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APR 13 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 79661-1

SUPREME COURT OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE

Respondent

**ANSWER TO MEMORANDUM OF AMICUS CURIAE
ASSOCIATION OF WASHINGTON BUSINESS
IN SUPPORT OF PETITION FOR REVIEW**

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I. INTRODUCTION

The Association of Washington Business (AWB) requests that the Supreme Court accept this case for two reasons. The first is to consider the burden of proof in tax cases. Specifically, AWB contends this case will impact the rules for statutory construction of ambiguous tax statutes. Since the Court of Appeals found that the plain language of RCW 82.21 is unambiguous, the rules for judicial construction of ambiguous tax statutes are simply not at issue in this case.

The second is to consider whether an agency can ignore its own rules. Again, this issue is not raised in this case. The rule at issue, WAC 458-20-252, has been applied by the Department of Revenue and the Court of Appeals in a manner consistent with RCW 82.21.030. Neither the courts, nor the agency, have ignored the administrative rule.

II. ARGUMENT

A. **The Court of Appeals Properly Declined to Engage in Judicial Construction of the Plain Language of RCW 82.21.020.**

AWB contends the Court of Appeals failed to apply the common law rules regarding statutory construction of ambiguous tax statutes. It is well settled that when the courts engage in statutory construction of an ambiguous tax statute, the statute is construed against the taxing authority.¹ This Court has consistently applied this rule of statutory

¹ *Texaco Ref. & Mktg., Inc. v. Dep't of Revenue*, 131 Wn. App. 385, 398, 127 P.3d 771 (2006), citing *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn. 2d 758, 763, 453 P.2d 870 (1969).

construction in numerous cases.² However, the rule for construction of ambiguous tax statutes has nothing to do with this case. The Court of Appeals recognized that the statutes at issue are unambiguous, and therefore correctly refrained from engaging in statutory construction.

There is no ambiguity in the tax statutes at issue in this case, or in the relevant statutory definitions. Under RCW 82.21.030, the legislature imposed a tax “on the privilege of possession of hazardous substances in this state.” In determining whether this tax statute applied to Tesoro, the Court of Appeals looked to the statutory definition of “possession,” found in RCW 82.21.020(3):

(3) "Possession" means the control of a hazardous substance located within this state and includes both actual and constructive possession. "Actual possession" occurs when the person with control has physical possession. "Constructive possession" occurs when the person with control does not have physical possession. **"Control" means the power to sell or use a hazardous substance or to authorize the sale or use by another.**

(Emphasis added.) The Court of Appeals applied the plain language of the statute, and held that the definition of control is written in the disjunctive. Under the statutory definition, control exists when there is power to sell **or** use, or when there is power to authorize the sale **or** use by another.

As AWB concedes, “the default interpretation of ‘or’ is disjunctive.”³ AWB does not point to any ambiguity in RCW 82.21.

² E.g., *AgriLink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005); *First Am. Title Ins. Co. v. Dep’t of Revenue*, 144 Wn.2d 300, 303, 27 P.3d 604 (2001).

³ Brief of AWB at 5.

Instead, AWB contends the Court of Appeals should not have applied the plain language of the tax enacted by the Legislature. AWB takes the remarkable position that administrative agencies can alter the law through the rule making process. According to AWB, when the courts find that a statute's meaning is plain and unambiguous, but an administrative agency offers a different construction, the statute must be found ambiguous.⁴

AWB's argument directly conflicts with this Court's longstanding position that when there is no ambiguity, the plain language of the statute must be applied. If an agency could undermine the plain language of a statute by enacting a contrary rule, it would allow agencies to commandeer both the authority of the legislature to enact laws, and the authority of the courts to interpret the law. This Court has repeatedly instructed agencies that they "may not legislate under the guise of the rule making power. Rules must be written within the framework and policy of the applicable statutes.... They may not amend or change enactments of the legislature."⁵ The courts "accord no deference to an agency's rule where no ambiguity exists. Courts retain the ultimate authority to interpret a statute."⁶ In two cases issued just a month ago, this Court reiterated that an agency's

⁴ Brief of AWB at 8.

