No. 25503

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF BOULDER, COLORADO, a municipal corporation, Appellant, v. THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate, Appellee.	Error to the District Court of the County of Boulder State of Colorado Honorable Rex H. Scott 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 Plaintiff in Error, the City of Boulder. The Colorado Municipal League is a non-profit voluntary association of two hundred fourteen (214) cities and towns throughout the state of Colorado. Of these, thirty-eight are home rule municipalities organized pursuant to and deriving their powers from Article XX of the Colorado Constitution. The Colorado Municipal League is vitally concerned with maintaining the broad taxing powers as granted by Article XX of the Colorado Constitution and as consistently upheld by this Court.

The right and opportunity for the citizens of Colorado cities to govern themselves has been cherished as a fundamental and long standing part of our Colorado Constitution. This right was first conferred by the citizens of Colorado in 1902 and substantially broadened by an amendment adopted by the electorate in 1912. Although the 38 home rule cities constitute, numerically speaking, a minority of Colorado municipalities, they contain and serve, based upon 1970 census figures, almost 60 percent of the state's population.

The high regard with which municipal home rule is held by Colorado citizens is further evidenced by overwhelming passage in 1970 of Constitutional Amendment Number Three adding, among other things, a new section 9 to Article XX. This amendment grants to all municipalities, regardless of size, the right to adopt home rule charters and directs the General Assembly to enact statutory procedures designed to facilitate adoption and amendment of home rule charters. (Since towns, as well as cities, are now eligible to adopt home rule charters, the term "home rule municipality" is sometimes used herein in lieu of the term "home rule city.")

The brief of the Colorado Municipal League is primarily directed at the principal issue of the case, namely, whether the Regents of the

University of Colorado can be compelled by the City of Boulder to collect and remit to the City the proceeds of an admissions tax levied by the City. This brief also addresses itself to the authority of the City of Boulder, as a home rule municipality, to impose an admissions tax upon persons attending events open to the public. This brief does not address itself to the third and fourth issues which relate to recovery of back taxes, and any penalty or interest therefor.

This Court is respectfully requested to affirm the authority of the City to levy an admissions tax upon persons attending events open to the public and to rule that the Regents may be compelled to collect and remit to the City the tax so levied.

STATEMENT OF THE ISSUES

The undersigned adopts the statement of issues appearing in the brief of the City of Boulder.

STATEMENT OF THE CASE

The undersigned adopts the statement of the case appearing in the brief of the City of Boulder.

SUMMARY OF ARGUMENT

The City of Boulder ordinance imposing a five percent tax on admissions charged to those attending events within the City which are open to the public, including events held at or by the University of Colorado, is a lawful exercise of the City's home rule taxing powers pursuant to Article XX of the Colorado Constitution. The language of Article XX, together with the consistent holdings of this Court confirming broad taxing powers of home rule municipalities, clearly substantiate the City's authority to levy an admissions tax. The tax is a non-discriminatory levy imposed on the customer or person attending the event, with the obligation

to collect and remit the tax falling upon the person or entity who charges the admission.

The power of Boulder as a home rule city to require collection of the admissions tax by the University does not interfere with the powers of the University as conferred in Article IX, Section 14, or Article VIII, Section 5.

Assuming, arguendo, that the duty of collecting and remitting the tax interferes, to some degree, with the management, supervision and control of the University, a holding by this Court that the University is not required to collect the tax would impliedly assume that a conflict exists between Article XX and those constitutional provisions concerning the control of the University. If such a conflict among the powers of home rule municipalities pursuant to Article XX, powers of the University pursuant to Article IX, Section 14, and Article VIII, Section 5, is assumed, these constitutional provisions must be construed by this Court to harmonize the purposes and meaning of each. In order to give reasonable effect to all of these constitutional provisions, it is submitted that the Court adopt the test as to whether imposition on the University of the duty of collecting and remitting the tax constitutes such a burden or interference as would impair its operations as a state educational institution or the ability of the Board of Regents to perform its constitutional duty of supervision of the University.

