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SUPREME COURT
STATE OF WASHINGTON

2006 AUG 18 A 10 10

BY C. J. MERRITT *bjh*

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

U.S. SMOKELESS TOBACCO
BRANDS INC., previously known
as United States Tobacco Sales and
Marketing Company Inc,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

No. 77690-3

MOTION TO STRIKE
RESPONDENT'S REQUEST FOR
AFFIRMATIVE RELIEF

I. IDENTITY OF MOVING PARTY

U.S. Smokeless Tobacco Brands Inc. ("Tobacco Sales") is the
Petitioner herein, and requests the relief set forth in Section II, below.

II. RELIEF REQUESTED

At pages 19 and 20 of its Supplemental Brief, the Respondent
Department of Revenue requests, as an alternative form of relief, that the
Court deny Tobacco Sales' tax refund claim. Tobacco Sales moves to
strike this request for affirmative relief on the ground that the Department
did not timely seek review and, therefore, its request for affirmative relief
is improper under RAP 2.4(a).

III. FACTS RELEVANT TO MOTION

In this appeal, Tobacco Sales seeks review of the Court of Appeals' decision in *U.S. Tobacco Sales and Marketing Co. Inc. v. Washington State Dept. of Revenue*, 128 Wn. App. 426, 115 P.3d 1080 (2005) ("*U.S. Tobacco II*"). In that decision, the Court of Appeals reiterated its holding in *U.S. Tobacco Sales & Mktg. Co. v. Dept. of Revenue*, 96 Wn. App. 932, 982 P.2d 652 (1999) ("*U.S. Tobacco I*"), that the Department incorrectly measured Petitioner's OTP tax liability based on Tobacco Sales' \$1.43 per can resale price to unaffiliated distributors. *U.S. Tobacco II*, 128 Wn. App. at 434 ("[W]e reiterate that it is not appropriate to measure the value of OTP sold by Tobacco Manufacturing by the price Tobacco Sales sold to independent distributors."). The Court of Appeals remanded the case for further trial court proceedings regarding the proper measure of the tax.

On October 5, 2005, Tobacco Sales petitioned for discretionary review of that decision, asking this Court to reverse the Court of Appeals' remand order and set the taxable market value price at 72¢ per can (the highest value shown by the evidence) or, in the alternative, that the matter be remanded with instructions to set a fair market value price within the scope of the evidence, *i.e.*, between 68¢ to 72¢ per can. Petition for Discretionary Review at 20. By its Petition, Tobacco Sales seeks review

of only limited aspects of the Court of Appeals' decision. *See* Petitioner's Supplemental Brief at 1. The Court granted review on May 31, 2006.

The Department did not seek review of any aspect of the Court of Appeals' decision. Nor did it indicate in its Answer to the Petition that it intended to seek affirmative relief. Nevertheless, at the very end of its Supplemental Brief (see pages 19 and 20), the Department for the first time requests affirmative relief by asking, in the alternative, that the Court deny Tobacco Sales' tax refund claim and thereby reinstate the Department's measure of the tax (\$1.43 per can). The Department has declined to withdraw its request for affirmative relief.

IV. GROUND

The Department's Request for Affirmative Relief is Untimely and Improper.

RAP 2.4(a) provides that a respondent may not seek affirmative relief from a lower court decision unless it timely asks for review of that decision:

The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

RAP 2.4(a). Here, the Department of Revenue did not timely seek review of the Court of Appeals' decision. Nor has it made any showing that

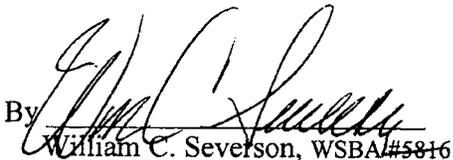
affirmative relief is “demanded by the necessities of the case.” Indeed, even if the Court were to reject Tobacco Sales’ appeal, the Department could never show that granting it affirmative relief is necessary. The Court of Appeals determined that the Department’s \$1.43 tax measure is legally incorrect. The Department, having failed to timely seek review, is bound by that determination. That determination is not before this Court, and there is no necessity for this Court to reverse that determination.

When a party includes an improper request for affirmative relief in its brief, a motion to strike is a proper remedy. *Pugel v. Monheimer*, 83 Wn. App. 688, 693, 922 P.2d 1377 (1996), *review denied* 131 Wash.2d 1024, 937 P.2d 1101 (motion to strike brief that contains improper claim for affirmative relief is proper remedy for a violation of RAP 2.4(a)). Therefore, Tobacco Sales respectfully asks that the Department’s request for affirmative relief be stricken from its Supplemental Brief.

Petitioner submits this motion for consideration without oral argument.

DATED this 18th day of August, 2006.

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2006 AUG 18 A.C. CERTIFICATE OF SERVICE

BY C. J. NEEDHAM
CLERK

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the date below signed, I caused true and correct copies of **Petitioner's Motion to Strike Respondent's Request for Affirmative Relief**, and this Certificate of Service to be served on counsel listed below by email attachment and/or U.S. First Class Mail:

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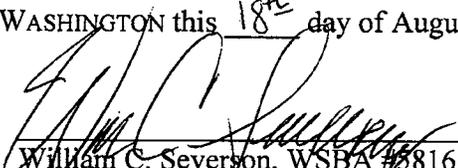
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FILED AS ATTACHMENT
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