FILED August 1, 2014 02:47 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

THE CITY OF SEATTLE, a municipal corporation of the State of Washington,
acting by and through its City Light Department,
Plaintiff-Appellant,
v.
DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court
4946, 4957

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,
WASHINGTON, a municipal corporation of the State of Washington,
Plaintiff-Appellant,
v.
DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court
4959

CITY OF TACOMA, , a municipal corporation of the State of Washington,
acting by and through its Department of Public Utilities, Light Division, dba
Tacoma Power,
Plaintiff-Appellant,
v.
DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court
4958

S061813

PLAINTIFFS-APPELLANTS' CORRECTED OPENING BRIEF AND EXCERPT OF RECORD

(*Continued on Inside Cover*) July 2014

Appeal from the October 15, 2013, Judgment from the Regular Division of the Oregon Tax Court

The Honorable Henry C. Breithaupt

Gregory A. Chaimov, OSB #822180
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2400
Portland, Oregon 97201
Telephone: 503-778-5328
Email: gregorychaimov@dwt.com

Attorneys for Plaintiffs-Appellants

Anna Marie Joyce, OSB #013112
Department of Justice
1162 Court Street, NE
Salem, Oregon 97301-4096
Email: anna.joyce@doj.state.or.us

Melisse S. Cunningham, OSB 972457
DOJ GC Tax & Finance
1162 Court St NE
Salem OR 97301
Email: melisse.s.cunningham@doj.state.or.us

Denise G. Fjordbeck, OSB #822578
DOJ Appellate Division
1162 Court St NE
Salem OR 97301
Email: denise.fjordbeck@doj.state.or.us

Attorneys for Defendant-Respondent Department of Revenue, State of Oregon

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Legislative History

Constitutional Provisions

Other Authorities

Index of Appendices

STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

This is an appeal from a judgment of the Oregon Tax Court.

Plaintiffs-Appellants ("Municipalities") challenge the decisions of Defendant-Respondent ("Department") to tax the Municipalities' interests in electricity transmission service agreements with the Bonneville Power Administration ("BPA"). The Tax Court held that (1) the Municipalities' interests in the transmission service agreements constitute property subject to tax, and (2) the Legislative Assembly validly adopted a law that repealed the Municipalities' exemption from taxation.[1]

The Municipalities seek reversal of the judgment and remand to the Tax Court with instructions to enter summary judgment determining that the Municipalities do not owe property taxes on the transmission service agreements.

B. Nature of the Judgment

The Tax Court decided the action on cross-motions for summary judgment. ER-20, 33. The judgment dismissed the Municipalities' appeals and upheld the Department's assessments. ER-40.

C. Jurisdiction

This Court has jurisdiction over this appeal by virtue of ORS 305.445.

---

[1] The Municipalities challenged the Department's assessments on other grounds, including based on the Commerce Clause, but those other grounds are not raised in this appeal.

D. Timeliness of Appeal

The judgment was entered on October 15, 2013. The Notice of Appeal was filed and served on November 14, 2013, within 30 days of the date of entry, as required by ORS 19.255.

E. Questions Presented on Appeal

1. Does a municipality's interest in a power transmission service agreement constitute an interest in property subject to tax under ORS 307.060?

2. Is a bill that increases general tax revenues by repealing a tax exemption a bill "for raising revenue" within the meaning of Article IV, section 18 of the Oregon Constitution ("section 18")?

3. Does the House of Representatives' amendment of a Senate Bill to raise revenue satisfy the requirement of section 18 that bills for raising revenue originate in the House of Representatives?

F. Summary of Arguments

A decade and a half ago, in *Power Resources Cooperative v. Depart. of Rev.*, 330 Or 24, 996 P2d 969 (2000) ("*Power Resources*"), this Court decided that an interest in a particular electricity transmission service agreement between BPA and an Oregon electric utility constituted a property interest taxable under ORS 307.060. This case involves the same form of agreement; the result, however, should be different. This Court decided *Power Resources* on incomplete and inaccurate stipulated facts and, thus, the decision should be reconsidered. Based on the limited information provided by the parties in

Power Resources, this Court concluded that the electricity transmission service agreement gave the party contracting with the BPA sufficient control over the transmission assets to constitute a form of possessory interest and, thus, property subject to taxation. In fact, the agreement does not give the contracting party—here, the Municipalities—the ability to control any aspect of the transmission.

The issue of interests in transmission service agreements would not be again before this Court if the Legislative Assembly had not repealed a law that had provided the Municipalities with the same exemption from taxation granted to Oregon municipalities. The bill that repealed the tax exemption for out-of-state municipalities, 2009 Senate Bill 495, was, however, adopted through an unconstitutional process. SB 495 was a bill "for raising revenue" that, in violation of section 18, originated in the Senate. Contrary to the Tax Court's interpretation of section 18, a bill does not "originate" in the House of Representatives by virtue of the House of Representative's amending a Senate Bill to add a revenue-raising provision.

G. Summary of Facts

The principal facts of the case involve the text and context of the electricity transmission service agreements into which the Municipalities entered with the BPA. Because the terms of the agreements form the basis for the Municipalities' arguments on the absence of a taxable property interest, the terms of the agreements are discussed in the Argument in relation to the legal standard that applies to the agreements. The context of the agreements, however, is provided here.

BPA, Portland General Electric Corporation ("PGE"), and PacifiCorp own facilities and equipment for the transmission of electricity between points in the Pacific Northwest and the Oregon-California border.[2] This transmission system is known as the Pacific Northwest AC Intertie ("Intertie"). Pursuant to an agreement among the three owners, BPA has responsibility for transmitting electric power across the Intertie on behalf of itself and the two nonfederal owners. BPA's portion of the Intertie is part of the federal Columbia River Transmission System ("Federal System"), governed by the Columbia River Transmission System Act, 16 USC §§ 838, *et seq*. ("Transmission Act"). Rates for service provided by BPA to the Municipalities and BPA's many other customers over the Intertie are regulated by the Federal Energy Regulatory Commission ("FERC").[3]

[2] PGE and PacifiCorp are regulated, investor-owned utilities in Oregon and are subject to assessment under ORS 308.505 through 308.665 on the facilities and equipment comprising the Oregon portion of the Pacific Intertie used by them in their utility business. Stipulated Facts, ¶ 4; ER-11. As a federal agency within the United States Department of Energy, BPA is exempt from Oregon property taxation. ORS 307.040; *United States v. County of Fresno*, 429 US 452, 459, 97 S Ct 699, 50 L Ed 2d 683 (1977).

[3] The facts discussed in this paragraph were alleged in the Second Amended Complaint ("SAC"), ¶ 6, ER-4, and admitted in the Answer, ¶ 8; ER-8.

