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STATE OF WASHINGTON
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NO. 77690-3

SUPREME COURT OF THE STATE OF WASHINGTON

UNITED STATES TOBACCO SALES AND MARKETING COMPANY
INC.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

Respondent's Answer To Motion To Strike

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I. INTRODUCTION

In its supplemental brief, the Department of Revenue argued that United States Tobacco Sales and Marketing Company Inc. (Tobacco Sales) failed to offer evidence of an established price that was generally available in the market place and the Court of Appeals correctly remanded the matter to provide Tobacco Sales yet another opportunity to offer evidence to prove it was entitled to a tax refund. Supp. Br. at 9. In the alternative, the Department of Revenue (Department) argued that this Court could resolve the issues by ruling that Tobacco Sales failed to carry its burden at trial and deny its tax refund. Id. Tobacco Sales moved to strike respondent Department's alternative request for relief on the grounds the Department did not timely seek review and that it is improper under RAP 2.4(a). Tobacco Sales motion should be denied. Tobacco Sales citation to RAP 2.4(a) does not apply and the Department's alternative request for relief is properly before the Court.

II. FACTS RELEVANT TO MOTION

Before Division II, the Department of Revenue sought review of the trial court's decision to award Tobacco Sales a tax refund for the excise taxes it paid on its OTP tax liability. The Department specifically identified as an issue before the court, Tobacco Sales' burden of proof to sustain a tax refund action:

Did Tobacco Sales fail to meet its burden under RCW 82.32.180 to prove that the “wholesale sales price” between Tobacco Sales and Tobacco Manufacturing was a “fair market value” price as defined by this Court’s decision in *United States Tobacco Sales & Marketing Co. Inc. v. Dep’t of Revenue*, 96 Wn. App. 932, 940, 982 P.2d 652 (1999) for purposes of calculating the OTP tax?

Department’s Appellate Brief at 2.

Tobacco Sales’ Petition for Review identified this same issue to this Court under its Issues Presented for Review as, “Did Tobacco Sales carry its burden of proving that it is entitled to a tax refund and the amount of the refund?” Pet. at 1.

The Department’s Answer to Tobacco Sales’ Petition for Review described the identical issue Tobacco Sales outlined in its concise statement of the issues to this Court regarding Tobacco Sales burden of proof to sustain a tax refund, “Did Tobacco Sales fail to meet its burden under RCW 82.32.180 to prove that it is entitled to a tax refund and the amount of the refund?” Department’s Answer at i and 1.

With the issue of whether the taxpayer carried its burden of proof before the Court, the Department requested in its supplemental brief to affirm the Court of Appeals decision in *United States Tobacco Sales & Marketing Co. Inc. v. Dep’t of Revenue*, 128 Wn. App. 426, 115 P.3d 1080 (2005) to remand the matter back to the trial court or alternatively deny its tax refund. Department’s Supplemental Brief at 9, 19, 20.¹

¹ In the Relief Requested section of Tobacco Sales’ Motion to Strike they have identified only pages 19 and 20 of the Department’s Supplemental Brief as requesting affirmative relief, however, the Department’s Supplemental Brief also requested alternative relief on page 9 of its Supplemental Brief.

III. ARGUMENT

A. **RAP 13.7(b) Governs The Scope Of Review Not RAP 2.4(a).**

Tobacco Sales cites RAP 2.4(a) and argues that the Department may not seek “affirmative relief from a lower court decision unless it timely asks for review of that decision.” Mtn. to Strike at 3.² However, RAP 2.4 applies to review of a trial court’s decision by the appellate court, not review by the state Supreme Court as evidenced by the title of the rule: “Scope of Review of A Trial Court Decision.” Moreover, the language in RAP 2.4(a) relates to a “timely filing of a notice of appeal or a notice of discretionary review.” An appellant has only two methods to obtain review before the state Supreme Court from a trial court decision: a motion for discretionary review or motion for direct review. RAP 4.2(e). Neither of these avenues for review applies here.