The record fails to show any substantial, significant or undue burden resulting from a requirement that the University collect and remit the tax. Indeed, Boulder's ordinance, as implemented by administrative regulations issued pursuant thereto, provides compensation to the University for costs incurred in collecting and remitting the tax. The absence of any such burden, coupled with the fact that, practically speaking, the tax must be collected by the person or entity who imposes the admission charge, fully justify a ruling that the City in this instance may compel the Regents to collect and remit the tax.

It is submitted that, based upon the facts of this case, a ruling that the Regents could not be compelled to collect and remit the tax would substantially erode long standing home rule taxing powers.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE BOULDER ADMISSIONS TAX IS VALID.

Apparently neither the University nor the trial court seriously questioned the authority of the City of Boulder to impose an admissions tax. We concur that the clear and broad language of Article XX, coupled with the consistent holdings of this Court, firmly support the validity of Boulder's admissions tax. The following discussion of Article XX and particularly of recent decisions of this Court, however, will not only confirm the legality of the tax, but perhaps more importantly demonstrate the necessity for requiring the Regents to collect and remit this tax.

Article XX enumerates specific taxing powers of home rule municipalities. Doubts, however, with respect to the breadth of these powers or the failure to enumerate "other powers," are clearly and unequivocally erased by the following overriding paragraph of Section 6:

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

A brief review of recent decisions of this Court interpreting the taxing powers of home rule municipalities will substantiate and reaffirm the powers of taxation conferred by Article XX.

In Post v. Grand Junction, 118 Colo. 434, 195 P.2d 958(1948), the Colorado Supreme Court upheld the authority of the City of Grand Junction to impose an occupational tax upon dealers in intoxicating liquors. Similarly,

in Englewood v. Wright, 147 Colo. 537, 364 P.2d 569(1961), the Colorado Supreme Court upheld the authority of a home rule city to impose a business or occupation tax on persons renting residential or commercial property.

In 1962 the Colorado Supreme Court construed the powers of home rule municipalities in relation to the formation of a four-county metropolitan capital improvement district charged with levying a district-wide sales tax and returning the proceeds to counties and municipalities for construction of local improvements. In holding that the statute creating the district was an unconstitutional infringement on the powers of home rule municipalities, this Court, in Four-County Metropolitan Capital Improvement District v. The Board of County Commissioners of Adams County, 149 Colo. 284, 369 P.2d 67(1962), stated:

> In numerous opinions handed down by this court extending over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs. 149 Colo. 284, 294. (Emphasis by the Court.)

In Berman v. Denver, 156 Colo. 538, 400 P.2d 434(1965), the Colorado Supreme Court was confronted with the issue of whether Denver, as a home rule municipality, had the power to impose a sales and use tax. The taxpayer argued that Denver lacked power to enact a sales and use tax for the reasons that such taxes did not involve matters of purely local concern and, furthermore, that Colorado had not given its consent to the enactment of such taxes but rather had fully preempted the field to the exclusion of the City. In disposing of these arguments the Court stated:

> The right to levy a tax to raise revenue with which to conduct the affairs and business of the City is clearly within the constitutional grant of power to home rule cities, contained in Article XX, Sec. 6 of the Constitution of Colorado.
>
> * * *
>
> The provisions of the sales and use tax ordinances adopted by the City related to matters of 'local or

> municipal' concern within the meaning of Article XX, Sec. 6. They were adopted to raise revenue with which to conduct the affairs and render the services performed by the City. These ordinances cover sales within the City, or sales outside the City where delivery is made in the City of goods or commodities to be used therein.
>
> The arguments of plaintiff relating to the fact that visitors or transients are unjustly required to pay the tax carries no substance and is not persuasive. These visitors are within the City when purchases are made by them and are subject to all the valid ordinances of the City governing their conduct and fixing their responsibilities. All the facilities and services of the City which are available to permanent residents are equally available to the visitors, and they cannot complain that they are required to contribute to the cost of supplying those facilities and services. 156 Colo. 538, 542-543.

