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No. 85971-0

SUPREME COURT
OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington nonprofit
corporation, TOWER ENERGY GROUP, a California corporation,

Appellants,

v.

STATE OF WASHINGTON; and JIM MCINTYRE, WASHINGTON STATE
TREASURER,

Respondents.

RESPONSE BRIEF OF APPELLANTS TO
BRIEF OF AMICUS CURIAE
WASHINGTON ENVIRONMENTAL COUNCIL

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A. INTRODUCTION

Tower Energy Group (“Tower”) and Automotive United Trades Organization (“AUTO”) seek prospective declaratory relief to stop the unconstitutional diversion of motor fuel taxes for non-highway purposes imposed by the hazardous substances tax (“HST”).

The Washington Environmental Council (“WEC”) has filed an amicus curiae brief that supports the State’s arguments in this case. It emphasizes the importance of the Model Toxics Control Act (“MTCA”) and the Department of Ecology’s environmental programs. However, WEC’s legal arguments mostly reiterate the State’s legal arguments already advanced.

AUTO/Tower do not dispute the importance of addressing environmental concerns. Nor do they seek to undo 24 years of work by the State to address cleanup of toxins. These are not the issues in this appeal. This Court must declare whether the HST as applied to motor vehicle fuel is unconstitutional under article II, § 40 of the Washington Constitution (“the 18th Amendment”). There will be no parade of horrors resulting from AUTO/Tower’s suit, as WEC claims. If the HST as applied to motor vehicle fuel is in fact unconstitutional, the Legislature can enact a constitutional tax to replace it. Nor should this Court impose a time limitation on declaratory judgment actions seeking only prospective relief, when the remedy can be fashioned to avoid any prejudice.

The HST as applied to motor vehicle fuel is unconstitutional. This Court can declare what the law is, and impose a just and sensible remedy.

B. STATEMENT OF THE CASE

WEC's statement of the case is largely an uncontroversial history of the enactment and purpose of the HST and the MTCA. Br. of amicus WEC at 2-3.

However, WEC's description of AUTO and Tower's actions and knowledge with respect to the HST is incomplete. WEC asserts that AUTO "knew about its potential claims over two decades ago, and decided to do nothing." *Id.* at 3 n.2.

AUTO's executive director, a non-lawyer, heard of concerns in the legislative process about the 18th Amendment when the HST was enacted from other organizations. CP 656. However, MTCA supporters, including WEC itself, insisted the HST was constitutional. *Id.* The 18th Amendment was not heavily discussed during the debates, and AUTO never saw any legal analysis of the subject during the deliberations on the legislation or the campaign on the referendum. *Id.*

Also, far from waiving or ignoring its rights to file suit, AUTO exercised restraint regarding any potential 18th Amendment challenge. Although AUTO did not endorse the HST as applied to motor vehicle fuel and had some concerns about its legality, it has acknowledged that it is good to clean up toxins in the

environment. *Id.* This fact allowed AUTO to overlook the potential unconstitutionality of the tax, and an uneasy peace ensued. *Id.*

However, recently, the HST's purpose has been corrupted as the Legislature considered HST rate increases and large scale diversions of HST revenues from the state toxics control accounts to the general fund. CP 669. This recent abuse of the HST prompted AUTO to take action and ask this Court to review the tax for its constitutionality. CP 657.

Finally, WEC does not, and *cannot* sustain any claim that Tower, the other appellant in this case, had *any* knowledge of the 18th Amendment violation and failed to act. Tower had nothing to do with the enactment of the HST, and was not a member of AUTO until long after the 1988 HST fight was over.

Tower/AUTO understand that any retroactive relief or request for damages, though warranted, would be unfair. That is precisely why they seek only declaratory judgment and prospective action to correct this illegal provision of MTCA. Tower/AUTO do not seek to undo any benefit that MTCA has engendered, only to ensure that MTCA is funded legally and constitutionally.

C. SUMMARY OF ARGUMENT

WEC's argument demonstrates what AUTO/Tower have been stating all along, and what this Court has already recognized: the HST's so-called "possession" incidence is merely a sale, use, and distribution incidence in disguise. WEC admits that the HST is imposed on those "users" of motor vehicle

fuel who benefit economically from its sale, distribution, and use. Yet WEC reiterates the State's argument that the HST avoids the 18th Amendment because it is imposed on "possession" of hazardous substances.

WEC also reiterates the dubious argument that the proviso of the 18th Amendment is a giant loophole that essentially renders the enacting portion of the Amendment meaningless. If the Legislature can avoid the 18th Amendment by simply imposing an excise tax on motor vehicle fuel and declaring that it "intends" to use that revenue for non-highway purposes, then the proviso constitutes a total nullification of the core of the 18th Amendment.

WEC cannot, as the State has argued, impose a time limit on declaratory judgment actions seeking only prospective relief. Regardless of whether an unconstitutional tax has been in place for a period of time, it does not "ripen" into a constitutional enactment. AUTO/Tower should be allowed to seek this Court's declaration of whether the HST as applied to motor vehicle fuel is unconstitutional. It is for this Court to fashion a prospective path to restore the rule of law.

