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No. 35883-2-II

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

G-P GYPSUM CORPORATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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REPLY BRIEF OF APPELLANT

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## Introduction

The primary issue in this case is the meaning of “use” in RCW 82.14.230.<sup>1</sup> The Parties agree that the standard of review for this legal issue is *de novo*.<sup>2</sup> The text of this Reply is devoted to this issue.

A secondary legal issue, which only needs to be addressed if the issue regarding the meaning of “use” is decided in favor of the Department of Revenue (hereinafter referred to as the “Department”), is whether the complaint adequately pleads a reason to refund tax paid on gas sold and/or transferred by G-P Gypsum Corporation (hereinafter referred to as “G-P”) outside Tacoma.<sup>3</sup> The sole factual finding to which error is assigned<sup>4</sup> is a function of the trial court’s conclusion on the second legal issue.

Correcting that legal error either moots the factual finding or necessitates

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<sup>1</sup> This legal issue raises the first issue pertaining to the assignment of errors and each of the issues subsidiary to that first issue stated in Brief of Appellant (hereinafter cited as “Br. of App.”) at 6 – 7. The Department chose to put forth a counterstatement of this issue. Brief of Respondent (hereinafter cited as “Br. of Resp.”) at 1. Unfortunately, the issue as stated by the Department is inadequate to resolve this appeal because the correct answer to the question asked by the Department is “sometimes”.

<sup>2</sup> See generally, Br. of Resp. at 7.

<sup>3</sup> This legal issue is essentially the second issue pertaining to the assignments of error in Br. of App. at 7. Again, the Department put forth a counterstatement of this issue. Br. of Resp. at 1. Here, the Department’s counterstatement is not on point and obfuscates the true issue. G-P does not contend that it can assert a new reason for a tax refund after the time limitation for asserting a refund claim has passed. G-P contends that the reason it stated, that it did not first take possession, dominion or control of and did not otherwise first use or consume any gas in Tacoma adequately pleads the reason for refunding taxes paid on gas sold and/or transferred by G-P outside Tacoma. By misstating the issue, the Department fails to ever address the actual issue.

<sup>4</sup> The alleged failure of Appellant, G-P, to explain or discuss a refund of state or local natural gas use taxes paid on the gas sold or transferred outside Tacoma is the finding that is the basis of the fifth assignment of error. Br. of App. at 1.

that the factual finding be reversed as a matter of law. Given the contingent import of these secondary issues and the failure of the Department to directly address G-P's arguments on these issues, our Reply on these issues is found at note 5.<sup>5</sup>

### Summary of Argument

G-P's Brief demonstrates, for purposes of local gas use taxes, that "use" means the first act by which a taxpayer takes dominion or control over an article in Washington. G-P reasons:

- (i) State law is settled; State use tax is imposed only on the first act in this State by which a taxpayer takes dominion or control over an article.

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<sup>5</sup> G-P's Brief explains that it set forth a reason for a refund; the gas on which tax was paid was first used outside Tacoma. Br. of App. at 36. This reason is an adequate statement to award a refund on gas sold or transferred outside Tacoma. The gas sold or transferred outside Tacoma is a subset of the gas first used outside Tacoma and was part of the evidence that all the gas for which taxes were paid and refund is claimed was first used outside Tacoma. Taxpayers are not required to set forth every subset or permutation of their reason for a refund nor are they required to state the evidence supporting the reason. See generally, Br. of App. 36 – 40. The Department by just arguing that G-P failed to state a reason failed to address G-P's argument. See, Br. of Resp. at 28 – 33. In addition, G-P has always contended that by "first using" the gas outside Tacoma, none of the gas was "used" in Tacoma. As some of the gas was sold or transferred outside Tacoma, even under the trial court's definition of "use", some of the gas was not "used" in Tacoma. G-P pled an adequate reason to be awarded a refund of tax paid on that gas.

The Department also misconstrues G-P's constitutional argument. G-P contends that the reason it stated for a refund is an adequate pleading for taxes paid on gas not used in Tacoma and that if RCW 82.32.180 was construed to require more than such a pleading, it would be an unreasonable limitation on the Court's constitutional powers. See, Br. of App. at 39 – 40. The Department must agree that the Court has constitutional powers and that the Legislature may not unreasonably infringe on those powers. By never addressing the question raised by G-P (is the reason G-P stated for refund an adequate pleading) the Department is unable to address the constitutional issue – if the Legislature required more than an adequate pleading (which G-P contends it did not) would that be an unreasonable limitation on the Court's powers. Nothing more need be said in Reply on this contingent issue.

