

No. 81995-5

X

SUPREME COURT OF THE STATE OF WASHINGTON

G-P GYPSUM CORPORATION,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE

Petitioner.

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STATE OF WASHINGTON

ANSWER TO AMICUS CURIAE BRIEF OF CITY OF TACOMA

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I. Introduction

Tacoma's amicus brief contends that the Court of Appeals decision¹ "held that as long as a taxpayer provides in its contract that it takes delivery of the gas outside the Tacoma city limits, Tacoma cannot impose the local natural gas use tax on that taxpayer" and that the Court erred "in holding that a taxpayer can avoid the local natural gas use tax by stating it first uses the gas outside the city limits because it specifies in its contract that it takes delivery outside the Tacoma city limits." Amicus Curiae Brief of City of Tacoma (hereinafter cited as "Br. of Tacoma") at 2.

The City proceeds to claim that the "Court of Appeals' decision allows taxpayers to make a simple change to their sales contracts and avoid the local natural gas use tax entirely" (Br. of Tacoma at 3) and that "[i]n order to take advantage of the Court of Appeals' decision, a taxpayer merely needs to change only a few words in its sales contract to state that it will take delivery outside the Tacoma city limits" (Br. of Tacoma at 6).

These claims by Tacoma are predicated to its conclusion that the Court of Appeals decision "will likely ensure that Tacoma, and other

¹ *GP Gypsum Corp. v. Dep't of Revenue*, __ Wn. App. __, 183 P.3d 1109 (2008). The Slip Opinion for this case was attached as Appendix A to the Petition for Review. Both the Petition for Review and the Answer thereto cited to the Slip Opinion. In this Answer to the Amicus Brief of Tacoma, we continue to cite to the Slip Opinion for ease of reference.

cities, receive little or no tax revenue from the local natural gas use tax.” Br. of Tacoma at 5. Tacoma’s conclusion coupled with its erroneously singular view of legislative intent leads Tacoma to contend that this case involves an issue of substantial public interest that should be determined by the Supreme Court. Br. of Tacoma at 9.

Tacoma’s arguments misstate the Court of Appeals’ holding, do not properly reflect the Record, and misunderstand legislative intent.

II. Argument

A. The Court of Appeals Held That Tacoma’s Use Tax Did Not Apply To Gypsum Because It First Exercised Dominion and Control Over The Gas Outside Tacoma.

Both the majority² and concurring³ opinions below held that Tacoma’s use tax could not be applied to G-P Gypsum Corporation (hereinafter referred to as “Gypsum”) because Gypsum first “used” the gas, first took dominion and control over the gas, outside Tacoma. Any

² Slip Op. at 1 (“Gypsum reasons that because it first exercised dominion over its natural gas in Washington outside Tacoma, it did not ‘use’ the gas in Tacoma and the local tax does not apply. Because the only statutory definition of ‘use’ supports Gypsum’s argument, we reverse ... ”); Slip Op. at 2 (“the issue is whether Gypsum is subject to Tacoma’s local use tax for natural gas under RCW 82.14.230 even though its first act of dominion or control over the gas in Washington occurred outside the city.”) and Slip Op. at 7 (“applying the only statutory definition of ‘use’ in either chapter, Gypsum first exercised dominion and control over the natural gas outside the City of Tacoma during the period in question. Thus, Tacoma’s use tax did not apply.”).

³ Slip Op. at 10 (Hunt, J. concurring) (“Here, however, regardless of the applicable definition of ‘use’, I agree with the majority that Gypsum ‘used’ the natural gas at issue when it first exercised dominion and control over the gas after it entered the State near Sumas.”)

and all claims by Tacoma that the holding was premised on mere contract language are false. The Court of Appeals clearly relied on the undisputed facts in this case that Gypsum took dominion and control over the gas outside Tacoma.

B. The Record Reflects That Gypsum's Dominion and Control Over the Gas Outside Tacoma Was Substantial. No Mere Change of Words Would Alter That Controlling Fact.

The undisputed testimony of Mr. Willis (Report of Proceedings 32-33, 50-53, 55-57, 60 (Trial transcript, Oct. 16, 2006) (hereinafter cited as "RP")) demonstrates the substance of Gypsum's dominion and control over the gas outside Tacoma.⁴

Based on this undisputed testimony and the parties stipulations⁵, the trial court found that Gypsum takes or assumes dominion and control of the gas at locations outside Tacoma, RP 62 and 65 (Court's ruling, October 17, 2006).

