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Supreme Court of Texas.
TGS-NOPEC Geophysical Company d/b/a TGS-NOPEC Corporation, Petitioner,
v.
Susan Combs, Successor-in-Interest to Carole Keeton Strayhorn, Comptroller of Public Accounts and Gregg Abbott, Attorney General of Texas, Respondents.
No. 08-1056.

April 15, 2010.

Appearances:

James T. McBride, Jackson Walker L.L.P., Houston, TX, for petitioner: TGS-NOPEC Geophysical Company.

Thomas R. Phillips, Baker Botts L.L.P., Austin, TX, for amicus curiae Westerngeco LLC, in support of petitioner.

Kevin D. Van Oort, Office of the Texas Attorney General, Taxation Division, Austin, TX, for respondnets.

Before:

Chief Justice Wallace B. Jefferson, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett.

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JUSTICE HARRIET O'NEILL: The Chief Justice is not available today, but he will be sitting in both causes. Justice Guzman will not be sitting in the first cause nor will Justice Philips, I mean Justice Hecht, sorry. The Court's ready to hear oral argument in 08-1056, TGS-NOPEC v. Susan Combs.

MARSHAL: May it please the Court, Mr. McBride will present argument for the petition. Mr. Phillips will present argument for the Amicus. Petitioners reserved five minutes for rebuttal. Mr. McBride will present the first five minutes and will present the rebuttal.

ORAL ARGUMENT OF JAMES T. MCBRIDE ON BEHALF OF THE PETITIONER

ATTORNEY JAMES MC BRIDE: May it please this Honorable Court, the issue before this court is whether Texas law sources TGS' receipts from conveying seismic data to its customers to the place where the data is used or to the location of payor. The statute of issue here are sections 171.103 and 171.1032 of the tax code, which is tab one in your bench book. For a number of years, the comptroller agreed with TGS that the transfer of seismic data pursuant to a license agreement was properly sourced to the location of payor under the catch-all provision subsection 6 as other business done in the state. In 2002, the comptroller changed their mind and claimed that as of 1997, the applicable provision in subsection 4, which sources the Texas receipts from the use of a patent, copyright, trademark, franchise or license in this state. The Court of Appeals agreed and concluded that because TGS uses a license to convey seismic data to its customers, TGS' receipts must come from the usable license and should be sourced to the place where the license is used.

JUSTICE HARRIET O'NEILL: How does the comptroller treat receipts from the licensing of software?

ATTORNEY JAMES MC BRIDE: To the location of payor just like we used to be treated.

JUSTICE HARRIET O'NEILL: And that's not in the statute?

ATTORNEY JAMES MC BRIDE: No it's not.

JUSTICE HARRIET O'NEILL: That's not mentioned in the statute. So doesn't the mention of license then indicate that it's different from licensing of software?

ATTORNEY JAMES MC BRIDE: Yes. We characterize the license as an asset. It's a thing. It's something like an FCC license. You license somebody else to broadcast bandwidth. That's how the statute reads. It's pretty simple.

JUSTICE HARRIET O'NEILL: Isn't a copyright though an intangible as well?

ATTORNEY JAMES MC BRIDE: Yes, it is and you license copyrights and so when if I own a copyright and I license that copyright to somebody else and that person pays me money for the use of that copyright, then I receive receipts from the use of that intangible asset. In our case, we have data, seismic data, which is not listed in the five intangible assets.

JUSTICE DAVID M. MEDINA: I find it ironic that we're listening to this tax

case on tax day.

ATTORNEY JAMES MC BRIDE: I do too, Your Honor.

JUSTICE DAVID M. MEDINA: And on my mother's birthday, but is there an issue as to perhaps the discretion that the controller has in making this decision.

ATTORNEY JAMES MC BRIDE: Well, the comptroller does have some discretion, but and we do in some cases defer to the comptroller's interpretation, but if we look at their interpretation, it has to be reasonable and it can't conflict with the plain meaning of the statute and we contend that her rationale is unreasonable. And she actually has interpreted the statute with the rule and the rule says that the owner of a patent, copyright, trademark, franchise or license should be taxed if somebody else uses that license somewhere else. We are not an owner of a license. We're not an owner of any of those assets. We own data and we license that by method of conveyance of license and they're confusing the two.