(ii) The definition of “use” for purposes of the use tax on natural gas is uniform with the definition of “use” for purposes of the general use tax.

(iii) The definition of “use” for purposes of State and local use taxes is uniform.

Br. of App. at 19 – 28.

The Department’s response essentially ignores the indisputable facts that State use tax is imposed only on the first act by which a taxpayer takes or assumes dominion or control over an article and that the definition of “use” for purposes of the State use tax on natural gas is uniform with the definition of “use” for purposes of the generally applicable use tax.

Instead, the Department (a) loosely uses the words use and consumes to seemingly assume away the issue<sup>6</sup> before the Court: the meaning of the term “use” for purposes of the local use tax on natural gas, (b) focuses on one legislative policy intention behind the use tax on natural gas (to maintain a revenue source for municipalities)<sup>7</sup> while denying another legislative policy (that the state and local use tax be

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<sup>6</sup> The Department uses the words use and consume in a nonstatutory sense at Br. of Resp. at 2, 3, 4, 6, 7, and 12 and in doing so seems to incorrectly imply that CP 174 (which states that G-P’s manufacturing plant consumes natural gas in its operations) is a legal conclusion that G-P “uses” natural gas in Tacoma. All that sentence actually refers to is the fact that G-P burns some natural gas in Tacoma. The issue before the Court is whether the burning is a taxable use. The Department also uses the word “delivery” as short hand for the taking of dominion and control. See, Br. of Resp. at 16 and 24. The word “delivery” is not contained in the definition of “use” and it fails to connote the substance of taking dominion and control. Perhaps, that explains why the Department contends that having the tax apply only on the first exercise of dominion or control is incorrect.

<sup>7</sup> Br. of Resp. at 8 – 11 and 15 – 17.

uniform)<sup>8</sup> and (c) argues that the statutory definition of “use” is not applicable.<sup>9</sup>

“Use” for purposes of RCW 82.14.230 means the “first exercise within this State of dominion or control of gas.” RCW 82.14.020 requires the statutory definition of “use” to be applied to RCW 82.14.230. RCW 82.14.070 requires the local gas use tax to be uniform with the state gas use tax. RCW 82.14.030 limits local gas use taxes to events taxable by the state gas use tax. This definition of “use” is also consistent with the Department’s practices.

G-P draws the Court’s attention to each of the above referenced statutes not only because each of the statutes is an independent basis for awarding G-P the relief it seeks, but also because taken as a whole the statutory scheme is more easily understood. The existence of all the statutes makes it easier to correctly interpret each statute.

For Tacoma’s use tax to apply to G-P, the Department’s interpretation of RCW 82.14.020, RCW 82.14.030 and RCW 82.14.070 must be correct and the Department must be relieved from its earlier admissions in this case and its practices. If G-P’s interpretation of any of these statutes is correct, G-P prevails. The Department can only prevail if all of its interpretations are correct.

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<sup>8</sup> Br. of Resp. at 18 – 23.

<sup>9</sup> Br. of Resp. at 13 – 15.

## Argument

### G-P Does Not “Use” Natural Gas In Tacoma.

G-P’s Brief establishes that for purposes of the local gas use tax authorized by RCW 82.14.230 “use” means the first exercise of dominion or control over an article in Washington. Br. of App. at 20 -34.

G-P demonstrated that “use” means the first exercise of dominion or control over an article in Washington for state use tax purposes. Br. of App. at 20 – 22. It did so by examining the words of the statute, this Court’s prior holdings and the Department’s own practices.

The Department did not address this reality.<sup>10</sup> It cannot deny this Court’s prior holdings. It cannot deny that its practice is to impose use tax only on the first exercise in this State of dominion or control.<sup>11</sup>

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<sup>10</sup> The Department notes that G-P failed to include the entire definition of “use” when quoting the statute, Br. of Resp. at 13 n. 9, but it does not contend that the meaning of “use” for state use tax purposes is other than G-P established by examining the words of the statute, this Court’s prior holdings and the Department’s own practices, that is, the first exercise of dominion or control over an article in Washington. Unable to refute the meaning set forth by Appellant, the Department resorts to attempting to create an appearance of impropriety.