Tobacco Sales petitioned for discretionary review of the appellate court’s decision, not the trial court’s decision. Title 13 governs the proceedings for review of the Court of Appeal decision in the state Supreme Court, not RAP 2.4.³ RAP 13.7(b) governs the scope of review:

² Mr. William Severson, counsel for Tobacco Sales contacted me requesting that I voluntarily withdraw my alternative request for relief or he would file a motion to strike pursuant to RAP 2.4(a). On Wednesday, August 16th, I left a message for Mr. Severson that I did not believe RAP 2.4 applied, but RAP 13.7 governed this issue. Further, I advised him that I believed I had raised this issue in my answer to the petition for review and that the Court had the inherent authority to review the matter and I would not withdraw the alternative request for relief in my supplemental brief. Despite my response, two days later, counsel filed this motion based upon RAP 2.4(a).

³ Even if RAP 2.4(a) applied, subsection 2 of the rule provides the Court the authority to review the Department’s request for alternative relief. It states, “(2) if demanded by the necessities of the case.” The issue identified by both parties, a taxpayer’s burden of proof to obtain a tax refund, subsumes both aspects of the relief requested, the granting of the tax refund or the denial of the tax refund. The appellate

(b) Scope of Review. If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in . . . the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition. The Supreme Court may limit the issues to one or more of those raised by the parties. If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.

RAP 13.7(b) (bold in original).

The central issue identified in both Tobacco Sales' petition for review and the Department's answer revolves around whether the taxpayer met its burden of proof. The Department's answer specifically identified Tobacco Sales' burden of proof to prove a tax refund within the question raised by this case. Furthermore, the issue of whether Tobacco Sales met its burden to prove its tax refund was the underlying issue presented for review to the Court of Appeals.

The issue of a taxpayer's burden of proof in a tax refund case has clearly been raised. The appropriate relief when a taxpayer fails to meet the burden is necessarily part of the remedies that would resolve this case. Tobacco Sales' motion is erroneous because it suggests that a separate appeal would be required. However, because the Court can answer the question presented with a "no," this case necessarily includes the

rules should not be interpreted to limit the State Supreme Court's authority to fashion the appropriate remedy it deems fit after deciding the legal issue.

Department's alternative argument regarding dismissal of the taxpayer's claim.

B. Supreme Court Has Inherent Authority To Fashion An Appropriate Remedy Which Would Include The Remedy Argued By The Department.

Tobacco Sales' motion is also inappropriate because it would artificially limit the Court's authority to fashion the appropriate remedy upon resolving the fundamental issue of whether the taxpayer has met its burden to justify a refund. As shown above, the motion is wrong because the question presented in this case raised the issue of whether the taxpayer has met its burden. The attempt to limit the scope of this Court's potential relief, however, is wrong for a number of other reasons.

First, this Court has inherent authority to consider an issue of law, even if not raised by the parties. *State v. Cantu*, 156 Wn.2d 819, 822, n.1, 132 P.3d 725 (2006) (Court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision); *City of Seattle v. McCreedy*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994); RAP 12.1(b). *See also, Ken McClarty v. Totem Electric, International Brotherhood of Electrical Workers Local 76*, ___ Wn.2d ___, 137 P.3d 844 (No. 75024-6, slip op. July 7, 2006) (Alexander, C.J. dissenting) (Court determined definition not raised or briefed before Court). *But see, State of Washington v. Korum*, No. 75491-8, slip op. at 4 (August 17, 2006) (Court held that the State did not properly identify the issue for review pursuant to RAP 13.4(c)(5) and therefore not reviewable pursuant to RAP

