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NO. 89734-4

SUPREME COURT OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION,

Appellant,

v.

STATE OF WASHINGTON, JAY INSLEE, PAT KOHLER,

Respondents.

STATE'S ANSWER TO BRIEFS OF AMICUS CURIAE

ROBERT W. FERGUSON
Attorney General

ROBERT W. FERGUSON
Attorney General

RENE D. TOMISSER
Senior Counsel
WSBA# 17509

ALICIA O. YOUNG
Assistant Attorney General
WSBA# 35553

ATTORNEY GENERAL'S OFFICE
P.O. BOX 40126
OLYMPIA, WA 98504-0126
(360) 586-6300
OID# 91023

ORIGINAL

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I. INTRODUCTION

Amicus Curiae Washington Policy Center (WPC) raises two non-controversial propositions in support of Petitioner AUTO: that the State needs statutory authorization to lawfully refund motor vehicle fuel taxes, and that the expenditure of state funds generally requires legislative appropriation. But WPC misses the mark in how it applies those rules to this case. As a preliminary matter, WPC, like AUTO, asserts a narrow definition of "refund" that defies this Court's own definition of refunds as a "sum that is paid back." According to WPC, a refund is constitutional only if it is being paid for a tax that was illegal or for an amount that was overcharged. The restrictive overlay urged by WPC has no support in constitutional language or the interpretive decisions of this Court. In addition to unraveling the fuel tax agreements between the State and numerous Washington tribes, WPC's view of refunds would eviscerate many other refund provisions in which the Legislature has determined that a particular refund promoted good public policy.

Additionally, WPC incorrectly assumes there is no legislative authorization for the State's refund of fuel taxes to Indian tribes. WPC's brief is completely bereft of statutory analysis of the language authorizing fuel tax agreements and makes no acknowledgment that the original

enactment was titled "AN ACT Relating to refunding motor vehicle fuel and special fuel taxes to Indian tribes. . ."

As the text and legislative history of RCW 82.36.450 and 82.38.310 make clear, the legislative authorization to enter into fuel tax agreements with the tribes has always included a methodology for providing refunds of fuel taxes to Indian tribes. Finally, every biennial transportation budget since 2001 has expressly appropriated sums for motor vehicle fuel tax refunds and transfers, which include the tribal refunds. WPC's argument about the need for appropriation, therefore, is factually incorrect and an unnecessary distraction, regardless of whether it is properly before the Court.

The State agrees with Amicus Curiae Indian Tribal Governments, and believes many of their points also refute WPC's arguments. This Court should affirm summary judgment in favor of the State because the tribal fuel tax refunds are refunds authorized by law.

II. ARGUMENT

The Constitution authorizes state motor vehicle fund expenditures for "refunds authorized by law for taxes paid on motor vehicle fuels." Const. Art. II, § 40. WPC's chief argument takes an unduly narrow interpretation of "refund" under Article II, Section 40, one that is unsupported by case law or the plain language of the Constitution.

Alternatively, WPC argues that the refunds to the tribes are not "authorized by law" either because they lack explicit statutory authorization or a contiguous appropriation. As explained below, WPC's arguments fail at each step.

A. The Fuel Tax Agreement Payments Are Refunds of Fuel Taxes Paid by the Tribes

WPC's primary argument is that a refund means only payment back for an amount erroneously paid to begin with, and, therefore, the payments to the tribes cannot constitute refunds unless they were illegally imposed from inception. This argument contradicts the plain meaning of "refund," ignores the courts' prior interpretation of "refund," and jeopardizes a number of other statutorily based refunds.

At the outset, WPC simply ignores the fact that the Court has already defined "refund" under Article II, Section 40 of the Washington Constitution as a "sum that is paid back." *Washington Off Highway Vehicle Alliance [WOHVA] v. State*, 176 Wn.2d 225, 234, 290 P.3d 954 (2012) (plurality) (quoting *Nw. Motorcycle Ass'n v. State*, 127 Wn. App. 408, 415, 110 P.3d 1196 (2005), *review denied*, 156 Wn.2d 1008 (quoting Webster's Third New International Dictionary 1910 (2002) (incorrectly cited as 1993 edition)). Both this Court and the Court of Appeals have

concluded the meaning of "refund" is unambiguous. *See WOHVA*, 176 Wn.2d at 234; *Nw. Motorcycle Ass'n*, 127 Wn. App. at 403.[1]

Despite the plain meaning of refund and prior precedent, WPC urges the Court to define "refund" narrowly as "a payment made to a taxpayer who has paid taxes in error, whether that error is one of law or fact." WPC Br. at 4. WPC cites examples of refunds for taxes and fees when a tax or fee is paid in excess of that properly due. WPC Br. at 5-6. However, the fact that the Legislature has enacted safety nets for taxpayers where a tax or fee was improperly collected to begin with does not foreclose the prerogative of the Legislature to allow refunds for other public policy reasons.