In Denver v. Duffy, 168 Colo. 91, 450 P.2d 339(1969), appeal dismissed, 396 U.S. 2(1969), this Court was asked to determine the validity of earnings, employer occupation, and employee occupation taxes levied by Denver. Following its decision in Denver v. Sweet, 138 Colo. 41, 329 P.2d 441(1958), the Court invalidated Denver's earnings or income tax. In Denver v. Sweet, supra, the Court had held that Article X, Sec. 17, of the Colorado Constitution, adopted subsequent to Article XX, vested exclusive non-delegable power in the General Assembly to levy income taxes and, therefore, Denver was without power to enact an ordinance imposing an income tax. It is significant that Denver v. Sweet and Denver v. Duffy, supra, both relating to imposition of income taxes by a home rule municipality, apparently constitute the only recent decisions of this Court limiting the taxing powers of home rule municipalities. In Duffy, supra, the Supreme Court proceeded to uphold both the employer occupation tax and the employee occupation tax levied by Denver.

The Duffy decision has been followed in two related cases upholding the taxing powers of home rule municipalities. In Hamilton v. City and County of Denver, Colo., 490 P.2d 1289(1971), plaintiffs challenged Denver's employee occupational privilege tax as it applied to various state elected and appointed officials. In upholding the tax as applied to these elected

and appointed state officials, the Court noted at page 1293 that it had "consistently upheld the right of home rule municipalities to enact taxes applicable to local matters," and concluded that application of Denver's head tax to these state elected and appointed officials did not interfere with employment by the state.

State Farm Mutual Automobile Insurance Company v. Temple, Colo., 491 P.2d 1371(1971), is the third and latest in a series of Denver head tax cases before this Court. The appellant-taxpayers claimed that imposition of the employer occupational privilege tax upon them was prohibited by C.R.S. 1963, 72-1-14 (1)(c), as amended, which provided that "...no other occupation tax or other taxes shall be levied or be collected from any insurance company by any county, city or town within this state...." In reaffirming the taxing powers of home rule cities, the Court concluded at page 1374 that:

> It follows, then, that with the grant of the taxing power to home rule cities, the state legislature cannot, under the guise of its police power to regulate the insurance industry, prohibit a home rule city, such as Denver, from taxing such businesses their share of the benefits enjoyed for the privilege of doing business therein.

Finally, in Security Life and Accident Company v. Temple, Colo., 492 P.2d 63(1972), this Court was asked to rule on the validity of Denver's sales and use tax as applied to the purchase and use within Denver of tangible personal property by insurance companies. The insurance companies, as in State Farm Mutual Automobile Insurance Company, supra, claimed exemption pursuant to C.R.S. 1963, 72-1-14 (1)(c), as amended, arguing that the statutory exemption was within the perogative of the General Assembly because regulation of insurance companies is of state-wide concern, and because uniform insurance company taxation was necessary to carry out the state's regulatory program. In upholding Denver's tax, this Court stated at page 64:

> The argument focuses upon a misconception of the question involved. The activity of the entity taxed is not

> controlling when testing whether Denver is acting in a purely local and municipal matter. The point is that the power to levy sales and use taxes for the support of the local home rule government is "essential * * * to the full exercise" of the right of self-government granted to such cities under Article XX, section 6. That the power to levy and collect within Denver excise taxes such as the sales tax is purely " 'local and municipal' concern" was delineated clearly in Berman v. Denver, 156 Colo. 538, 400 P.2d 434(1965). See State Farm Mut. Auto. Ins. Co. v. Temple, Supreme Court No. 24754, announced December 20, 1971, ____ Colo. ____, ____P.2d ____; Denver v. Duffy, 168 Colo. 92, 450 P.2d 339(1969), and cases cited therein. The state, even when acting under its regulatory powers, cannot prohibit home rule cities from exercising a power essential to their existence (local taxation). (Emphasis added)

The above cases indicate the consistently broad interpretation this Court has applied to the taxing powers of home rule municipalities and confirm the authority of Boulder, as a home rule municipality, to impose an admissions tax. Perhaps more importantly, the cases indicate the necessity for ruling that the authority of Boulder as a home rule city must encompass the power to require the Regents to collect and remit this tax.

II. THE TRIAL COURT ERRED IN HOLDING THAT TO COMPEL THE UNIVERSITY TO COLLECT AND REMIT THE TAX WOULD BE AN UNCONSTITUTIONAL INTERFERENCE BY THE CITY WITH THE RIGHT OF THE REGENTS TO GOVERN THE UNIVERSITY.

