

RECEIVED BY E-MAIL

NO. 85971-0

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington  
nonprofit corporation, TOWER ENERGY GROUP, a California  
corporation,

Appellants,

v.

STATE OF WASHINGTON; and JIM MCINTYRE, WASHINGTON  
STATE TREASURER,

Respondents.

---

**RESPONDENT STATE OF WASHINGTON'S ANSWER TO BRIEF  
OF AMICUS CURIAE WESTERN STATES PETROLEUM  
ASSOCIATION**

---

ROBERT M. MCKENNA  
Attorney General

LAURA J. WATSON, WSBA #28452  
KELLY T. WOOD, WSBA #40067  
Assistant Attorneys General

DAVID M. HANKINS, WSBA #19194  
Senior Counsel

PO BOX 40117  
Olympia, WA 98504-0117  
(360) 586-6770

ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ARGUMENT .....1

    A. Contrary To WSPA’s Argument, A Significant Portion  
    Of Hazardous Substance Tax Revenues Are Used To  
    Clean Up Petroleum-Contaminated Sites .....1

    B. The Legality Of Transferring Revenues From The Toxic  
    Control Accounts To The State General Fund Is Not The  
    Issue Before The Court.....3

III. CONCLUSION .....5

TABLE OF AUTHORITIES

Cases

*Covell v. City of Seattle*,  
127 Wn.2d 874, 905 P.2d 324 (1995)..... 3

*Hillis Homes, Inc. v. Snohomish Cy.*,  
97 Wn.2d 804, 650 P.2d 193 (1982), *overruled on other grounds*  
*by R/L Assoc., Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d  
838 (1989)..... 3

*Sheehan v. Central Puget Sound Reg'l Transit Auth.*,  
155 Wn.2d 790, 123 P.3d 88 (2005)..... 3-5

*Sheldon v. Purdy*,  
17 Wash. 134, 49 P. 228 (1897) ..... 5

*State v. Gonzalez*,  
110 Wn.2d 738, 757 P.2d 925 (1988)..... 3, 4

Statutes

RCW 70.105D.070..... 2, 3, 4

Other Authorities

AGLO 1973 No. 31..... 4

## I. INTRODUCTION

The Western States Petroleum Association (WSPA) submitted an amicus brief arguing that the constitutional issues in the present case are important. Notably, WSPA does not argue that the hazardous substance tax violates Amendment 18 of the Washington State Constitution. Instead, WSPA argues: (1) that hazardous substance tax revenues are used for environmental purposes other than cleanup of petroleum-contaminated sites; and (2) that hazardous substance tax revenues cannot constitutionally be diverted to the general fund. These arguments are not relevant to whether the hazardous substance tax violates Amendment 18 and do not support the result sought by the Automotive United Trades Association (AUTO). To the extent the Court does address these arguments, WSPA is incorrect.

## II. ARGUMENT

### A. **Contrary To WSPA's Argument, A Significant Portion Of Hazardous Substance Tax Revenues Are Used To Clean Up Petroleum-Contaminated Sites**

WSPA argues that hazardous substance tax revenues are not used primarily to fund cleanups of petroleum-contaminated sites. WSPA Amicus Br. at 2-3. That is incorrect. The majority of the tax revenues are used to clean up contaminated sites, and the vast majority of those sites contain petroleum product contamination. CP at 184, 199-214, 243-49.

Although there may not be a precise mathematical proportionality between the amount of the tax paid by oil refineries in any given year and the amount of petroleum cleaned up in that same year, there can be little doubt that hazardous substance tax revenues are used to clean up petroleum-contaminated sites as intended by the people when they enacted Initiative 97. *See* CP at 91-94 (voter's pamphlet statements emphasizing that petroleum-related industries should pay their fair share of the tax because of their contribution to contamination).

WSPA notes that the hazardous substance tax is also used to fund other beneficial environmental programs in addition to funding the clean up of contaminated sites. WSPA Amicus Br. at 3. It is true that tax revenues authorized by Initiative 97 have always been used to fund additional environmental programs that are not directly linked to the clean up of contaminated sites. *Compare* CP 98-99 (original language creating the toxics control accounts) *with* RCW 70.105D.070 (current language). However, the relevance of this argument is unclear.

