

FILED
AUG 28 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
clp

81995-5

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 AUG 18 P 4:03
BY RONALD R. CARPENTER

No. _____

Court of Appeals No. 35883-2-II

CLERK

THE SUPREME COURT
STATE OF WASHINGTON

G-P GYPSUM CORPORATION,

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

**AMICUS CURIAE BRIEF OF CITY OF TACOMA
IN SUPPORT OF STATE OF WASHINGTON, DEPARTMENT OF REVENUE'S
PETITION FOR REVIEW**

ELIZABETH A. PAULI, WSBA #18254
City Attorney

DEBRA E. CASPARIAN, WSBA #26354
Assistant City Attorney
Attorneys for Amicus Curiae
City of Tacoma

Tacoma City Attorney's Office
747 Market Street, Room 1120
Tacoma, WA 98402
(253) 591-5885

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE
CITY OF TACOMA.....1

II. SCOPE OF AMICUS BRIEF1

III. ISSUE PRESENTED2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT2

 A. The Court of Appeals’ decision is contrary to the
 intent of the legislature and treats Tacoma taxpayers
 unfairly3

 B. The Court of Appeals’ decision allows taxpayers to
 avoid paying the local natural gas use tax and
 in so doing, greatly impacts Tacoma’s budget5

VI. CONCLUSION.....9

APPENDIX

A. Page 35 of the City of Tacoma 2007-2008 Biennial Budget

TABLE OF AUTHORITIES

Cases

G-P Gypsum Corp v. Dep't of Revenue,
— Wn. App —, 183 P.3d 1109 (2008).....1

Statutes

Laws of 1989, Ch. 384 § 1.....3, 4
RCW 35.21.8705
RCW 35.21.870(1).....4
RCW 82.14.0501
RCW 82.14.2301, 3, 4, 5
RCW 82.14.230(1).....2, 6
RCW 82.14.230(2).....4
RCW 82.16.090(2).....4
RCW 82.32.0608

Rules

RAP 13.4(b).....1

Other Authorities

Tacoma Muni. Code §6A.90.030.....4
Tacoma Muni. Code §6A.90.040.....1

I. INTEREST OF AMICUS CURIAE CITY OF TACOMA

Amicus curiae City of Tacoma (Tacoma) is the municipal corporation that received the brokered natural gas use tax revenue at issue in this case. Tacoma Muni. Code 6A.90.040. The Washington State Department of Revenue collects this tax on behalf of Tacoma and other cities, and then remits the tax to those cities. RCW 82.14.050, .230. If Tacoma is required to refund GP Gypsum the local natural gas use tax at issue here, Tacoma must pay GP Gypsum \$881,018.48 plus statutory interest. CP 6. As a result of this refund claim, other potential refund claims, and the impact to Tacoma's ability to collect the tax in the future, Tacoma has a significant interest in this case. Any refund, or interpretation of the tax authorized under RCW 82.14.230, directly impacts Tacoma and its budget.

II. SCOPE OF AMICUS BRIEF

This brief addresses one principal point raised by the Washington State Department of Revenue in its Petition for Review—whether the Court of Appeals' decision in GP Gypsum Corp. v. Dep't of Revenue, — Wn. App. —, 183 P.3d 1109 (2008) involves an issue of substantial public interest under RAP 13.4(b) that should be determined by the Supreme

Court. The Court of Appeals' decision has a significant impact on Tacoma's ability to impose the local natural gas use tax and raise much needed revenue.

III. ISSUE PRESENTED

RCW 82.14.230(1) authorizes a city to impose a tax "for the privilege of using natural gas or manufactured gas in the city as a consumer." The Court of Appeals held that as long as a taxpayer provides in its contract that it takes delivery of the gas outside the Tacoma city limits, Tacoma cannot impose the local natural gas use tax on that taxpayer.

Did the Court of Appeals err in holding that a taxpayer can avoid the local natural gas use tax by stating it first uses the gas outside the city limits because it specifies in its contract that it takes delivery outside the Tacoma city limits?