WPC's argument that a refund of taxes is permissible only when the tax was illegally collected in the first instance has broad implications extending beyond the reach of this case. The Legislature has authorized tax refunds in several instances beyond those in which the tax was paid in error, including for urban transportation systems (RCW 82.36.275); for fuel distributors, including retailers, whose fuel supply is lost or destroyed (RCW 82.36.370); for nonprofit providers of transportation to persons with special needs (RCW 82.36.285); for low-income families

[1] Although the *WOHVA* case was a plurality decision, neither the concurrence nor the dissent took issue with the lead opinion's definition of "refund" as a sum that is paid back; the dissent disagreed with whether the benefit was "targeted" enough to constitute being "paid back" to the taxpayers. *WOHVA*, 176 Wn.2d at 244.

(RCW 82.08.0206); for consumers who have purchased machinery and equipment used for generating energy (RCW 82.12.962); for wholesalers with respect to grain elevators and distribution centers (RCW 82.08.820); for the benefit of off road and non-highway vehicle users (RCW 46.09.520); and for the benefit of snowmobilers (RCW 46.10.510). In each of these instances the tax is properly collected, but the Legislature made a policy decision that those entities should receive a refund for the cost of the tax if they submit a request for a refund.

The same is true with respect to the tribal refunds. In consideration of past and potential future disputes over sovereignty, to allow the tribes to provide infrastructure to their members and others travelling across their reservations, to incentivize tribes not to become fuel suppliers, and to further positive government-to-government relations, the Legislature determined that the tribes would be entitled to partial refunds of the total amount of fuel taxes they paid. That the taxes were not illegally imposed to begin with does not change the nature of the refund being a "sum that is paid back."

Contrary to WPC's characterization, RCW 43.88.170 and 43.01.072, which provide safety nets for the refund of erroneously collected "fees or other payments," are not the State's "general policy on refunds." WPC Br. at 7. By their plain language, those statutes provide a

basis for refund where there is no other law "authoriz[ing] the refund of erroneous or excessive payments thereof." RCW 43.88.170; RCW 43.01.072.[2] The statutes say nothing of the Legislature's intent to limit the provision of refunds only to instances of error in law or fact. These statutes serve an important role in ensuring that people who have clearly paid more fees than they are legally required are not left without any remedy. *See* Wash. Att'y Gen. Op. No. 98 (1966) (interpreting RCW 43.88.170 as "only" applying where there is no provision elsewhere for the requested refund). Neither logic nor the statutes' language and purpose foreclose the possibility of refunds for other public policy purposes.

WPC cites to cases applying these and similar statutes to support its conclusion that courts *always* must first consider whether a tax was erroneously paid in determining the validity of a refund claim. WPC Br. at 7-8 (citing *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 946 P.2d 1235 (1997); *Nor-Pac Enter. v. Dep't of Licensing*, 129 Wn. App.

[2] It is not clear that RCW 43.88.170 and 43.01.072 apply to motor vehicle fuel taxes, as they specifically mention only "fees or other payments," not taxes, and the Legislature has provided a separate mechanism for seeking the refund of erroneously paid motor vehicle fuel taxes in RCW 82.32.060. But this Court need not address this question because the statutes clearly do not limit the Legislature from authorizing refunds of taxes for reasons other than that they were erroneously paid to begin with. *See also Clark Cty. Pub. Util. Dist. No. 1 v. State, Dep't of Revenue*, 153 Wn. App. 737, 760-61, 222 P.3d 1232 (2010)) (refusing to consider parties' arguments over whether RCW 43.88.170 and 43.01.072 applied to tax refunds, concluding that neither party argued to the contrary before the trial court).