In the Energy and Water Development Appropriations Act of 1984, 98 Stat 360, Congress authorized the Secretary of Energy to participate in constructing an upgrade of the Intertie and to "accept funds contributed by non-Federal entities for that purpose." 16 USC § 837g-1. In the early 1990s, BPA, PGE, PacifiCorp, and a number of California utilities agreed to construct new facilities to increase the electrical capacity of the Intertie and transmission capacity in California. Stipulated Facts, ¶ 5; ER-11. BPA, PGE, and PacifiCorp added new components to their own transmission systems, thereby increasing the Intertie's capacity. Stipulated Facts, ¶ 5; ER-11.

After construction of the improvements, the total capacity of the Intertie to transmit power ("Transfer Capacity") was approximately 4,800 megawatts ("MW"). Stipulated Facts, ¶ 5; ER-11. Of that 4,800 MW, BPA's share is 3,450 MW, PGE's share is 950 MW, and PacifiCorp's share is 400 MW. Stipulated Facts, ¶ 5; ER-11. BPA determined that BPA had 725 MW of Transfer Capacity surplus to its projected needs. SAC, ¶ 10, ER-5; admitted in Answer, ¶ 10, ER-8.

The Transmission Act, 16 USC §§ 838, *et seq.*, requires BPA to make surplus transmission capacity available, in the form of regulated transmission services, to nonfederal utilities in the Pacific Northwest, such as the Municipalities. 16 USC § 838d. BPA complies with this statutory directive by transmitting nonfederal power pursuant to "wheeling contracts" with requesting nonfederal utilities. The most common method by which BPA charges for this service is through transmission rates that are based on a customer's daily, monthly, or annual reservation of service on the BPA transmission system. This practice is standard throughout the utility industry and governed by FERC regulations.[4]

Congress hoped to defray BPA's cost of improving the Intertie by imposing on customers a new form of transmission rates. The Municipalities and other utilities seeking transmission service on the expanded Intertie were required to enter into agreements that called upon customers to make up-front, lump-sum payments equal to the capital costs that the BPA would otherwise be required to bear in order to provide the service requested.[5] In other words, BPA provided customers who would receive service over the Pacific Intertie with agreements that called for the customers to contribute funds, before the service began, to defray BPA's capital costs.

The three Intertie agreements were effective as of September 27, 1994. Under Seattle's Intertie agreement, BPA would transmit up to 160 MW of power using Transfer Capacity deemed surplus by BPA under the Columbia River Transmission System Act. SAC, ¶ 14; admitted in Answer, ¶ 12. Under Snohomish PUD's Intertie agreement, BPA would transmit up to 42 MW of

[4] The facts discussed in this paragraph were alleged in SAC, ¶ 9, ER-5, and admitted in the Answer, ¶ 1, ER-7.

[5] The facts discussed in this paragraph were alleged in SAC, ¶ 10, ER-5 – 6, and admitted in the Answer, ¶ 10, ER-8.

power using Transfer Capacity deemed surplus by BPA. SAC, ¶ 15; admitted in Answer, ¶ 13. And under its Intertie agreement, Tacoma Power could wheel up to 41 MW of Transfer Capacity deemed surplus by BPA. SAC, ¶ 16; admitted in Answer, ¶ 14. These agreements, labeled by BPA as "Capacity Ownership Agreements," and referred to by the Tax Court as "COAs" and in this brief as Intertie agreements, embody the rights that the Department has taxed as property.[6]

The Tax Court summarized the remaining facts as follows:

> "Previously, Defendant (Department) sought to extend the holding of *Power Resources* to these taxpayers and collect from them property tax in respect of the property interest in Oregon that they possessed by reason of the COAs. *See PUD No. 1 of Snohomish County v. Dept. of Rev.*, 17 OTR 290 (2004). That litigation ended by reason of Oregon Laws 2005, chapter 832, a statute that exempted foreign municipal corporations from taxation in respect of COAs.[[7]]

---

[6] The Municipalities' agreements with BPA are too voluminous to include in the Excerpt of Record or Appendix, but are part of the record in the Tax Court.
[7] ORS 307.090 was amended to add a new subsection (3), which provided:

> "(3)(a) Notwithstanding ORS 308.505 to 308.665, the property described in paragraph (b) of this subsection is exempt from taxation if the owner of the property described in paragraph (b) of this subsection is a city or public entity of a state other than Oregon and the city or public entity does not own a fee title interest in any real property in Oregon.
>
> "(b) The property that is subject to exemption under paragraph (a) of this subsection is tangible or

> "The exemption accomplished under the 2005 legislation was again the subject of legislative consideration in 2009. In that year, Senate Bill 495 (SB 495) was introduced in the Oregon Senate. As introduced, the bill would have broadened the exemption established in 2005 so as to have it apply to electric cooperatives. *See* SB 495 A-Engrossed (2009). After passage in the Oregon Senate, SB 495 proceeded to the Oregon House of Representatives where it was subjected to a 'gut and stuff' procedure. The expanded exemption provisions were 'gutted' and in their place were 'stuffed' provisions repealing the exemptions adopted in 2005. *See* SB 495 B-engrossed (2009). As so altered, the bill was passed by the Oregon House of Representatives and returned to the Senate, which concurred with the changes made in the House and passed the bill. SB 495, as amended by the House and passed by both legislative chambers was then signed by the Governor. *See* Or Laws 2009, ch 804." ER-20 - 21.

ORS 307.090, in its current form, provides an exemption from property taxes for property "used or intended for corporate purposes" of Oregon municipalities. Now that Oregon Laws 2005, chapter 832, has been repealed, however, no similar exemption is provided for the Municipalities.

ASSIGNMENT OF ERROR

The Tax Court erred by granting the Department's motions for summary judgment and denying the Municipalities' motions for summary judgment, then

---

> intangible property, property rights or property interests in or related to the Pacific Northwest AC Intertie, as referenced in a written capacity ownership agreement executed before November 4, 2005, between the United States Department of Energy and the city or public entity described in paragraph (a) of this subsection."

entering a Judgment that upheld the Department's assessments of the Municipalities.

A. Preservation of Error

In their Second Amended Complaint, the Municipalities challenged the Department's taxation of their interests in transmission service agreements and prayed for a judgment that declared: "2009 Senate Bill 495 is void because the Legislative Assembly adopted the law in violation of Article VI, section 18, of the Oregon Constitution," and the Municipalities' "rights to receive transmission service over the Intertie are not subject to property taxation under Oregon law."

On July 20, 2010, the Municipalities filed their Motion for Summary Judgment, asking the Tax Court to enter summary judgment for the Municipalities on, among other counts, the count of the Second Amended Complaint that alleged that the Legislative Assembly did not adopt SB 495 through valid procedures. ER-9.[8]

On August 22, 2010, the Department filed its Cross-Motion for Partial Summary Judgment, asking the Tax Court to enter judgment for the Department on, among other counts, the count of the Second Amended Complaint that alleged that the Legislative Assembly did not adopt SB 495 through valid procedures.

