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**SUPREME COURT OF THE STATE OF WASHINGTON**

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G-P GYPSUM CORPORATION,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Petitioner.

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**ANSWER TO AMICUS CURIAE BRIEFS OF  
CITY OF SEATTLE, CITY OF TACOMA  
AND THE WASHINGTON STATE ASSOCIATION OF  
MUNICIPAL ATTORNEYS**

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## I. Introduction

This brief answers the three amici briefs filed on October 16, 2009 by the City of Seattle, City of Tacoma and Washington State Association of Municipal Attorneys. Tacoma's and the Association's briefs do not contend anything other than that previously argued by the Department of Revenue and the amici in this action. These arguments have been previously responded to in the Brief of Appellant, pages 19 - 41, Reply Brief of Appellant, pages 2 - 17, Answer to Amicus Curiae Brief of City of Seattle, pages 5 - 7 and Answer to Amicus Curiae Brief of City of Tacoma, pages 2 - 6. As the briefs of those amici simply restate arguments previously made and fully answered, we limit our response to Tacoma's and the Association's briefs to one paragraph each.

The City of Seattle's amicus brief however, in addition, to remaking an argument already made and answered regarding legislative intent, makes two arguments in contravention of well-established law. The first of Seattle's arguments contends that a finding of fact to which neither party assigned error should not be a verity on appeal. The second of Seattle's arguments contends that this Court should not consider G-P Gypsum's explanation of the constitutional reason for the statutory definition of "use" to include the first act by which a taxpayer assumes dominion or control over an article. Seattle argues that G-P's

constitutional argument was made for the first time in its Supplemental Brief and therefore it should not be considered.

## II. Argument

### A. Unchallenged Findings of Fact Are Verities On Appeal.

Seattle argues that the trial court's unchallenged finding, CP 175, that G-P Gypsum first takes dominion and control over the gas outside Tacoma is in error. Amicus Curiae Memorandum of City of Seattle ("Seattle Brief") at 3 – 5. Without citation to any authority, Seattle contends that G-P Gypsum arguing that the finding is a verity on appeal is "misleading" because the trial court ruled in favor of the Department. Seattle Brief at 5.

Not only is this finding supported by substantial evidence, *see*, Answer to Amicus Curiae Brief of City of Seattle and The Association of Washington Cities at 6 *and see*, Answer to Amicus Curiae Brief of City of Tacoma at 3, it is well-established that unchallenged findings are verities on appeal. *Stuewe v. Department of Revenue*, 98 Wn. App. 947 (2000). *See also*, *Paul v. Department of Revenue*, 110 Wn. App. 387 (2002).

In *Paul*, the Court of Appeals reversed the trial court holding in favor of the Department on the basis of findings not challenged by the Department. The Court held those facts to be verities on appeal. That the trial court ruled in favor of the Department did not excuse the

Department's failure to challenge the finding of facts deemed controlling by the Court of Appeals. Here too, the fact that the trial court ruled in favor of the Department does not mean that court's unchallenged findings, which the Court of Appeals properly relied upon, are not verities on appeal. Thus, *Paul* is direct authority in opposition to the bald assertion of Seattle. We have also located no authority supporting Seattle's argument.

**B. G-P Gypsum's Constitutional Argument Is Proper.**

In its Supplemental Brief, G-P Gypsum for the first time argued that the Commerce Clause requires the use tax to be imposed on the first act by which a taxpayer assumes dominion or control. Seattle argued that the argument should not be considered because "Washington appellate courts do not consider issues raised for the first time on appeal." Seattle Brief at 6.

Seattle fails to understand that G-P Gypsum's constitutional argument is merely an explanation as to why the Legislature included the "first act within this state by which a taxpayer assumes dominion or control over the article" in the statutory definition of "use". The Legislature chose such a definition because it is constitutionally required if the use tax is to "compensate" for a tax on sales. Nothing prohibits a Respondent from providing the Court with the constitutional reasoning behind a statutory definition.

Seattle also fails to recognize the well-established rule that this Court may affirm a lower court's opinion on any ground supported by the record.<sup>1</sup> *State v. Costich*, 152 Wn.2d 463, 477 (2004), *Truck Ins. Exch. v. VanPort Homes, Inc.* 147 Wn.2d 751, 766, (2002).<sup>2</sup> G-P Gypsum's constitutional argument is made in support of the Court of Appeal's opinion. The thrust of the argument is that the Department's current<sup>3</sup> definition of "use" for State use tax on natural gas purposes (that the meaning of "use" is limited to burning or storage within a city) is constitutionally impermissible. G-P Gypsum was completely proper in advising the Court of the ramifications of the State's new interpretation. A use tax that facially discriminates against interstate commerce is unconstitutional unless it compensates for a tax on intrastate commerce imposed on an event substantially equivalent to use. "Use" is substantially equivalent to a sale when its meaning includes the first act by which a person assumes dominion or control over an article. *Henneford v. Silas Mason*, 300 U.S. 577, 583-84 (1937). This constitutional requirement is something the Court may consider in deciding this case.

