

No. 81995-5

Court of Appeals No. 35883-2-II

THE SUPREME COURT
STATE OF WASHINGTON

G-P GYPSUM CORPORATION,

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

**AMICUS CURIAE BRIEF OF CITY OF TACOMA
IN SUPPORT OF STATE OF WASHINGTON,
DEPARTMENT OF REVENUE**

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**I. IDENTITY AND INTEREST OF AMICUS CURIAE
CITY OF TACOMA**

Amicus curiae City of Tacoma (Tacoma) is the municipal corporation that received the local brokered natural gas use tax revenue at issue in this case. Tacoma Muni. Code 6A.90.040. The Washington State Department of Revenue (Department) collects this tax on behalf of Tacoma and other cities, and then remits the tax to those cities. RCW 82.14.050, .230. If Tacoma is required to refund GP Gypsum the local natural gas use tax at issue here, Tacoma must pay GP Gypsum \$881,018.48 plus statutory interest. CP 6. As a result of this refund claim, other potential refund claims, and the impact to Tacoma's ability to collect the tax in the future, Tacoma has a significant interest in this case.¹

II. SCOPE AND ISSUE OF AMICUS BRIEF

This brief addresses one principal point raised by the Department in its Supplemental Brief, and that is how the word "use" should be defined. See Department's Supp. Brief, p. 15-18. The Department and Tacoma maintain that the word "use" in the local natural gas use tax statute, RCW 82.14.230, should be given its ordinary definition and mean where the natural gas is burned. The portion of the general definition of "use" in

¹ Since Tacoma filed its Amicus Brief in Support of the Department's Petition for Review, City staff discovered an error in calculating the total amount of natural gas use tax it collects from those who pay it. See City's Amicus in Support of the Department's Petition, p. 8. The correct amount is approximately \$ 1.9 million for the 2005/2006 biennium and \$ 2.7 million for the 2007/2008 biennium.

RCW 82.12.010(2) relating to “dominion or control” does not apply to the local natural gas use tax and should not prevent Tacoma from taxing GP Gypsum when it burns natural gas within Tacoma city limits.

III. STATEMENT OF THE CASE

Tacoma adopts the statement of the case in the Department’s Supplemental Brief.

IV. ARGUMENT

A. The Court should adopt a definition of “use” that fulfills the Legislature’s intent.

The central question in this case is whether GP Gypsum “used” natural gas in Tacoma and owes natural gas use tax under Tacoma Municipal Code 6A.90.040(A). Tacoma’s natural gas use tax states:

Pursuant to RCW 82.14.230, there is fixed and imposed upon every person a use tax for the privilege of using natural gas or manufactured gas in the City as a consumer.

Similarly, RCW 82.14.230(1) provides:

The governing body of any city, while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer.

When interpreting statutory language, the court’s goal is to carry out the intent of the Legislature. Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 149, 3 P.3d 741 (2000). In ascertaining this intent, statutory language must be evaluated in the context of the entire statute. In addition,

the court should avoid interpretations that are “strained, unlikely or unrealistic.” Id. (citations omitted).

There is really no question about what the Legislature intended when it enacted the natural gas tax statute in 1989. See Laws of 1989, ch. 384. As the Department has explained, the Legislature intended to impose a use tax on those who choose to purchase the natural gas through a broker, as GP Gypsum did, and not through the natural gas utility. See Department’s Supp. Brief, pp. 5-9; see also City of Tacoma’s Amicus Curiae Brief in Support of Department’s Petition for Review, pp. 3-4.

B. The ordinary meaning of “use” applies to the local natural gas use tax.

The natural gas use tax statute, RCW 82.14.230, does not define “use.” Nor does Chapter 82.14 RCW, the Local Retail Sales and Use Taxes chapter, define “use” within RCW 82.14. However, the Legislature provided that definitions in the state Use Tax Chapter, RCW 82.12, apply to RCW 82.14, the Local Retail Sales and Use Taxes chapter “insofar as applicable.” RCW 82.14.020(7) states:

The meaning ascribed to words and phrases in chapters 82.04, 82.08 and 82.12, as now or hereafter amended, insofar as applicable, shall have full force and effect with respect to taxes imposed under the authority of this chapter.

(Emphasis added). RCW 82.12.010(2), in turn, defines “use” to include its “ordinary meaning, and shall mean the first act of dominion or control over the article of tangible personal property (as a consumer). . . .”

From this definition of “use,” the Court of Appeals held that GP Gypsum first exercised “dominion and control” over the gas outside the city limits of Tacoma. GP Gypsum Corp. v. Dep’t of Revenue, 144 Wn. App. 664, 183 P.3d 1109 (2008). The Court of Appeals all but ignored the “ordinary meaning” language included within the definition in RCW 82.12.010(2). As a result, it held that GP Gypsum did not owe natural gas use tax in Tacoma (or anywhere else, for that matter) because GP Gypsum exercised dominion and control at the Sumas Station, which is outside the limits of the city. CP 85.