JUSTICE DAVID M. MEDINA: You think perhaps the controller's interest in trying to maximize a tax base for the state of Texas has anything to do with this?

ATTORNEY JAMES MC BRIDE: I do.

JUSTICE DAVID M. MEDINA: And whether or not that goes into perhaps this question in making this decision.

ATTORNEY JAMES MC BRIDE: It does.

JUSTICE PHIL JOHNSON: So you could just call your lease instead of a license.

ATTORNEY JAMES MC BRIDE: Sure. It's been known as a license for many, many years and the industry likes the term. It's a standard contract. It gets modified over time, but it takes a lot to get those licenses modified.
JUSTICE PHIL JOHNSON: So why do you call it a license?

ATTORNEY JAMES MC BRIDE: Because of the industry.

JUSTICE PHIL JOHNSON: Why did you before call it a license at least?

ATTORNEY JAMES MC BRIDE: It's been and we've talked with the industry about that, about trying, because it's really just an agreement, but it's a limited agreement. We give them the right to use data. They can use it anywhere they want to, any place they want to. They just can't transfer it to somebody else.

JUSTICE DON R. WILLETT: So how are your customers different than the licensees of a patent?

ATTORNEY JAMES MC BRIDE: Well, our customers use data. The licensees of a patent use patents and that is listed in the statute. If data was listed

in the statute, we wouldn't be here. If it said other intangible assets like other states do, we would not here on that issue.

JUSTICE HARRIET O'NEILL: But it's a little bit confusing because you can patent a process and this is almost like licensing a process.

ATTORNEY JAMES MC BRIDE: Well it's licensing information. It's just information. It's just data. It's just what is under the ground.

JUSTICE HARRIET O'NEILL: Well, but, I mean, what a patent produces is a tangible item. You gather data and so therefore you're patenting, it's like a patent of a process or a data gathering mechanism isn't it?

ATTORNEY JAMES MC BRIDE: Not really. It's, the, you got to look at it from a taxpayer's standpoint and the taxpayer has data just like the taxpayer has a patent and the asset is the actual patent, which has everything underlying the patent, the process, everything like that. Just as much as a franchise does. A franchise has a bunch of intangible rights. It's actually an asset in and of itself and it's licensed to somebody else to use that franchise.

JUSTICE DALE WAINWRIGHT: Counsel, as I understand it, your view is that under 1711034, the license used there is not the licensing process that you're using. Give an example, of a license that is included under subsection 4, several examples.

ATTORNEY JAMES MC BRIDE: FCC license, airport date license, a sublicense of a patent, copyright or trademark. That would be sourced under the statute.

JUSTICE DALE WAINWRIGHT: And a clear, concise distinction in what at first glance seems like a somewhat metaphysical difference what your clear, concise distinction between the licenses you just gave an example of are under subsection 4 in yours. What's the rule you would draw.

ATTORNEY JAMES MC BRIDE: I'm sorry, I don't understand.

JUSTICE DALE WAINWRIGHT: As a clear test to distinguish the two.

ATTORNEY JAMES MC BRIDE: What does a taxpayer own? If the taxpayer owns one of those five assets, then it's taxed and they will receive income from the use of one of those assets, then they get taxed on that. My time is up so I will be happy to finish answering your line of question.

JUSTICE HARRIET O'NEILL: I think he's answered that particular question. Thank you, Counsel. We will hear from [inaudible].

