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NO. 79661-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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TESORO REFINING AND MARKETING COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

ROBERT M. MCKENNA
Attorney General

ANNE E. EGELER, WSBA No. 20258
Senior Counsel
PO Box 40123
Olympia, Washington 98504
(360) 753-7085

ORIGINAL

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I. INTRODUCTION

Tesoro requests review of the Court of Appeals decision that Tesoro is liable for hazardous substance tax. Tesoro asks for review to challenge two well-settled rules of law.

First, Tesoro requests review of the Court of Appeals' reading of the plain language of RCW 82.21.020(3). Because the Court of Appeals did not find ambiguity in RCW 82.21.020, it followed the substantial body of case law reading the plain meaning of the word "or" in the disjunctive, rather than inserting "and" in its place. Tesoro argues that the Court of Appeals should have found that an administrative rule created ambiguity in the law. The administrative rule is consistent with the law. However, even if it were not, this Court has consistently ruled that it is inappropriate to apply an agency's reading of the law unless the statute is first found to be ambiguous.

Second, Tesoro asks for review of the application of the rules for construction of ambiguous tax statutes. The Court of Appeals and the Superior Court held that the statutes at issue are unambiguous, and applied the plain language of the law. Therefore, this case does not present an issue regarding construction of ambiguous tax statutes.

There is no basis for review under RAP 13.4(b). Tesoro's arguments do not present an issue of substantial public interest that warrants Supreme Court review. The Court of Appeals' decision does not conflict with any case law. On the contrary, it tightly adheres to the guidance set forth by this Court regarding plain language analysis.

II. NATURE OF CASE AND DECISION

A. Statutory Background

Washington places a hazardous substance tax (HST) on the first possession of nearly all hazardous substances. RCW 82.21.030(1) states that “a tax is imposed on the privilege of possession of hazardous substances in this state.”

The term “hazardous substance” is defined by RCW 82.21.020(1)(b) to include “petroleum products.” RCW 82.21.020(2) defines “petroleum products” to include “plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual oil, liquefied or liquefiable gases such as butane, ethane, and propane, and every other product derived from the refining of crude oil.” (Emphasis added).

Possession is defined by RCW 82.21.020(3), which states: “Possession” means the control of a hazardous substance located within this state and includes both actual and constructive possession. “Actual possession” occurs when the person with control has physical possession. “Constructive possession” occurs when the person with control does not have physical possession. “Control” means the power to sell or use a hazardous substance or to authorize the sale or use by another.

B. Factual Background

Tesoro operates a refinery in Anacortes, Washington. At the refinery, Tesoro heats crude oil to separate it into a variety of marketable fuels. During the refining, byproduct fuel gases are produced that are

uneconomical for Tesoro to recover and sell.¹ These gases include propane, hydrogen, methane, ethane, ethylene, butane, butylene and propylene. When a byproduct gas is created, it is piped to a fuel gas blender where the collected gases mix to form refinery gas.²

Once created, refinery gas is immediately piped throughout the refinery and used as fuel to heat refinery units and steam boilers.³

Refinery gas only creates heat on the exterior of the unit being heated.⁴ It never touches the contents of the refining unit or steam boiler.⁵ Nor is it combined with other ingredients to create new products.⁶

Because the refinery gas created by Tesoro is insufficient to meet the refinery's fuel needs, it is supplemented with natural gas. On average, the ratio of refinery gas to other fuels used to heat the refinery is 75 percent refinery gas and 25 percent other fuel.⁷ According to Tesoro's Process Engineering Manager, using refinery gas saves Tesoro the expense of buying additional natural gas.⁸ Although natural gas is used as a supplement, it cannot replace the use of refinery gas.⁹ As Tesoro's

¹ CP 152.

² CP 156. There is no chemical reaction. It is just a blending of the gases that maintain their separate physical characteristics. CP 17.

³ CP 177-78.

⁴ CP 163.

⁵ CP 177-78.

⁶ CP 178.

⁷ CP 177; CP 167-68.

⁸ CP 167 (Deposition of Russell Crawford).

⁹ CP 166-67.

engineer explained, “Ironically, without this byproduct gas, there’s not enough energy to run the refinery. You could not run without it.”¹⁰

If more refinery gas is created than Tesoro can use, the gas is “flared.” That is, the gas is released through a valve and burned. Tesoro tries to avoid flaring because it “doesn’t want to lose the value of the fuel.”¹¹

C. Statement of Procedure

Tesoro filed an action requesting refund of \$937,889 of HST paid for its possession of refinery fuel from 1999 through June 2003, plus interest. The Superior Court ruled that Tesoro’s creation and use of refinery gas constitutes “possession of hazardous substances” taxable under RCW 82.21.030(1).

The order was upheld on appeal. The Court of Appeals held that refinery gas is a hazardous substance taxable under the plain language of RCW 82.21.030.¹² The court explained that “[b]ecause Tesoro has the power to use the refinery gas to provide heat for the refining process, it controls and therefore possesses a hazardous substance” pursuant to RCW 82.21.020(3).¹³

¹⁰ CP 163; CP 166.