If WSPA argues that petroleum products cannot be taxed to clean up anything other than petroleum products, that argument is incorrect. Taxes, unlike fees, are intended to raise money for any proper governmental purpose, and the imposition of a tax does not require a correlation between the tax being charged and the benefit to the taxpayer.

*See, e.g., Covell v. City of Seattle*, 127 Wn.2d 874, 879-85, 905 P.2d 324 (1995); *Hillis Homes, Inc. v. Snohomish Cy.*, 97 Wn.2d 804, 809-10, 650 P.2d 193 (1982), *overruled on other grounds by R/L Assoc., Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989).<sup>1</sup> Thus, there is no constitutional problem with the fact that the hazardous substance tax funds numerous environmental programs in addition to cleaning up petroleum-contaminated sites.

**B. The Legality Of Transferring Revenues From The Toxic Control Accounts To The State General Fund Is Not The Issue Before The Court**

Next, WSPA argues that the legislature's recent transfer of funds from the toxics control accounts<sup>2</sup> to the state general fund violates both the Model Toxics Control Act (MTCA) and article VII, section 5 of the Washington State Constitution. WSPA Amicus Br. at 3-5. However, nobody has challenged the statute that transfers the funds, and therefore, these issues are not before the Court in the present case. The Court should decline to reach them. *See, e.g., State v. Gonzalez*, 110 Wn.2d 738, 752

---

<sup>1</sup> Furthermore, the imposition of a special excise tax does not require a snug fit between the tax being charged and the privilege enjoyed by the taxpayer. *Sheehan v. Central Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 799-801, 123 P.3d 88 (2005). However, a close fit exists in the present case because the activity being taxed (first possession of a hazardous substance) is directly related to the taxpayer's enjoyment of the privilege to possess the hazardous substance within the state.

<sup>2</sup> Initiative 97 created both the state and local toxics control accounts. RCW 70.105D.070. These accounts are funded mostly by hazardous substance tax revenues and are used almost exclusively to clean up contaminated properties and support other clean up related environmental programs. *Id.*

n.2, 757 P.2d 925 (1988) (“we have many times held that arguments raised only by amici curiae need not be considered.”)

In brief response, the State notes that the transfer of funds from the toxics accounts to the general fund does not violate MTCA because MTCA was amended to temporarily allow such transfers to occur. In pertinent part, RCW 70.105D.070 states:

(8) During the 2007-2009 and 2009-2011 fiscal biennia, the legislature may transfer from the local toxics control account to either the state general fund or the spill prevention account, or both such amounts as reflect excess fund balance in the account

....

(10) During the 2009-2011 fiscal biennium, the legislature may transfer from the state toxics control account to the state general fund such amounts as reflect the excess fund balance in the account.

Thus, the transfer of the funds is in accordance with MTCA.

For similar reasons, the transfers do not violate article VII, section 5 which states “[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the same to which only it shall be applied.” Here, the taxes were levied and spent in accordance with MTCA, which allows for temporary transfers to the general fund. *See* AGLO 1973 No. 31 (legislature can amend a statute to allow for transfer of motor vehicle excise taxes into the general fund).

The cases cited by WSPA do not suggest a different result. WSPA Amicus Br. at 5 (citing *Sheehan v. Central Puget Sound Reg'l Transit*

*Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005); *Sheldon v. Purdy*, 17 Wash. 134, 49 P. 228 (1897)). Both cases involved the question of whether a local government had exceeded the taxing authority granted to it by the legislature. Here, the legislature granted itself the authority to transfer funds from the toxics control accounts to the general fund. Therefore, article VII, section 5 does not appear to be implicated. However, even if it was implicated, the issue raised by WSPA has no bearing on the issues in the present case. Therefore, the Court should decline to reach it.

### III. CONCLUSION

The issues raised by WSPA are not relevant to the issues before the Court in the present case nor do they support AUTO's position in this case. The State respectfully asks the Court to decline to reach the issues. To the extent the Court does entertain these issues, as discussed above, WSPA's arguments lack legal merit.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of April, 2012.