ATTORNEY JAMES MC BRIDE: Thank you.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS PHILLIPS: May it please this Honorable Court. My client,

Westerngeco, is like TGS and NOPEC, an owner of seismic data, which it licenses to exploration and production companies for their use in finding petroleum underground, generally under water, but not always. The narrow question before this court is whether the receipts that TGS and Westerngeco get from selling that seismic data are receipts from the use of a license, are receipts from other business done in this state. I think the clearest way to see why the controller is wrong is to apply the usual statutory interpretation aids to the language of and see what happens if you come up with a ridiculous result. First, the other four intangibles that are specifically listed in the Texas statute, that is patents, copyrights, trademarks and franchises, may themselves be licensed. That is, they're either kept or not used at all or they're sold outright or they are licensed and so when you add the word license here, and then treat it as a mechanism or a method of conveyance as the controller wants to do, it makes the word patent, copyright, trademark and franchise surplusage and that violates Sultan v. Matthew, which says that you should treat like words in a series alike and it violates your rule against making words of a statute mere surplusage. You can just have the word license only in here and reach the same result as to any transfer or conveyance of four of those five or really five of those five even with a license.

JUSTICE HARRIET O'NEILL: Well what about the argument that the legislature in fact intended that result by amending the statute.

ATTORNEY THOMAS PHILLIPS: The legislature changed the statute in 1997 to make it consistent with a rule the comptroller promulgated back in 1998, 1988. The comptroller. Well let me go backwards a little bit. Prior to 1959, everything was sourced to the location of payor. Then, the legislature amended the statute and said that royalties from patents and copyrights would be sourced to their place of use. In 1988, the comptroller passed a rule, the successor of which is still around and the history of this is in tab 3 of your bench book saying that receipts of the owner for the use of trademarks, franchises and licenses are allocated to the location where they're used. Then in 1995, the legislature had another rule that said receipts from lawsuits, recoveries and lawsuits should be sourced to the location of use and there was a challenge to that in Pennzoil case and a Travis County District Court that rule was struck down and the court said hey, this is not a patent or a copyright. So the legislature, the comptroller at that point repealed not only that rule, but repealed this rule under the because it couldn't survive under the rationale and it's admitted in the Court of Appeals' opinion and in the comptroller and her brief on the merits at page 6 that the comptroller's office then went to the legislature and said enact our language so the legislature's addition in 1997 of this, of these three new words, trademarks, franchises and licenses was to merely make the law consistent with the practice that the comptroller had had for nearly a decade and the practice that.

JUSTICE NATHAN L. HECHT: But the Pennzoil case involved settlement proceeds and that was.

ATTORNEY THOMAS PHILLIPS: It did, but it was another section of that statute and the rationale of the Pennzoil case made this section the comptroller thought that made this part of, well at any rate, she repealed

the part of her rule.

JUSTICE HARRIET O'NEILL: But in this case, the language is a little more specific. She had used settlement agreement there to be swept into another piece of the statute. Here, license has been actually put into the statute.

ATTORNEY THOMAS PHILLIPS: Neither one of those were in the statute. Neither settlement agreements nor licenses were in the statute itself at the time of the Pennzoil case. Pennzoil case, but both of them were in comptroller rules. The Pennzoil case involved a different rule than this one. It involved a rule about settlement proceeds. When the Pennzoil case struck that down, the comptroller felt that the reasoning the court used made that holding binding on this rule as well. So both of them were repealed. Then the comptroller went to the legislature and this part, at least, was added at the request of the comptroller's office was added back in so under our humble case and under typical legislative acceptance doctrine, this court should have looked at the practice that the administrative agency was using at the time they went to the legislature and said adopt this rule and essentially what it did was the legislature adopted the status quo ante and they made license one of the assets that is an exception to the general rule of sourcing the location of payor and instead you source it to place of use.

JUSTICE DAVID M. MEDINA: Section 5 of your bench brief you have the Wisconsin statute there and I guess can you talk about that now.

ATTORNEY THOMAS PHILLIPS: I'd love to talk about Wisconsin. It is a little metaphysical to talk about this word license and its different uses, but the Wisconsin statute at tab 5 of the bench book makes it absolutely clear. It says gross royalties and other gross receipts received for the use or license of intangible property including and then it lists certain intangibles and down about eighth in the list is licenses. So this statute actually uses the term licensed in both of its different meanings.

JUSTICE DON R. WILLETT: By using a license agreement are you not using a license?