⁵ *Kitsap-Mason Dairymen's Ass'n*, 77 Wn.2d 812, 815, 467 P.2d 312 (1970), citing *State ex rel. West v. Seattle*, 50 Wn.2d 94, 309 P.2d 751 (1957), *Pringle v. State*, 77 Wn.2d 569, 464 P.2d 425 (1970), *Pierce Cy. v. State*, 66 Wn.2d 728, 404 P.2d 1002 (1965); *Edelman v. State ex rel. Public Disclosure Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004); *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d 375 (1992).

⁶ *Edelman*, 152 Wn.2d at 584; *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994).

interpretation of the law is entitled to no deference unless the law is ambiguous. On the contrary, “rules that are inconsistent with the statutes they implement are invalid.”⁷

In the face of this overwhelming precedent, the only case AWB cites in support of its ambiguity argument is *City of Puyallup v. Pacific Northwest Bell Telephone Co.*, 98 Wn.2d 443, 656 P.2d 1035 (1983).⁸ It is unclear why AWB cites this case. In *Pacific Northwest Bell*, the Court found that a Puyallup city ordinance conflicted with two other Puyallup city ordinances addressing the same topic, and was therefore ambiguous. The case did not address any other governmental body’s interpretation of the statute, or any regulations applying the ordinance.

Unlike the *Pacific Northwest Bell* case, there is no conflict in the hazardous substance tax statutes. The Court of Appeals and the superior court did not find any ambiguity in RCW 82.21.020 or RCW 82.21.030, and correctly applied the plain language of the law. The rule of statutory construction AWB requests the Court to consider applies only when a tax statute is ambiguous, and statutory construction is necessary. Since this case does not present an issue regarding construction of an ambiguous tax statute, the rule of construction is simply not raised in this case.

⁷ *Bostain v. Food Express, Inc.*, ___ Wn.2d ___, 153 P.3d 846, 853 (Mar. 2007); *Dep’t of Labor & Indus. v. Granger*, ___ Wn.2d ___, 153 P.3d 839, 844 (Mar. 2007).

⁸ Brief of AWB at 8.

B. This Case Does Not Involve “Impeachment” of An Agency Rule.

AWB’s second request is that the Court accept review to consider whether an agency may retroactively “impeach” an administrative rule.⁹ Again, AWB is requesting review of an issue that is not presented in this case.

The Court of Appeals read WAC 458-20-252 in conjunction with RCW 82.21.030’s assessment of tax on the “first possession” of a hazardous substance. The Court noted that the rule, entitled “recurrent tax liability,” “is intended to set the timing of the taxing incident and avoid double taxation.”¹⁰ The Court agreed with the Department of Revenue that since Tesoro possesses refinery gas only once, the rule does not exempt the possession from the hazardous substance tax.¹¹

AWB contends that review should be accepted to determine whether the Department of Revenue is assessing tax contrary to its own rules. Yet as the Court of Appeals’ decision reflects, the Court’s reading of the rule is consistent with the Department of Revenue’s interpretation. The specter raised by AWB is simply not presented in this case. The Department is not seeking to ignore or impeach its rules.

⁹ Brief of AWB at 9-10.

¹⁰ *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 135 Wn. App. 411, 425-26, 144 P.3d 368 (2006).

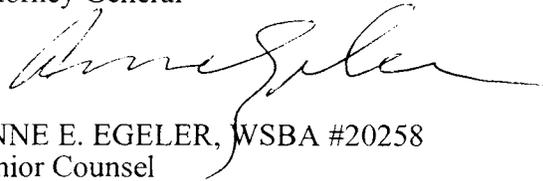
¹¹ *Id.* at 426.

III. CONCLUSION

The Court of Appeals followed the decisions of this Court, and properly refrained from engaging in judicial construction of the plain language of RCW 82.21. There is no conflict in the law regarding the rules of statutory construction, or the statutory burden on the taxpayer. Therefore, the request for review should be denied.

RESPECTFULLY SUBMITTED this 13th day of April, 2007.

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A handwritten signature in black ink, appearing to read "Anne Egeler", written over a horizontal line.

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