¹¹ CP 169. Extremely little of the gas is flared. CP 170.

¹² *Tesoro Refining & Marketing Co. v. State*, 135 Wn. App. 411, 144 P.3d 368 (2006).

¹³ *Tesoro*, 135 Wn. App. at 420.

III. REASONS WHY REVIEW SHOULD BE DENIED.

A. RAP 13.4(b) Criteria.

Tesoro asserts two grounds for review under RAP 13.4(b)(1) and

(4):

Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Neither consideration supports further review of the opinion in this case.

B. **The Court of Appeals Ruling on the Hazardous Substance Tax is Consistent with the Plain Language of the Statute and Therefore Presents No Issues Worthy of Review.**

Under RCW 82.21.030(1), the HST “is imposed on the privilege of possession of hazardous substances in this state.”¹⁴ RCW 82.21.020(1)(b) specifically states that “[p]etroleum products” are hazardous substances.

A “petroleum product” is defined by RCW 82.21.020(2) as “every ... product derived from the refining of crude oil.”¹⁵

¹⁴ RCW 82.21.020 lists six specific exemptions from the hazardous substance tax. Tesoro does not claim to be entitled to any of the statutory exemptions. Nor does it claim that the list of exemptions is ambiguous.

¹⁵ Tesoro misleadingly quotes a selective portion of RCW 82.21.020(3) to argue that hazardous substance tax applies only to products that pose a threat to human health or the environment. Brief of Tesoro at 9, fn. 4. Read in full, RCW 82.21.020(3) allows DOE to include additional substances DOE considers harmful, not to limit the definition of hazardous substances set forth in RCW 82.21.020(1)(b). RCW 82.21.020(3) also states that although possession of minimal amounts of hazardous substances is exempt from the tax, this limitation does not apply to petroleum products. Under the plain language of RCW 82.21,

The prior version of the HST contained an exemption for “liquid fuel or fuel gas used in petroleum processing.”¹⁶ In 1989, Initiative 97 amended the law and eliminated the exemption for liquid fuel or fuel gas used in petroleum processing.¹⁷ Accordingly, fuel gas used in petroleum processing was subject to the HST after Initiative 97 eliminated the exemption.

Shortly after Initiative 97 passed, the Legislature enacted the petroleum products tax (PPT), found in RCW 82.23A.¹⁸ RCW 82.23A imposes the PPT on the “possession of petroleum products in this state.”¹⁹ The PPT defines the terms “possession” and “control” in precisely the same manner as the HST.²⁰ As in the earlier version of the HST, the Legislature included an exemption from the PPT for possession of “liquid fuel or fuel gas used in petroleum processing.” Inclusion of the exemption to the PPT is noteworthy for two reasons. First, if fuel gas used in petroleum processing could not be “possessed,” there would be no reason for the exemption. Second, when the Legislature enacted the PPT and included the exemption, it expressly stated that did not to override the will

hazardous substance tax applies to every product derived from refining crude oil.

¹⁶ Laws of 1987, 3d Ex. Sess., ch. 2, § 47(3).

¹⁷ Laws of 1989, ch. 2, § 24, effective March 1, 1989.

¹⁸ Laws of 1989, ch. 383.

¹⁹ RCW 82.23A.020(1).

²⁰ RCW 82.23A.010(2).

of the people and restore any exemptions to the HST. Accordingly, RCW 82.23A.005 states that the PPT “is not intended to exempt any person from tax liability under any other law.”

Since the current law does not contain an exemption for fuel gas, the Court of Appeals properly refrained from Tesoro’s invitation to rewrite the exemption back into the law. The Court of Appeals correctly held that under the plain language of RCW 82.21, Tesoro’s possession of refinery gas is subject to tax. As the Court of Appeals stated, “the parties agree that refinery gas is formed in the process of refining crude oil. Thus, refinery gas is a petroleum product and a hazardous substance under RCW 82.21.020(1)(b).”²¹

Tesoro’s primary contention is that the Court of Appeals erred in finding that Tesoro possesses refinery gas, as required by RCW 82.21.030(1). RCW 82.21.020(3) defines “possession” as “the control of a hazardous substance located in this state” including “both actual and constructive possession.” The statute defines “control” as “the power to sell or use a hazardous substance or to authorize the sale or use by another.”²² Tesoro seeks review to argue that the statute should be read as requiring the taxpayer to have the power to “sell **and** use” rather than “sell or use” the hazardous substance.

²¹ *Tesoro*, 135 Wn. App. at 419.

²² RCW 82.21.020(3).

1. The Court of Appeals followed this Court's rulings in holding that under the plain language of RCW 82.21.020(3), the word "or" is read in the disjunctive.

