

**IN THE SUPREME COURT OF THE
STATE OF GEORGIA**

CASE NO. S08G0568

CITY OF ATLANTA, GEORGIA,

Appellant

v.

HOTELS.COM, LP; HOTELS.COM TICKETS, INC.; CENDANT TRAVEL
DISTRIBUTION SERVICES GROUP, INC.; EXPEDIA, INC.;
INTERNETWORK PUBLISHING CORP. (d/b/a LODGING.COM);
LOWESTFARE.COM, INC.; ONETRAVEL HOLDINGS, INC.; ONETRAVEL,
INC.; ORBITZ, LLC; PRICELINE.COM, INC.; SITE59.COM;
TRAVELCITY.COM, LP; AND TRAVELNOW.COM, INC.,

Appellees.

***AMICUS CURIAE* BRIEF OF THE COUNCIL ON STATE TAXATION IN
SUPPORT OF APPELLEES**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

COST, the Council On State Taxation, is a nonprofit trade association formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today COST has grown to an independent membership of more than 620 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST is significantly interested in the City of Atlanta's "taxation by litigation" approach to assessing hotel excise tax because permitting a locality to blatantly ignore mandated administrative procedures and farm out its enforcement power to private attorneys can lead to the imposition of tax based on litigation profitability, not the public interest. The exercise of a few undemanding administrative measures before burdening the resources of the judicial system not only is required by Georgia law, but also represents sound tax policy. Moreover, contracts that provide private attorneys with the right to a percentage of whatever tax the attorneys decide to assess violate principles of fundamental fairness. COST and its members have a strong interest in ensuring that the government not be permitted to outsource its police power functions to attorneys with a profit interest in the outcome of a case, lest our members find themselves targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained

by the constitutional checks and ethical obligations on the exercise of that authority. The ramifications of the method chosen by the City of Atlanta to administer and enforce its local hotel excise tax go well beyond this case and could affect virtually every COST member.

I. STATEMENT OF FACTS

This litigation began in early 2006 when the City authorized a lawsuit against online travel-related service companies, claiming that tax was due on services the City had never previously taxed. Rather than engaging in a fact-finding audit, or pursuing litigation with its own publicly funded counsel, or hiring additional assistance on an hourly basis, the City chose to enter into a contingent-fee agreement with an outside law firm. Numerous other Georgia localities brought similar suits in venues across the state after being encouraged by contingent-fee law firms.

Based on clear statutory precedent and sound public policy, the Court of Appeals upheld a trial court dismissal of the City's action based on its complete failure to exhaust administrative remedies. The dismissal through the failure to exhaust administrative remedies is the sole issue before this court.

II. SUMMARY OF THE ARGUMENT

COST has followed with great interest and unease this case and the litigation *Amici* for the City refer to as the "parallel litigation" in federal court. While the

underlying substantive tax issues are interesting, the method the cities and counties use to administer and impose their local taxes is disturbing. In its capacity as a tax assessor, the City (and many other localities around Georgia) has taken the unprecedented step of hiring a group of contingent-fee attorneys to make discretionary determinations and compute, assess, and collect a tax. In doing so, the City evaded the deliberative administrative processes that are universally used to initially resolve tax disputes by virtually every jurisdiction in America.

Because the Appellees have skillfully argued the constitutional and legal reasons why this court should affirm the decision below, this *amicus* brief will not repeat those arguments. Rather, this brief will focus on the policy implications associated with two aspects of the case: the importance of following an administrative process before filing suit and the ill-advised use of contingent-fee attorneys to compute and assess taxes. Contracting out the State's enforcement power to private contingent-fee attorneys facilitates what we consider "taxation through litigation." The strategy of the private contingent-fee attorneys (select an emerging or established industry and pursue it through tax litigation as opposed to administrative assessments by tax authorities) is nothing more than an end-run around local representative government. In addition to offending the democratic process, contingent-fee agreements by governments darken the business climate and legal environment in Georgia.

III. ARGUMENT

As an initial matter, it is important to note that COST does not object to the City's ability to sue in order to collect delinquent taxes. COST also does not object to the collection of delinquent taxes by using a contingent-fee-based collector.¹ The City's actions in this case, however, are quite different. The City failed to send even a single notice to any party indicating tax was due. It also never undertook any effort to gather information that would have allowed it to determine if tax was due and compute the amount. Instead, the City hired contingent-fee attorneys to administer, compute, assess, and collect the tax by using the court system. The City's attempt to enforce its tax in this matter goes well beyond the collection of a delinquent tax and runs counter to the sound policy considerations laid out below.

A. Sound Tax Policy Requires the City to Implement Basic Administrative Procedures to Compute and Assess Taxes before Bringing Suit

Considerations of judicial economy, sound administration of local taxes, and the orderly administration of justice compel the conclusion that a locality choosing

¹ For example, the Georgia Tax commissioner is empowered to collect delinquent taxes by using contractors compensated on a contingent fee basis. Ga. Code Ann. § 48-2-6.

to impose a tax must provide basic administrative processes before it attempts to collect a tax in a civil action. In short, the doctrine of exhaustion of administrative remedies applies to the Atlanta hotel excise tax.

