CASE

The undersigned adopts the statement of the case appearing in the brief of the City and County of Denver.

SUMMARY OF ARGUMENT

I. DENVER V. SWEET SHOULD BE OVERRULED AND THE AUTHORITY OF THE CITY AND COUNTY OF DENVER TO LEVY AN EARNINGS TAX SHOULD BE CONFIRMED.

II. THE CITY AND COUNTY OF DENVER HAS AUTHORITY TO LEVY BUSINESS AND EMPLOYEE OCCUPATIONAL PRIVILEGE TAXES.

ARGUMENT

I. DENVER V. SWEET SHOULD BE OVERRULED AND THE AUTHORITY OF THE CITY AND COUNTY OF DENVER TO LEVY AN EARNINGS TAX SHOULD BE CONFIRMED.

It is respectfully submitted that Denver v. Sweet, 138 Colo. 41, 329 P.2d 449 (1958) is erroneous and should be overruled by this Court. Sweet, which

holds that Article X, Section 17, of the Colorado Constitution has preempted or divested home rule cities of any authority to impose an income tax, is the only case preventing the City and County of Denver, or any other home rule city, from levying income or earnings taxes.

The Supreme Court has historically broadly construed the taxing powers of home rule cities. Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066 (1905) and Four-County Metropolitan Capital Improvement District, et al., v. Board of County Commissioners of Adams County, 149 Colo. 284, 369 P.2d 67 (1962). Berman v. Denver, 156 Colo. 538, 542, 400 P.2d 434 (1965), decided seven years after Sweet, supra, held that ". . . right to levy a tax to raise revenue with which to conduct the affairs and business of the City (was) clearly within the constitutional grant of power to home rule cities . . ." The opinion stated at page 544 that:

> The power to levy a tax in home rule cities, to be paid by those who live or sojourn there, for the purpose of defraying expenses of local and municipal government, stems from a grant by the people in the form of a constitutional provision. (emphasis supplied)

Without broad powers of taxation constitutional home rule would be seriously impaired.

In Sweet, the Court read into Article X, Section 17, by implication repeal or divesture of income tax powers of home rule cities under Article XX. Yet there is no language in Article X, Section 17, referring to home rule powers. Nor is there wording that any income tax levied by the General Assembly would be exclusive; furthermore, the language of Article X, Section 17, is merely permissive. Indeed, the title of the ballot pursuant to which the income tax amendment was passed in 1936 only stated (for or against) "the amendment of Article X of the Constitution of the State of Colorado, adding thereto a new section to provide for the enactment of an income tax." Session Laws of 1935, House Concurrent Resolution No. 13, Sec. 2, p. 1125. The 1936 amendment adopting Article X, Section 17, was intended to remove the prohibition in Article X, Section 7, of state-imposed, locally-shared taxes and perhaps to avoid any application of Article X, Section 3 requiring uniform taxation. As Howard C. Klemme has pointed out in "The Powers of Home Rule Cities in Colorado," 36 Uni. of Colo. L. Rev., 321, 358, where the people have desired to divest home rule cities of home rule powers by subsequent constitutional amendment, they have been able to do so by making the provision specifically applicable to such cities (Article XXV - regulation of privately owned public utilities operating in home rule cities) or by clearly stating that a certain power was

vested exclusively in the General Assembly (Article XXII - regulation of intoxicating liquors).

Neither is there a conflict between Article XX and Article X, Section 17, which could justify finding a repeal or divesture of Article XX powers by implication. This Court has repeatedly ruled that the state and its municipalities may levy taxes of the same kind or upon the same matters. Berman v. Denver, supra, and Post v. Grand Junction, 118 Colo. 434, 195 P.2d 958 (1948). No conflict exists in income taxes levied by the state pursuant to Article X, Section 17, and by home rule cities pursuant to Article XX of the Colorado Constitution justifying a repeal of constitutional powers by implication.

Repeals by implication are not favored and should not be found in the absence of a clear conflict. This rule should certainly be applicable to the home rule powers conferred by the people in the adoption of Article XX. This Court in Berman v. Denver, supra, and in Post v. Grand Junction, supra, refused to find preemption or divesture of taxing powers by subsequent constitutional amendment and there is no reasonable basis for such an implication as a result of Article X, Section 17.

Denver v. Sweet, supra, should be overruled and the authority of home rule cities to levy income or earnings taxes for the funding of matters of local and municipal concern should be upheld.

II. THE CITY AND COUNTY OF DENVER HAS AUTHORITY TO LEVY BUSINESS AND EMPLOYEE OCCUPATIONAL PRIVILEGE TAXES.

Occupation taxes are extensively utilized by Colorado cities and towns. The General Assembly in 1907 granted cities of the second class and towns the authority now codified in C.R.S. 1963, 139-78-3 (2):

> To license, regulate, and tax, subject to any law of the state now in force, or hereafter to be enacted, any and all lawful occupations, business places, amusements, or places of amusement.

First class cities have the same authority by virtue of C.R.S. 1963, 139-75-1 (3).

In recent years the Colorado Supreme Court on four separate occasions has upheld the authority of municipalities to impose general or specific occupational taxes. Post v. Grand Junction, 118 Colo. 434, 195 P.2d 958 (1948); Jackson v. Glenwood Springs, 122 Colo. 323, 221 P.2d 1083 (1950); Ping v. Cortez, 139 Colo. 575, 342 P.2d 657 (1959); and Englewood v. Wright, 147 Colo. 537,

364 P.2d 569 (1961). In each of these cases this Court affirmed the municipality's power to impose occupation taxes and rejected all attempts to limit that power. It is submitted that these cases conclusively dispose of any question regarding authority of the City and County of Denver to levy a "business occupational privilege tax" and an "employee occupational privilege tax."

CONCLUSION

The undersigned on behalf of the Colorado Municipal League, Amicus Curiae, respectfully submits that Denver v. Sweet, supra, was erroneous; that the people in adopting Article X, Section 17, of the Colorado Constitution did not expressly or by implication preempt or divest home rule cities of the authority to enact similar income taxes; and that the full power of taxation possessed by home rule cities as enunciated in other cases of this Court should be restored by overruling Denver v. Sweet, supra. It is further submitted that the authority of municipalities to impose occupational taxes is indisputable, and that the business and employee privilege taxes enacted by the City and County of Denver should be upheld.

Respectfully submitted,

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