

STATE OF WASHINGTON

2011 DEC 21 A II: 31

-No. 7-966-1-4-

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

sa

SU  
STATE

---

TESORO REFINING AND MARKETING COMPANY

SAW.

4

t

-I.,

Petitioner,

v.

12/21/11  
FILED  
-5  
26

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

---

BRIEF OF AMICUS CURIAE  
ASSOCIATION OF WASHINGTON BUSINESS

---

Kristopher I. Tefft, WSBA #29366  
ASSOCIATION OF  
WASHINGTON BUSINESS  
1414 Cherry Street SE  
Olympia, WA 98507  
(360) 943-1600  
Attorney for Amicus Curiae



## TABLE OF AUTHORITIES

### Cases

<i>Aaro Medical Supplies, Inc., v. Dept. of Revenue</i> , 132 Wn. App. 709, 132 P.3d 1143 (2006) .....	3-4
<i>AgriLink Foods, Inc. v. Dept. of Revenue</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005) .....	3
<i>Association of Washington Business v. Dept. of Revenue</i> , 155 Wn.2d 430, 120 P.3d 46 (2005) .....	3
<i>Dept. of Ecology v. Campbell &amp; Gwinn L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002) .....	7
<i>Duwamish Warehouse Co. v. Hoppe</i> , 102 Wn.2d 249, 684 P.2d 703 (1984) .....	6
<i>Emwright v. King County</i> , 96 Wn.2d 538, 637 P.2d 656 (1981) .....	7-8
<i>Ford Motor Co. v. City of Seattle</i> , 160 Wn.2d 173, 157 P.3d 847 (2007) .....	4
<i>Group Health Coop. of Puget Sound, Inc., v. Washington State Tax Comm'n</i> , 72 Wn.2d 422, 433 P.2d 201 (1967) .....	11
<i>Nelson v. Appleway Chevrolet, Inc.</i> , 160 Wn.2d 173, 157 P.3d 847 (2007) .....	4
<i>Tesoro Refining and Marketing Co.</i> , 135 Wn. App. 411, 144 P.3d 368 (2006) .....	10

<i>Texaco Refining and Marketing, Inc. v. Dept. of Revenue</i> , 131 Wn. App. 385, 127 P.3d 771 (2006), <i>rev. denied</i> , 158 Wn.2d 1012 (2006).....	4
<i>US. Tobacco Sales &amp; Marketing Co., Inc. v. Dept. of Revenue</i> , 128 Wn. App. 426, 115 P.3d 1080 (2005), <i>rev. granted</i> , 157 Wn.2d 1001 (2006).....	4
<i>Weyerhaeuser Co. v. Dept. of Revenue</i> , 106 Wn.2d 557, 723 P.2d 1141 (1986).....	5-6, 8

**Statutes and Regulations**

42 U.S.C. § 9601.....	6
RCW ch. 82.21.....	4
RCW 82.21.010.....	6
RCW 82.21.020.....	2, 6, 7
RCW 82.21.030.....	6
RCW 82.21.020.....	2, 6, 7
WAC 458-20-252 ("Rule 252").....	9-10

**Secondary Authority**

Washington Alliance for a Competitive Economy, 2008 Competitiveness Redbook: Key Indicators of Washington State's Business Climate (2007) .....	5
---	---

## I. INTRODUCTION

The Association of Washington Business ("AWB"), the principal representative of the state's regulated business community, submits this amicus curiae brief to address the court on the critical importance of two fundamental concepts.

First, this case again evokes the foundational rule of statutory construction in tax cases, that taxing laws susceptible to multiple reasonable constructions be construed in favor of the taxpayer.

Secondly, the case brings squarely before the court an instance of a regulatory agency acting in plain disregard of a duly promulgated rule (and interpretive advisory document) upon which taxpayers have relied. In other words, assessing a tax in plain violation of one of its own rules. The source of the agency's disregard of its rule appears to be its recent re-interpretation of the underlying statute, newly minted to coincide with the development of its litigation position in this appeal.

