

No. 81995-5

SUPREME COURT OF THE STATE OF WASHINGTON

G-P GYPSUM CORPORATION,

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner,

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Amicus Curiae Memorandum of City of Seattle

THOMAS A. CARR
Seattle City Attorney

Kent C. Meyer, WSBA #17245
Assistant City Attorney
Attorneys for Amicus Curiae
City of Seattle

Seattle City Attorney's Office
600 - 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

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TABLE OF CONTENTS

Page(s)

I. IDENTIFICATION AND INTEREST OF AMICUS CURIAE1

II. ISSUES ADDRESSED BY AMICUS CURIAE3

III. ARGUMENT.....3

 A. The Decision In This Case Should Not Apply To
 Seattle Or Other Cities Because Users of Natural Gas
 Do Not Normally Take Dominion And Control Of Gas
 Until They Consume It At Their Facilities.3

 B. The Court Should Refuse To Consider Gypsum’s
 Commerce Clause Argument That Gypsum Is Raising
 For The First Time On Appeal.5

 C. The Court Of Appeals’ Decision Disregards The
 Legislature’s Intent In Authorizing Cities To Impose A
 Local Natural Gas Use Tax Under RCW 82.14.230.7

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

American Tug Boat Co. v. Washington Toll Bridge, 48 Wn.2d 117, 291 P.2d 668 (1955)..... 4

Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002)..... 8

In the Matter of the Disability Proceeding Against Susan G. Diamondstone, 153 Wn.2d 430, 105 P.3d 1 (2005) 6

Landmark Development, Inc. v. City of Roy, 138 Wn.2d 561, 980 P.2d 1234 (1999)..... 3

Paxton v. City of Bellingham, 129 Wn. App. 439, 449 n 17, P.3d 373 (2005)..... 6

State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999) 6

STATUTES

RCW 82.14.230 7

RCW 82.14.230(2)..... 1

COURT RULES

RAP 2.5(a), 6

ORDINANCES

SMC 5.68.010..... 1

I. IDENTIFICATION AND INTEREST OF AMICUS CURIAE

Amicus curiae City of Seattle (“City”) is a first class Washington city and the largest city in the state. The City of Seattle and approximately 45 other cities currently impose the local natural gas use tax at issue in this case.¹ See SMC 5.68.010; RCW 82.14.230(2). The City is interested in the outcome of this case because the court of appeals’ decision deprived Tacoma of its ability to collect the local natural gas use tax from Gypsum and could, contrary to the intent of the legislature, deprive Seattle and other Washington cities of revenue from the tax. The City of Seattle expects to receive more than \$2.1 million from this tax in 2010 and, as shown in the table below, has received similar amounts in prior years:

Year	Local Natural Gas Use Tax Revenue
2010 (projected)	\$2,156,000
2009 (projected)	\$2,243,000
2008	\$3,325,000
2007	\$2,787,000
2006	\$2,799,000
2005	\$2,767,000

¹ Washington State Department of Revenue, *Tax Reference Manual, Information on State and Local Taxes in Washington State*, 92-94 (January 2007) (available at http://dor.wa.gov/docs/reports/2007/Tax_Reference_2007/Tax_Reference_2007.pdf).

Total 2005-2010²	\$13,921,000
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Thus, from 2005 through 2010, the City of Seattle will have received more than \$13 million from the local natural gas use tax.

Accordingly, the City of Seattle has a significant interest in the outcome of this case. If the court of appeals is affirmed, the City expects to lose tax revenue in the future and to receive refund requests for taxes already paid. Gypsum contends that this is only speculation. That is not correct. Seattle and other cities have already received refund requests based on the court of appeals' decision. And, as demonstrated by the evidence at trial, any large consumer of natural gas can avoid the tax by merely contracting to purchase gas at Sumas and then contracting with the pipeline company to transport that gas to the user's premises for consumption.

²See City of Seattle's 2010 Proposed Budget, p. 653, line 4; City of Seattle's 2008 Adopted Budget, p. 629, City of Seattle's 2007 Adopted Budget, p. 657. City of Seattle's 2010 Proposed Budget, p. 653, line 4, available on-line at http://www.seattle.gov/financedepartment/10proposedbudget/funds_subfunds_and_other.pdf; City of Seattle's 2008 budget available at: <http://www.seattle.gov/financedepartment/08adoptedbudget/default.htm>. City of Seattle's 2007 budget available at: http://www.seattle.gov/financedepartment/0708adoptedbudget/Entire_2007_Adopted_&_2008_Endorsed_Budget.pdf.