[8] The motion addressed other counts, but the other counts are not the subject of this appeal.

On December 27, 2011, the Tax Court entered an Order that granted the Department's Cross-Motion for Summary Judgment and denied the Municipalities' Motion for Summary Judgment. ER-19.[9]

On September 14, 2012, the Municipalities filed their Second Motion for Summary Judgment, asking the Tax Court to determine that the Municipalities' "rights as customers to receive transmission service from BPA over the Intertie do not constitute taxable 'property' in the state of Oregon." ER-28.[10]

On October 18, 2012, the Department filed its Second Cross-Motion for Summary Judgment, asking the Tax Court to enter judgment for the Department on the Municipalities' contention that their interests in the transmission service agreements do not constitute taxable property. ER-29.

On June 27, 2013, the Municipalities voluntarily dismissed the counts in the Second Amended Complaint that were not decided by the Tax Court's Order dated December 27, 2011, or the subject of the then-pending second motions. ER-31.

In an Order Granting Defendant's Cross-Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment dated September 13, 2013, the Tax Court granted the Department's Second Cross-Motion for

---

[9] The order also denied both motions for summary on one count because of a disputed issue of fact, but that count is not an issue on appeal.

[10] The motion addressed an additional count, but the other count is not the subject of this appeal.

Summary Judgment and denied the Municipalities' Second Motion for Summary Judgment. ER-33.

On October 15, 2013, the Tax Court entered a Judgment that incorporated the rulings in orders on summary judgment:

> "Pursuant to the court's Order, entered December 27, 2011, the court's Order Granting Defendant's Cross-Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, entered September 11, 2013, and plaintiffs' Notice of Voluntary Dismissal, filed June 27, 2013, plaintiffs' complaints in TC 4946 (Control), 4957, 4958 and 4959 are dismissed in their entirety and the property tax assessments issued to plaintiffs for tax year 2010-11 are upheld; * * *" ER-42.

B. Standard of Review

Because this matter is before this Court "on a grant of summary judgment, [this Court] must determine whether, as the [tax] court concluded, there were no genuine issues of material fact and [the Department] was entitled to judgment as a matter of law[,]" or, conversely, whether the Municipalities were entitled to judgment as a matter of law. *Synectic Ventures I, LLC v. EVI Corp.*, 353 Or 62, 70, 294 P3d 478 (2012). Because "[t]his appeal presents a question of law concerning the interpretation and application of a statutory provision to undisputed facts[,] this Court review[s the Tax Court's judgment] *de novo*." *King Estate Winery, Inc. v. Depart. of Rev.*, 329 Or 414, 417, 988 P2d 369 (1999) (citing ORS 305.445). The same standard of review applies to the interpretation and application of constitutional provisions. *Ragsdale v. Depart. of Rev.*, 321 Or 216, 218, 895 P2d 1348 (1995).

ARGUMENT

Because of this Court's "first things first" approach to review, the Municipalities present first whether the Tax Court "committed statutory error," then address the constitutional question. *State v. Algeo*, 354 Or 236, 243, 311 P3d 865 (2013).

A. The Municipalities' Agreements with BPA Do Not Give Rise to an Interest Sufficient for the Department to Assess Property Taxes

The Municipalities' rights as customers to receive transmission service from BPA over the Intertie do not constitute or create a possessory interest in the capacity of, or the facilities and equipment comprising, the Intertie under ORS 307.060 or ORS 308.505 – 308.515. The Municipalities do not "hold," "use," or have definable possessory interests in the Intertie. The Tax Court, however, disagreed, granting judgment to the Department because the Tax Court considered itself to be bound by this Court's decision in *Power Resources*, which addressed the same kind of agreements that are at issue in this case.[11] This Court is not so constrained. This Court should find that *Power*

[11] Given the Tax Court's determination that *Power Resources* controlled the question whether the Municipalities had taxable property interests, the Tax Court did not reach an alternative argument advanced by the Department: that under *Pacificorp Power Marketing v. Dept of Rev*, 340 Or 204, 131 P3d 725 (2006) ("*PPM*"), the Municipalities retain sufficient control and are the users of their shares in the Intertie, rendering the property subject to central assessment

Resources was wrongly decided, overrule the decision, and hold that the Municipalities hold no property in Oregon subject to taxation.

B. The *Power Resources* Decision

Although this Court "does not overrule its prior decisions lightly," *Purdy v. Deer and Company*, __ Or __, Slip op at 22 (April 17, 2014), this Court has recognized that its obligation, when interpreting constitutional and statutory provisions and when formulating the common law, is to reach what we determine to be the correct result in each case." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011). "If a party can demonstrate that we failed in that obligation and erred in deciding a case, because we were not presented with an important argument or failed to apply our usual framework for decision or adequately analyze the controlling issue, we are willing to reconsider the earlier case." *Farmers Ins.*, 350 Or at 698 (citing *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000)). This Court has not identified an "exhaustive" list of factors to consider in determining whether a particular precedent should be abandoned, but has looked to the age of the decision at issue and the extent to which the decision has been relied upon in other cases. *Mowry*, 350 Or at 693 n3 (citing *State v. Ciancanelli*, 339 Or 282, 290-91, 121 P3d 613 (2005), in which precedent relied upon was less than 10 years old and had been little relied upon). This Court also recognizes that the "degree" of the

---

and taxation. For the reasons set forth below at page 25, however, *PPM* does not apply.

error in the earlier case and the extent of any resulting injustice or harm are factors in determining whether to reexamine earlier interpretations of statutes. 350 Or at 693 n3 (citing *Severy/Wilson v. Board of Parole*, 349 Or 461, 474, 245 P3d 119 (2010)).

These considerations militate strongly in favor of reconsidering *Power Resources*. The decision is only 14 years old and has been cited by Oregon courts only a handful of times—most prominently in the Tax Court proceedings below. As discussed below at page 19, the failure of the parties in *Power Resources* to present a complete and accurate factual record, which, in turn, failed to put the issue of statutory construction in the proper context, led this Court to misapply ORS 307.060 to Intertie agreements and find the existence of a "property" interest where none exists. The Municipalities, the owners of none of the physical property associated with the Intertie, have nevertheless been assessed hundreds of thousands of dollars in taxes that they should have no obligation to pay. *Power Resources* was incorrectly decided and should be overruled.

Because the Municipalities are asking this Court to revisit *Power Resources*, a review of that case's facts and reasoning is in order.