<sup>11</sup> The Department does call the practice “alleged”, Br. of Resp. at 5 – 6, but it does not deny the practice. The evidence of the practice includes the Department’s admission in this case that “use tax is triggered by the first use of the goods in Washington”, Ex. Plaintiff’s 2, the testimony of Mr. Willis, RP 18, 23-24, 29-31, 48-49 (Trial transcript, Oct. 16, 2006), published determinations of the Department stating that the statute “specifies that ‘use’ is the first act of dominion and control in this state, ‘use’ is not the second act or the third act, or any subsequent act” (Det. No. 99-239R, 197 WTD 367), and the Department’s regulations that clearly limit use to the first exercise of dominion and control by a taxpayer (WAC 458-20-178(3) and WAC 458-20-230(9)(a)). The uncontroverted evidence proves the Department’s practice is to limit use tax to the first act within Washington of dominion and control. The Department cannot deny this fact. There is no evidence to the contrary. G-P offered Hammond’s declaration, the declaration of a speaking agent of the Department during the period in question, after

G-P's Brief demonstrates that the definition of "use" for the State's use tax on natural gas is identical with the definition of "use" for the State's general use tax. Br. of App. at 23 – 24. The Department is unable to refute that the tax on natural gas is part and parcel of the use tax. That is, the State use tax on natural gas is contained within the chapter of the RCW which imposes the State's generally applicable use tax. RCW 82.12.020, RCW 82.12.022 and RCW 82.12.023.<sup>12</sup> The introductory language of the statute that defines "use" reads, "[f]or purposes of this chapter." RCW 82.12.010. Thus, the definition of "use" for State natural gas use tax purposes and the State's general use tax *must be* identical.<sup>13</sup>

G-P's Brief demonstrates that the state and local use taxes are uniform. G-P relied not only on (i) RCW 82.14.020's cross reference of the meaning ascribed to words and phrases within RCW 82.12 insofar as applicable, and (ii) RCW 82.14.050's application of all administrative provisions in RCW 82.12 to the extent applicable, but also on (iii) the

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trial. This Declaration could be considered cumulative. This long-standing Department practice is only consistent with G-P's positions and should be given weight in interpreting the statutes. See generally, *Council of Camp Fire v. Department of Revenue*, 105 Wn.2d 55, 711 P.2d 300 (1985) (statutory construction by the department charged with administration of a statute is not binding but is entitled to considerable weight).

<sup>12</sup> The local use tax on natural gas is similarly part and parcel of the generally applicable local use tax. See RCW 82.14.030 discussed at page 13 below.

<sup>13</sup> The Department's brief contains a heading that reads, "[e]ven if the uniformity provision applied to the local BNG use tax, the tax would still apply to consumption within a city" but the text of that section utterly fails to explain or even suggest that the definition of "use" for state natural gas use tax purposes could somehow be different than the long settled definition of first exercise of dominion or control within the state. Br. of Resp. at 24 – 25. Thus, despite the empty Department protestation, it is not possible for the uniformity provision to be given meaning and for Tacoma's tax to apply to G-P.

express language of RCW 82.14.070 which requires that any local sales and use tax adopted pursuant to RCW 82.14 be as consistent and uniform as possible with the state sales and use tax (iv) RCW 82.14.020's definition of taxable event<sup>14</sup> which limits local use taxes to events subject to state use taxes, and (v) the Department's practice of administering state and local use taxes uniformly.

The Department responded that the definition of "use" for state use tax purposes is not applicable. It relies on one case, *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 243 P.2d 474 (1952). *St. Paul* stands for the proposition that if a statutory definition is not applicable, then the definition will not apply.<sup>15</sup> The case adds nothing.<sup>16</sup> RCW 82.14.020 makes clear that the definitions in the state use tax have force and effect

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<sup>14</sup> The definition of "taxable event" applies to the local use tax on gas through RCW 82.14.030. The Department's complete misunderstanding of RCW 82.14.030 is most telling and controls the outcome of this matter. See, pages 13-17 below.

