

NO. 81995-5

SUPREME COURT OF THE STATE OF WASHINGTON

FILED
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G-P GYPSUM CORPORATION,

Respondent,

v.

CLERK OF SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

**ANSWER TO AMICUS CURIAE BRIEF OF CITY OF SEATTLE
AND THE ASSOCIATION OF WASHINGTON CITIES**

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I. Introduction

The City of Seattle and the Association of Washington Cities repeatedly grossly overstate the effect of the Court of Appeals decision¹ in their effort to persuade this Court that “[t]his case presents a matter of substantial public importance because it will result in tens of millions of dollars of lost revenue and tax refunds requests” Amicus Curiae Brief of City of Seattle and Association of Washington Cities (hereinafter cited as “Br. of Seattle”) at 5.²

They state: “The court of appeals’ decision is equivalent to a revocation of a tax” Motion of City of Seattle and Association of

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. The Petition for Review, the Answer thereto and the Answer to the Amicus Brief of Tacoma all cite to the Slip Opinion. Here, we continue to cite to the Slip Opinion for ease of reference.

² Amici also claim the case should be reviewed because a conflict supposedly exists between the decision below and a decision of this Court. The case raising the supposed conflict is the same case discussed by the Petitioner in its Petition for Review. For the reasons already discussed in the Answer to the Petition, no such conflict exists, and for the reasons already discussed in the Answer to the Petition and in the Answer to the Amicus Curiae Brief of Tacoma, the supposed conflict is of no import. The case relied on by the Petitioner and amici only lends support to an argument that a court should find legislative intent. The Court of Appeals’ decision actually does correctly seek and find the legislative intent. *See*, Slip Op. at 3 (“Our objective in construing a statute is to ascertain and carry out the legislature’s intent.”), 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) and 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). What Petitioner and amici really seek is for a court to add language to an unambiguous statute to change the statute’s plain meaning based on their belief that the Legislature intended something other than what it plainly expressed. The Court of Appeals correctly declined to take such an action. Slip Op. at 5.

Washington Cities to File Amicus Brief at 3; “The court of appeals’ decision ... [will] effectively deprive other Washington cities of the revenue from the tax.” Br. of Seattle at 2; “The court of appeals’ decision deprived Tacoma of this significant revenue source and will have a similar effect on Seattle and other Washington cities.” *Id.*

The court of appeals’ decision does no such thing. The decision is premised on a finding of fact -- that GP Gypsum Corporation, (“Gypsum”) assumed dominion and control over the gas outside Tacoma -- which amici contend is not supported by the evidence. Br. of Seattle at 9 – 10. If Gypsum had taken dominion and control within Tacoma, Tacoma’s tax would have applied. The court of appeals’ decision permits the local tax to apply anytime a business first assumes dominion and control over gas within a taxing jurisdiction.³

Moreover, as described more fully in the Argument, any speculative revenue loss does not raise an issue of substantial public interest that should be decided *by this Court*. In addition, the trial court’s finding of fact concerning Gypsum’s assumption of dominion and control

³ The amici are aware that the tax still applies in some circumstances. *See*, Br. of Seattle at 5 (“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. Other natural gas purchasers who do not already have the same arrangement as Gypsum will be able to avoid the tax simply by altering their purchase documents.”); *and see*, Br. of Seattle at 4 (“The court of appeals’ decision will result in depriving these cities of much of this revenue in future years.”).

outside Tacoma is for purposes of this case a verity. The finding was not appealed to the Court of Appeals nor even questioned in anyway before the Court of Appeals.

II. Argument

A. A Speculative Revenue Loss Does Not Raise An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

The thrust of the amici's arguments is that the case should be reviewed because it affects the public fisc.⁴ Br. of Seattle at 2 - 5. While the argument should fail due to its speculative nature and because it is contrary to the Record, *see*, Answer at 3 - 5 *and see*, Answer to Amicus Brief of Tacoma at 3 - 4, the argument must fail because, even if the speculation were true and not contrary to the Record, the effect on the public fisc of properly applying a tax does not convert what is inherently a legislative issue to one that should be determined by the Supreme Court.⁵

⁴ This argument was also made by the City of Tacoma (Br. of Tacoma at 5 - 9) and the Petitioner (Petition for Review at 13 - 16). Previously, we principally responded by demonstrating that the alleged effect is at best speculative and contrary to the Record. *See*, Answer at 3 - 5 *and see*, Answer to Amicus Brief of Tacoma at 3 - 4. We also noted in both Answers that even if the Petitioner's or Tacoma's speculation was correct, the case would only raise a legislative issue, not an issue that should be determined by the Supreme Court. *See*, Answer to Amicus Brief of Tacoma at n. 6 *and see*, Answer at n. 3. In text, we now expand our argument concerning the proper role of the Legislature and courts in tax matters.

⁵ Stripped bare, Petitioner's and amici's arguments are that the Court should review this case because it costs the losing parties a lot of money. Such a circumstance is not unusual in litigation and hardly justifies review by the Supreme Court.