13.7(b) even though the State raised the issue in its argument section of the petition for review.)⁴ Second, this Court considers issues not raised by the parties to secure a “fair and orderly review” and “serve the ends of justice.” *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 373, n.6, 113 P.3d 463 (2005); *Mader v. Health Care Authority*, 149 Wn.2d 458, 467, 70 P.3d 931 (2003); *State v. Aho*, 137 Wn.2d 736, 740, 975 P.2d 512 (1999) (“Court has authority to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and to waive the rules of appellate procedure when necessary to ‘serve the ends of justice.’”); *Tuerk v. Department of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994). *See also*, RAP 1.2 (a) (“rules liberally interpreted to promote justice and facilitate the decision of cases on the merits.”), RAP 12.1(b) (the court reserves the right to consider an issue that has not been set forth in the briefs and permissively, “may notify the parties and give them an opportunity to present written argument on the issue raised by the court.”). Accordingly, there is no question that the Court can reach the question of what should happen upon the taxpayer’s failure to meet its burden of proof.

This Court also recognizes its own inherent authority to consider the appropriate remedy, whether or not such relief has been requested. In *Blaney v. Int’l Ass’n of Machinists and Aerospace Workers, District No.*

⁴ *Korum* should be distinguished because it involves the State raising an issue which would, if addressed and affirmed, result in affirming a criminal conviction and sentence. In contrast, the alternative relief sought in the State’s supplemental brief in this case is inextricably tied to the core issue, which is whether the taxpayer met their burden of proof to show entitlement to a refund.

160, 151 Wn.2d 203, 209, 87 P.3d 757 (2004), the Court first identified its authority to consider an issue not raised under RAP 13.7(b) and considered whether a party was entitled to an offset even though the petition and answer did not explicitly brief the issue:

This court generally reviews only those issues raised by the parties in their petition and answer. RAP 13.7(b). This rule is subject to numerous exceptions. *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970). One such exception provides that “[t]his court has the inherent discretionary authority to reach issues not briefed by the parties if those issues are necessary for decision.” *City of Seattle v. McCready*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994).

Although the parties’ petition and answer did not explicitly brief characterization of Ms. Blaney’s requested offset as “any other appropriate remedy,” we may reach this remedial provision under RAP 13.7(b) because the parties expansively defined the WLAD issue as to whether WLAD entitles Ms. Blaney to the offset.

Id. at 213 (footnotes omitted).

Just as *Blaney* considered the appropriate remedy under RAP 13.7(b), the Court in the present case can consider the appropriate remedy in deciding the issue of whether a taxpayer has met its burden of proof to sustain a tax refund claim.

The alternative, urged by Tobacco Sales, would leave the Court with only two options: (1) affirm the Court of Appeals which means to remand the matter back to the trial court for the parties to provide evidence of a price a completely unaffiliated entity would have had to pay to purchase OTP from Tobacco Manufacturing in 1992 or (2) to reverse the Court of Appeals and set the price at 72¢ per can. Squarely within the

scope of these remedies, however, is the option argued by the Department. The Supreme Court may deny Tobacco Sales a tax refund for failing to carry its burden of proof in a tax refund case.

In summary, the issue of whether Tobacco Sales has carried its burden has clearly been raised by both parties, in the trial court and the Court of Appeals. In the state Supreme Court, the issue is identified by the petition for review and in the answer to the petition for review. By asking whether Tobacco Sales met its burden, the parties have necessarily raised the question of the appropriate remedy for failing to meet the burden. In addition to this preservation of the issue, this Court has the inherent authority to fashion an appropriate remedy to secure a “fair and appropriate review” and “serve the ends of justice.” Where a taxpayer has the burden to prove its tax refund claim under RCW 82.32.180, the Court may deny a tax refund in its entirety without remanding the matter to the trial court, if it determines that Tobacco Sales failed to carry its burden. The Department need not separately petition the Court for this relief because it is raised by the issues and within the inherent powers of the highest court of our state.

V. CONCLUSION

The Department’s alternative request for relief to deny Tobacco Sales its tax refund for failing to meet its burden is properly raised before the Court and the motion by Tobacco Sales motion should be denied.

Respectfully submitted, this 28th day of August 2006.

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FILED AS ATTACHMENT
TO E-MAIL

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