Since the Court of Appeals did not find any ambiguity in RCW 82.21.020(3), it applied the plain language of the statute, and the word "or" was given its ordinary, disjunctive meaning. The Court of Appeals' reasoning closely adheres to the direction provided by this Court in *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 103 P.3d 1226 (2005). In *Agrilink*, the statute at issue established the tax rate for those engaged in "the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale only." RCW 82.04.260(4). The Court applied the plain language of the statute, and held that "and/or" "is commonly understood to allow for a disjunctive reading."²³ Therefore, processing alone is sufficient to entitle a taxpayer to the tax rate contained in RCW 82.04.260(4).²⁴ The Court saw no reason to apply the rules of statutory construction or explore legislative history. Applying the ruling in *Agrilink*, the Court of Appeals concluded that "when the legislature uses the disjunctive 'or' in its definition of control, the legislature intends that a taxpayer has control of a hazardous substance when the taxpayer has the power to sell or use the hazardous substance."²⁵

²³ *Agrilink*, 153 Wn.2d at 397.

²⁴ *Id.*

²⁵ *Tesoro*, 135 Wn. App. at 423.

The Court of Appeals' application of *Agrilink* is consistent with numerous cases in which this Court has refused to engage in statutory construction of the plain language of a statute containing the term "or." As early as 1906, this Court announced that the "exceptional" construction of replacing "or" with "and," "can only be resorted to where the act itself furnishes cogent proof of the legislative error."²⁶ Since then, the courts have stated time after time that in reading the plain language of a statute, "'or' does not mean 'and.'"²⁷ Statutory interpretation of the word "or" is appropriate "only when the language of the statute is ambiguous."²⁸

Tesoro implies that this Court departed from this line of reasoning in *Childers v. Childers*, 89 Wn.2d 592, 575 P.2d 201 (1978).²⁹ In reality, *Childers* is completely consistent with the longstanding rulings of this Court. In *Childers*, this Court reiterated that "[w]hen the term 'or' is used it is presumed to be used in the disjunctive sense, unless the legislative intent is clearly contrary."³⁰ The reference to legislative intent is not an indication that the courts will engage in judicial construction of unambiguous statutes. Rather, this Court consistently states that "where a

²⁶ *State v. Tiffany*, 44 Wash. 602, 604, 87 P. 932 (1906).

²⁷ E.g., *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978), citing *Tiffany*, 44 Wash. 602; *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006); *Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 959-60, 983 P.2d 635 (1999); *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996); *State v. Judge*, 100 Wn.2d 706, 711, 675 P.2d 219 (1984).

²⁸ *Judge*, 100 Wn.2d at 711.

²⁹ Brief of Tesoro at 10-11.

³⁰ *Childers v. Childers*, 89 Wn.2d at 595, quoting 1A C. Sands, *Statutes and Statutory Construction*, § 21.14 n.1 (4th ed. 1972).

statute is unambiguous, we will determine the Legislature's intent from the language of the statute alone.”³¹ In *Childers*, this Court found that based on the plain language of the statute, “or” must be read in the disjunctive, not replaced with the word “and.”³²

Instead of accepting Tesoro’s invitation to engage in statutory construction of an unambiguous statute, the Court of Appeals properly followed this Court’s consistent rulings that legislative intent is determined by considering “the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.”³³ The Court of Appeals considered the language of RCW 82.21.020(3) and RCW 82.21, and correctly concluded that “when the legislature used the disjunctive ‘or’ in its definition of control, the legislature intends that a taxpayer has control of a hazardous substance when the taxpayer has the power to sell or use the hazardous substance.”³⁴

³¹ *Waste Mgmt. v. Washington Util. & Transp. Comm’n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994); *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (“The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.”)

³² *Childers*, 89 Wn.2d at 595-96.

³³ *Tesoro*, 135 Wn. App. at 422, quoting *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006).

³⁴ *Tesoro*, 135 Wn. App. at 423, citing RCW 82.21.020(3) and *Agrilink*, 153 Wn.2d at 397.

This is not a case in which the statutory language makes it difficult to tell whether “or” is to be read in the conjunctive. Tesoro points to absolutely nothing in the language of RCW 82.21.020(3), or any other portion of Initiative 97, that raises uncertainty about the meaning of “or” in the definition of control. On the contrary, RCW 82.21.020(3) is clearly written. A disjunctive reading is consistent with the intent of the HST, as expressed in RCW 82.21.010. And it is consistent with the chapter’s definition of “hazardous substances” as “petroleum products,” including butane, ethane, propane and “every other product derived from the refining of crude oil.”³⁵ Therefore, Tesoro’s argument challenging the plain meaning of the word “or” does not meet the standards for review under RAP 13.4. There is no conflict in the cases and there is no public interest in allowing argument on the well-settled principles for applying the plain language of the law.

2. Rules do not create ambiguity in the law.

Tesoro also argues that review should be accepted to address its argument that an administrative rule created ambiguity in the law. Administrative rules, however, cannot create ambiguity in the plain meaning of the HST law enacted by the voters. This Court has consistently ruled that “the plain language of a statute can only be disregarded ... where the act itself furnishes cogent proof of the legislative error.”³⁶ This principle was reiterated in *AgriLink*, when this Court

³⁵ RCW 82.21.020(1)(b); RCW 82.21.020(2).

³⁶ *Tiffany*, 44 Wash. at 604.