556, 119 P.3d 889 (2005); *Clark Cty. Pub. Util. Dist. No. 1 v. State, Dep't of Revenue*, 153 Wn. App. 737, 222 P.3d 1232 (2010)). But these cases specifically considered that question only in considering the applicability of the "erroneously paid" statutory bases for refunds. Of course, when considering whether a refund is due on the grounds that it was "erroneously paid," the Court of Appeals would first consider whether the tax was erroneously paid. *Tiger Oil Corp.*, 88 Wn. App. at 937; *Nor-Pac Enter.*, 129 Wn. App. at 565-66; *Clark Cty. Pub. Util. Dist. No. 1*, 153 Wn. App. at 740. WPC fails to mention that these cases went on to analyze other grounds for refund, where the taxpayer has "an initial obligation to pay the gas tax, but it is [later] entitled to a refund" for other reasons. *Nor-Pac Enter.*, 129 Wn. App. at 566; *Tiger Oil Corp.*, 88 Wn. App. at 934.[3] In analyzing those grounds for refunds, the Court of Appeals did not concern itself with whether the tax was erroneously paid to begin with, but rather acknowledged the proper initial collection of the tax.

The tax refunds upheld in the *WOHVA* and *Northwest Motorcycle Association* cases also set forth examples of refunds authorized for reasons other than erroneous payment. WPC gives short-shrift to those decisions,

[3] In *Clark County Public Utility District Number 1*, the Court of Appeals was not asked to opine on the availability of any other basis for a refund other than the tax's unlawful imposition. 153 Wn. App. at 740.

summarily stating "there was no question that the taxpayers overpaid." WPC Br. at 2. But in neither case did the Court conclude that the motor vehicle fuel taxes were improperly imposed against the suppliers or retailers who paid the taxes, or upon the consumers who ultimately purchased the gas. *WOHVA*, 176 Wn.2d at 234; *Nw. Motorcycle Ass'n*, 127 Wn. App. at 415.

In both *WOHVA* and *Northwest Motorcycle Association*, the motor vehicle fuel tax was (and still is) lawfully imposed on fuel sold for use in propulsion of motor vehicles and motorboats. *E.g.*, RCW 82.36.010(19); .020. The fuel tax laws did not exempt fuel used for off-highway uses; rather, the Legislature provided a refund for the benefit of off road and non-highway vehicle users. RCW 46.09.520. Reflecting that a refund can be authorized for reasons having nothing to do with the propriety of the tax's initial collection, the Court approved of the expenditure of fuel tax refunds in those cases without regard to whether the taxes were correctly imposed in the first instance. *WOHVA*, 176 Wn.2d at 234; *Nw. Motorcycle Ass'n*, 127 Wn. App. at 415.

In addition to proving the point that a tax refund can exist for reasons unrelated to the propriety of the initial tax, the *WOHVA* and *Northwest Motorcycle Association* cases also demonstrate that "refunds" under Article II, Section 40 are not limited to dollar for dollar direct

payments back to taxpayers. In those cases, the Court concluded that an expenditure providing a targeted benefit to taxpayers—specifically, recreational trails and facilities for the benefit of off road and non-highway vehicle users as set forth in RCW 46.09.520—constituted a refund under Article II, Section 40. *WOHVA*, 176 Wn.2d at 234.[4]

Here, the fuel tax payments are made directly to the tribes who, under the fuel tax agreements, are required to purchase tax-burdened fuel. The Court need not even compare this case to *WOHVA* in order to conclude that the tribal payments are sums paid back to the tribes. But as the Tribes point out in their amicus brief, even if AUTO is correct that only the individual customer who bears the ultimate economic incidence of the tax can be entitled to a refund,[5] this case presents a much stronger case for a targeted benefit than that already approved by the Court in

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[4] These cases also demonstrate that a refund's availability is not limited to the entity that bears the legal incidence of a tax, as AUTO and WPC suggest. In 2005, during the relevant time period for the *Northwest Motorcycle Association* case, the legal incidence fell on the retailer, and since 2007, the relevant time period for *WOHVA*, the legal incidence of the fuel tax is imposed on the fuel suppliers. *Squaxin Island Tribe et. al. v. Fred Stephens, Director, Washington State Dep't of Licensing*, No. CO3-3951Z (W.D. Wash. Jan. 4, 2006) (CP at 493-496); Laws of 2007, ch. 515, §§ 15, 19, 21, 31. Yet the refunds authorized in those cases were not made to the suppliers or the retailers but for the benefit of the consumers who purchased the gas.

[5] To avoid claims of unfair competition from non-tribal retailers, the agreements require tribal retailers to include the fuel tax in the price charged to consumers, of which, at the time the agreements were formed, an estimated 75 percent constituted tribal members, and 25 percent were non-tribal members. CP at 286.

That 75 percent of consumers, who *would* bear the ultimate economic incidence of the tax are estimated to be tribal members, who, under the agreements, cannot obtain additional refunds on the fuel, would support the argument that the payments to the tribes are refunds for taxes paid by the tribes (including their members). CP at 61.