A. Compelling the University to collect and remit the tax would not interfere with the control, supervision or management of the University.

Article IX, Sec. 14, provides that:

> The board of regents shall have the general supervision of the university, and the exclusive control and direction of all funds of, and appropriations to, the university.

Article VIII, Sec. 5, provides, in part, that:

> The following educational institutions, to-wit: the University at Boulder...are hereby declared to be institutions of the state of Colorado, and the management thereof subject to the control of the state, under the provisions of the constitution, and such laws and regulations as the general assembly may provide....

(These two constitutional provisions are hereinafter often referred to collectively as "powers of the University.")

The threshold question is whether the Boulder ordinance compelling the University to collect the admissions tax would be an interference with these constitutional powers. It is submitted that there is no interference whatsoever in that: (1) the provision in Article IX, Sec. 14 relating to "exclusive control and direction of all funds" is concerned solely with funds of the University and does not include funds collected by the University and held in trust for remittance to the City pursuant to the admissions tax ordinance; and (2), since the admissions tax ordinance as implemented by administrative regulations promulgated pursuant thereto provides for reimbursement to the University of costs of collection, the duty of collection does not constitute any interference with the supervision and management of the University. Indeed, there is no evidence in the record that mandatory collection would interfere in any way with the constitutional powers of the University. Hence, this Court is urged to uphold the power of the City to require the University to collect that tax on the simple basis that such a requirement in no way interferes with the powers of the University.

B. If the Court finds that the University's tax collection duty does, to some degree, interfere with the control, supervision or management of the University, then the Court should determine whether the duty of collecting and remitting the tax constitutes such a burden or interference as would impair the operation of the University as a state educational institution, or the ability of the Board of Regents to perform its constitutional duty of supervision of the University.

It is axiomatic that the power to collect taxes is an essential and inherent adjunct of the power to tax. Without the power to establish reasonable collection procedures, the power to tax is meaningless. The vital importance of the power to establish reasonable tax collection procedures was recognized in Liebhardt v. Revenue Department, 123 Colo. 369, 229 P.2d 655(1951), wherein this Court, when discussing the power of the state to enforce collection of income taxes, quoted with approval, the following from 51 American Jurisprudence 857, Sec. 980:

> " * * * The continued existence of the effective government depends upon regular receipt of public revenue. It is imperatively necessary that taxes be paid or collected promptly; delay cannot be tolerated. The legislature may adopt any reasonable method designed for the effective enforcement of the collection of taxes, whether the property taxed belongs to residents or nonresidents. Whether the means adopted are within reasonable and rational limits is largely a question for the legislature alone. By whom, when, and through what procedure or remedy taxes shall be collected is a matter for legislative determination, subject to the rule that the procedure cannot be utterly unreasonable or arbitrary or unequal and unjust in its operation." 123 Colo. 369, 374.

Because the power to adopt and enforce reasonable procedures for tax collection is an inherent part of the power to tax itself, the establishment of such procedures by a home rule municipality must be considered an exercise of power pursuant to Article XX of the Colorado Constitution:

> That the power to levy and collect within Denver excise taxes such as the sales tax is purely " 'local and municipal' concern" was delineated clearly in Berman v. Denver, 156 Colo. 538, 400 P.2d 434(1965). (Emphasis added.) Security Life and Accident Company v. Temple, supra, 64.

As an exercise of power pursuant to Article XX, the method of tax collection chosen by a home rule city should be upheld so long as that method is reasonable and does not conflict with other constitutional provisions.

The method established by Boulder for collecting the admissions tax is certainly reasonable because the tax can, practically speaking, be collected only by the person charging admission, and because the City has provided for reimbursement of the tax collector for his costs of collection and remittance. As to the question of whether the method provided for collection conflicts with other constitutional provisions, it is submitted that no such conflict should be found in this case. The Court should construe Article XX, Article IX, Sec. 14, and Article VIII, Sec. 5, to give meaning and purpose to each:

> A construction which raises a conflict between different parts of the constitution is not admissible, where, by any reasonable construction, they may be made to harmonize. People ex rel Livesay v.