ATTORNEY THOMAS PHILLIPS: No, because as you look at this term, use from the receipt of intangible, receipts from the use of intangible property, it's clear that the use is that of the customer and the receipts are those that come to the owner of this intangible and the comptroller's rule makes that clear. It talks about receipts from the owner. That's implied in the statute. So what's being used has to be the intangible asset, which is not a license here. What is being used, the asset that is owned by TGS is its data. The license is only owned by the customer.

JUSTICE DON R. WILLETT: So your argument is there's no use of a license by TGS by the selling of data because the data is.

ATTORNEY THOMAS PHILLIPS: No. It's not using a license. If TGS had a right to sublicense in its agreement with its customer and the customer then sublicensed to say one of its subsidiaries, it would be using a license

because what it owns is not the data. It owns a license that it purchased from TGS so if it sublicenses and that's why when you have patents, copyrights, why these words become surpluses because the only way that those are transferred is through a license. A license can be transferred through a sublicense and in addition to those that have been mentioned by co-counsel, you have stadium seats can be sublicensed. You may have a license to use a hunting lease that can be sublicensed. So a lot of times you have a license that can be sublicensed.

JUSTICE DALE WAINWRIGHT: If a patent is licensed in the generic sense so it's some other entity. If you client did that and also sold the patent or got receipts from use of the patent with other clients, other customers, how would you analyze that under 171103, b or 6?

ATTORNEY THOMAS PHILLIPS: Well the sale of a patent is a sale of an intangible asset so it's sourced to the location of payor. The licensing of the patent is under subsection 4, under receipts from the use of an intangible asset that's specifically listed, which is here the patent. Many states do. They list a number of things like Wisconsin does and then they put or any other intangible asset or similar intellectual property. Texas doesn't do that. The general rule is that you source to location of payor, an easy rule, and they've made, the legislature has chosen to make limited exceptions to it. What I believe the Court of Appeals did is that instead of interpreting the statute, it rewrote it whether purposely or inadvertently. On page 645, the court held, we conclude that the payments by TGS for licensing its customers to use proprietary seismic data or gross receipts from the use of a license. There, again, confounding who owned and who used. And 14 times in their opinion, the court uses the term licensing activities and tries to make that equal to a license. I say that in the context of this statute, licensing is no more equivalent to a license than fishing is an equivalent to a fish and the court has been confounded by the limitations of the English language and it's taken the same words which can have two very different meanings and has conflated them. By doing so, it's rendered much of the statute surplusage. It's led to the possibility for inconsistent interpretations because when you license a patent, you don't know how you're going, which way it's going to be like, which way it's going to be treated. Other intangible properties that are subject to a license that are not in this list have the possibility of being sourced either to location of use or location of payor. You can solve all these problems by looking to Wisconsin, seeing the difference in the use of this same word in two different uses. In interpreting this as the controller herself interpreted it in the language she asked the legislature to adopt back in 1997.

JUSTICE HARRIET O'NEILL: Are there any further questions?

ATTORNEY THOMAS PHILLIPS: Thank you.

JUSTICE HARRIET O'NEILL: Counsel. The Court's now prepared to hear argument from respondent.

MARSHAL: May it please the Court, Mr. Van Oort will present argument for the respondent.

ORAL ARGUMENT OF KEVIN D. VAN OORT ON BEHALF OF THE RESPONDENT

ATTORNEY KEVIN VAN OORT: May it please the Court, TGS issues a license to its customers to use the data and the customer then uses the data, it is using the license to the same extent that a person using a protected formula or protected process would be using a patent. Thus, it is the location of the customer's use that determines the sourcing of TGS' receipts.

JUSTICE DALE WAINWRIGHT: So in licensing data, you would say the customer is both using the data and using the license or TGS is using the data and using the license both.

ATTORNEY KEVIN VAN OORT: Well the customer is, TGS owns the data. The customer is using the data, I think, in a very practical sense both TGS and its customers are using the license. Both are using the license, although it's the use of the, I should say the location of the customers' use that's determinative for the statute because again the purpose of this statute is to affix some type of geographic location to a use to apportion an intangible receipt.