II. ISSUES ADDRESSED BY AMICUS CURIAE

1. Did the court of appeals err by basing its decision on a finding of fact that is not supported by the evidence?
2. Should the Court consider an argument based on the Commerce Clause that Gypsum makes for the first time in its supplemental brief?
3. Can a taxpayer that burns natural gas within Tacoma avoid the local natural gas use tax by contracting to purchase the gas outside the city?

III. ARGUMENT

- A. The Decision In This Case Should Not Apply To Seattle Or Other Cities Because Users of Natural Gas Do Not Normally Take Dominion And Control Of Gas Until They Consume It At Their Facilities.

The precedential value of this case will be limited by the trial court's erroneous finding that Gypsum took dominion and control of the gas outside Tacoma.³ CP 175, ¶ 15. The evidence presented at trial does not support the trial court's finding. The parties did not stipulate to this fact. CP 83-87. The evidence in the record does not show that Gypsum took dominion and control of the same gas that it took title to while the

³ *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (court determines if the trial court's findings of fact were supported by substantial evidence in the record and, if so, whether those findings of fact support the trial court's conclusions of law).

gas was in Sumas. In fact, the record shows that Gypsum purchased only the right to receive a certain quantity of gas at the distribution hub near Sumas and did not purchase or take dominion and control over specific, identifiable gas particles. RP 20; CP 85, ¶¶ 9-11.

Gypsum paid Northwest Pipeline, a gas distribution business under RCW 82.16.010, to transport the gas to Sumner and Puget Sound Energy then transported the gas by pipeline from Sumner to Gypsum's Tacoma plant. CP 85, ¶¶ 7, 8; CP 86, ¶ 22; RP 32.⁴ The gas was in the possession and control of Northwest Pipeline and Puget Sound Energy while being transported to Tacoma and was commingled with gas to be consumed by other customers. Gypsum never assumed dominion and control over the gas it consumed until the gas was removed from Puget Sound Energy's pipeline and burned at Gypsum's Tacoma factory. Until it was burned in Tacoma, the natural gas that Gypsum purchased was a fungible product commingled with other users' gas. Due to the fact that natural gas is a fungible product transported by a common carrier pipeline system, no user assumes dominion and control over gas until it is burned or stored by the user. The trial court incorrectly concluded that Gypsum took dominion and control outside Tacoma.

⁴ This is a classic bailment. *See American Tug Boat Co. v. Washington Toll Bridge*, 48 Wn.2d 117, 121, 291 P.2d 668 (1955).

In responding to Seattle's petition in support of review, Gypsum argued that the trial court's findings were verities on appeal because the Department did not assign error to the trial court's finding. This is misleading because the trial court ruled in favor of the Department and correctly concluded that the gas was first used inside the Tacoma city limits. CP 179, ¶¶ 14, 16. Thus, the issue of taking dominion and control at Sumas was not relevant or controlling. The Department did not appeal the trial court's ruling and had no reason to assign error to that finding. That issue only became relevant when the court of appeals incorrectly based its decision on that otherwise irrelevant fact. This Court should not overturn a City's taxing authority based on an incorrect trial court finding.

If the Court does affirm the court of appeals, the Court should limit the decision to the facts in this case so that other cities will be able to continue to tax consumers who first use gas in the city limits regardless of where title passes.

B. The Court Should Refuse To Consider Gypsum's Commerce Clause Argument That Gypsum Is Raising For The First Time On Appeal.

Gypsum contends in its Supplemental Brief that the natural gas use tax violates the Commerce Clause of the U.S. Constitution. (Gypsum Supplemental Brief, p. 5.) The Court should not consider this argument that Gypsum makes for the first time in its supplemental brief.

Washington appellate courts do not consider issues raised for the first time on appeal. *Paxton v. City of Bellingham*, 129 Wn. App. 439, 449 n 17, 119 P.3d 373 (2005). Gypsum’s argument does not qualify for the narrow exception to this rule under RAP 2.5(a). The Court explained the test for review under RAP 2.5(a) in *In the Matter of the Disability Proceeding Against Susan G. Diamondstone*, 153 Wn.2d 430, 443, 105 P.3d 1 (2005):

Under RAP 2.5(a), we decline to address new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right. RAP 2.5(a) “was not designed to allow parties ‘a means for obtaining new trials whenever they can “identify a constitutional issue not litigated below.” ’ ” *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)

In re Disability Proceeding, 159 Wn.2d at 443 (emphasis added). Here, Gypsum is simply attempting to raise for the first time here an argument that it chose not to raise with the superior court or the court of appeals.