Like the Municipalities, Power Resources Cooperative ("PRC") entered into a transmission service agreement with the BPA. Under the agreement, PRC received 50 megawatts of transmission capacity for the physical life of the

Intertie in exchange for an advance lump sum payment and a promise to pay a proportionate share of the Intertie's operating, maintenance, and replacement expenses.

The principal issue in *Power Resources* was whether PRC "held" a proportionate share of the Intertie, for which PRC could be assessed and taxed pursuant to ORS 307.060.[12] In arguing that PRC did not hold a share of the Intertie, PRC relied primarily on *Sproul et al v. Gilbert et al*, 226 Or 392, 359 P2d 543 (1961). In *Sproul*, this Court had considered the taxation of grazing rights on United States Forest Service land. This Court compared grazing *permits* (under which ranchers had a nonexclusive right to graze their cattle within a designated grazing district) with grazing *leases* (under which ranchers had an exclusive right to graze their cattle on land that was not part of an official grazing district). This Court held that grazing leases were taxable under ORS 307.060, while suggesting that grazing permits were not. 226 Or at 400. This Court explained that ORS 307.060 applies only to *possessory* interests:

> "We believe that the statute was intended to apply where the person holding under the United States had an interest of such dignity that it could be regarded as tantamount to a present temporary ownership * * *. We construe the statute to include only interests which are capable of possession."

[12] ORS 307.040 exempts all property of the United States from taxation. However, ORS 307.060 provides that property of the United States "held by any person under a lease or other interest or estate less than a fee simple" is subject to assessment.

226 Or at 423-24. Based on this understanding of ORS 307.060, this Court concluded that grazing leases provide a sufficient possessory interest in the designated grazing land to implicate ORS 307.060; the lessee's use of a parcel was relatively exclusive and restrictions imposed on use were consistent with a leasehold arrangement. 226 Or at 420.[13]

PRC argued that, under *Sproul*, its interest in the Intertie was not taxable under ORS 307.060. PRC argued that its rights under its transmission service agreement were like those conferred by a grazing permit (as opposed to a possessory lease), for three reasons: (1) PRC's right to use the Intertie is shared by others; (2) PRC does not occupy physically or control any definable part of the Intertie; and (3) PRC's use of the Intertie is subject to stringent scheduling and advance notice provisions. *Power Resources*, 330 Or at 30. Because of these factors, PRC argued, all PRC has under the Capacity Ownership Agreement is "a prepaid, long-term transmission service agreement, not a possessory interest in the real and personal property that comprises the Intertie." 330 Or at 30.

This Court disagreed. It noted that, although *Sproul* held that ORS 307.060 applies only to "possessory" interests in property, this Court had observed in *Sproul* that the concept of possession can be a "flexible" one, and

---

[13] Grazing permittees, by way of contrast, held only a right to run cattle within a shared grazing district and, thus, lacked a sufficient possessory interest to trigger ORS 307.060. 226 Or at 397-420.

that the exclusivity of one's occupancy of property can be a "matter of degree." *Power Resources*, 330 Or at 30 (citing *Sproul*, 226 Or at 404-06). Relying on these concepts from *Sproul*, this Court then articulated two broad principles about property interests in the context of ORS 307.060:

> "(1) [A]lthough a 'possessory' interest always is marked by some degree of control and some degree of exclusivity, neither absolute control nor absolute exclusivity is required; and (2) the test for the existence of a possessory interest necessarily varies with the nature of the property at issue."

330 Or at 31.

Applying these "flexible" principles to PRC, this Court found that PRC "held" a taxable share of the Intertie for four reasons. First, this Court observed that "the particular type of right that taxpayer has in the Intertie, *i.e.*, to transmit electricity over it, is a right to use the Intertie for its only apparent beneficial use." 330 Or at 31.

Second, this Court held that, even though PRC must share the transmission capacity of the Intertie with others, PRC nevertheless had an exclusive right to a definable part—50 megawatts of transmission capacity—and had some degree of control over the capacity:

> "[E]ven if taxpayer does not have exclusive rights to the entire transmission capacity of the Intertie, it does have an exclusive right to a definable part, *viz.*, 50 MW. Moreover, taxpayer has a great deal of control over that 50 MW share. Taxpayer may choose to use the 50 MW in whatever manner it wishes, *i.e.*, it may choose to transmit its own electrical output, or it may,

> instead, 'wheel' electricity that is produced by others. Moreover, and even if taxpayer chooses not to use all its capacity share to transmit electricity, it retains a palpable right to the entire 50 MW: If BPA 'borrows' any capacity that taxpayer has failed to schedule at any given time, then it must reimburse taxpayer for such use. Finally, taxpayer's 50 MW share exists for the lifetime of the Intertie; it is not revocable; and it cannot be diminished, for example, by the addition of more capacity owners."

330 Or at 31.

Third, in response to PRC's argument that PRC's use of the Intertie is subject to various scheduling requirements, this Court stated that "those requirements appear to us to be precisely the kind of restrictions that joint owners or lessees of this kind of property would impose on themselves in the interest of orderly operation," and that "[s]uch restrictions are consistent with a possessory interest." 330 Or at 31-32.

Fourth, in response to PRC's argument that PRC does not possess any part of the property that makes up the Intertie—because the Capacity Ownership Agreement does not confer on PRC any exclusive right to occupy or control a spatially defined portion of the Intertie—this Court stated that although this argument "factually is accurate," it "misses the point." 330 Or at 32. Again applying a concept of "flexibility," this Court said that, given the kind of property involved in *Sproul*, relatively exclusive control over a defined spatial area would be a necessary element of possession. However, the notion of "possession," according to the Court, "varies with the property at issue":

> "The property involved in this case – an electric transmission grid – cannot physically be divided usefully among its owners. However, that limitation has not prevented taxpayer from investing in the expansion of the system, sharing the costs of its upkeep, and thereby obtaining an exclusive right to use and control the system to the extent necessary to permit transmission of 50 MW of electricity for taxpayer's own benefit. In this context, that is sufficient; taxpayer's 50 MW capacity ownership share in the Intertie is a possessory interest in that entity."

330 Or at 32.

C. *Power Resources* Was Incorrectly Decided

The overarching problem with *Power Resources* is that the decision was based on incomplete and inaccurate and, therefore, misleading stipulated facts, which, in turn, lead to reasoning that incorrectly found a possessory ownership interest in a relationship that is nothing more than the right to receive transmission services.

1. *Power Resources* Was Decided on Inadequate Stipulated Facts

The *Power Resources* case was presented to the Tax Court on a two-page set of stipulated facts in which the parties incorrectly stipulated that the Intertie Agreement "gives [PRC] the right to use a portion of the [Intertie]." *Power Resources Cooperative v. Department of Revenue*, 14 Or Tax 479, 480-81 (1998). That stipulation of use, which is not a fact in this case, ignores the nature of electrical transmission and misstates transmission rights under Intertie agreements. In effect, the parties stipulated to characterizations of terms of

Intertie agreements rather than relying on the terms of the agreements themselves. As Justice Landau explained, when on the Court of Appeals, contract terms trump characterizations of terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 101, 45 P3d 162 (2002) ("simply saying a contract is ambiguous does not make it so"; Landau, J., dissenting, joined by Linder and Kistler, JJ.).