WOHVA. Br. of Amicus Curiae of Indian Tribal Governments Party to Fuel Tax Agreements (as amended) at 7. The tribal fuel tax agreements and their authorizing statutes require the tribes to spend their refund proceeds or equivalent amounts in specific ways, all of which are targeted to benefit the same people who are purchasing tax-burdened fuel from tribal retailers. RCW 82.36.450(3)(b) (requiring tribes to use fuel tax refunds or equivalent amounts on roads, bridges boat ramps, transit services, transportation planning, police services, and other highway-related purposes); RCW 82.38.310(3)(b) (same). Like the use of motor vehicle funds in *WOHVA* and *Northwest Motorcycle Association* for recreational trails and facilities, it is the fact that the sum is paid back from the purchase of tax burdened fuel in a manner sufficiently targeted to benefit the taxpayers that qualifies the payment as a refund, which, under Article II, Section 40, is a highway purpose.

This Court has already determined that a "refund" within the meaning of Article II, Section 40 unambiguously means "a sum that is paid back." *WOHVA*, 176 Wn.2d at 234 (quoting *Nw. Motorcycle Ass'n*, 127 Wn. App. at 415). WPC has not presented any compelling reason to deviate from that definition, let alone established that the *WOHVA* holding was incorrect and harmful. *See, e.g., In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis requires a

showing that precedent is incorrect and harmful before being abandoned). The return to the tribes of a percentage of the fuel taxes they paid as part of the price of fuel is a refund within its most basic meaning.

B. The Legislature Specifically Authorized the State to Make Fuel Tax Refunds to Indian Tribes

WPC alternatively argues that even if the Legislature has the authority to enact refunds for reasons other than illegal or excessive collection in the first instance, which the Legislature failed to do so here. WPC Br. at 5 (citing RCW 82.36.280, .370, .285, .290, .300), n.4. In making this secondary argument, WPC fails to recognize the clear legislative intent reflected in RCW 82.36.450 and 82.36.310 to authorize refunds for fuel taxes paid by tribes and tribal retailers, and does not undertake any serious analysis of the authorizing statutes.

In the motor vehicle and special fuel tax laws' first iteration in 1995, the legislation was entitled "AN ACT Relating to *refunding* motor vehicle fuel and special fuel taxes to Indian tribes." Laws of 1995, ch. 320 (codified in former RCW 82.36.450 and 82.38.310) (emphasis added). At that time, the Legislature authorized the State to enter into agreements with tribes for the refund of fuel taxes paid by the tribes "upon terms substantially the same as those in the consent decree" regarding the Confederated Tribes of the Colville Reservation, which specially provided

for the refund of fuel taxes paid by tribal retailers and members. *See* Laws of 1995, ch. 320, §§ 2-3; CP at 1030-49.

When the laws were updated in 2007, the Legislature did nothing to signal withdrawal of its approval to provide refunds of fuel taxes to Indian tribes. To the contrary, the Legislature specifically approved the existing agreements, all of which provided for the refund of fuel taxes to tribes, and further authorized the State to enter into new agreements using the same or a similar methodology as that contained in the presently existing agreements. RCW 82.36.450(2); RCW 82.38.310(2); CP at 908-1028. WPC fails to offer any argument, other than the fact that that the statutes do not contain the word "refund," as to why these statutes are not sufficient authorization for the State to negotiate and pay fuel tax refunds to the tribes. In light of the fact that all of the existing fuel tax agreements existing at the time of the 2007 legislation specifically provided a methodology for fuel tax refunds, the Legislature's intent in authorizing future fuel tax refunds is unmistakable.

WPC also fails to explain what the Legislature could have possibly meant in dictating constraints on the tribes' use of "fuel tax proceeds" if the law did not contemplate a refund of fuel tax moneys to the tribes. *See* RCW 82.36.450(3)(b); RCW 82.38.310(3)(b). The only place that fuel tax proceeds can come from is from the Motor Vehicle Fund. The Legislature

undoubtedly authorized the State to negotiate and pay fuel tax refunds to the tribes.

C. Whether It Needed To or Not, the Legislature Appropriated Funds for Fuel Tax Refunds

Finally, WPC tries, as AUTO did in its brief, to resurrect an unpreserved argument based on the general constitutional requirement that expenditures from the treasury of this State must be in furtherance of an appropriation by law. WPC Br. at 12 (citing Wash. Const. Art. VIII § 4).[6] AUTO did not make this argument in the summary judgment proceedings below, and the Court should not consider it under RAP 2.5.