ROBERT M. MCKENNA  
Attorney General

  
LAURA J. WATSON, WSBA #28452  
KELLY T. WOOD, WSBA #40067  
Assistant Attorneys General

DAVID M. HANKINS, WSBA #19194  
Senior Counsel

NO. 85971-0

**SUPREME COURT OF THE STATE OF WASHINGTON**

AUTOMOTIVE UNITED TRADES  
ORGANIZATION, a Washington  
nonprofit corporation, TOWER  
ENERGY GROUP, a California  
corporation,

Appellants,

v.

STATE OF WASHINGTON; and JIM  
MCINTYRE, WASHINGTON STATE  
TREASURER,

Respondents.

CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 19th day of April  
2012, I caused to be served a copy of Respondent State of Washington's  
Answer to Brief of Amicus Curiae Western States Petroleum Association  
in the above-captioned matter upon the parties herein as indicated below:

PHILIP A. TALMADGE  
SIDNEY TRIBE  
TALMADGE/FITZPATRICK  
18010 SOUTHCENTER PARKWAY  
TUKWILA WA 98188-4630

U.S. Mail  
 Hand Delivered  
 Overnight Express  
 By Fax: (206) 575-1397  
 By Email:  
phil@tal-fitzlaw.com  
sidney@tal-fitzlaw.com

BRYCE WILCOX  
ATTORNEY AT LAW  
717 W. SPRAGUE AVE STE 1600  
SPOKANE, WA 99201-3923

U.S. Mail  
 Hand Delivered  
 Overnight Express  
 By Fax: (206) 575-1397  
 By Email:  
bwilcox@lukins.com

KENNETH LEDERMAN  
STEVEN GILLESPIE  
FOSTER PEPPER PLLC  
1111 3<sup>RD</sup> AVE STE 3400  
SEATTLE, WA 98101-3264

U.S. Mail  
 Hand Delivered  
 Overnight Express  
 By Fax: (206) 575-1397  
 By Email:  
ledek@foster.com  
gills@foster.com

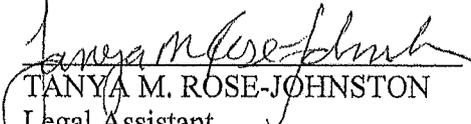
ALEXANDRA SMITH  
PORT OF OLYMPIA  
915 WASHINGTON ST NE  
OLYMPIA, WA 98501-6931

U.S. Mail  
 Hand Delivered  
 Overnight Express  
 By Fax: (206) 575-1397  
 By Email:  
alexs@portolympia.com

the foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of April 2012, in Olympia, Washington.

  
TANYA M. ROSE-JOHNSTON  
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

---

**To:** Rose-Johnston, Tanya (ATG)  
**Cc:** phil@tal-fitzlaw.com; Sidney Tribe; Bryce Wilcox; ledek@foster.com; gills@foster.com; Alex Smith; Wood, Kelly (ATG); Watson, Laura (ATG); Hankins, David (ATG)  
**Subject:** RE: E-filing for Supreme Court No. 85971-0

Rec. 4-19-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

---

**From:** Rose-Johnston, Tanya (ATG) [<mailto:TanyaR@ATG.WA.GOV>]  
**Sent:** Thursday, April 19, 2012 11:42 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** phil@tal-fitzlaw.com; Sidney Tribe; Bryce Wilcox; ledek@foster.com; gills@foster.com; Alex Smith; Wood, Kelly (ATG); Watson, Laura (ATG); Hankins, David (ATG)  
**Subject:** E-filing for Supreme Court No. 85971-0

Attached for filing in *Automotive United Trades Association v. State of Washington*, No. 85971-0, is Respondent State of Washington's Answer to Brief of Amicus Curiae Western States Petroleum Association.

<<04-19-12StateAnswerToWSPAAmicus.pdf>>

*Please save natural resources by not printing this email unless necessary.*

*Tanya Rose-Johnston*  
Legal Assistant to

*Kelly T. Wood, WSBA #40067*

[Kelly.wood@atg.wa.gov](mailto:Kelly.wood@atg.wa.gov)

Washington Attorney General's Office

Ecology Division  
(360) 586-6770