

Washington: State Supreme Court upholds Seattle's gun tax



David M. Kall | Thursday, August 17, 2017

Almost exactly two years ago, the Seattle City Council unanimously approved a gun violence tax of \$25 per firearm sold at retail. The [legislation](#) also imposed levies of 2 cents per round of ammunition that contains a single projectile that measures .22 caliber or less sold at retail, and 5 cents per round of ammunition for all other ammunition sold at retail.

The ordinance, whose purpose is to “promote public safety, prevent gun violence and address in part the cost of gun violence in the city,” noted that hospital-based intervention programs, modeled on a similar approach for alcohol interventions in the 1990s, reduced injuries requiring hospital admission by nearly 50 percent.

As we [explained](#) when Seattle City Council passed the ordinance, those opposed to the measure, including the National Shooting Sports Foundation, promised a vigorous and prompt response. They reasoned that the gun tax was “nothing but a poll tax on the exercise of a fundamental civil liberty protected by the Second Amendment.”

Trial court

That litigation began on August 24, 2015, with a [complaint](#) in state court filed by purchasers of guns and gun ammunition: Outdoor Emporium, the largest firearm and ammunition retailer in Seattle; Precise Shooter, another retailer of firearms and ammunition; the Second Amendment Foundation, Inc.; the National Rifle Association of America, Inc.; and the above-mentioned National Shooting Sports

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Foundation. They sued the city of Seattle and the mayor, among others.

On Dec. 22, 2015, the trial court granted the defendants' motion for summary judgment, holding that the ordinance is an authorized tax, not a regulation, as the plaintiffs argued, because its primary purpose is to raise revenue. In so doing, the court held that the pre-emption argument failed because the statute at issue prohibits conflicting regulations, not taxes.

On appeal, the Court of Appeals certified this key question to the state's Supreme Court: Whether a municipal ordinance imposing a tax on retail firearm and ammunition sales within the municipality is a constitutional and lawful exercise of taxing authority.

Washington Supreme Court

The high court accepted review, and issued its [opinion](#) in the city's favor last week. The court considered three questions:

1. Is the gun tax actually a regulatory fee?
2. If it is a tax, is it authorized by law?
3. Is the tax pre-empted because only the state has the jurisdiction to levy it?

In its analysis, the court conceded that "[l]abeling something a tax does not make it so." Nevertheless, it dispensed with the plaintiffs' arguments relatively succinctly. First, it determined that the tax is a tax, authorized by state law that delegates broad taxing authority to first class cities, because its primary purpose is to raise revenue for public services.

Citing a 1995 case *Covell v. City of Seattle*, the court distinguished a tax from a fee, noting that "[f]ees are generally based on a local government's police powers, while the taxing authority of Washington's municipalities largely depends on legislative delegation." Pointing to the three-factor test that *Covell* set forth, the court looked at whether 1) the "'primary purpose'" of the ordinance is to raise revenue or to regulate; 2) whether the money collected must be allocated only to the authorized regulatory purpose; and 3) whether there is a direct relationship between the fee charged and the service received [or] the burden produced by the fee payer.

Factor 1: Primary purpose

The court dispensed with this factor quickly, by quoting actual language from the ordinance. That text states that the purpose is to raise revenue, and that it will fund specific programs that promote public safety. Thus, "[b]ecause public health research and gun safety programs are 'desired public benefits which cost money,' the Ordinance imposes a tax."

To the plaintiffs' contention that the legislative history supports a finding that the tax is a regulation, the court opined that such a tactic "would unwisely embroil courts in second-guessing the motives of lawmakers. Statements by 'individual legislator[s] do[] not show legislative intent.'"

Factor 2: Allocation

The court determined that this factor is "inconclusive." Although the ordinance segregates revenues by dedicating them to education and research, it does not allocate them for a regulatory purpose, even if it requires "retailers to keep sales records for tax purposes."

Factor 3: Relationship between the fee and the services it pays for

The court surmised that "there does not appear to be a direct relationship between the amount of annual revenue the Ordinance is expected to generate, \$300,000 to \$500,000, and the economic burden of gun

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violence in King County, about \$180 million per year.” Further, “it does not appear that the Council made any attempt to correlate the economic burden of gun violence with the revenue generated by the tax. The record does not reveal how the Council arrived at the tax rate imposed. Under *Covell*, when these ‘calculations’ are completely absent, the charge is a tax.”

As for the remaining two questions that the court addressed, the court disputed the plaintiffs’ position that tax was not authorized by law, and also disagreed that the tax was pre-empted. It cited various case and statutory authority, along with Washington’s constitution, going so far as to point out the “clear statutory language” that undercut the plaintiffs’ case, that the plaintiffs’ “restrictive characterization of municipal taxing authority is inconsistent with Washington case law,” and that “there is no evidence of express preemption.”

To the possibility of an implied preemption argument, the court recognized that “[w]hen the legislature does intend to preempt taxation, it typically does so explicitly.” The court “decline[d] to infer intent to preempt taxes from statutory language contemplating regulation...the legislature is ‘well aware of how to say taxation when it means taxation.’”

Dissenting opinion

One justice, while agreeing with the majority’s application of the three factor test, thought that a different inquiry should have been deployed, because statutory preemption was the issue: “*Covell* was not designed to distinguish between regulations, “laws[,] and ordinances” that are preempted by a specific statute on the one hand, and taxes on the other.”

On this question, the dissenting judge asserted that “[t]he city of Seattle certainly tried to avoid language that would obviously trigger the preemption statute. But the answer to this question does not depend-as the majority suggests-on whether the ordinance should be labeled a regulation or a tax under a legal test designed for a different purpose. Instead, it depends on the language of the statute.”

On examination, the “plain language [of Washington’s statute] demonstrates clear legislative intent to preempt local ‘laws and ordinances’ that ‘relat[e] to firearms’ as broadly as possible. A city tax that singles out the sale of firearms and ammunition for disadvantageous treatment is therefore preempted.”



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