More immediately, this case is about the taxation of "refinery gas," a byproduct of the manufacturing process whereby crude oil is transformed into gasoline, propane, asphalt, and other finished products. Clerk's Papers ("CP") at 40-41. This byproduct is created from chemical reactions within the refining process and is immediately consumed as an integral part of that process or, if excess, burnt off in the refinery flare. CP at 42-44. Refinery gas exists in most cases for approximately thirty seconds. CP at 19, 44. So, in the face of an ambiguous taxing statute, and in light of a valid administrative regulation and policy interpretation to the contrary, should this ephemeral vapor be subject to the state's Hazardous Substance Tax ("HST") when it is fully consumed within the same process that creates it and Tesoro has no legally significant control over it, that is, no power to sell or use it under RCW 82.21.020(3)?

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB, founded in 1904, is the state's oldest and largest general business trade association. AWB represents over 6,500 member businesses, of whom 85 percent are small businesses employing fewer than 50 workers, and who are engaged in all sectors of industry and aspects of commerce in Washington. In total, AWB members employ over 750,000 individuals in Washington. Despite their manifest diversity, AWB members share in common that they are taxed under the various business tax laws of this state. AWB therefore frequently appears as a party or amicus curiae in tax cases of consequence to its membership. *See, e.g., Association of Washington Business v. Dept. of Revenue*, 155 Wn.2d 430, 120 P.3d 46 (2005); *Agrilink v. Dep 't of Revenue*, 153 Wn.2d 392, 103 P.3d 1226 (2005); *US. Tobacco Sales & Marketing Co., Inc. v. Dept. of Revenue*, 128 Wn. App. 426, 115 P.3d 1080 (2005), *rev. granted*, 157 Wn.2d 1001 (2006); *Aaro Medical Supplies, Inc. v. Dept. of*

*Revenue*, 132 Wn. App. 709, 132 P.3d 1143 (2006), *rev. denied*, 159 Wn.2d 919 (2007); *Texaco Refining and Marketing, Inc. v. Dept. of Revenue*, 131 Wn. App. 385, 127 P.3d 771 (2006), *rev. denied*, 158 Wn.2d 1012 (2006); *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 156 P.3d 185 (2007); *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007).

### III. ISSUES OF CONCERN TO AMICUS CURIAE

Whether refinery gas, a byproduct of crude oil refining that is either wholly consumed as part of the refining process or burned off, is subject to Washington's hazardous substance excise tax, RCW ch. 82.21.

### IV. STATEMENT OF THE CASE

For brevity's sake, AWB adopts, as if set forth herein, the Statement of the Case provided by Tesoro in its *Petition for Review* at pages 2-5.

## V. ARGUMENT

According to the Washington Alliance for a Competitive Economy, Washington's business community pays 52.9 percent of the state's overall taxing revenue, a share which is the 10<sup>th</sup> highest in the nation. Washington Alliance for a Competitive Economy, 2008 Competitiveness Redbook: Key Indicators of Washington State's Business Climate 1.0 (2007). Because tax and fiscal policy is a perennial business climate concern, the predictability, uniformity, clarity, and fairness with which taxing laws and rules are interpreted and applied is likewise an urgent matter of import to the state's economic competitiveness.

In that regard, AWB is concerned about a slow erosion in practice of a foundational principle of tax interpretation: "Any doubts as to the meaning of a statute under which a tax is sought to be imposed will be construed against the taxing power." *Weyerhaeuser Co. v. Dept. of Revenue*, 106 Wn.2d 557, 566, 723 P.2d 1141 (1986) (quoting *Duwamish Warehouse*

*Co. v. Hoppe*, 102 Wn.2d 249, 254, 684 P.2d 703 (1984). While the lower court stated this important standard, it failed to apply it. Moreover, the lower court allowed the Department to essentially impeach its own duly promulgated regulation in order to find against the taxpayer. These are basic substantive errors this court ought to reverse.

**A. THE COURT SHOULD CONSTRUE RCW 82.21.020(3) IN TESORO'S FAVOR AND FIND THE HAZARDOUS SUBSTANCES TAX DOES NOT APPLY TO CONSUMED REFINERY GAS.**

The Legislature has determined that the Department will collect an excise tax on the "privilege of possession of hazardous substances in this state." RCW 82.21.030(1). The Legislature described its intent to tax substances and products that "present[] a threat to human health or the environment" and to tax them only once upon their first possession. RCW 82.21.010. A "hazardous substance" is any substance, with some exceptions, declared as such under federal law, 42 U.S.C. § 9601(14); petroleum products; and those substances declared

by the Department of Ecology "to present a threat to human health or the environment if released into the environment." RCW 82.21.020(1). "Possession" of a hazardous substance means control of it, RCW 82.21.020(3), and "control" means "the power to sell or use a hazardous substance or to authorize the sale or use by another." *Id.* This is what the court must construe.

