SUMMARY
February 16, 2023

2023COA17

No. 21CA1423, *City of Aurora v. Colorado Department of Revenue* — Taxation — Cigarette Sales

A division of the court of appeals considers whether a local government's sales tax on cigarettes disqualifies it from receiving a share of state income tax revenue from cigarette sales under section 39-22-623(1)(a)(II)(A), C.R.S. 2022. The division concludes that the sales tax is disqualifying. Accordingly, the division affirms the district court's grant of summary judgment to the Colorado Department of Revenue.

COLORADO COURT OF APPEALS **2023COA17**

Court of Appeals No. 21CA1423
City and County of Denver District Court No. 20CV32783
Honorable Alex C. Myers, Judge

City of Aurora, Colorado,

Plaintiff-Appellant,

v.

Colorado Department of Revenue,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE HAWTHORNE*
Harris and Gomez, JJ., concur

Announced February 16, 2023

Daniel L. Brotzman, City Attorney, Tim Joyce, Assistant City Attorney, Hanosky Hernandez Perez, Assistant City Attorney, Aurora, Colorado, for Plaintiff-Appellant

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Local governments receive a share of state income tax revenue if they refrain from imposing certain local taxes on cigarettes. *See* § 39-22-623(1)(a)(II)(A), C.R.S. 2022. The only issue in this appeal is whether the City of Aurora disqualified itself from receiving a share of state income tax revenue under this section because it imposed a local sales tax on cigarettes. We conclude that it did. So we affirm the district court's summary judgment for the Colorado Department of Revenue (CDOR), albeit on grounds different from those relied on by the district court.

I. Background

¶ 2 Before 2019, section 39-22-623(1)(a)(II)(A) provided that to receive shares of state income tax revenue from cigarette sales, local governments were "prohibited from imposing fees, licenses, or taxes on any person as a condition for engaging in the business of selling cigarettes or from attempting in any manner to impose a tax on cigarettes." § 39-22-623(1)(a)(II)(A), C.R.S. 2018.

¶ 3 In 2019, the General Assembly narrowed the prohibition. Ch. 53, sec. 5, § 39-22-623, 2019 Colo. Sess. Laws 185-86. The statute now provides that to receive a share of the state income tax revenue, local governments are "prohibited from imposing taxes on

any person as a condition for engaging in the business of selling cigarettes." § 39-22-623(1)(a)(II)(A), C.R.S. 2022.

¶ 4 After the 2019 amendments, Aurora imposed a local sales tax on cigarettes. CDOR determined that the sales tax disqualified Aurora from receiving a share of the state income tax revenue and discontinued payments to Aurora. Aurora then sued CDOR, seeking (1) a declaratory judgment that it is entitled to the payments despite the sales tax and (2) injunctive relief requiring CDOR to disburse past and future payments to which Aurora is entitled.

¶ 5 After receiving cross-motions for summary judgment, the district court ruled for CDOR. The court ruled that under the amended statute's plain language, Aurora's cigarette sales tax was a tax "on any person as a condition for engaging in the business of selling cigarettes." *Id.*

¶ 6 Aurora appeals, arguing that the district court erred in so interpreting the statute.

II. Aurora's Sales Tax Disqualified It

A. Standard of Review and Governing Law

¶ 7 Whether the district court erred by ruling that the sales tax disqualified Aurora is a question of statutory interpretation that we review de novo. *See McCoy v. People*, 2019 CO 44, ¶ 37.

¶ 8 When construing a statute, our primary purpose is to give effect to the legislature's intent. *Id.* We do this by first examining the statute's language. *Id.* We give the legislature's words and phrases their plain and ordinary meanings. *Id.* We read the words and phrases in context, "construe the statute as a whole, in an effort to give consistent, harmonious, and sensible effect to all its parts." *People v. Diaz*, 2015 CO 28, ¶ 12. And we do not add words to the statute or subtract words from it. *Id.*

¶ 9 If the statute's plain language is unambiguous, we need look no further. *See McCoy*, ¶ 38. But if the language is ambiguous, we turn to other tools of statutory interpretation, including the statute's legislative history. *Id.*

¶ 10 A statute is ambiguous if it is "reasonably susceptible [of] multiple interpretations." *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the

statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

¶ 11 "An appellate court may . . . affirm on any ground supported by the record." *McLellan v. Colo. Dep't of Hum. Servs.*, 2022 COA 7, ¶ 10 (quoting *Taylor v. Taylor*, 2016 COA 100, ¶ 31).

B. The Statute's Language is Ambiguous

¶ 12 Section 39-22-623(1)(a)(II)(A) prohibits local governments from imposing a tax on "any person" as a condition for engaging in the business of selling cigarettes. But the parties disagree about whether the person who is taxed must be engaging in the business of selling cigarettes for the prohibition to apply. In other words, does the statute prohibit taxes on any person as a condition for *that person* engaging in the business of selling cigarettes (thus prohibiting only occupation taxes)? Or does the statute prohibit taxes on any person (the consumer) as a condition for *that person or a different person* (the retailer) engaging in the business of selling cigarettes (thus prohibiting sales taxes and occupation taxes)?

¶ 13 CDOR argues persuasively that viewing this provision in the context of section 39-22-623's entirety supports the latter interpretation. As CDOR points out, section 39-22-623(1)(e) refers

to a "tax on the occupation of selling cigarettes" — in other words, an occupation tax on retailers. Had the General Assembly intended subsection (1)(a)(II)(A) to prohibit only occupation taxes on retailers, it could have used the same language it used later in subsection (1)(e) and prohibited units of local government from imposing taxes "on the occupation of selling cigarettes." But it did not. Instead, it prohibited "taxes on any person as a condition for engaging in the business of selling cigarettes." That the General Assembly purposely avoided using the same language to refer to occupation taxes suggests its intent that the prohibited taxes are not limited to only occupation taxes.