IV. STATEMENT OF THE CASE

Tacoma adopts the statement of the case in the Department of Revenue's Petition for Review.

V. ARGUMENT

This case presents an issue with implications reaching well beyond the proper application of a tax ordinance and statute to a single user of

natural gas. Any city is authorized to impose a tax “for the privilege of using natural gas or manufactured gas in the city as a consumer.”

RCW 82.14.230. The Court of Appeals’ decision allows taxpayers to make a simple change to their sales contracts and avoid the local natural gas use tax entirely. This not only defeats the express intent of the Legislature and treats taxpayers unfairly, but also significantly impacts Tacoma’s budget.

A. The Court of Appeals’ decision is contrary to the intent of the Legislature and treats Tacoma taxpayers unfairly.

When the Legislature enacted the local natural gas use tax in 1989, it intended to replace significant tax revenue that cities lost due to new laws regulating natural gas:

Due to a change in the federal regulations governing the sale of brokered natural gas, cities have lost significant revenues from the utility tax on natural gas. It is therefore the intent of the legislature to adjust the utility and use tax authority of the state and cities to maintain this revenue source for the municipalities

Laws of 1989, ch. 384, §1 (emphasis added).

As discussed in more detail in the Department of Revenue’s Petition for Review and briefing to the Court of Appeals, the Court of Appeals’ decision is contrary to this express legislative intent. The Legislature intended to impose a use tax on those who choose to purchase

the natural gas through a broker, as GP Gypsum did, and not through the natural gas utility. The use tax in RCW 82.14.230 is essentially intended to complement the local public utility tax under RCW 35.21.870(1).

Pursuant to RCW 35.21.870(1) taxpayers who purchase gas through a natural gas utility pay a 6 percent local public utility tax. See also Tacoma Muni. Code 6A.90.030¹. The public utility tax does not apply if a taxpayer purchases the gas through a broker, as GP Gypsum did. Thus, the Legislature determined that if a taxpayer purchases gas from a broker and not a natural gas utility, then the purchaser should pay a local natural gas use tax, to essentially complement the public utility tax. Laws of 1989, ch. 384, §1. Even the tax rates are required to be the same. RCW 82.14.230(2). Without such complementary tax, taxpayers who purchase gas from a natural gas utility could be treated unfairly and could pay a higher share of taxes for the same product merely because it purchases gas from a different type of entity.

By holding that a taxpayer who specifies in its contract that it takes delivery of the natural gas outside the city limits is not subject to the local natural gas use tax, the Court of Appeals' decision ensures that some taxpayers will indeed be treated unfairly. In other words, if a taxpayer

¹ RCW 82.16.090(2) requires that a gas distribution business include in its customer billings the amount of each tax levied upon the revenue of the business.

purchases natural gas from a broker and takes delivery outside Tacoma's city limits, then that taxpayer can avoid both the public utility tax in RCW 35.21.870 and the local natural gas use tax in RCW 82.14.230. As a result, the Court of Appeals' decision will drastically affect the amount of revenue Tacoma, and other cities, may collect pursuant to RCW 82.14.230.

B. The Court of Appeals' decision allows taxpayers to easily avoid paying the local natural gas use tax and in so doing, greatly impacts Tacoma's budget.

The Court of Appeals' decision in this case entirely defeats the Legislature's intent and will likely ensure that Tacoma, and other cities, receive little or no tax revenue from the local natural gas use tax authorized by RCW 82.14.230.