D. ARGUMENT

(1) The HST as Applied to Motor Vehicle Fuel Is a Tax on the Sale, Use, and Distribution

WEC's argument is contradictory. It argues that the HST avoids 18th Amendment entanglements because it taxes "possession" rather than "sale, use, or

distribution” of motor vehicle fuel. Br. of WEC at 4. It claims the HST is constitutional because mere “possession” does not implicate any of the economic activities with which the 18th Amendment is concerned. *Id.* at 4-6. However, WEC also argues that the HST is a “classic user fee” that only impacts those who “benefit economically from possession of motor vehicle fuel. *Id.* at 4. The 18th Amendment’s language must be interpreted in the fashion an average citizen would understand that language. *State ex rel. Albright v. Spokane*, 64 Wn.2d 767, 394 P.2d 231 (1964). A tax on the possession of motor vehicle fuel is nothing more than a tax on its sale or use, as WEC effectively concedes.

Declaring that the HST is imposed on “possession” is a semantic device that cannot hide the true incidence of the tax. The Legislature cannot change the real nature and purpose of an act by giving it a different title, or by declaring its nature and purpose to be otherwise. *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936). “The character of a tax is determined by its incidents, not by its name.” *Id.*

As WEC acknowledges, the HST falls upon those who “benefit economically” from motor vehicle fuel. No one “benefits economically” from merely possessing motor vehicle fuel. They benefit economically from its sale, use, or distribution. Thus, the Legislature has not managed to successfully disguise the true incident of the HST, even from its most ardent supporters.

WEC also misreads *Tesoro Refining & Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 190 P.3d 28 (2008) and misstates the language of the HST. Br. of amicus WEC at 7. WEC claims that this Court in *Tesoro* simply gave effect to the phrase “power to sell” in the HST, and argues that “if...the power to sell is the equivalent of actual sale, the HST needlessly included the phrase ‘power to.’” Br. of amicus WEC at 7.

This Court in *Tesoro* was not merely applying the phrase “power to” in the HST, because the HST does not contain that phrase. RCW 82.21.030. Instead, this Court was interpreting the word “possession” and concluded that when the Legislature used that term, it meant not physical possession, but the power or ability to sell or use the substance in question. *Tesoro*, 164 Wn.2d at 321.

What neither WEC nor the State can explain in this case is how a tax on the “power” to sell, use, or distribute motor vehicle fuel is materially distinguishable from tax on its sale, use, or distribution, particularly when the tax is imposed on the *economic value* of the substance, rather than on its volume. These kinds of arguments simply reveal the semantic games that have been the hallmark of this case, and do not change the simple fact that the HST violates the 18th Amendment.

- (2) The 18th Amendment Cannot Be Avoided by Simply Declaring a Tax to Be for Purposes Other than Highway Purposes

WEC argues that the 18th Amendment's proviso grants the Legislature power to impose an excise tax on the sale, use, or distribution of motor vehicle fuel, as long as the declared purpose of the tax is for non-highway purposes. Br. of amicus WEC at 5, 7-11. It focuses on the language in the proviso that states: "This section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes...." *Id.* at 5. WEC claims that the Legislature could constitutionally impose an excise tax on the sale, use, or distribution of motor vehicle fuel, as long as the legislation included a declaration that it intended to use the revenue for non-highway purposes. *Id.* at 8.

This phrase in the proviso echoes the language in the 18th Amendment's enacting section regarding "all other state revenue intended to be used for highway purposes." In other words, the proviso re-emphasizes that the 18th Amendment does not apply to "*other state revenue*" intended to be used for non-highway purposes. The proviso does *not*, as WEC suggests, exempt a tax on the sale, use, or distribution of motor vehicle fuel simply because the Legislature declares that the tax is "intended" for another use. That would be an untenable, illogical reading of the proviso that would nullify the 18th Amendment, which is impermissible. *John H. Sellen Const. Co. v. State Dep't. of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342, 1344 (1976) ("By interpretation we should not nullify any portion of the statute").

WEC also argues that the proviso is meaningless if it does not allow the Legislature the power to declare a tax to be for non-highway purposes to avoid the 18th Amendment. Br. of amicus WEC at 8.

There are certain taxes that are exempted under the proviso, those excise taxes that touched upon motor vehicle fuel that existed when the 18th Amendment was enacted in 1944. At that time, three taxes in place that arguably fell within the meaning of the enacting clause: the gas tax, the motor vehicle excise tax (“MVET”), and the business and occupation (“B&O”) tax. The MVET was imposed on the privilege of using a motor vehicle in the state. In 1945, after the passage of the 18th Amendment, this tax was still distributed to the general fund, to cities and towns, and to support the common schools. Laws of 1945, ch. 152, § 14. Although some B&O tax revenue was derived from the sale of gasoline, it was never deposited in the motor vehicle fund, either before or after passage of the 18th Amendment. Laws of 1935, ch. 180, § 211; Laws of 1945, ch. 249, § 10.