Wright, 6 Colo. 92, 95 (1881). See also People v. Higgins, 69 Colo. 79, 168 P. 740(1917).

The powers of the University, namely those relating to the control, management and supervision of the University, can be rationalized and upheld without doing violence to the meaning or purposes of Article IX, Sec. 14, Article VIII, Sec. 5, or Article XX, by applying the following or a similar test: whether imposition on the University of the burden of collecting and remitting the tax constitutes such a burden, or interference, as would impair its operation as a state educational institution or the ability of the Board of Regents to perform its constitutional duty of supervision of the University.

This approach of balancing interests and burdens has considerable precedent in law, e.g. state regulation and taxation of interstate commerce. Significantly, this Court used similar reasoning in the analogous case of Bedford v. Colorado National Bank of Denver, 104 Colo. 311, 91 P.2d 469(1939), affd. 310 U.S. 41(1940). In this case the Bank contested a two percent tax on, among other things, the service of furnishing safety deposit boxes. The Bank argued that the state could not force a national bank, as an instrumentality of the federal government, to collect and remit the tax. The Colorado Supreme Court upheld the tax since the incidence of the tax was on the customer, and upheld the Bank's duty of collection since that duty did not constitute an unconstitutional burden on the Bank. On appeal the United States Supreme Court in Colorado National Bank of Denver v. Bedford, 310 U.S. 41 (1940) at page 53 stated:

> "The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality. Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect." p. 53

In Hamilton v. City and County of Denver, supra, this Court was asked to reconcile the power of Denver to levy an employee occupational privilege tax on state officials, with an alleged interference of the tax on the operation of state government. In rejecting the argument that the tax was an unlawful interference with the operations of state government, this Court stated at page 1294:

> We perceive nothing in the above, or other applicable statutes and constitutional provisions to preclude a city such as Denver from applying appropriate taxes such as the one herein to those employees of the state physically employed within the confines of the city.
>
> It has long been well established that reasonable, non-discriminatory taxes may be imposed by one governmental unit upon the employees of another, where not precluded by applicable law.

See also the lengthy list of decisions cited in Hamilton, supra, supporting that position.

The test suggested for adoption on page 11 of this brief would afford reasonable protection to both University and City without negating powers granted to either. Particularly in light of the clear language and precedent of Article XX, such an approach is to be preferred over the mutually exclusive theory adopted by the trial court. A construction of these constitutional provisions similar to that suggested would also recognize the practical and equitable considerations that location of institutions of higher learning within municipalities create major demands for municipal services and protection. The University itself, and individuals who choose to attend its public events, derive municipal benefits such as police protection, fire protection, utilization of streets, parking areas, and parks. All of these require revenue to finance.

Compelling the University to collect and remit the admissions tax would not, in this situation, constitute such a burden or interference as to impair the University's operation as a state educational institution

or the ability of the Regents to perform its constitutional duty of supervision of the University. The tax is not a tax on the University itself. The ordinance specifies that the tax is to be paid by the person who is charged a fee for admission to the place or event. Provision is made for full compensation of any costs incurred by the University in collecting and remitting the tax. By enacting the ordinance, the City has not dictated that the University hold any particular event, what the admission price should be, or any other related determination. The University is merely required to collect and remit a tax on admissions to any public events for which an admission price is charged.

Meaningful interpretation of the applicable constitutional provisions and an equitable resolution of the possible conflicts between the City of Boulder and the University of Colorado can be provided by applying a test which balances the interests and burdens of each. In the case of Boulder's admissions tax, collection by the University clearly does not constitute such a burden or interference as to justify invalidating the requirement that the University collect the tax.

CONCLUSION

For the reasons stated, and the authorities cited, the Colorado Municipal League prays the Court do the following:

1. Affirm that portion of the judgment of the trial court upholding the validity of the Boulder Ordinance No. 3661.

2. Reverse the remaining portion of the judgment of the trial court and declare that the University has the obligation to collect the tax on

events open to the public for which an admission fee is charged.

Respectfully submitted,

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