The inadequate factual presentation made by the parties in *Power Resources* led this Court to make assumptions about the rights of parties to Intertie agreements that simply are not accurate. The more complete record in this case shows that this Court should not have assumed, as this Court did in *Power Resources*, that parties to Intertie agreements have "an exclusive right to a definable part" of the Intertie over which they have "a great deal of control"; that the purchased transmission capacity "cannot be diminished"; that the actual Intertie "cannot physically be divided usefully among its owners"; or that BPA reimburses contracting parties when it remarkets unused capacity shares (which the *Power Resources* Court cited as evidence that PRC retained a "palpable right" to its "definable part" of the Intertie). 330 Or at 31, 32.

In fact, the Municipalities' agreements do not provide for the exclusive use of Intertie improvements by the Municipalities or the right of Municipalities to "use" a "portion of the PNW AC Intertie facility" as had been stipulated in *Power Resources*. The Municipalities' agreements confer only "Scheduling

Rights": rights to add to the volume of electricity being transmitted on the BPA transmission grid and to withdraw that electricity from the grid. The core consideration provided by BPA under Intertie Agreements is stated in section 4(c): "Bonneville shall make deliveries of power or energy to the California-Oregon border or the John Day Substation, as appropriate, pursuant to schedules submitted in accordance with this section 4."

Further, contrary to this Court's assumption in *Power Resources,* BPA does not reimburse contracting parties when BPA remarkets unused capacity shares. This Court based its conclusion that PRC possessed "an exclusive right to a definable part" of the transmission capacity of the Intertie in large part on its observation that "if taxpayer chooses not to use all its capacity share to transmit electricity, it retains a palpable right to the entire 50 MW: If BPA 'borrows' any capacity that taxpayer has failed to schedule at any given time, then it must reimburse taxpayer for such use." 330 Or at 31. But as the record in this case establishes, that is not what happens:

> In the event Snohomish PUD does not utilize the 42 MW of capacity under its Third AC Intertie Agreement, BPA remarkets such capacity to third parties. <u>Any revenue BPA obtains as a result of such remarketing is not credited to Snohomish PUD</u>.

Declaration of Anna Miles, ¶ 11 (emphasis added).

Finally, the key assumptions in *Power Resources* that the capacity owner had "an exclusive right to a definable part" of the Intertie over which the taxpayer "has a great deal of control" were also wrong. The transmission system does not permit the Municipalities to control the path of electricity or the parts of the Intertie used in any particular transfer of electricity from one place to another. Moreover, BPA exercises operational and managerial control of the Intertie. BPA and the other Intertie owners control the Intertie's maintenance, upkeep and improvements.[14]

BPA schedules the Intertie's use and requires compliance with protocols to gain access to the system. These protocols are not, as this Court assumed in *Power Resources*, merely related to orderly operation, but are evidence that the Municipalities do not have any right to control the operation of the Intertie facilities. BPA and the other Intertie owners own or lease the property on which the facilities are located and prohibit occupation of the substations by others. The Intertie agreements confer no physical ownership of the Intertie to the capacity owners, and BPA retains control of all operations of the Intertie.

[14] In *Power Resources*, this Court also appears to have based its decision upon the belief that PRC shares the cost of upkeep of the Intertie as a factor indicating possession. 330 Or at 32. If so, that belief was mistaken. Operation and maintenance costs are part of every transmission rate charged by BPA, because, by law BPA, is obligated to charge cost-based rates to its customers. *See* 16 USC § 838g (2). *See also* Declaration of Robert W. Cromwell, ¶ 4; ER-14 - 15 (noting that principal difference between Plaintiff City of Seattle's Intertie agreement and the City's other transmission agreements with BPA is that these costs are paid up-front under the Intertie agreement, and are paid over time under its other BPA transmission agreements).

2. The Municipalities' Agreements are Merely Transmission Agreements

The record in this case, unlike the record in *Power Resources*, demonstrates that the Municipalities' agreements are transmission agreements and do not confer any possessory ownership interest—no matter how much "flexibility" one reads into ORS 307.060. The Municipalities' rights and responsibilities under Intertie agreements are not indicia of ownership or any other kind of possessory interest:

- Although the Intertie agreements are labeled "Capacity Ownership Agreements" for political reasons,[15] the agreements provide the Municipalities with transmission services no different from those specified in any BPA transmission agreement.[16]

- When a Municipality wishes to request service under its agreement, the Municipality must submit a request on the day before service, following the same scheduling procedures as any other transmission service customer of BPA.

---

[15] The Municipalities acknowledge that BPA's choice of label for the transmission agreements is infelicitous for the contention that the agreements do not provide an ownership (or any other) interest subject to taxation. This Court, however, has always looked past labels to the merits. *See, e.g., Niday v. GMAC Mortgage, LLC*, 353 Or 648, 664, 302 P3d 444 (2013) ("the fact that MERS was identified as the 'beneficiary' in the trust deed does not make it so").

[16] All bullet points come from the Declaration of Robert W. Cromwell, Jr. ¶¶ 3, 5. Although Mr. Crowell's testimony refers to the agreement by the City of Seattle, the other Municipalities agreements are the same. Declarations of Anna Miles and Travis Metcalfe.

- When capacity on the Intertie is restricted due to maintenance, BPA curtails service pro rata to the Municipalities, just as BPA curtails service pro rata to other transmission customers.

- Although the Municipalities possess rights to receive service as transmission customers, they do not control the availability of that service; BPA does.

- The Municipalities do not schedule or perform maintenance on the transmission lines and substations, nor do they exercise any operational control over the Intertie.

- When the Municipalities wish to have BPA transmit power from Washington to California or vice versa over the Intertie, the Municipalities only role is to request service from BPA and then make power available to BPA in Washington (or to be ready to receive power in Washington). BPA manages all transmission operations for delivery of that power, to or from the Municipalities' power resources in Washington, across the combined transmission systems of BPA, Portland General Electric Company, and PacifiCorp, to the Municipalities' California power providers or purchasers at the California-Oregon border.

These limitations are not consistent with any kind of "ownership" interest. They show, instead, that the Municipalities simply contract with BPA in Washington for transmission services. It is BPA—not the Municipalities—that holds and uses the physical facilities within Oregon. Just as the purchase of power from BPA does not give any of the Municipalities any ownership, usage, or control of the federal Columbia River hydroelectric dams comprising the BPA power system, merely purchasing transmission service from BPA does not give any of the Municipalities any such interest in the Intertie, which is owned, used, and controlled exclusively by its owners—BPA, Portland General Electric Company, and PacifiCorp.