<sup>15</sup> The statute at issue in *St. Paul*, dealt with a business and occupation (B&O) tax definition of the term "consumer." That definition had prefatory language which applied the definition "unless required otherwise by the context." The prefatory language together with the context resulted in the B&O tax statutory definition of consumer not being applied in that case. 40 Wn.2d 347, at 352-353. The language of RCW 82.14.020, "insofar as applicable", was only referred to in a make-weight fashion. *Id.* at 353. Finally, the B&O tax definition of the term "consumer" was previously held not to apply in a sales tax context, *Klickitat Co. v. Jenner*, 15 Wn.2d 373, 130 P.2d 880 (1942) cited in *St. Paul*. In that prior case, the Court recognized that the term "consumer" had another statutory definition provided by the sales tax. Thus, *St. Paul* says nothing about whether the definition of use in the use tax statute is applicable to a local use tax.

<sup>16</sup> Just because a definition has full force and effect insofar as applicable does not mean the definition is not applicable. The Department's argument, to the extent it is based on intent, is more that the definition should not apply rather than the definition is not applicable. The Legislature decides what the law should be and it decided that the definition should have full force and effect insofar as applicable.

insofar as applicable to the local use tax.<sup>17</sup> *St. Paul* does not indicate in any manner that the term “use” is not applicable to the local use tax on natural gas.<sup>18</sup>

It is axiomatic that the term “use” is applicable to all local use taxes including the local use tax imposed on natural gas.<sup>19</sup> Nothing prohibits the definition of “use” from applying to the local gas use tax, and several statutes command the definition to apply. See, RCW 82.14.020, .030, .050 and .070.

The Department’s argument that the term’s definition is not applicable is:

The definition of “use,” “insofar as applicable” to the local BNG use tax statute, cannot mean the first act of dominion and control within the state, as Appellant suggests. The local BNG use tax statute authorizes cities to impose a tax on the use of natural gas within a city. RCW 82.14.230. It would make no sense to authorize a tax on use within a city and then to define “use” to mean dominion and control outside the city. The only meaningful way to harmonize the definition of “use” in RCW 82.12.010 “insofar as applicable” to the local BNG tax statute is to apply the definition of “use” to use within the city, as the trial court did in this case.

Br. of Resp. at 14 – 15.

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<sup>17</sup> The fact that the cross referencing statute limits the cross reference to the extent terms are applicable cannot be an excuse for not applying the terms’ definitions when possible. Where understanding a cross referenced term is needed to impose a tax and it is possible to apply the cross referenced definition, it is an error to not apply the cross referenced definition. The Department’s argument, quoted in text, does not justify a failure to apply the statutory definition.

<sup>18</sup> G-P argued that no prior case has ever permitted a lack of uniformity between state and city use taxes. Br. of App. at 27. *St. Paul* is not such a case.

<sup>19</sup> To impose any use tax, the term “use” must be applied.

The Department's argument is contradicted by the generally applicable state and local use taxes.<sup>20</sup> Cities are authorized to impose taxes on the use of articles of tangible personal property within the cities. See generally, RCW 82.14. and RCW 82.12. As demonstrated in G-P's Brief,<sup>21</sup> in this Reply and admitted by the Department,<sup>22</sup> the generally applicable local use tax is only imposed on "uses" subject to the state tax. The state tax is only imposed on the first exercise of dominion or control in the State. Thus, what the Department claims makes no sense. Authorizing a tax on use within a city and then defining "use" to mean dominion and control within the State<sup>23</sup> is the law in Washington.<sup>24</sup> It is also the Department's practice.<sup>25</sup>

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<sup>20</sup> The Department attempts to buttress its argument by claiming that if there is a statutory conflict between the legislative statement of intent and the uniformity provisions of the statute or if the statutes are ambiguous, the statement of intent should be given preference. See e.g., Br. of Resp. at 15 and 25. These arguments are wrong. The trial court held (CP 178) and *Vita Foods v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978) together with the cases cited therein make plain that ambiguous tax statutes are construed in favor of the taxpayer. There is also no statutory conflict. The statutes creating a uniform gas and general use tax structure do not conflict with the desire (or intent) to provide revenue sources to localities. The Legislature wants cities to tax the use of goods within their jurisdiction but only if the State is taxing the same use. RCW 82.14.030.