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<sup>1</sup> The policy against accepting new arguments on appeal is to avoid giving appellants a new trial on appeal. Allowing additional arguments in support of the judgment below permits the Court to be better informed and presents no such risk.

<sup>2</sup> Nothing requires a Court to reverse a correct decision. The Court considers issues *sua sponte* to ensure that the correct decision is made. See, RAP 12.1(b); See generally, *Barrett v. Lucky Seven Saloon, Inc.* 152 Wn.2d 259, 282 (2004).

<sup>3</sup> The Department previously did not contend that the definition of use for State use tax purposes was anything other than that provided by RCW 82.12.010. See, Supplemental Brief of Respondent at 4.

**C. The Amici's Arguments Evidence The Weakness of the Department's Position.**

Seattle in its attempt to bolster the Department's position argues, as demonstrated above, contrary to well-established court doctrine.

Tacoma in its attempt to bolster the Department's position argues that G-P Gypsum "did not owe natural gas use tax in Tacoma (or anywhere else, for that matter) because G-P Gypsum exercised dominion and control at the Sumas Station, which is outside the limits of the city." Amicus Curiae Brief of City of Tacoma ("Tacoma Brief") at 4. But, G-P Gypsum did owe and pay State use tax on natural gas based on its use at Sumas.<sup>4</sup> Tacoma also argued that "the definition of 'use' is susceptible to more than one reasonable interpretation and renders the statute ambiguous" and thus has to argue against the general rule that ambiguous tax statutes are interpreted in the taxpayer's favor. Tacoma Brief at 5. Finally, Tacoma's Brief is centered around a chart<sup>5</sup> comparing the local use tax on natural gas to the generally applicable local sales and use tax. Tacoma fails to compare the local use tax on natural gas to the State use tax on natural gas, and the law compels the local use tax on natural gas to

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<sup>4</sup> "Use" for state use tax purposes is defined by RCW 82.12.010 as the first act within the State by which a taxpayer assumes dominion and control over an article. Thus, as G-P Gypsum exercised dominion and control over gas at the Sumas Station, it used the gas inside the State although outside Tacoma. Hence, it paid the State use tax.

<sup>5</sup> Tacoma Brief at 8.

be uniform with the State use tax on natural gas. RCW 82.14.020, RCW 82.14.030, RCW 82.14.050, RCW 82.14.070, RCW 82.14.230.

The Association while focusing on legislative intent<sup>6</sup> fails to address the legislative intent, codified into law, that the local use tax on natural gas must be uniform with State use tax on natural gas, and admits that the local tax may apply when the first act of dominion and control occurs within a city. Association's Brief at 5.<sup>7</sup>

The amici's arguments are flawed as is the Department's position.

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<sup>6</sup> Brief of Amicus Curiae Washington State Association of Municipal Attorneys ("Association's Brief") at 3.

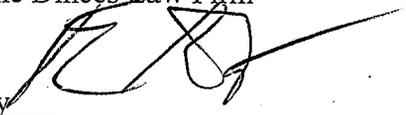
<sup>7</sup> The Association also implies that because pipelines bring natural gas into Washington in only four counties that the local tax cannot apply if the Court of Appeals is correct. Association's Brief at 6. Such an implication is false. The tax applies where the first act of dominion and control occurs. This act can and does occur within cities. G-P Gypsum itself takes dominion and control of some gas (the taxation of which is not at issue) in Tacoma. CP 86. The record supports the view that consumers of gas typically assume dominion and control at the place the gas is burned. CP 175-76; RP 59-60. G-P Gypsum, as the record reflects, is not typical in this respect. *Id.*

### III. Conclusion

For the reasons expressed above as well as the reasons discussed in the Brief, Reply Brief and Supplemental Brief of Appellant, the Court of Appeals decision in this matter should be affirmed.

Respectfully submitted, this <sup>31<sup>st</sup></sup> day of November, 2008.

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I, Franklin G. Dinces, do hereby certify that on this the 11 day of  
November 2009, I placed in the United States mail, postage prepaid, a  
copy of the Answer to amicus curiae briefs of City of Seattle, City of  
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