There are two reasons for this. First, the Court of Appeals' decision encourages taxpayers to specify in their contracts that they take delivery outside Tacoma city limits, just as GP Gypsum did. This is not mere "speculation contrary to the evidentiary record" as GP Gypsum claims. Answer, p. 3. Practically, a taxpayer will try to reduce the amount of taxes it must pay. In order to take advantage of the Court of Appeals' decision, a taxpayer merely needs to change only a few words in its sales contract to state that it will take delivery outside the Tacoma city limits, without changing the nature of how the gas is transported or consumed

within Tacoma. If a taxpayer can easily arrange to take delivery of gas outside the Tacoma city limits (and in a jurisdiction that does not impose this use tax) to avoid the local natural gas use tax, there is no reason to think it would not do so. Moreover, since only cities, and not counties, may impose a local natural gas use tax, it will be very easy for taxpayers to find a delivery point outside a jurisdiction that imposes this local use tax. See RCW 82.14.230(1).

GP Gypsum seems to suggest that its business practices and pricing needs are so unique that the impact of the Court of Appeals' decision is limited and will not severely impact local budgets. GP Gypsum states that there is "no reason to entertain speculation that taxpayers other than GP Gypsum" would take on the "significant risks and liability that Gypsum only assumed for business reasons." Answer, p. 5. But GP Gypsum is wrong. There is no evidence in the record to support GP Gypsum's claim that its "business reasons" for taking delivery outside Tacoma are any different than other taxpayers' business reasons.

In fact, the predominant "business reason" GP Gypsum took delivery outside Tacoma was better pricing. GP Gypsum stated that it "would primarily buy it [natural gas] at Sumas because of the pricing." RP 21, 60. In other words, GP Gypsum found it cheaper to buy natural gas at Sumas. So for GP Gypsum to say that its business practices and

justifications are so unique that the effect of the Court of Appeals' decision is limited, is simply wrong.

GP Gypsum claims that "common sense and the evidentiary record indicate delivery at the taxpayer's facility is the norm, not the exception."

Answer, p. 4. GP Gypsum fails to cite the record for such a statement. In fact, neither of GP Gypsum's witnesses testified that taxpayers generally take delivery of natural gas at their facility.

The second reason the Court of Appeals' decision means Tacoma will collect very little natural gas use tax is because the main delivery point of natural gas in the Tacoma area is at the Tacoma City Gate in Sumner, which is outside Tacoma's and Sumner's city limits and in unincorporated Pierce County. CP 85.² Therefore, if a Tacoma business uses natural gas, but arranges for delivery at the Tacoma City Gate, then as a result of the Court of Appeals' decision, Tacoma cannot impose the local natural gas use tax on that natural gas consumed within the Tacoma city limits. No other city can impose the use tax either because the Tacoma City Gate is located in Sumner, but outside Sumner city limits in unincorporated Pierce County. CP 85. Thus, contrary to GP Gypsum's

² The Sumner station, otherwise known as the Tacoma City Gate, is where Puget Sound Energy's pipeline connects with Northwest Pipeline. CP 85.

claim, cities will not “have ample opportunities to impose their taxes.”

Answer, p. 4.

The total financial impact on Tacoma as a result of the Court of Appeals’ decision is tremendous. Tacoma receives between \$4.6 and \$7.2 million per biennium from the local natural gas use tax:

Year	Local Natural Gas Use Tax Revenue
2007/2008 (projected)	\$ 7,293,200
2005/2006	\$ 6,535,983
2003/2004	\$ 4,698,468

See City of Tacoma’s 2007-2008 Biennial Budget, p. 35, at http://cms.cityoftacoma.org/Finance/Budget/07_08Budget/2007_2008FinalBudget.pdf. (For the Court’s convenience, page 35 of the City of Tacoma 2007-2008 Biennial Budget is attached as Appendix A.)

Finally, if this Court does not accept review, Tacoma will not only face significant loss of revenue in the future, but it will also face a significant loss of past revenue through local natural gas use tax refund claims. Taxpayers have four years, plus the current tax year, to petition the Department for a refund of local natural gas use tax. RCW 82.32.060. Tacoma could be required to repay up to approximately \$16 million in tax refunds for local natural gas use taxes paid back through 2004. As a result

of such a potential impact, the Court of Appeals' decision raises a significant issue of substantial public interest that should be decided by this Court.