JUSTICE HARRIET O'NEILL: It's a little bit unclear to me why the location of payor and place of use are so very different. Where the payor is located would seem to me where the license is used.

ATTORNEY KEVIN VAN OORT: In some cases it would be, I'm sorry let me. In some cases, it would be the same. In the for TGS' customers, most of these customers had their principal place of business in Texas, presumably in Houston, but were had their legal domicile elsewhere in Delaware and so the location of payor fixes on legal domicile not the principal place of business.

JUSTICE DON R. WILLETT: How is the licensing of seismic data different than the licensing of software?

ATTORNEY KEVIN VAN OORT: Well the, I think in one key way that presumably had some importance to the comptroller, certainly recognized by the Third Court, is that the software industry is substantially larger. It has more customers. It would be harder for the comptroller to keep track of location of use of thousands if not millions of copies of computer software. The comptroller made a determination for administrative convenience to source the software receipts to the location of payor.

JUSTICE DON R. WILLETT: Does the comptroller believe that the income derived from the licensing of any intangible asset ought to be apportioned based on use?

ATTORNEY KEVIN VAN OORT: Essentially that's correct. The phrase, the term licensing, the last item in the subsection 4 category, that could and does apply to any intangible, any item within intellectual property that is used by another person.

JUSTICE HARRIET O'NEILL: But you'd acknowledge that's a sea change from the comptroller's position evidenced in the administrative interpretation in 1988.

ATTORNEY KEVIN VAN OORT: Well, it is and it isn't. TGS' reliance on the 1990 and 91 letter rulings we believe is based on an incomplete reading of those letter rulings. The close and specifically I'm looking at the May 23, 1990 letter ruling, the closer.

JUSTICE HARRIET O'NEILL: I'm looking at the rule implementing section 171.103 that said receipts to the owner for use of trademarks, franchises and licenses are allocated according to the location where used and the comptroller interpreted that language to be the location of the payor for seismic data licensing.

ATTORNEY KEVIN VAN OORT: Prior to the 1997 statute, the comptroller did indeed source those transactions to the location of payor.

JUSTICE HARRIET O'NEILL: Well it sourced it, but it interpreted that language, that specific language that included licenses and so the argument's been made that the 1997 amendments by the legislature were simply incorporating her interpretation under the statute and that shouldn't be changed now. That's my understanding of their argument.

ATTORNEY KEVIN VAN OORT: That is correct. That is TGS' argument, but I think that a closer inspection of the letter rulings that they're relying on, the 1990 and 91 letter ruling indicated that the comptroller at the outset stated that the gross receipts from these activities are from a license to use the geophysical information or the data. So right out of the box, the comptroller categorized and defined these receipts as being receipts from a license to use the data and, again, this is pre-1997 statute, preenactment so she categorized the receipts, but then the next step is where to source them. Prior to 1997, there were fewer choices as to where to source it. It wasn't tangible personal property. It wasn't lease of real property. The only other option would be to treat it as a sale of an intangible and source it to the location of payor.

JUSTICE HARRIET O'NEILL: Are you saying between 1988 and 1997 the comptroller just simply changed her mind?

ATTORNEY KEVIN VAN OORT: Yes, ma'am, that's the record indicates that sometime after 198--when the rules were promulgated in '88 and the time she promulgated or he promulgated the 1990 letter ruling that the comptroller changed his mind and decided not to enforce the 1988 rule and TGS is construing as the comptroller making a decision as saying that their receipts aren't applicable, but a closer inspection of the letter rulings indicate otherwise that the comptroller was making a distinction. She was categorizing it and defining it, but then not assigning it according to the rule, but in fact was assigning it according to the statute and.

JUSTICE HARRIET O'NEILL: But isn't that circular because her 1988 interpretation was according to the statute and then you're saying she completely changed her mind, reinterpreted the statute and back full circle.

ATTORNEY KEVIN VAN OORT: In fact, the comptroller changed her mind based not on what the statute, not on what the rule means or should mean, but based on challenges to the constitutionality of that rule, the comptroller made a determination we had, this was when the Pennzoil case was starting to bubble up. The comptroller made a decision not to multiply the potential litigation and not enforce these provisions.

