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NO. _____

Court of Appeals No. 35883-2-II

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CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

G-P GYPSUM CORPORATION,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

ANSWER

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I. Issues Presented

1. Does a Court of Appeals tax decision conflict with a decision of this Court under RAP 13.4(b)(1) when it is consistent with all decisions cited and discussed below but petitioner for the first time alleges in its petition that the decision is conflict with non tax decisions not cited, argued or discussed below?
2. Does a Court of Appeals tax decision raise an issue of substantial public importance that should be determined by this Court under RAP 13.4(b)(4) when such decision limits, as a result of unambiguous statutes, a city use tax to first “uses” within the State that occur within the city but Petitioner alleges, contrary to the evidentiary record, that the decision will severely hamper cities’ abilities to impose the challenged tax?

II. Statement of the Case

G-P Gypsum Corporation (“Gypsum”) purchased natural gas at two primary delivery points in Washington: (1) the Sumas station and (2) the Sumner station. CP 174-175. These stations are located outside the city limits of their respective cities. *Id.*

When Gypsum purchases natural gas at delivery points in Washington, it takes dominion and control over the gas at those delivery points. CP.175. Gypsum assumes the risk of loss and risk of liability for the gas at those delivery locations. *Id.* At those locations, Gypsum

determines the amount of gas it will ship to its plant and the amounts of gas it will transfer and/or sell to others. *Id.*

The record below demonstrates that it is easier for most taxpayers to take delivery where the gas is actually burned. There are risks of loss and liability associated with controlling natural gas. CP 175. There are also costs of transporting the gas to where it will be burned. CP 176. Gypsum expends significant effort and incurs substantial risks to take delivery outside Tacoma. RP 59-60 (Trial transcript, Oct. 16, 2006). Gypsum often has excess gas and excess transportation rights with which it must deal. CP 175-176 *and see* Ex. Plaintiff's 17.

The record reflects that Gypsum did not take delivery of gas outside Tacoma to avoid taxes. It took delivery outside Tacoma for gas supply reasons. RP 20-23 (Trial transcript, Oct. 16, 2006).

The issue decided below was whether Gypsum was subject to Tacoma's local use tax under RCW 82.14.230 even though it first assumed dominion or control over the gas in Washington outside the city.

III. Argument

RAP 13.4(b) provides the criteria governing whether a petition for review will be accepted by the Supreme Court. Of the four criteria listed, the Petitioner, State of Washington, Department of Revenue ("Department") contends that review is appropriate because allegedly two

of the criteria are satisfied. It claims that the case involves an issue of substantial public interest that should be determined by the Supreme Court and that the Court of Appeals opinion conflicts with Washington Supreme Court opinions. The Department is wrong.¹ The claim of substantial public importance is premised on speculation contrary to the evidentiary record. The claim of conflict allegedly arises from cases neither cited nor argued below. The Court of Appeals opinion is correct, based on the plain language of the relevant statutes and does not raise any issue of substantial public importance that should be determined by the Washington Supreme Court.

A. The Department's Claim is Contrary to the Record.

The Department claims that the issue presented is "one of substantial public interest because the ability of cities across Washington to impose local natural gas use taxes will be severely hampered if not eliminated altogether." Pet. for Review at 1. The Department bases this claim on speculation. It argues that "[e]ven if there are some ... [purchasers] ... that currently accept delivery of the natural gas within a

¹ The Department also failed to follow RAP 13.4(a) by filing its petition for discretionary review with this Court rather than the Court of Appeals. The Court of Appeals has now issued its mandate to the Superior Court. The Department recently filed a motion with the Court of Appeals to recall the mandate. The Department's motion is pending in the Court of Appeals.

city, the Court of Appeals decision ensures that the number of such purchasers will dwindle if not disappear.” Pet. for Review at 13.

The Department’s speculation is contrary to the record. The Court of Appeals decision permits city natural gas use taxes to apply whenever a taxpayer assumes dominion and control over natural gas within a city. That situation occurs whenever a taxpayer takes delivery of natural gas at its facility if the facility is within a city. Common experience and the evidentiary record indicate that delivery at a taxpayer’s facility is the norm, not the exception. The evidence is that it is easier for taxpayers to take delivery where the gas is actually burned. There are risks of loss and liability associated with controlling natural gas. CP 175. There are also costs of transporting the gas to where it will be burned. CP 176. Gypsum expends significant effort and takes on substantial risks to take delivery outside Tacoma. RP 59-60 (Trial transcript, Oct. 16, 2006). Gypsum often has excess gas and excess transportation rights with which it must deal. CP 175-176 *and see* Ex. Plaintiff’s 17. Thus, cities have ample opportunities to impose their use taxes.