<sup>21</sup> Br. of App. at 20 – 28.

<sup>22</sup> Br. of Resp. at 22. ("The statutory definition of taxable event includes 'any use of an article of tangible personal property, upon which a state tax is imposed pursuant to chapter 82.08 or 82.12 RCW.' The local sales and use tax provides for the imposition of local use tax upon the occurrence of a 'taxable event,' which supports the legislative intent of making local sales and use taxes uniform with the state sales and use taxes.") (citations omitted).

<sup>23</sup>"Use" is defined as the taking of dominion and control within Washington. The fact that the taking of dominion and control within Washington can occur outside a city does not make the definition of "use" nonsensical for local tax purposes. It merely means that the cities can only tax "uses" that are taxed by the State that occur within their jurisdiction, exactly what RCW 82.14.030 requires. The Department confuses the issue

The very fact that up until the filing of its trial brief in this case the Department accepted that state and local gas use taxes were imposed on the same event and that the event was the first use of the gas in the state demonstrates that the statutory definition of “use” not only can be applied but has been applied to the gas use tax. For the first time in its trial brief and again here, the Department claims that this historic practice makes no sense.<sup>26</sup>

Local use taxes only apply when the first use within the State occurs within the locality. See, Br. of Resp. at 22. Any other practice

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and obfuscates the general rule in Washington by substituting the words “outside the city” for “within Washington.”

<sup>24</sup> Note 16 in the Br. of App. makes this very point and provides the necessary statutory references in detail.

<sup>25</sup> Br. of App. at 21 – 23 cites and discusses CP 181-182 (Hammond Declaration); Det. No. 99-239R, 19 WTD 367; WAC 458-20-230(9)(a) and WAC 458-20-178(3) to demonstrate the Department’s practice. The Department’s Brief does not deny this practice or question G-P’s interpretation of the cited Department regulations and determinations.

<sup>26</sup> The Department also claims that G-P’s position leads to absurd results. Br. of Resp. at 26. To support this claim, the Department enters into sheer speculation contrary to the evidence in the record. The Department contends that taking dominion and control at a location far from the place gas is consumed is “a simple avenue for avoiding” tax. *Id.* at 28. But, the record demonstrates that G-P took on significant risks and costs to be able to take dominion and control of its gas at Sumas. RP 59-60 (Trial transcript, Oct. 16, 2006). G-P entered into a 20 year firm transportation contract for the gas. There are also costs of transporting the gas to where it will be burned. G-P Gypsum often has excess gas and excess transportation rights with which it must deal. See generally, id. and CP 175-176 and see Ex. Plaintiff’s 17. There is nothing absurd about limiting city use taxes to the taking of dominion and control within the city. That is exactly what occurs with the general use tax and it is what the statutes require for the gas use tax as well. What is absurd is the Department’s contention that RCW 82.14.070 does not apply to the tax while admitting that the gas use tax is subject to RCW 82.14.050. Compare and contrast Br. of Resp. n. 1 and RCW 82.14.050 with Br. of Resp. at 19 and RCW 82.14.070. See also, note 33 below. Equally absurd is the Department’s bizarre claim, at Br. of Resp. n. 14, that the local gas use tax is “specifically exempt” from RCW 82.14.030 provisions. See, pg. 13-17 below for a demonstration of the Department’s claim and RCW 82.14.030.

would result in multiple local taxes applying every time an article first used within any particular locality is subsequently used within a second locality.<sup>27</sup> This result is avoided because local use taxes are only imposed on events subject to state tax. RCW 82.14.030 and 82.14.020(9). Thus, the Department is just plain wrong. The state definition of “use” applies to the local use tax on natural gas just like it does to the generally applicable local use tax.