Several powerful policy considerations underlie the exhaustion requirement. First, the requirement serves to eliminate or mitigate damages. If a taxing authority provides a taxpayer with an opportunity to determine through the issuance of an assessment or other tax notice that it has committed error, then the taxpayer may be able correct the error without incurring additional interest, penalties, and litigation costs. In a case like this—which arguably involves whether a tax was appropriately collected from an end consumer—prompt action by the City to notify taxpayers that the City believes a tax is due can often result in prompt payment and collection of taxes, thereby mitigating the escalating liability that would otherwise occur. The alternative chosen by the City—simply to file an action, conduct discovery, and wait for trial—encourages just the reverse.

Second, by insisting that a dispute remain as an initial matter within the expertise of the taxing authority, the exhaustion requirement eases the burden of the courts by developing a fuller record. *Amici* for the city contend that exhaustion is intended to require only aggrieved parties (e.g. taxpayers) to use an administrative system before racing to court, but has no effect on tax administrators. This is simply not the case. The doctrine does not run in only one

direction. Rather, it is intended to keep all controversies—regardless of who the complaining or aggrieved party might be—in front of an administrative body without inundating the courts. In fact, the *Amici* in the self-described “parallel case” are a perfect example of the policy in practice. The putative class-action litigation was brought on behalf of numerous localities, none of which had made any legitimate attempts to investigate or resolve the tax issue before suing. This case and the “parallel case” are exactly the types of actions the doctrine is intended to address. Rather than burden the court system with the heavy lift of fact-finding, the City should have taken the initial steps required by law before suing. The City failed to initiate—much less exhaust—statutorily mandated processes before bringing suit.

B. The Purpose of Contingent Fees is to Provide Access to Justice to Individuals Who Cannot Otherwise Afford to Bring a Lawsuit; Government Use to Compute and Assess Taxes is Suspect

The City’s litigious approach to assessing its hotel tax is greatly complicated by its use of contingent-fee attorneys. The City is using contingent-fee attorneys not only to replace its mandated administrative process and make initial determinations as to taxability, but also to advocate its position in its lawsuits. Inserting attorneys with an escalating pecuniary interest into a governmental process that is intended to accurately and fairly compute the amount of tax a person owes to a jurisdiction greatly distorts that process.

Contingent-fees, once viewed as illegal in the United States, gained grudging acceptance in the late nineteenth century. Contingent fees do have a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989). Such arrangements can allow an individual to assert a claim that he or she might not otherwise afford to bring. As one commentator observed of the American system, “contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel.” *See* Alfred D. Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965). When, however, contingent-fee arrangements do not further access to the courts for individuals with limited means or create incentives that violate public policy, they should be viewed with skepticism and scrutiny. Indeed, when the contingent-fee arrangement involves the state’s exercise of police power (such as criminal or public nuisance cases), it is absolutely barred.

As the Supreme Court of the United States has recognized, attorneys for the state or local governmental entity that exercise the state’s police powers are “the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Conversely, contingent-

fee attorneys are legitimately motivated by financial incentives to maximize recovery for their private clients. The two functions—fair and impartial governance and for-profit lawsuits—are irreconcilably conflicted. They should not and cannot be allowed to mix.

Contingent-fee agreements were meant to increase access to courts for individuals without the resources to pay an hourly attorney fee; they were not meant for governmental entities. Cities and Counties have no need to hire lawyers on a contingent-fee basis to impose a tax and have other means to safeguard the government's power to tax. Delegation of the state's tax enforcement power to private attorneys on a contingent-fee basis circumvents core principles embodied in the Georgia Constitution, statutes governing the conduct of public officials, Georgia public policy, and ethics rules. *See e.g. Sears, Roebuck and Co. v. Parsons*, 260 Ga. 824, 401 S.E.2d 4 (1991). The experience of other states that have engaged in the practice of entering contingent-fee contracts demonstrates that government-hired private attorneys are often political donors, friends, or colleagues of the hiring government official—creating the appearance of impropriety, and sometimes worse. Stuart Taylor, *How a Few Rich Lawyers Tax the Rest of Us*, Nat'l Law J., June 26, 1999 (noting that history has shown that lawyers chosen to represent the government are “often from the ranks of their own campaign contributors and cronies”).

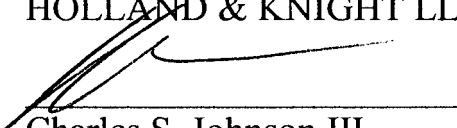
When the localities ordain lawyers on a contingent-fee basis to serve as de facto tax assessors, damage to the public's confidence in government's ability to fairly administer taxes will certainly occur. Moreover, these government-endorsed lawsuits have led to financially motivated litigation and ill-conceived attempts to expand tax under the cloak of state authority.

IV. CONCLUSION

For the reasons stated herein, COST respectfully requests that this Court affirm the Georgia Court of Appeals decision.

Respectfully submitted this 3rd day of December, 2008.

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CERTIFICATE OF SERVICE

I certify that on December 3, 2008, I served a copy of the *AMICUS CURIAE BRIEF OF THE COUNCIL ON STATE TAXATION IN SUPPORT OF APPELLEES* by it in the United States Mail with First Class Postage, addressed to:

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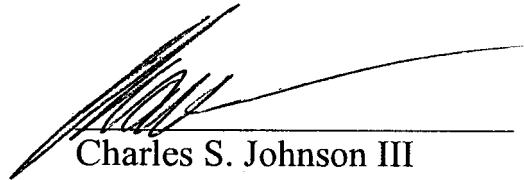
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This the 3rd day of December, 2008.

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A handwritten signature in black ink, appearing to read 'C. S. Johnson III', is written over a horizontal line. The signature is stylized and cursive.

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