The Department engages in rank speculation contrary to the record when it argues that the local natural gas use tax will disappear as a result of the Court of Appeals decision. The record shows that not only did Gypsum take on significant risks and liabilities by assuming dominion and

control over the gas far from its plant but that it did so for supply reasons. RP 20-23 (Trial transcript, Oct. 16, 2006). There is no reason to entertain speculation that taxpayers other than Gypsum are going to take on the significant risks and liabilities that Gypsum only assumed for business reasons.² The Department is incorrect. The tax is an insufficient reason for a business to take on such risks and liabilities.³

B. The Court of Appeals Opinion Does Not Conflict With Any Decision of This Court.

1. The Alleged Conflict Arises From Decisions Not Even Cited To The Court of Appeals.

The Department alleges that the Court of Appeals opinion conflicts with numerous Supreme Court opinions. Pet. for Review at 4. It cites those opinions on pages 5 and 6 of its petition. But, none of those decisions, allegedly so in conflict that the opinion below needs to be reviewed, was even cited below.

² The record even demonstrates that there are times Gypsum refuses to take on such risks and purchases natural gas at its Tacoma plant. CP 86. The gas purchased in that manner is not at issue.

³ Even if the Department's speculation were true, the case would still not raise an issue of substantial public interest that should be determined by the Supreme Court. It would only raise an issue for the Legislature. The Court of Appeals correctly held that the Legislature mandated that state and local use taxes are to be uniform and collected at the same time and place. Slip. Op. at 7. *See also*, RCW 82.14.070. Thus, the Legislature intended, as the Court of Appeals held, the city tax to be imposed only when the "use" within a city is the use taxed by the State, the first "use" within the State. *See*, Slip. Op. at 7, n.5 (majority opinion) and at 10, n.10 (concurring opinion). The Legislature could easily change the definition of "use" if it intended otherwise as the Department claims.

2. No Conflict Exists.

The Court of Appeals majority and concurring opinions both hold that the definition of ‘use’ is found in RCW 82.12.010. No court or party involved in this case ever held or contended that under RCW 82.12.010 Gypsum “used” the gas in issue in Tacoma.

None of the cases now raised by the Department bear on that issue. They are not even tax cases. They are cases dealing with general rules of statutory construction. On that subject the Court of Appeals relied on *Tingey v. Hirsch*, 159 Wn.2d 652, 152 P.3d 1020 (2007), a case subsequent to and consistent with the cases now raised by the Department. Thus, no conflict exists.⁴

The Court of Appeals found no ambiguity in chapters 82.12 and 82.14 RCW regarding the meaning of when a taxable use occurs. It applied the only definition of “use” in either chapter to the fact that Gypsum first exercised dominion and control over the gas outside Tacoma and concluded that Tacoma’s tax did not apply. Slip Op. at 7. The

⁴ The Department seeks to have the Court determine legislative intent, apparently not recognizing that the Court of Appeals majority and concurring opinions both determined, relying on statutory language, that the Legislature intended the local natural gas use tax to be as consistent and uniform as possible with any other use tax. *See*, Slip Op. at 7, n. 5 (Maj. Op.) and at 10, n. 10 (Concurring Op.) and RCW 82.14.070. The concurrence noted, “[i]n 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.*” Slip. Op. at 10, n. 10 (emphasis added). The Department’s arguments ignore the legislative intention to have a uniform use tax. Such uniformity results in the emphasized language being true.

concurring opinion also held that under RCW 82.12.010 Gypsum used the gas when it first exercised dominion and control over the gas after it entered the state near Sumas. Thus, there was no taxable event for Tacoma to tax. Slip Op. at 10.

3. The Alleged Conflict Cannot Save The Tax.

In its attempt to create a conflict, the Department is forced to now argue that the tax statute is ambiguous, susceptible to multiple meanings. Pet. for Rev. at 5 (“... Court of Appeals interpretation is not the only reasonable interpretation of the language ...”). Even if the Department were correct that the statutes are ambiguous, this Court has long held that ambiguous tax imposition statutes, as opposed to statutes providing exemptions, are construed in favor of the taxpayer. *See generally, Vita Food Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978) (briefed below); *Foremost Dairies, Inc. v. State Tax Comm’n.*, 75 Wn.2d 758, 762, 453 P.2d 870 (1969); *Department of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973). Thus, even if the Department were correct that the definition of “use” within the tax imposition statute was ambiguous so it would be appropriate for a court to interpret it, the Department’s proffered definition would not be accepted.⁵

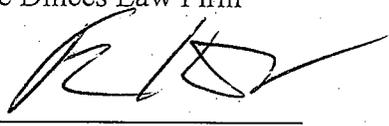
⁵ While unstated in its petition, the Department seeks to have “use” defined for city natural gas use taxes in a manner other than as defined by statute and other than as defined for any other use tax purpose.

IV. Conclusion

For the reasons expressed above, the Petition for Review should be denied.

Respectfully submitted, this 11th day of July, 2008.

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By 

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Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the ___ day of July 2008, I placed in the United States mail, postage prepaid, a copy of the Respondent's Answer, addressed to:

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