This Court has previously recognized that “the taxing power is inherently legislative”⁶ and that “the Legislature possesses a plenary power in matters of taxation except as limited by the Constitution”⁷ “It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature.” *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 770, 131 P.3d 892 (2006) quoting, *Tacoma Sch. Dist. No. 11 v. Kelly*, 176 Wash. 689, 690, 30 P.2d 638 (1934) and *Love v. King County*, 181 Wash. 462, 467, 44 P.2d 175 (1935). The reason for this fundamental principle is “[t]he power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people, and if committed to persons whom may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time.” *Id.* quoting, *State Tax Commission, v. Redd*, 166 Wash. 132, 141, 6 P.2d 619 (1932).

Here, the Court of Appeals applied the statutes as they are written. It correctly found that first “use” occurs at the moment a business assumes dominion and control over an article of tangible personal property. Gypsum assumed dominion and control over the gas outside Tacoma. Therefore, Gypsum did not owe Tacoma’s tax. Even if that resulted in the

⁶ *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 770, 131 P.3d 892 (2006).

⁷ *Belas v. Kiga*, 135 Wn.2d 913, 915, 959 P.2d 1037 (1998).

tax never applying, it would create only a legislative issue. The Court of Appeals correctly applied the statute.⁸ Courts do not impose taxes. Courts do not add language to unambiguous tax statutes even if they believe that the Legislature intended something other than what it expressed. *Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978) (“The State would have us add words to the statute to ascribe legislative intent ... It is not within our power to add words to a statute even if we believe the legislature intended something else but failed to express it adequately.”)

B. Unchallenged Findings of Fact Are Verities On Appeal.

“It is well established law that an unchallenged finding of fact will be accepted as a verity upon appeal.” *Contested Election of Schoessler*, 140 Wn.2d 368, 998 P.2d 818 (2000) quoting, *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). No error was assigned to the trial court’s finding that Gypsum first assumed dominion and control over the gas outside Tacoma. At no time in the Court of Appeals was any issue raised concerning this finding of fact. It is axiomatic that an amicus cannot successfully raise a question concerning a verity as a reason for granting review.⁹

⁸ Mere issues of statutory application do not justify accepting review under RAP13.4(b) because the Legislature can always correct any supposed error by the Court of Appeals.

⁹ All the speculation by Petitioner, Tacoma, and Seattle that the tax will never apply may be premised on the mistaken belief that the trial court erred in finding that Gypsum assumed dominion and control over the gas outside Tacoma. For *if* Gypsum had not

**C. Gypsum Demonstrated Its Dominion and Control Over
The Gas By Selling Some Of The Gas Outside Tacoma, Transporting
The Gas To Various Locations and Consuming Some Of The Gas
Outside Tacoma.**

While it is a verity that Gypsum first assumed dominion and control over the gas outside Tacoma, that finding of fact is also demonstrated by the facts that Gypsum sold some of the gas outside Tacoma, transported some of the gas to locations other than Tacoma, and permitted some of the gas to be consumed outside Tacoma. Ex. Plaintiffs 17.¹⁰ Dominion and control could not be more clearly demonstrated than Gypsum's actual sales, use and transportation of gas to multiple locations outside Tacoma.¹¹

The clear *exercise* of dominion and control by Gypsum over the gas outside Tacoma also demonstrates that the concern of Tacoma, Seattle and Petitioner that no one will ever pay the local tax is speculative and

taken dominion and control over the gas outside Tacoma but it nevertheless avoided the tax on that basis, then anyone might similarly avoid the tax. Of course, Gypsum did assume dominion and control over the gas outside Tacoma. It is too late for anyone to question that fact in this case. If anyone wants to challenge that verity, they need to contest the facts in the next case. It would be inappropriate to review this case based on concerns regarding a fact found by the trial court, supported by the evidence and not questioned on appeal.

¹⁰ Extensive testimony was taken concerning Exhibit 17 (Oct. 16, 2006, RP 81 - 99) and these facts (Oct. 16, 2006, RP 100 - 113). The parties stipulated that Exhibit 17 contained correct calculations and summaries of Gypsum's business records. CP177.

¹¹ Other substantial evidence demonstrating Gypsum's dominion and control over the gas outside Tacoma is detailed in the Answer to Amicus Brief of Tacoma at 3 - 4 and the Answer at 1 - 2.

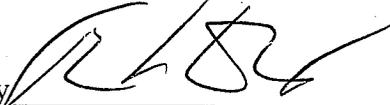
contrary to the record. Not all businesses sell, transport and consume natural gas outside of the locale at which they ultimately burn gas.

III. Conclusion

For the reasons expressed above, in the Answer to the Petition for Review and in the Answer to the Amicus Curiae Brief of Tacoma, the Petition for Review should be denied.

Respectfully submitted, this 10th day of September, 2008.

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Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 18 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 Seattle and the Association of Washington Cities, addressed to:

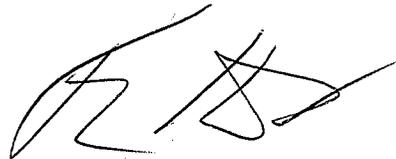
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