⁴ Gypsum, because of a 20 year transportation agreement, was obligated to pay for transporting gas from Sumas to Sumner. RP at 32. Gypsum's seller had no responsibility regarding the gas from the moment it was delivered to Gypsum at Sumas. RP 32-33. Gypsum was responsible for the transportation of the gas from that point; Gypsum had the risk of loss from that point; Gypsum had to pay for the gas at that point; Gypsum had the risk of liability at that point, and Gypsum was concerned about that potential liability. RP 33. Mr. Willis specifically testified that there was substance to the delivery at Sumas (RP 50) and that, contrary to Tacoma's unsupported allegations, the delivery terms could not be easily changed (RP 51). It was also important to Gypsum that Sumas was a larger point for transactions of natural gas, whether it was purchasing, selling or transporting gas. RP 52 and 60.

⁵ CP 83-87.

Any and all claims that it was simple, easy or insubstantial for Gypsum to assume dominion or control of the gas outside Tacoma instead of its Tacoma plant are plainly contrary to the Record. Given the significant risks and liabilities that Gypsum incurred in order to assume dominion and control of the gas outside Tacoma, there is no reason to entertain speculation that the Court of Appeals' decision will lead other taxpayers to now rearrange their business affairs to avoid the tax.

Indeed, Gypsum did not take on these risks and liabilities to avoid the tax. It did so because it had a long term transportation agreement to transport gas from Sumas to Sumner, the market price of gas was lower at Sumas than Tacoma, and the ability for Gypsum to sell excess gas was greater at Sumas than Tacoma. RP 60. The Court of Appeals decision reflects the law. Thus, there is no reason to speculate that gas consumers are going to now change where they purchase natural gas.⁶

**C. The Legislature Intended The Local Tax To Only Apply
When The State Tax Applied, And The State Tax Applied to Events
Outside Tacoma.**

⁶Even if Tacoma were correct in alleging that the tax is easily avoided, the case would not raise an issue that should be addressed by the Supreme Court. It would only raise an issue for the Legislature. Both the majority and concurring opinions below conclude that "use" as defined by statute results in Gypsum not owing Tacoma's tax. The decision below is a function of statutes. Tacoma's argument, to the extent it has any validity, needs to be made to the Legislature not the Supreme Court. It is a legislative function to enact law and a judicial function to apply the law the Legislature enacts.

Tacoma argues that the Legislature intended cities to be able to tax natural gas. Br. of Tacoma at 3. The legislative intent in regard to the local natural gas use tax is not singular. While the Legislature gave cities the option of taxing natural gas “used” within city limits, that option is limited to when the “use” is the taxpayer’s first use within the State. *See*, RCW 82.12.010; RCW 82.14.230; RCW 82.14.020; RCW 82.14.070. This limitation on the ability of cities to tax natural gas was recognized in different ways by both the majority⁷ and the concurring⁸ opinions below.

Given the legislative intent to permit Tacoma to tax the use of natural gas but only if it does so in a manner consistent and uniform with the State’s taxation of natural gas (RCW 82.14.070), on an event subject to the State’s tax (RCW 82.14.030), Tacoma may not define “use” other than as defined by RCW 82.12.010. The State use tax applied to Gypsum’s gas when it assumed dominion and control over the gas outside of Tacoma. *See generally*, RCW 82.12.010. As Gypsum’s “use” of the gas occurred outside Tacoma, Tacoma may not tax Gypsum’s use. That is the law, and that is the holding below.

⁷ Slip Op. at n. 5 (“The legislature therefore intended the local natural gas use tax to be ‘as consistent and uniform as possible’ with any other use tax.”) (citing RCW 82.14.070 and applying that statute to RCW 82.14.230.)

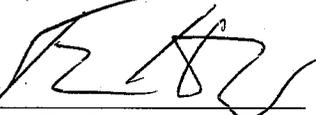
⁸ Slip Op. at n. 10. (Hunt, J concurring, “In order to ameliorate the loss of revenue to cities caused by federal legislation, our state legislature expressly gave cities the option of taxing natural gas ‘used’ within city limits, but only if that is the taxpayer’s first act of use within the State.”) (citing former RCW 82.12.010; former RCW 82.14.230; former RCW 82.14.020).

III. Conclusion

For the reasons expressed above as well as the reasons discussed in the Answer to the Petition for Review and in the Answer to the Amicus Curiae Brief of Seattle and the Association of Washington Cities, the Petition for Review should be denied.

Respectfully submitted, this 10 day of September, 2008.

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Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 18th day of September 2008, I placed in the United States mail, postage prepaid, a copy of the Respondent's Answer to Amicus Curiae of City of Tacoma, addressed to:

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