JUSTICE HARRIET O'NEILL: The comptroller lost in Pennzoil.

ATTORNEY KEVIN VAN OORT: The comptroller lost in Pennzoil in I believe 1995 and then in 1996, she pulled the 1988 rule down, repealed it and then in 1997, the legislature enacted the statute that we're talking about today and then of course, after the '97 enactment, she promulgated, repromulgated rules on this.

JUSTICE PHIL JOHNSON: Your position does not depend the master licensing agreement's existence I take it.

ATTORNEY KEVIN VAN OORT: Well in.

JUSTICE PHIL JOHNSON: If they it was just on an a la carte basis where someone came in and said we would like to purchase or lease this data and there's no preexisting master licenses and so then we call this a temporary lease or a terminable lease or something other than a license, we still have the net effect of what we have here. We just don't have the master license agreement. Does that change the comptroller's position?

ATTORNEY KEVIN VAN OORT: It would not. The exact form of the master license agreement is not critical. I think what's critical is that there be some license. However, in your example, one of the hypotheticals you put on the table would be something that was more like a sale. If it was not a license, but if it was an absolute conveyance of all the rights to this data, then the comptroller would source it to the location of payor as a sale of an intangible.

JUSTICE DALE WAINWRIGHT: Are there any assets that we normally refer to that can be licensed and any arrangements that we normally refer to as licensing excluded from subsection 4 in your opinion?

ATTORNEY KEVIN VAN OORT: Not that I'm aware of. I would like to respond to one of the points that the Amicus made with respect to surplus verbiage in the subsection 4 provision. As I mentioned a few minutes ago, the term license would encompass the licensing of any type of intellectual property or any type of intangible. We think that looking at the statute, the legislative history, the term patent and copyright was already there. The comptroller added these three additional categories, franchise, license and a trademark. The term patent and copyright well the functional similarity of all being legal tools to protect intellectual property, they are different in ways and I think more significantly each has a commonly un-

derstood meaning and if those terms were not used in the statute, that would create some confusion, but they're already there, so the comptroller in an attempt or the comptroller in a proposed legislation in the bill in 1997 enactment when the legislature added the three additional categories to the existing provision, they were indicating that these three additional categories should receive the same treatment as previously applied to patents and copyrights.

JUSTICE DAVID M. MEDINA: I would agree with that licensing those terms are all part of the intellectual property analysis, but as you said, they all have distinct meanings and they have distinct purposes. If the corporation that owns a product and has a patent on it is going to sell that asset, then they get rid of the entire asset. If they want to keep the asset, which perhaps is a patent or a trademark, then they can license it and that has a distinctive term and that seems to fall right in with the argument of your opposing counsel so I don't understand how you want to group all these words together and say that in this instance they mean the same.

ATTORNEY KEVIN VAN OORT: Well, for example, the term that hasn't determined in subsection 4 that hasn't been discussed is a franchise agreement. A franchise agreement is very similar to a license. It's a contractual agreement that's issued. It doesn't preexist the conveyance and it's hard to see how a franchise could be licensed. In fact, I would assume that most franchise agreements have a prohibition against sublicensing the rights that are conveyed in a franchise agreement which brings me back full circle to the use of the term license and why in this provision, why it's similar to a patent and the copyright that TGS makes some point of the fact or the argument that a license is not a preexisting asset and we think that argument just doesn't take them very far. Granted, a patent and a copyright is something that the taxpayer that a person has. They have it in a drawer. Have it in a safe. The license, however, is created at the time the taxpayer, at the time TGS attempts to invade the rights to use intellectual property.

JUSTICE HARRIET O'NEILL: But the argument has been made is that the licensing here is the vehicle for transfer of an asset and so if this said we deed you the data, you would not be treating it as a license and you're saying this is sort of the same thing. The vehicle for transfer is irrelevant. It's what's being transferred is an asset and not a license.