The Court of Appeals further stated that the “uniformity provision” in RCW 82.14.070 applied and supported the holding that the definition of “use” in RCW 82.12.010(2) should apply to the natural gas use tax. See Gypsum, 144 Wn.2d at 671, n.5. The “uniformity” provision states:

It is the intent of this chapter that any local sales and use tax adopted pursuant to this chapter be as consistent and uniform as possible with the state sales and use tax and with other local sales and use taxes adopted pursuant to this chapter.

RCW 82.14.070 (Emphasis added). However, because of the significant differences between the local sales and use tax, and the local natural gas use tax—as outlined in the chart below—it is not “possible” to import the “dominion or control” portion of the definition of “use” in RCW 82.12 to the natural gas use tax in RCW 82.14.230. Rather, “use” for purposes of the

natural gas use tax should be given its ordinary meaning, as RCW 82.12.010(2) allows.

The ordinary meaning of “use” includes “to bring or put into service of action : employ” and “the act of using or putting to a purpose.” WEBSTER’S NEW COLLEGE DICTIONARY 1215 (1995). In this case, this means where the gas is burned. There is no question that GP Gypsum burned natural gas in Tacoma. CP 84, 174. As a result, GP Gypsum should pay Tacoma’s natural gas use tax.

The “ordinary meaning” of “use,” as provided in RCW 82.12.010(2), applies to the natural gas use tax for three reasons. First, the definition of “use” in RCW 82.12.010(2) is ambiguous. “Use” is defined as including both the “ordinary meaning” and “the first act of dominion or control.” As can be seen in this case, the first act of dominion or control may have been at Sumas, while the actual use of the gas, when looking at the ordinary meaning of “use,” occurs when GP Gypsum burns the gas in Tacoma. Thus, the definition of “use” could mean the tax is to be imposed at Sumas, or in Tacoma. It is unclear which portion of the definition applies here. This means the definition of “use” is susceptible to more than one reasonable interpretation and renders the statute ambiguous. As a result, this court may employ tools of statutory construction such as legislative history to interpret

the statute. Tesoro Ref. & Mktg. Co. v. Dep't of Revenue, 164 Wn.2d 310, 317-18, 190 P.3d 28 (2008).²

Using the ordinary meaning gives full effect to the Legislature's intent. As has been discussed previously by the Department and Tacoma, the Legislature intended that businesses, like GP Gypsum, pay natural gas use tax when it purchased natural gas from a broker. See Laws of 1989, ch. 384, § 1; see also Department's Supp. Brief, pp. 13-15.

The second reason why the ordinary meaning of "use" in RCW 82.12.010(2) applies is that the general definitions in RCW 82.12 apply to RCW 82.14 only "insofar as applicable." See RCW 82.14.020(7). Because of the significant differences between the natural gas use tax in RCW 82.14.230 and the local sales and use tax—as outlined in more detail below—the "dominion or control" part of the definition of "use" in RCW 82.12 is not "applicable" to the natural gas use tax in RCW 82.14.230.

Third, the "uniformity" provision does not require that the natural gas use tax be identical to the local sales and use tax. The Legislature did not

² GP Gypsum argues that if the definition of "use" is ambiguous, "the term would have to be defined in taxpayer's [sic] favor under the rules of statutory construction." Brief of Appellant, p. 32 (citing to Vita Food Products v. State, 91 Wn.2d 132, 587 P.2d 535 (1978)). Just because a tax imposing statute is ambiguous does not mean the court is required to rule in favor of the taxpayer, as GP Gypsum suggests. No case requires such an automatic result. Rather, this statutory construction tool is just one tool use to interpret statutes. Moreover, as this Court noted, construing an ambiguous tax statute in the taxpayer's favor is only a "general presumption." AgriLink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 399, n.1, 103 P.3d 1226 (2005). Where, as here, it is clear the Legislature intended businesses such as GP Gypsum to pay the natural gas tax where it burned the gas, it would be inappropriate to use another statutory construction tool to automatically discount the Legislature's express intent.

state its intention that the natural gas use tax *always* be “consistent and uniform” with the local sales and use tax. Nor did the Legislature state that the natural gas use tax be “identical,” as RCW 82.14.070 reads now, to other use taxes.³ Importantly, the Legislature limited the application of the “uniformity” provision so as to be only “as consistent and uniform as possible.” (Emphasis added). As outlined below, uniformity between the local sales and use tax, and the natural gas use tax, is not reasonably “possible.”