D. *Pacificorp Power Marketing* Does Not Apply

The Department's alternative theory for taxing the Municipalities—as centrally assessed entities under *PPM*—does not apply. First, in *PPM*, the taxpayer had control of *all* of the output of the property in question—a power plant. 340 Or at 217. Although this Court noted that "absolute" control is not required for a taxpayer to have "used" property (340 Or at 217-18), the Municipalities' limited transmission rights under the Intertie agreements—even if characterized as "ownership"—fall far short of the level of control exercised by the taxpayer in *PPM*. The Municipalities, through their agreements, have the ability to ask BPA to transmit power equal to roughly five percent of the Intertie.

Second, in addition to contractual rights to all of the facility's output, the taxpayer in *PPM* had the contractual right to exercise operational control over the facility:

> "PPM's management contract with the city also allowed PPM to exercise control over the facility. Under the management agreement, PPM 'perform[ed] all administrative work of the facility,' including administering the power-purchase agreement on a day-to-day basis and developing an annual budget. The city paid PPM a management fee as well as a performance incentive bonus. Further, that contract was a 20-year renewable contract with the city to manage the facility. That contract granted PPM 'the nonexclusive right * * * to enter on the premises on which the Facility is located and to occupy and have free access to use the same for solely the purposes set forth in this Agreement.'"

340 Or at 217. By contrast, the Municipalities have *no* authority to exercise control over the facilities of the Bonneville Power Administration. Section 7(a) of the Capacity Ownership Agreement flatly states that "Bonneville is the operator of the PNW AC Intertie," and that Bonneville "shall operate, maintain, and manage Bonneville's PNW AC Intertie."

E. The Legislative Assembly Violated Article IV, Section 18 of the Oregon Constitution When Adopting SB 495

In contrast to the request to reconsider *Power Resources*, this appeal presents two questions of first impression under Article IV, section 18 ("section 18"):

1. Whether, under Oregon's current property tax system, a bill that repeals a tax exemption is a bill "for raising revenue"; and

2. Whether a Senate Bill that the House of Representatives has, by amendment, changed into a revenue-raising bill "originate[s]" in the House of Representatives.

The answer to the first question is yes; the answer to the second question is no. SB 495 was a bill "for raising revenue" that should have originated as a House Bill. Section 18 states:

> "Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives."

The Tax Court assumed without deciding that SB 495 was a bill "for raising revenue," ER-22, then decided that SB 495 satisfied "the substantive concerns of the Origination Clause" because "SB 495, although created in the Senate, had its entire cargo relating to raising revenue loaded on in the House." ER-22. The Tax Court, however, erred by elevating "concerns" underlying the adoption of section 18 over the *text* of section 18. To amend is not to "originate."

1. SB 495 Was a Bill "for Raising Revenue"

Determining whether a bill is "for raising revenue" requires a two-part analysis. First, to be a bill "for raising revenue," the bill must "collect[] or bring[] money into the treasury." *Bobo v. Kulongoski*, 338 Or 111, 122, 107 P3d 18 (2005).

The second step is to determine if the money brought into the treasury will support general government purposes or a program that specially benefits the persons from whom the government collects the money. If the money supports general government purposes, then the bill is "for raising revenue"; if the money is dedicated to "a specific purpose" that benefits the payers of the tax, then the bill is not "for raising revenue." *Bobo*, 338 Or at 122. The distinction is substantially the same as the distinction this Court recognized recently between a tax and a fee. *McCann v. Rosenblum*, ___ Or ___, slip op at 5–6 (April 24, 2014). A bill that imposes or increases fee, *i.e.*, a payment for a service that a person may choose to avoid, is not a bill for raising revenue. *Pacific Livestock Co. v. Cochran*, 73 Or 417, 426, 144 P 668 (1914) (fees for postal services); *Northern Counties Trust v. Sears*, 30 Or 388, 401, 41 P 931 (1895) (fees for service of summons).

The application of this test leads to the conclusion that SB 495 is a bill "for raising revenue." First, the Legislative Assembly listed SB 495 as one of the "revenue measures" passed, and estimated that the result of the bill would be the increase in property tax revenues of more than $1.2 million per biennium. Revenue Measures Passed by the 75th Legislative Assembly, p. 34 (LRO Aug 2009). The goal of the Association of Oregon Counties, the proponent of the amendments that turned SB 495 into a bill "for raising revenue," was to raise revenue:

> "According to the *2009-11 Tax Expenditure Report*, this property tax exemption will cost Oregon education and other public services $1.2 million in biennium 2009-11, and shift $200,000 of taxes to other taxpayers. It benefits only out-of-state business enterprises. * * * Now is not the time to ignore legitimate, lawful, and reasonable opportunities to provide revenues for badly needed public services."

Comments of Gil Riddell, House Committee on Revenue, Ex. Q, p. 1 (May 26, 2009).

Second, the Municipalities cannot avoid the tax by declining to make use of a government service. Third, there is no law that dedicates the taxes the Municipalities pay as a result of SB 495 to a program specially benefitting the Municipalities or any other taxpayer.

The Municipalities acknowledge that this Court has held, with some reservation, that a bill that repeals a property tax exemption was not a bill "for raising revenue" under section 18:

> "[I]t is not sufficiently clear that a law which merely declares that certain property heretofore exempt from taxation shall thereafter be subject to taxation is strictly a law for raising revenue. We do not feel warranted, therefore, as at present advised, in declaring the law unconstitutional on this ground."

Mumford v. Sewall, 11 Or 67, 71, 4 P 585 (1883) (upholding Senate Bill that repealed exemption from taxation for interests in mortgages).

Mumford, even if correct, is not valid today because of the fundamental change from the then levy-based property tax system to today's rate-based property tax system. Modern discussions of the decision show that a bill that repeals an exemption from taxation in a rate-based system is a bill "for raising revenue."

In the state's former levy-based system, a government determined its budget needs, then levied the amount of taxes needed to collect that finite amount: "Before Measure 50, local governments and voters set levies, and tax rates were the result of dividing levies by assessed value." A BRIEF HISTORY OF OREGON PROPERTY TAXATION, p. 3 (Or Dept Rev June 2009) ("Brief History"). Because the revenues collected were finite, the repeal of an exemption did not result in the payment of more money into the treasury. Repeal of an exemption merely redistributed tax burdens among taxpayers. As a result of more property being available on which to levy a finite amount of taxes, revenues stayed the same; the result of the repeal of the exemption was that some taxpayers paid more while others paid less. That is why the law at issue in *Mumford* is described only as "a law affecting or regulating the classification, collection or enforcement of taxes[,]" not a bill "for raising revenue." 26 Op Atty Gen 76, 77 (1953).