VI. CONCLUSION

Because the Court of Appeals' decision involves an issue of substantial public interest that should be determined by this Court, this Court should accept the Department of Revenue's Petition for Review.

RESPECTFULLY SUBMITTED this 15 day of August, 2008.

ELIZABETH A. PAULI, WSBA #18254
City Attorney

Debra E. Casp

DEBRA E. CASPARIAN, WSBA #26354
Assistant City Attorney

Tacoma City Attorney's Office
747 Market Street, Room 1120
Tacoma, WA 98402
(253) 591-5885
Attorneys for City of Tacoma

Revenue Detail By Group Object

	2003/2004 Actual	2005/2006 Actual	2007/2008 Appropriation	Absolute Change
General Fund				
Taxes				
Property Tax				
General Property Tax-Prior Period	3,616,959	3,014,957		(3,014,957)
General Property Tax-Current Period	67,067,752	75,836,679	91,103,000	15,266,321
Sales Tax Title Property	6,519	37,814		(37,814)
Total Property Tax	70,691,230	78,889,450	91,103,000	12,213,550
Sales Tax				
City Sales/Use Tax	33,654,746	38,853,578	42,562,400	3,708,822
City Optional Sales/Use Tax	33,508,165	38,691,438	42,430,000	3,738,562
Sales Tax .1% Criminal Justice	4,955,537	5,783,950	6,476,300	692,350
Natural Gas Use Tax	1,048,296	1,790,434	1,642,200	(148,234)
Total Sales Tax	73,166,744	85,119,400	93,110,900	7,991,500
Business Tax				
International Finance District	1,271,964	2,874,004	1,940,700	(933,304)
Cellular Telephone & Pager Tax	5,670,814	8,546,562	8,940,700	394,138
Telephone Tax	10,994,088	6,976,023	6,134,000	(842,023)
Cable Television Tax	3,186,955	4,054,354	3,296,000	(758,354)
Public Education & Government Cable Fran	(16,534)			
Natural Gas Tax	4,698,468	6,535,983	7,293,200	757,217
Private Solid Waste Tax	48,453	42,319		(42,319)
Business Tax Miscellaneous	656,674		(4,000,000)	(4,000,000)
Manufacturing Tax	3,076,827	4,858,741	4,651,500	(207,241)
Retailing Tax	12,830,526	14,384,960	14,915,900	530,940
Service Tax	18,115,601	20,333,213	22,114,800	1,781,587
Railroad Franchise Tax	403	806		(806)
Wholesaling Tax	9,285,306	9,257,120	8,153,100	(1,104,020)
B/O Tax Job Credit	(770,923)	(878,784)	(407,200)	471,584
Multiple Activities Tax Credit	(269,735)	(990,705)	(867,800)	122,905
Retail Services	2,060,643	2,002,792	2,659,500	656,708
Cabaret	116,391	91,044	93,000	1,956
Buying & Selling of Wheat Oats Corn Barl	154,705	155,794		(155,794)
Admission Tax	1,097,007	1,241,406	994,800	(246,606)
Total Business Tax	72,207,633	79,485,632	75,912,200	(3,573,432)
Utility Tax				
Power Excise Tax	38,486,271	42,544,782	45,604,470	3,059,688
Water Excise Tax	6,548,550	8,789,447	8,847,581	58,134
Wastewater Excise Tax	9,652,404	10,513,072	10,500,000	(13,072)
Solid Waste Excise Tax	7,268,317	8,055,358	8,186,700	131,342
Rail Excise Tax	1,989,062	2,556,694	3,248,790	692,096
Click! Excise Tax	1,909,992	2,559,979	2,800,943	240,964
Cable TV Franchise Fee	56,001	151,934	150,000	(1,934)
Total Utility Tax	65,910,597	75,171,266	79,338,484	4,167,218
Other Taxes				
Leasehold Excise Tax	1,693,751	1,987,503	1,491,600	(495,903)
Bingo & Raffles	144,278	70,094	50,000	(20,094)

Appendix A