ATTORNEY KEVIN VAN OORT: Agreed, agreed that the transferred vehicle or the licensing mechanism concept is not particularly relevant to this analysis. What is relevant is that at the end of the day, TGS' customer has as license and they're using that license and they're paying consideration to TGS for that license and that's a receipt.

JUSTICE HARRIET O'NEILL: And that's where it gets kind of metaphysical.

ATTORNEY KEVIN VAN OORT: Yes, ma'am.

JUSTICE HARRIET O'NEILL: Because I read from one or the Amicus briefs where the parties agree the licensing of an asset is properly regarded as the same of an asset. I understand the comptroller agrees with that posi-

tion. You're just, right? The licensing of an asset is treated like the sale of an asset?

ATTORNEY KEVIN VAN OORT: No, it is not. In terms of how it's sourced, no, the comptroller does not agree with that position. The leasing of an asset may be a type of sale and for some tax purposes may be included within the general definition of a sale of an asset, but for.

JUSTICE HARRIET O'NEILL: Well if this was a master lease agreement, what would be your position on the sourcing of the receipts?

ATTORNEY KEVIN VAN OORT: It would be sourced to the location of use of the data.

JUSTICE HARRIET O'NEILL: If it were a sale of an asset?

ATTORNEY KEVIN VAN OORT: If TGS made an absolute conveyance of complete ownership rights in the data, then it would be assigned to or source do the location of payor, the legal domicile of the purchaser. I see that my time is almost up, but one final point to address some issues that were brought up about the Humble Oil case. The criteria or the conditions established by the Humble Oil case for the legislature to amend the source and statute and to repeal the location of payor rule were met in this case and I think were clearly met. If the payor and a comparison of the Humble facts to TGS facts, I think will illustrate that. In the Humble case, in 1963, the comptroller seized on some specific sourcing provisions as an implied repeal of the location of payor rule and inferred the adoption of a substitute sourcing provision. In this case, the comptroller's action was not based on any type of inferential reasoning, but instead the comptroller looked to clear and expressed language that was added to the statute. It wasn't there before and it expressly addresses franchises, trademarks and licenses and that is a substantial and expressed change to the text of the statute, indicates the intent of the legislature to abandon the location of payor rule for the three categories that were added in 1997.

JUSTICE DAVID M. MEDINA: Mr. Van Oort, I don't know if you had a chance to look at the bench brief from opposing counsel, but what guidance, if any, do you give this Wisconsin statute.

ATTORNEY KEVIN VAN OORT: Well, thank you for mentioning the Wisconsin statute. I think that the Wisconsin statute, if anything it's easier to read and it's and I'm thinking that it's easier to read not because it uses the word license twice, but because it uses the word use twice. It speaks to the grantor's use and then again later on in the statute, it speaks to the licensors use and then the licensees use and so it makes the statute, the Wisconsin statute easier to read because of the use of the word use twice. However, with respect to the Texas statute, the use of the term or the inclusion of the word use applies to the use of the data, which the comptroller has construed as being the customers' use of the license, use of the data and so the term use that's not in the Texas statute relates to the licensors use of the license to protect its intellectual property, its

ownership interest in that data and so I think that's what makes the Wisconsin statute easier to read. Also, I believe that if you take the same set of facts and applied the Texas statute and applied the Wisconsin statute, you'd come up with the same result.

JUSTICE DALE WAINWRIGHT: If TGS receives or obtains receipts from the use of a patent, the receipts are sourced to the state where the license is used correct?

ATTORNEY KEVIN VAN OORT: I'm sorry for a patent?

JUSTICE DALE WAINWRIGHT: For a patent, use of a patent.

ATTORNEY KEVIN VAN OORT: It's sourced to the location where the process or formula is put into a production line or put into some type of productive use.

JUSTICE DALE WAINWRIGHT: So where it's used?

ATTORNEY KEVIN VAN OORT: Yes, but.

JUSTICE DALE WAINWRIGHT: If TGS licenses a patent, your position is it's sourced to the state where the license is used.

ATTORNEY KEVIN VAN OORT: Same result as the prior, well really the same result either way, but the.