Proposed versions of the 18th Amendment that did not include the proviso failed. Wash. Att’y Gen. Op. 2001 No. 2 (2001). They did not preserve these needed, existing excise tax revenue sources – particularly the B&O tax – for the general fund. *Id.* Both before and after passage of the 18th Amendment, these sources of revenue were still applied to non-highway purposes, and still are today.

Thus, the proviso was key to the 18th Amendment’s adoption, and is not meaningless in light of its preservation of the B&O tax and MVET for non-

highway purposes. A sound interpretation of the proviso was that it preserved those taxes that were in place for other purposes. It was not to give the Legislature a massive loophole it could use to negate the 18th Amendment.

This Court should reject WEC's reading of the language of the 18th Amendment's proviso in a way that essentially renders the 18th Amendment subject to legislative override. The 18th Amendment would be eviscerated if the Legislature could invoke the proviso by simply including a declaration that says the motor vehicle fuel tax is levied for environmental cleanup, or for general revenue, or to fund the 4th of July fireworks display.

(3) This Declaratory Judgment Action Is Not Barred by Laches

WEC argues that AUTO/Tower cannot seek prospective declaratory relief regarding the constitutionality of the HST as applied to motor vehicle fuel because time has passed since its enactment. Br. of amicus WEC at 13-19. WEC cites two cases in support of the notion that sometimes, citizens may be precluded from bringing constitutional challenges to statutes because too much time has passed.

The common thread connecting the cases WEC cites is that the citizens challenging the statutes sought a grant of some particularized, *retrospective* relief for themselves from the courts. *State v. Howell*, 92 Wash. 540, 545, 159 P. 777, 779 (1916) (would-be legislative candidate sought ballot access by challenging 15-year-old redistricting law that would have required statewide redistricting and

would have revoked the seats of some sitting legislators); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1003 (6th Cir. 1999) (taxpayers waited until bonds issued and work was 85% complete before seeking refund of taxes paid on sewer project).

AUTO/Tower take no issue with a court declining to grant a taxpayer refunds of years of back taxes, or a disgruntled politician a seat in the Legislature. Parties seeking retroactive relief or some personal legal remedy should act with reasonable speed to obtain that relief.

However, no citizen or taxpayer should *ever* be denied the ability to seek this Court or any court's declaration regarding of the constitutionality of a statute, as long as that party foregoes any retroactive remedy that might prejudice the rights of others already granted and relied upon *in the past*.¹

WEC claims that despite the lack of any retroactive remedy here, prejudice will result from this Court's declaration regarding the constitutionality of the HST. Br. of amicus WEC at 15-17, 20. WEC, apparently arguing on behalf of the Department of Ecology, claims that if the HST is unconstitutional, "Ecology's third largest program" will be threatened with a diminution in funds in the future. *Id.*

¹ For example, if a taxpayer successfully claimed a statute enacted in 1990 was unconstitutional in 2012, the tax statute would be nullified and the taxpayer would be entitled to a refund, but only for taxes paid within the time period of the statute of limitations. The taxpayer could not recover a refund for the time period that pre-dated the expiration of the statute of limitations for bringing such actions.

WEC's argument regarding prejudice rests on the erroneous assumption that the only possible funding source for MTCA is imposing the HST on motor vehicle fuel. This ignores the fact that the asserted prejudice can be avoided by simply imposing a constitutional tax to replace the unconstitutional one at issue. Because AUTO/Tower seek no retrospective relief, refund, or other past remedy, there is no threat to the MTCA programs that WEC defends.

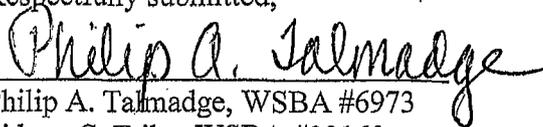
The potential *future* loss of an unconstitutional funding source is not the type of prejudice that this Court or any court has declared sufficient grounds for the assertion of laches. AUTO/Tower have made clear that they simply want a declaration of the constitutionality of the HST as applied to motor vehicle fuel, and that the MTCA program be funded constitutionally in the future. The doctrine of laches does not apply here.

E. CONCLUSION

WEC admits, and this Court has held, that the HST is not actually a tax on possession, but is really a tax on the use of gasoline in disguise. It is not saved by the proviso to the 18th Amendment, which is limited in scope and should not be used to nullify the Amendment. As applied to motor vehicle fuel the HST is unconstitutional, and this Court should grant declaratory relief.

DATED this 19th day of April, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the Response Brief of Appellants to Brief of Amicus Curiae Washington Environmental Council in Supreme Court Cause No. 85971-0 to the following parties:

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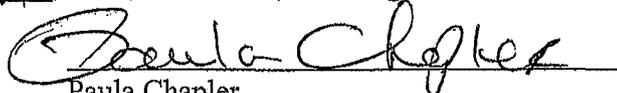
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 19, 2012, at Tukwila, Washington.


Paula Chapler
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DECLARATION

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Per Mr. Talmadge's request, please see the attached Response Brief of Appellants to Brief of Amicus Curiae Washington Environmental Council for filing in the following case:

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