Gypsum attempts to justify its untimely argument by contending that Gypsum did not have a chance to brief this issue earlier because the “Department did not previously claim that the definition of “use” in respect to gas for state and local use tax purposes was limited to burning and storing.” (Gypsum’s Supplemental Brief, p. 2.) This is incorrect. The Department argued in its October 11, 2006 trial brief that “the ordinary meaning of “use” includes burning natural gas in the City of

Tacoma.” CP 55; CP 48 (burning gas within the City is “use” under the statute.) Similarly, the Department argued to the court of appeals that Gypsum was subject to the tax because Gypsum first used the gas inside the City. (Department’s 7-18-07 court of appeals brief, section C.) The Department has contended since the beginning that despite the fact that Gypsum allegedly took dominion and control in Sumas, the first use of the gas occurred when Gypsum burned the gas in Tacoma. Gypsum never previously raised its Commerce Clause argument in response.

It would be especially unfair to consider this new issue when the Department never had a chance to respond to it because Gypsum raised it for the first time in its supplemental brief to this Court. The Court should not consider a new issue on appeal when only one party has had the opportunity to submit briefs.

C. The Court Of Appeals’ Decision Disregards The Legislature’s Intent In Authorizing Cities To Impose A Local Natural Gas Use Tax Under RCW 82.14.230.

Under Gypsum’s interpretation of the statute, a taxpayer could avoid the local natural gas use tax merely by contracting to take title to the gas outside city limits. This contradicts the legislature’s intent under RCW 82.14.230 to replace the utility tax revenues that cities lost as a

result of the federal deregulation of the interstate natural gas market.

Laws of 1989, ch. 384, §1.⁵

The evidence presented to the trial court showed that natural gas is delivered through an extensive pipeline system with a major hub located outside Sumas, Washington. RP 20, CP 85, ¶ 5; CP 174-176. According to the court of appeals' decision, Gypsum was able to avoid paying the tax by entering into an agreement with the seller to assume ownership of the gas near Sumas. Despite Gypsum's arguments to the contrary, a gas user can avoid the tax simply by changing its contract with its supplier to take title outside the city. The nature of the natural gas delivery system that uses pipeline systems owned by public utilities and hubs located outside cities allows purchasers to avoid the tax without significant changes to the manner in which the gas is transported and consumed. The legislature did not intend to create a tax that could be avoided by taxpayers merely agreeing that title transfers outside a city.

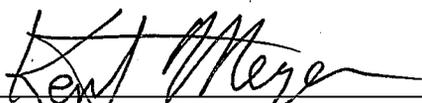
⁵ The court of appeals failed to follow Supreme Court decisions that require courts to consider legislative intent and a statute's context when determining a statute's plain meaning. *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The Court in *Campbell & Gwinn* specifically rejected the Gypsum court's holding that a court should consider statutory context or legislative intent only if the statute is ambiguous. *Campbell & Gwinn*, 146 Wn.2d at 10.

IV. CONCLUSION

The Court should reverse the court of appeals' decision. The court of appeals failed to consider the legislature's stated intent and, consequently, interpreted the statute incorrectly. In addition, the court of appeals based its decision on the unsupported finding that Gypsum took dominion and control over gas outside Tacoma. In reality, Gypsum did not use or take dominion and control over the gas until Gypsum burned it in Tacoma. Finally, the Court should not consider Commerce-Clause arguments that Gypsum raises for the first time in its supplemental brief. The court of appeals' decision is erroneous and inapplicable to the purchaser of a fungible product transported through a state-wide pipeline system.

DATED this 16 day of October, 2009.

THOMAS A. CARR
Seattle City Attorney

By: 
Kent C. Meyer, WSBA #17245
Attorneys for City of Seattle

CERTIFICATE OF SERVICE

I, certify that on this date I caused a copy of Amicus Brief of the City of Seattle to be filed with the Court and served by U.S. Mail on:

Franklin G. Dinces
The Dinces Law Firm
5314 28th St. NW
Gig Harbor, WA 98335

Peter B. Gonick
Attorney General's Office – Revenue Division
7141 Cleanwater Dr. SW
P.O. Box 40123
Olympia, WA 98504-0123

Signed at Seattle, Washington, this 16 day of October, 2009.


Marisa Johnson