JUSTICE DALE WAINWRIGHT: Do you agree with that statement?

ATTORNEY KEVIN VAN OORT: Yes.

JUSTICE DALE WAINWRIGHT: Then address the argument that under that interpretation of subsection 4, the term license is superfluous, why is the license in that list of items if you don't need it?

ATTORNEY KEVIN VAN OORT: Because the patent and a copyright are commonly recognized forms to protect, vehicles to protect intellectual property and they're included in this list to clarify or specify that it applies to any type of conveyance of the right to use a patent short of an absolute sale and then we talked about.

JUSTICE DALE WAINWRIGHT: I'm not sure I follow you. Can you restate that? Why is the term license in subsection 4 not superfluous?

ATTORNEY KEVIN VAN OORT: It's not superfluous in part because a franchise agreement is a self-implemented or self-executing contract agreement. A franchise agreement does not need the separate licensing agreement in order to be effective or to be effected and the other explanation is look at the legislative history of this, patents and copyrights were already there. If the legislature had been working from a clean slate, they may have drafted it differently. They may have used the format that Wisconsin used, but the legislature had a purpose in adding the additional categories to the existing subsection 4.

JUSTICE HARRIET O'NEILL: Are there any further questions? Thank you, counsel. The court is ready to hear argument, hear rebuttal.

REBUTTAL ARGUMENT OF JAMES T. MCBRIDE ON BEHALF OF PETITIONER

ATTORNEY JAMES MC BRIDE: May it please this Honorable Court. [inaudible] licensing any intangibles, Justice Willett you asked whether this took this statute and this rule licensing any intangible, if you take the work licensing and intangible you don't need those other four words because patents are always licensed. You don't need those four words at all. And I guess I could see if they just added the word license to those two words, but they used two other assets, trademark and franchise, at the same time that they added the word license.

JUSTICE PHIL JOHNSON: It seems like you have with a patent, you actually have something separate from the process that's patented. You have a protection that's granted by the government and then you have the process that you don't even have to get a patent unless you want, I mean, you could keep that process as a trade secret maybe. So you have separately. And the same thing on a copyright and a trademark. You have the underlying asset or process or whatever and then you have the protection. How about franchise?

ATTORNEY JAMES MC BRIDE: Well, franchise, that's interesting because franchise it's an actual asset so McDonald's. They have a bunch of rights in the franchise so they have.
JUSTICE PHIL JOHNSON: Are there any governmental franchises granted where you have something some protection or something granted apart from the operation itself?

ATTORNEY JAMES MC BRIDE: I think there are, Justice, but I'd have to brief that for you. I think there are governmental franchises, but I think this does cover contractual franchise agreements as well.

JUSTICE PHIL JOHNSON: But this franchise as we move away from a protective separation, something that is separate from the underlying asset into a contractual relationship, we move into the licensing.

ATTORNEY JAMES MC BRIDE: Well we got franchise is an asset of itself. You could sell a franchise. And in our case, we could sell our data and we do. You asked that question earlier. We have situations where somebody will come to us and say okay, we want we just want some data and we want all rights to that data. We do sell that. We go out and do the shoot and we will see it to them and that's taxed to the location of payor. We just have a master license agreement that we can sell the same data to other people and they just can't give it to anybody else or sell it to anybody else. And all we're asking this court to do is follow clear statutory rules construction with the surplusage problem, follow the comptroller's own rule in interpreting the statute and she herself used the word asset in her fiscal notes when she was going to the legislature to ask them to implement this rule and so we're just asking you for this court to follow

the comptroller's own rules, follow sounds rules of statutory construction and the computer software problem will go away because it's not, this statute is not designed to tax the licensing of all assets. It was designed to tax somebody who owns a license. That's all I have. Do you have anymore questions?

JUSTICE HARRIET O'NEILL: Any further questions? Thank you, counsel.

ATTORNEY JAMES MC BRIDE: Thank you.

JUSTICE HARRIET O'NEILL: The cause is now submitted and the court will take a brief recess.

MARSHAL: All rise.

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