The Department also tries to deny the clear legislative intent that all local and state use taxes be uniform.<sup>28</sup> While it can cite not a single case where any decision maker has permitted use to be defined differently for state and city use taxes and while the only legislative action<sup>29</sup> in regard

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<sup>27</sup> The Department repeatedly pretends that “use” for local gas use tax purposes should have its plain meaning. Br. of Resp. at 11, 12, 15, and 18. The trial court did not give the term its plain meaning but chose to limit the meaning to the first use or the first exercise of dominion and control over natural gas within a city. RP 65-68 (Court’s ruling, October 17, 2006) and CP 179 (Conclusion of Law 13). The trial judge discussed the multiple taxation problem, RP 67-68 (Court’s ruling, October 17, 2006), and the statutory definition, RP 64-66 (Court’s ruling, October 17, 2006), in giving the term something other than its plain meaning. See also, Br. of App. at 31 for further discussion of why the term’s plain meaning is not appropriate.

<sup>28</sup> The Department argues that nothing in the statute or legislative history limits the tax to the taking of dominion or control within a city. Br. of Resp. at 16-17 (The Department uses the short hand word “delivery” to mean the taking of dominion or control). The Department fails to understand the meaning of the word “use” and the meaning of the uniformity provisions of RCW 82.14.020, .050 and .070. In addition, nothing in the legislative history suggests in any manner, and nothing in any statute suggests in any manner, that “use” for gas use tax purposes is to be given a meaning other than that provided by statute. If the Legislature had intended a different meaning to be applied for gas use tax purposes, it would have said so.

<sup>29</sup> The Department cites to a Senate bill report for the proposition that the uniformity provision does not apply to the local use tax on gas and argues that RCW 82.14.070 states an intent that local sales and use taxes should be as uniform as possible with other local sales and use taxes but that the local use tax on gas is different from other local use taxes.

to this point has been to strengthen the uniformity requirement,<sup>30</sup> the Department claims that the local use tax on natural gas is not a sales and use tax subject to RCW 82.14.070's uniformity requirements. Br. of Resp. at 19.<sup>31</sup>

This argument is without merit.

First, the local use tax on natural gas (authorized by RCW 82.14.230) is included within the meaning of the phrase "any local sales and use tax." RCW 82.14.030. That statute explicitly permits cities to

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Br. of Resp. at 22. The Department misunderstands both the Senate report and the uniformity provision. The Senate report is focused on the Streamlined Sales Tax Agreement, an effort to permit the several states to persuade mail and internet sellers to begin collecting the states' sales taxes. That Agreement requires that the several states' sales taxes become uniform and that each of the states' sales and use taxes be uniform within a jurisdiction. Sales and use taxes imposed on gas, solid waste, lodging, motor vehicles, aircraft, watercraft, and certain homes are excluded from the Agreement. As to RCW 82.14.070, it first requires local taxes to be uniform with the State's and secondly requires local taxes to be uniform with other localities' taxes. Applying the statute in the manner G-P contends is correct satisfies these provisions because the definition of "use" and the "taxable event" would be uniform between the state and local use taxes on gas and all local use taxes on gas would be uniform. The logic of the Department's view is that each locality can have a use tax on gas that is different from one another and from the State's use tax on gas. How is the Department's view possible given that RCW 82.14.050 has the Department administering all of the gas use taxes?

<sup>30</sup> RCW 82.14.070 now commands that state and local use taxes be identical, not as uniform as possible.

<sup>31</sup> The Department also spends many pages discussing that the gas use taxes were imposed due to a change in federal regulation governing the sale of natural gas and were intended to maintain a revenue source for cities. Br. of Resp. at 8 – 11 and 15 – 16. It is well settled that legislative intent cannot override statutory language. *Vita Foods Products v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978). The Department argues that a more specific and identifiable intent than that discussed in *Vita Foods* is present here and should lead to a different result than in that case. Nothing in *Vita Foods* supports the Department's argument and the Department's arguments do not address the reality that here the legislative intent is two-fold, to maintain a revenue source and uniformity. Those two intentions do not conflict. The statutes require that state and local gas use taxes (the revenue source being maintained) be applied uniformly. RCW 82.14.070, RCW 82.14.050 and RCW 82.14.030.

impose a sales and use tax in accordance with RCW 82.14 but “except as provided in RCW 82.14.230 this sales and use tax shall not apply to natural or manufactured gas.” (Emphasis added). Thus, the tax provided by RCW 82.14.230 (the local use tax on natural gas) is part of a sales and use tax. Stated differently, the local use tax on natural gas is included within the meaning of the term sales and use tax.<sup>32</sup> RCW 82.14.030.