Regardless of whether the issue is properly before the Court, WPC and AUTO fail to recognize that the Legislature *has* made express appropriations for motor vehicle fuel tax refunds in every biennial budget since at least 2001, which include the refunds to the tribes. *See* Laws of 2001, ch. 14, § 403; Laws of 2003, ch. 360, §§ 405, 1404; Laws of 2004, ch. 229, § 405; Laws of 2005, ch. 313, §§ 405, 804; Laws of 2006, ch. 370, § 405; Laws of 2007, ch. 518, §§ 405, 406, 1004; Laws of 2008, ch. 121, §§ 405, 406; Laws of 2009, ch. 470 §§ 405, 406; Laws of 2010, ch. 247, §§ 405, 406; Laws of 2011, ch. 367, §§ 405, 406; Laws of 2012, ch. 86, §§ 405, 406; Laws of 2013, ch. 306, §§ 405, 406, 1104, 1105; Laws of

[6] That provision provides in part "No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law. . . ." Wash. Const. Art. VIII § 4.

2014, ch. 222 §§ 208, 405, 406.[7] Accordingly, regardless of its merit, the significant portion of WPC's brief devoted to explaining why appropriation is required is superfluous.

III. CONCLUSION

WPC fails to offer a compelling reason for this Court to depart from the plain meaning of "refund" for purposes of Article II, Section 40 of the Washington Constitution as a "sum that is paid back." Moreover, the Legislature specifically authorized the refunds to the tribes beginning in 1995 and continuing to this day. This Court should affirm summary judgment and dismissal of AUTO's challenge to the State's fuel tax agreements with Indian tribes.

RESPECTFULLY SUBMITTED this 24th day of April, 2015.

ROBERT W. FERGUSON
Attorney General

RENE D. TOMISSER WSBA #17509
Senior Counsel
ALICIA O. YOUNG, WSBA #35553
Assistant Attorney General
Attorneys for Respondents

[7] As reflected in the most recent transportation revenue forecast and in earlier forecasts, the Legislature accounts for tribal refunds as part of the refunds and transfers from gross gasoline and special fuel taxes. *See, e.g.*, Transportation Revenue Forecast Council, February 2015 Transportation Economic and Revenue Forecasts, Volume II: Detailed Forecast Tables (Feb. 20, 2014), at II-8, 10, 12, 14, and 16 (noting tribal refunds are accounted) *available at* http://www.ofm.wa.gov/budget/info/Feb14transpovol2.pdf (last visited Apr. 8, 2015).

PROOF OF SERVICE

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Via first-class U.S. Mail and electronic mail.

Harry J.F. Korrell
Joseph P. Hoag
Davis Wright Tremaine, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
harrykorrell@dwt.com
josephhoag@dwt.com

Paul J. Lawrence
Matthew J. Segal
Pacifica Law Group, LLP
1191 Second Avenue, Suite 2100
Seattle WA 98101
paul.lawrence@pacificalawgroup.com
matthew.segal@pacificalawgroup.com

Philip Talmadge
Thomas Fitzpatrick
Talmadge/Fitzpatrick'/Tribe, PLLC
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
phil@tal-fitzlaw.com
tom@tal-fitzlaw.com
matt@tal-fitzlaw.com

Cory J. Albright
Kanji & Katzen, PLLC
401 Second Ave. S., Suite 700
Seattle, WA 98104
calbright@kanjikatzen.com

Via first-class U.S. Mail

Scott Crowell
Crowell Law Offices-
Tribal Advocacy Group
1487 W. State Route 89A, Ste. 8
Sedona, AZ 86336

Bruce Didesch
Didesch & Associates
P.O. Box 1076
Mead, WA 99021

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

DATED this 24 day of April, 2015, at Tumwater, WA.

Debora A. Gross

DEBORA A. GROSS
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Gross, Debora (ATG)
Cc: Tomisser, Rene (ATG); Young, Alicia (ATG)
Subject: RE: 89734-4; Automotive United Trades Organization v. State of Washington

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From: Gross, Debora (ATG) [mailto:DeboraG1@ATG.WA.GOV]
Sent: Friday, April 24, 2015 1:26 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Tomisser, Rene (ATG); Young, Alicia (ATG)
Subject: 89734-4; Automotive United Trades Organization v. State of Washington

Good afternoon,

Attached for e-filing is the State's Answer to Briefs of Amicus Curiae in the above matter. Thank you for your assistance in this matter.

Deb Gross

Debora A. Gross
Assistant to Division Chief Pam Anderson
Legal Assistant 3 / Office of the Attorney General
Torts Division / PO Box 40126
Olympia, WA 98504/ 360.586.6427