The differences between the local sales and use tax, and the natural gas tax, are significant. They serve different purposes, complement different taxes, and contain different credits. The following chart highlights these differences and shows how why the Legislature treats the natural gas use tax differently than the local sales and use tax.

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³ The Legislature made it quite clear when it amended the Local Sales and Use Taxes chapter that the local natural gas use tax in RCW 82.14.230 did not need to be identical to other use taxes. See Final Bill Report on S.B. 5783, 58th Leg., Reg. Sess. (Wash. 2003), at 3 (“Sales and use taxes must be uniform within a jurisdiction, with the exception of (a) the use tax on natural or manufactured gas....”). This is evidenced by the fact that the natural gas use tax, and the local sales and use tax, are imposed a different rates. See RCW 82.14.230 and RCW 35.21.870 (maximum rate of 6% for local natural gas use tax); RCW 82.14.030 (maximum rate of 1% for local sales and use tax).

<u>Differences</u>	Local Sales and Use Tax	Local Natural Gas Use Tax
Authority	RCW 82.14.030—both cities and counties may impose sales and use tax	RCW 82.14.230—only a city may impose local natural gas use tax
Purpose	Use tax complements the retail sales tax; see WAC 458-20-17401	Natural gas use tax complements public utility tax; Laws of 1989, ch. 384, § 1.
Tax Rates	Rate for local sales and use tax rate authorized in RCW 82.14.030 is a maximum of 1%	Rate for natural gas use tax same as public utility tax under RCW 35.21.870 (rate may not exceed 6%); RCW 82.14.230(2)
Credits	No credit for gross receipts tax paid to another state*	Credit for similar gross receipts tax paid to another state; see RCW 82.14.230(4)(a)
Deductions	No deduction for transportation costs	Deduction for amounts paid for transporting natural gas if transportation subject to local public utility tax. RCW 82.14.230(2)
Application to sale	Applies to local sale or use. RCW 82.14.030(1)	Applies only to use, not sale. RCW 82.14.230

* There is no credit for gross receipts tax paid another jurisdiction because retail sales and use taxes are not gross receipts taxes. The public utility tax is a gross receipts tax because it is imposed on the gross income of the business. See RCW 35.21.870; Tacoma Muni. Code 6A.90.030.

The local natural gas use tax is fundamentally different from the local sales and use tax. The purpose (the natural gas tax is to complement the local public utility tax, which is a gross receipts tax), the tax rates (6% versus 1%), and the credits (against the natural gas tax for a similar gross receipts tax paid

to another state) are all different from the local sales and use tax. The natural gas tax is simply a specialized tax for a specialized industry. That is why the Legislature treats it differently than other use taxes.⁴

Because of the significant differences between the local sales and use tax, and the natural gas use tax, the “insofar as applicable” language in the definition section and the “uniformity” provision must be interpreted to mean that the ordinary definition of “use” in RCW 82.12.010(2) can, and should, apply. By giving “use” its ordinary meaning for purposes of the natural gas use tax in RCW 82.14.230, this Court will fulfill the Legislature’s intent.

As discussed in earlier briefs, the Legislature enacted the local natural gas use tax after deregulation of the natural gas industry so as to ensure that cities would receive tax revenue that it lost via the utility tax on natural gas. See City of Tacoma’s Amicus Curiae Brief in Support of the Department, pp. 3-4. The Legislature intended that those who purchase natural gas from a broker, as GP Gypsum did, pay the natural gas use tax so as not to circumvent the public utility tax (which would only be imposed if GP Gypsum purchased the natural gas through a distributor.) See Laws of 1989, ch. 384, § 1. Such a tax structure ensures that cities maintain an important tax revenue stream. Id.

⁴ This is also why Tacoma codified the natural gas use tax with its public utility tax, and codified its local sales and use tax separately. See Tacoma Muni. Code 6A.90.030 (public utility tax) and Tacoma Muni. Code 6A.90.040(A) (natural gas use tax); Tacoma Muni. Code 6A.70.010-040 (local sales or use tax).

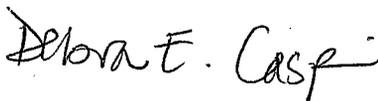
By adopting the Court of Appeals' and GP Gypsum's approach that "use" is as defined in RCW 82.12.010(2) as asserting "dominion or control," this Court would be adopting an interpretation that is strained and unrealistic. It would render the Legislature's express intent meaningless and allow taxpayers to easily avoid the natural gas use tax by specifying in their contracts that they take delivery outside city limits. See City of Tacoma's Amicus Curiae Brief in Support of Department's Petition for Review, pp. 5-9. This is not what the Legislature intended when it enacted the natural gas use tax in 1989.

V. CONCLUSION

For the foregoing reasons, the City of Tacoma respectfully requests the Court to reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 16 day of October, 2009.

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