Under Measure 50, however, "permanent tax rates replaced most levies, making the permanent rates central to the property tax system." BRIEF HISTORY, p. 3. Under a rate-based system, revenues collected are not finite; repeal of an exemption increases revenues for the entire system, and the burden of taxation changes—increases—only for owners of newly-taxed properties. BRIEF HISTORY, pp. 3-4.

Because of this difference in systems, the logic of *Mumford* no longer holds:

> "At the time *Mumford* and *Dundee*[[17]] were decided, Oregon had a pure levy-based property tax system. Under a levy-based system, the repeal of an exemption would not raise any more revenue. Instead, the repeal would reduce the amount of property taxes paid by all property owners other than the owners of the formerly exempt property. Oregon's current property tax system is a rate-based system. See section 11, Article XI, Oregon Constitution. *The repeal of an exemption in a rate-based system would raise more revenue*."

Bill Drafting Manual, p. 15.2, n1 (Legis Counsel 2009) (emphasis added).

The Attorney General has leaned toward the same conclusion:

> "Although neither *Northern Counties Trust* nor *Mumford* expressly acknowledges the point, the validity of their conclusion that a bill repealing a property tax exemption is not a 'billing [*sic*] for raising revenue,' may depend upon the fact that, under the levy-based property tax system authorized by former Article XI, section 11, of the Oregon Constitution that existed at the times of those decisions, the repeal of an exemption did not increase the total amount of taxes that lawfully could be imposed. Rather, the repeal simply shifted taxes from

[17] In *Dundee Mortgage Trust Co. v. Parrish*, 24 F 197, 201 (D Or 1885), the federal court upheld the same law challenged in *Mumford*, explaining that the bill did not "rais[e] one cent of revenue[,]" and was, thus, not a bill "for raising revenue."

> those taxpayers who had not enjoyed the benefit of the exemption to those who had. *Under the current rate limitations of the Article XI, section 11, however, it is conceivable that a bill repealing an exemption could result in an increase in the total amount of taxes collected and, thus, constitute a bill for raising revenue*."

49 Op Atty Gen 77, 84 n4 (1998) (emphasis added). Repealing ORS 307.090(3) *did* "result in an increase in the total amount of taxes collected and, thus, constitute[s] a bill for raising revenue."

2. SB 495 Did Not "Originate" in the House of Representatives

SB 495 did not "originate" in the House of Representatives by virtue of the House of Representatives adding the revenue-raising language.

The Tax Court followed the New Hampshire Supreme Court's decision in *Baines v. New Hampshire Senate President*, 876 A2d 768 (2005), to reach a different and erroneous conclusion. ER-23. Although conceding the question was a "close call," 876 A2d at 782, the New Hampshire Supreme Court interpreted that state's Origination Clause to permit the adoption of a Senate Bill with revenue-raising provisions because the first vote on the bill with the revenue-raising provisions came in the House of Representatives. 876 A2d at 782. Like the New Hampshire Supreme Court, the Tax Court believed that the first *consideration* of revenue-raising provisions by the House of Representatives satisfied the Origination Clause: "all of the substantive concerns that lay behind the Origination Clause are satisfied * * * [because t]he principle and operative language as to extension of taxation was first proposed by the House." ER-23.

Oregon is not New Hampshire. Satisfying the spirit of a law is not enough; this Court requires adherence to language. *In re Lawrence*, 332 Or 502, 512, 31 P3d 1078 (2001) (rejecting claim that compliance with "spirit" rather than "letter" of rule was sufficient); *Dodge et al v. Davies et al*, 181 Or 13, 27, 179 P2d 735 (1947) ("departing from the letter in supposed adherence to the spirit, involves an assumption of jurisdiction easily abused"; quotations and citations omitted); *Bank of Columbia v. Portland*, 41 Or 1, 67 P 1112 (1902) ("it is idle to speculate as to the object of the enactment, and what would be a sufficient compliance with its spirit, rather than its letter").[18] Even if

[18] The language of section 18 is different from the New Hampshire equivalent, Part II, section 18 ("All money bills shall originate in the house of representatives; but the senate may propose, or concur with, amendments, as on other bills"), but the purpose of the sections appears to be the same. The New Hampshire Supreme Court agreed with this Court's statement that Origination Clauses reflect a "belief that the branch of government closest to the people will be more watchful and cautious in the imposition of taxes and thus should be the source of those bills." 876 A2d at 779 (quoting *Bobo*, 338 Or at 120 - 21).

Where this Court and the New Hampshire Supreme Court differ is in the methodology of interpretation of constitutional provisions and the degree of deference given to the legislative branch to determine that branch's adherence to constitutionally-imposed procedural requirements. First, unlike this Court, which focuses its interpretive methodology on the text of the provision, *State v. Mills*, 354 Or 350, 356, 312 P3d 515 (2013) ("the 'best evidence' of what the framers of a constitutional provision intended to mean is the wording of the provision itself"), the New Hampshire Supreme Court never considered the framers' intent when using the term "originate." The New Hampshire Supreme Court simply noted that there was "no definitive guidance as to the meaning of compliance with the spirit of section 18 were enough, the Tax Court erred by concluding that amendment of a bill satisfies the goal of political accountability that section 18 achieve. The processes for amendment and origination have different levels of transparency and, thus, accountability.

This Court says that "[i]n determining what [a 'bil[l] for raising revenue'] means, we consider [the phrase's] 'specific wording, the case law surrounding it, and the historical circumstances that led to its creation.'" *Bobo*, 338 Or at 119–20 (quoting *Priest v. Pearce*, 314 Or 411, 415–16 (1992)). The Tax Court did not perform this task—a key to the Court's error, because the "specific wording" of section 18 is key:

> "Bills may originate in either house, but may be amended, or rejected in the other; except that bills for raising revenue shall originate in the House of Representatives."

---

the word[,]" 876 A2d at 781, and did not attempt to discern the meaning of the term alone or in context.

Second, this Court does not defer to the Legislative Assembly in the determination of compliance with lawmaking procedures the constitution prescribes. *E.g., McIntire v. Forbes*, 322 Or 426, 446, 909 P2d 846 (1996) (bill void because Legislative Assembly did not follow constitutional requirements for making law). The New Hampshire Supreme Court, on the other hand, defers to the legislative branch's determination whether the legislative branch complied with requirements for lawmaking. Underlying the New Hampshire Supreme Court's decision was that court's belief that the New Hampshire House of Representatives would not have approved the Senate Bill if the House of Representatives "had * * * believed that [its origination] power had been usurped." 876 A2d at 782.

Section 18, by its terms, recognizes a distinction between "amend[ment]" and "originat[ion]." The framers referred to amendments in the first clause of section 18 and not in the second clause.