Second, the Department fails to recognize that the local use tax on natural gas is simply part of a local use tax<sup>33</sup> just like the state use tax on natural gas is part of the state use tax.<sup>34</sup>

Third, the Department is attempting to examine individual trees, but it has completely missed the forest. The entire statutory scheme authorizing local use taxes makes clear that such taxes must be uniform with state use taxes. G-P relies not only on RCW 82.14.020’s cross reference of the definition of “use” and RCW 82.14.070’s uniformity command. G-P also relies on RCW 82.14.050’s requirement that state and local use taxes (including the local gas use taxes) be uniformly administered by the Department. How is that going to occur if the

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<sup>32</sup> *Impeaching its own arguments*, the Department cites RCW 82.14.050 as the authority for its administration of the local gas use tax. Br. of Resp: at n. 1. But, that statute only uses the words “sales and use tax” to describe the taxes to be administered by the Department. The Department is correct that the local gas use tax is within the meaning of a sales and use tax as that term is used in RCW 82.14.050. The local gas use tax is also within the meaning of a sales and use tax as that phrase is used in RCW 82.14.070. The Department cannot have it both ways.

<sup>33</sup> RCW 82.14.030 makes this point indisputable.

<sup>34</sup> RCW 82.12.022 makes the state use tax on natural gas part of the state’s use tax.

definitions of “use” for the state use tax and the local use tax are different?

The Department must admit that it uniformly administers the state and local gas use taxes.<sup>35</sup> The Department must admit that WAC 458-20-230 and Determination No. 99-239R require the statute of limitations for both taxes to run simultaneously and that has been the Department’s practice.

How is that possible if the taxable events are different?

Most importantly, the Department’s claim that the taxable events may be different directly conflicts with RCW 82.14.030. The Department cannot reconcile its position with RCW 82.14.030. Incredibly, the Department claims<sup>36</sup>:

[T]he statutory provision authorizing local sales and use taxes specifically exempts natural or manufactured gas. RCW 82.14.030.

Shockingly, the note<sup>37</sup> to that quoted portion of the Department’s brief baldly claims:

G-P Gypsum repeatedly cites to RCW 82.14.030 for authority that the local BNG use tax is imposed at the same time as the state BNG use tax without advising the Court

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<sup>35</sup> The procedures followed in this case demonstrate that the local gas use taxes are uniformly administered with the state gas use taxes. The matter was first brought to the Department (CP 83 and 173) and a claim for refund of certain state use taxes (that was resolved at trial and is not subject to appeal) was brought simultaneously with this claim for local gas use taxes (CP 174). The taxes at issue were also paid at the same time and on the same return as the state gas use taxes (see, Appendix 1, Natural Gas Use Tax Return). See also, Br. of Resp. n. 1 where the Department admits it administers the local gas use tax.

<sup>36</sup> Br. of Resp. at 19.

<sup>37</sup> Br. of Resp. at 19 n. 14.

that RCW 82.14.030 specifically exempts local BNG use tax from its provisions.

The Department's claims are incredible and shocking because RCW 82.14.030 does not exempt local gas use tax from its provisions.

RCW 82.14.030 reads:

The governing body of any county or city while not required by legislative mandate to do so, may, by resolution or ordinance for the purposes authorized by this chapter, fix and impose a sales and use tax in accordance with the terms of this chapter. Such tax shall be collected from those persons who are taxable by the state pursuant to chapters 82.08 and 82.12 RCW, upon the occurrence of any taxable event within the county or city as the case may be:  
**PROVIDED, That except as provided in RCW 82.14.230, this sales and use tax shall not apply to natural or manufactured gas. ...**

(Emphasis added)

We have emphasized the statutory language to avoid any possibility of confusion.

The underlined portion clearly authorizes city sales and use taxes.

The Department does not disagree with this statement.

The italicized portion clearly limits the local sales and use tax (that is the tax referred to as "Such tax") to persons who are taxable pursuant to the State sales (RCW 82.08) and use (RCW 82.12) taxes. The italicized portion also limits the local sales and use tax to the "occurrence of any taxable event within the county or city." "Taxable event" is defined by RCW 82.14.020 to mean any sale or use upon which a state tax is

imposed. The Department agrees that the generally applicable local use tax is limited to events subject to state use taxes (Br. of Resp. at 22) even though it falsely claims that this provision does not apply to local use taxes on gas. Br. of Resp. at n. 14 and 22-23.