¶ 14 Also, other 2019 amendments to the statute suggest that the General Assembly intended to prohibit sales taxes. As mentioned above, before 2019, local governments could not impose fees, licenses, or any taxes on cigarettes. But the 2019 amendments removed the prohibition on fees and licenses. With this change, the General Assembly added clarifying language explaining that local governments that had been disqualified from receiving shares of state income tax revenue because they had imposed fees or licenses were newly eligible to receive shares going forward:

> For any city, town, or county that was previously disqualified from the apportionment set forth in this subsection (1)(a)(II)(A) by reason of imposing a fee or license related to the sale of cigarettes, the city, town, or county is eligible for any allocation of money that is based on an apportionment made on or after [the effective date of the 2019 amendments].

§ 39-22-623(1)(a)(II)(A); 2019 Colo. Sess. Laws at 186. The General Assembly did not include a parallel provision about local governments that had been disqualified because they had imposed any kind of tax on cigarettes. If it intended in 2019 to end the prohibition on sales taxes along with that on fees and licenses, it could have included a similar provision for sales taxes, clarifying that local governments that were previously disqualified for having imposed a sales tax were disqualified no longer. But it did not. Indeed, the 2019 restoring-eligibility provision suggests that the General Assembly intended the continuing prohibition to include any tax on the sale of cigarettes.

¶ 15 Based on this statutory context, we are tempted to conclude that subsection (1)(a)(II)(A)'s plain language unambiguously prohibits the sales tax at issue here because the sales tax is a tax on the consumer ("any person") as a condition for the seller

engaging in the business of selling cigarettes. But the statutory context described above only *suggests* that the General Assembly intended to prohibit sales taxes and occupation taxes. Despite the statute's contextual clues, it still may reasonably be read as prohibiting only occupation taxes. So we must conclude that the statute is ambiguous. But the 2019 amendments' legislative history clearly guides us to further conclude that the General Assembly intended to prohibit local governments from imposing sales taxes on cigarettes to receive a share of state income tax revenue.

C. 2019 Amendments' Legislative History

¶ 16 The 2019 amendments passed the General Assembly as H.B. 19-1033. The bill was passed first by the Colorado House and then amended and passed by the Senate. The Senate version ultimately became law.

¶ 17 The version introduced in the House struck the entire provision at issue here — in other words, it allowed local governments to receive a share of state income tax revenue regardless of whether they imposed fees, licenses, or taxes on cigarettes. H.B. 19-1033, 72d Gen. Assemb., 1st Reg. Sess. (Colo.

2019) (an introduced, Jan. 4, 2019), https://perma.cc/UCY6-AD9Q. The House passed amendments on second reading adding language providing that any local government that was previously disqualified because it had imposed "a fee, license, *or tax* related to the sale of cigarettes" was disqualified no longer. H.B. 19-1033, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (an engrossed, Feb. 5, 2019) (emphasis added), https://perma.cc/REF9-HXQ4. This version went to the Senate Committee on Health and Human Services, and then the Senate floor, where it was amended again.

¶ 18 The floor amendments ultimately became law. They provided that local governments were disqualified from receiving shares of state income tax revenue if they imposed "taxes on any person as a condition for engaging in the business of selling cigarettes." They also removed taxes from the provision addressing previously-but-no-longer-disqualified local governments. And local governments that were previously disqualified for having imposed "a fee or license related to the sale of cigarettes" (not taxes) were disqualified no longer. H.B. 19-1033, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (as revised, Feb. 22, 2019), https://perma.cc/9U7E-AQ8V.

Senator Bridges, the sponsor of the Senate floor amendment that became law described the ultimately adopted language as follows: "[The language] simply says that any municipality or county that actually raises taxes on cigarettes will lose their share back from the state, it's a form of double dipping." 2d Reading on H.B. 19-1033 before the S., 72d Gen. Assemb., 1st Reg. Sess. (Feb. 22, 2019).

¶ 19 In sum, the proposed 2019 amendments went from allowing local governments to impose fees, licenses, and taxes on cigarettes, to allowing them to impose only fees and licenses. The ultimately adopted 2019 amendments were described on the Senate floor as prohibiting local governments that "actually raise[] taxes on cigarettes" from qualifying for the state income tax revenue. This legislative history clearly establishes that the General Assembly intended to render all taxes on cigarettes, not just occupation taxes, disqualifying.

¶ 20 Still, Aurora points out that before 2019, there were two clauses describing prohibited tax impositions: (1) "imposing . . . taxes on any person as a condition for engaging in the business of selling cigarettes" and (2) "attempting in any manner to impose a

tax on cigarettes." § 39-22-623(1)(a)(II)(A), C.R.S. 2018. And it argues that those pre-2019 clauses must have referred to mutually exclusive types of taxes: the first clause to occupation taxes and the second clause to sales taxes. According to Aurora, because the 2019 amendments eliminated the second clause, the only disqualifying taxes remaining are those described by the first clause: occupation taxes. We reject this argument.

¶ 21 Considering the statutory context and the 2019 amendments' legislative history analyzed above, it is more plausible that the two clauses were not mutually exclusive and the General Assembly eliminated the second clause because it was a catch-all that was partially or entirely redundant of the first clause.

¶ 22 We therefore conclude that because Aurora imposed a sales tax on cigarettes, it disqualified itself from receiving a share of state income tax revenue under section 39-22-623(1)(a)(II)(A).

III. Conclusion

¶ 23 The judgment is affirmed.

JUDGE HARRIS and JUDGE GOMEZ concur.