Amendment and origination are different actions with different procedures. "Amendments are instructions that direct how to make technical and substantive changes to a printed bill." Form and Style Manual for Legislative Measures, p. 75 (2012 - 13). Under the terms of section 18, it is a "bill"—not an "amend[ment]"—that must originate in the House of Representatives. If section 18 were to have the meaning that the Tax Court ascribes, then section 18 would have to have different or additional language permitting the House of Representatives to add revenue-raising provisions to a bill that originated in the Senate:

> "Bills may originate in either house, but may be amended, or rejected in the other; except that [*bills*] **provisions** for raising revenue shall originate or be added in the House of Representatives."

or

> "Bills may originate in either house, but may be amended, or rejected in the other; except that bills **or amendments** for raising revenue shall originate or be added in the House of Representatives."

Without such a change to section 18, the House of Representatives may not add revenue-raising provisions to a Senate Bill. *See State v. Conger*, 319 Or

484, 502, 878 P2d 1089 (1994) (framers' inclusion of a term in one provision and not in another was purposeful).

Second, the Legislative Assembly treats origination differently from amendment and in a manner that precludes the House of Representatives from adding revenue-raising provisions to a Senate Bill. The standing rules of both chambers employ a uniform system for measures that defines "House of Origin" as the "Chamber or house in which a measure originates. The house of origin is often referred to as the 'first house.'" Form and Style Manual for Legislative Measures, p. 158. If the chamber in which a *measure* originates is the "first house," then, as a matter of logic, a bill cannot originate through amendment in the second house. This point is reinforced by the definition of "Second House":

> "The chamber or house that receives for consideration a bill, concurrent resolution, joint resolution or joint memorial that was enacted or adopted by the members of *the measure's house of origin*."

Form and Style Manual for Legislative Measures, p. 161 (emphasis added).

Third, treating amendment as origination defeats the purpose of section 18. The framers' required revenue-raising bills "to have their origin in the lower branch of the legislature because it is the more numerous of the two bodies, and, being oftener renewed by elections, presumptively it more closely and directly represents the people." *Northern Counties Trust*, 30 Or at 401. As an integral part of that function, section 18 provides the means for electors to have the information to select the body that "more closely and directly represents the people":

> "[T]ax increases * * * must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. The Federalist No. 58 'defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue.'"

National Federation of Independent Business v. Sebelius, ___ US __, 132 S Ct 2566, 2655 (2012) (Scalia, J., dissenting).

Proposing a measure in the Legislative Assembly is a public act. The House of Representatives requires "[e]very measure introduced in the House [to] bear the name of the member * * * sponsoring the measure." House Rule 12.10 (1) (2009). Thus, any member who proposes a measure to increase taxes announces the proposal to electors. On the other hand, a member's proposing an amendment to a measure can be a confidential act:

> "Amendments, which can be used to change legislation wholesale, do not list lawmakers' names * * *.
>
> "The lack of transparency makes it difficult for voters to learn more about proposed legislation and to track the performance of lawmakers, some legislators and political observers say. The process can even result in a lawmaker being listed as the sponsor of a bill he or she does not support."

Transparency advocates push Oregon lawmakers to put their names on proposed bills, amendments, http://www.oregonlive.com/politics/index.ssf/2013/07/transparency_advocates_push_or.html (July 15, 2013).

Treating amendment as origination, as the Tax Court did, thus denies electors information to make use of the electoral accountability section 18 fosters.

Finally, for guidance in the interpretation of section 18, this Court looks to the federal courts' interpretation of the section's federal predecessor. *Bobo*, 338 Or 121, n11 ("the court has recognized that [the] history [of the federal Origination Clause] also informs the meaning of Article IV, section 18."); *Dale v. Kulongoski*, 322 Or 240, 243, 905 P2d 844 (1995) (citing to federal case law for meaning of "raising revenue"). Although federal cases are few, those cases interpret Article I, section 7 of the United States Constitution not to permit the House of Representatives to add revenue-raising provisions to a Senate Bill. *Hubbard v. Lowe*, 226 F 135, 138 (SDNY 1915), *appeal dism'd*, 242 US 654 (1916) (invalidating Act in which "the House struck out everything after the enacting clause and substituted the act" into the Senate Bill).

///

///

///

CONCLUSION

This Court should reverse the judgment of the Tax Court and remand the case for entry of judgment for the Municipalities.

Dated this 1st day of August, 2014.

DAVIS WRIGHT TREMAINE LLP

By: /s/ Gregory A. Chaimov
Gregory A. Chaimov, OSB # 822180
John A. Cameron, Jr., OSB # 920371
Email: gregorychaimov@dwt.com
Email: johncameron@dwtcom
Telephone: 503-241-2300
Facsimile: 503-778-5299

THE CITY OF SEATTLE

By: /s/ GREGORY C. NARVER
Gregory C. Narver, Assistant City Attorney
600 – 4th Avenue, 4th Floor
PO Box 94769
Seattle, WA 98124-4769
Telephone: 206-684-8200
Facsimile: 206-684-8284
E-Mail: gregory.narver@seattle.gov
Attorneys for Plaintiff The City of Seattle

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,394 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Gregory A. Chaimov

Gregory A. Chaimov, OSB #822180
gregorychaimov@dwt.com
Telephone: 503-778-5328
Facsimile: 503-778-5299

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on August 1, 2014, I filed the foregoing **PLAINTIFFS-APPELLANTS' AMENDED OPENING BRIEF AND EXCERPT OF RECORD AND BRIEF ON THE MERITS** with the State Court Administrator by using the court's electronic filing system.

I further certify that, on August 1, 2014, I directed **PLAINTIFFS-APPELLANT'S AMENDED OPENING BRIEF AND EXCERPT OF RECORD** to be served upon Defendant-Respondent's attorneys, as listed below, by using the Court's electronic filing system:

Anna Marie Joyce
Department of Justice
1162 Court Street, NE
Salem, Oregon 97301-4096
Email: anna.joyce@doj.state.or.us

Denise G. Fjordbeck
DOJ Appellate Division
1162 Court St NE
Salem OR 97301
Email:
denise.fjordbeck@doj.state.or.us

Attorneys for Defendant-Respondent Department of Revenue, State of Oregon

Melisse S. Cunningham
DOJ GC Tax & Finance
1162 Court St NE
Salem OR 97301
Email:
melisse.s.cunningham@doj.state.or.us

DAVIS WRIGHT TREMAINE LLP

By: /s/ Gregory A. Chaimov
Gregory A. Chaimov, OSB #822180
gregorychaimov@dwt.com
Telephone: 503-778-5328
Facsimile: 503-778-5299

Of Attorneys for Plaintiffs-Appellants