As explained most fully in *Dept of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002), the court's objective in construing a statute is to determine the intent of the Legislature. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* at 9-12. The court has explained it will harmonize statutory provisions and rules whenever possible. *Emwright v. King*

*County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). If, according to the pro-taxpayer rule of construction, the statutory language is susceptible to more than one reasonable interpretation, the ambiguity must be resolved in favor of the taxpayer.

*Weyerhaeuser*, 106 Wn.2d at 566.

The issue turns on what "power to sell or use" reasonably means. As Tesoro nicely framed the question in its supplemental brief, is it the power to choose either to sell or to use the substance or the power either to sell or to use the hazardous substance but not necessarily the power to do both? *Supp. Br. of Pet.* at 6. The question for the court is whether Tesoro's reading of "power to sell or use" refinery gas is a reasonable construction that furthers the legislative intent of the HST to tax products that "present a threat to human health or the environment" when Tesoro has no ability to sell the refinery gas and has no choice but to see it either completely consumed in the refining process in a matter of seconds or flared off If

this is a reasonable construction, the matter ought to be resolved in Tesoro's favor.

Despite the position it has taken in this litigation, the Department has already declared, through a duly promulgated rule, that a taxpayer is not subject to the HST for substances that are created in the manufacturing process and that are "consumed during the manufacturing or processing activity."

WAC 458-20-252(7)(b) ("Rule 252"). Rule 252 specifies:

When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

This regulatory guidance to taxpayers is not only consistent with Tesoro's understanding of the matter but was the basis of the Court of Appeals dissenting opinion. Chief Judge Quinn-Brintnall stated that while the portion of refinery

gas flared off into the environment may pose a taxable incident, "under rule 252(7)(b), Tesoro is entitled to a refund of taxes it paid on gas that was created and immediately recycled and consumed during the refining process." *Tesoro Refining & Marketing Co. v. Dept. of Revenue*, 135 Wn. App. 411, 429, 144 P.3d 368 (2006) (Quinn-Brintnall, C.J., concurring in part and dissenting in part). .

In sum, the Department, through Rule 252, which it duly adopted in furtherance of its responsibility for administering the tax laws of the state; as well as a Court of Appeals judge, have both construed the statute as not applying to refinery gas consumed in the refining process. These are objective indicia that Tesoro's conjunctive construction of section .020(3) is at least a reasonable construction of the HST statute. In the face of this alternative reasonable construction, the statute must be construed in favor of the taxpayer.

**B. THE COURT SHOULD HOLD THE  
DEPARTMENT TO ITS OWN  
ADMINISTRATIVE RULE.**

The Department should not be allowed to assess a tax contrary to one of its own duly adopted rules. *See Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Comm'n*, 72 Wn.2d 422, 428, 433 P.2d 201 (1967) (holding that the Department may not "retroactively impeach its own lawful rulings.").

If the Department should come to believe that a duly adopted rule is erroneous, the proper procedure is for the Department to follow the provisions of the Administrative Procedures Act and repeal or amend the rule. Such a change would be prospective only. It is fundamentally unfair to taxpayers and contrary to the purpose of administrative rules for the Department to retroactively renounce a rule and assess a taxpayer in a manner contrary to the rule. Even if a court later comes to determine that a rule is inconsistent with an underlying statute, at least taxpayers relying in good faith on

the Department's rulemaking are protected in the meantime prior to the court's determination. There is no such protection from a Department unilaterally, and without the due process protections of the APA, disregarding its own rule and imposing a tax in contradiction to it.

## VI. CONCLUSION

AWB urges the court to reverse the decision of the Court of Appeals.

Respectfully submitted this 21<sup>st</sup> day of December, 2007.

  
\_\_\_\_\_  
Kristophe A. Tefft, WSBA #29366  
Attorney for Amicus Curiae AWB