The quoted proviso printed above and below in bold type demonstrates that the Department is just wrong. It reads again:

**“PROVIDED, That except as provided in RCW 82.14.230, this sales and use tax shall not apply to natural or manufactured gas.”**

(Emphasis added). RCW 82.14.230 is the statute that authorizes the local use tax on gas. Thus, the statute means that the local sales and use tax which is limited to events subject to the state sales and/or use tax may not apply to natural or manufactured gas except as provided by RCW 82.14.230. But, as provided by RCW 82.14.230, the local sales and use tax may be imposed on natural or manufactured gas subject to the statutory limitation that those taxes may be imposed only on events subject to state sales or use taxes.

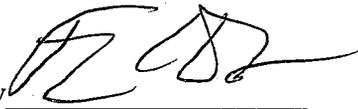
RCW 82.14.030, far from exempting local use taxes on gas from its provisions, specifically limits local gas use taxes to events subject to state use taxes. This statute demonstrates that the Department is wrong and the trial court should be reversed.

### Conclusion

RCW 82.14.030 limits the imposition of local gas use taxes authorized by RCW 82.14.230 to events subject to the state gas use tax. The state use tax on gas is imposed only on the first exercise in this State of dominion or control over the gas. G-P first exercised dominion and control over the gas in this State outside Tacoma. Therefore, Tacoma's gas use tax cannot be imposed on G-P. For these reasons, more fully explained above and in G-P's Brief, G-P requests that the Judgment of the trial court denying G-P a refund of all Tacoma natural gas use taxes G-P paid between January 1, 1996 and December 31, 2001 be reversed and this matter remanded for entry of Judgment awarding G-P a refund of all such taxes together with refund interest at the statutory rate from the dates of payment until the date of refund.

Respectfully submitted, this 9<sup>th</sup> day of August, 2007.

The Dinces Law Firm

By 

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Name \_\_\_\_\_ Tax Reporting Acct. No. \_\_\_\_\_

Firm Name \_\_\_\_\_

Show Changes in Address / Phone /  
 Ownership and Date of Change

Street Address \_\_\_\_\_

City, State, Zip \_\_\_\_\_

See Instructions on Page 4

Line No.	City Code	Volume (In Therms)	Purchase Price	Transportation Charges	Total Value	Tax Rate	Tax Due	Dept. Use Only
1	State					.03852		
2								
3								
4								
5								
6								
7								
8								
<b>TOTAL</b>								

**CREDITS** (Credits for Tax Paid in Another State)

Line No.	City Code	Consumer Paid Use Tax *	Seller Paid State Gross Receipts	Seller Paid Municipal Gross Receipts Tax *	TOTAL
9	State				
10					
11					
<b>TOTAL CREDITS</b>					

\* This credit is to be split proportionally among the locations. For example, if the state's portion of this tax constitutes 38.7 percent of the total tax, then 38.7 percent of the credit is to be deducted from the state's portion of this tax.

**PRIOR PERIOD ADJUSTMENTS**

Line No.	Type of Adjustment	Amount	Explanation

**THIS RETURN IS DUE APRIL 30, 2000**

TAXPAYER MUST FILE A RETURN EVEN IF NO TAX IS DUE

\*\* Add Penalty If Paying After May 1, 2000  
 Minimum \$5.00

5% After May 1, 2000  
 10% After May 31, 2000  
 20% After June 30, 2000

Signature \_\_\_\_\_

Telephone \_\_\_\_\_ Date \_\_\_\_\_

Line No.	Totals	Tax Due	Dept. Use Only
13	Tax Due	+	
14	Less Credits	-	
15	Total Tax Due	=	
16	Penalty **	+	
17	Interest	+	
18	Less Adjustments	-	
19	<b>Total Payment Enclosed</b>	=	

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Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 9<sup>th</sup> day of August 2007, I placed in the United States mail, postage prepaid, a copy of the Reply Brief of Appellant, addressed to:

Peter Gonick, Assistant Attorney General  
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Franklin G. Dinces

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