

**FILED**

JUL 30 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 305244-III

IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

IGI RESOURCES, INC,

Respondent

v.

CITY OF PASCO

Appellant.

---

**BRIEF OF APPELLANT**

---

LELAND B. KERR, WSBA #6059  
Kerr Law Group  
7025 West Grandridge Blvd., Suite A  
Kennewick, WA 99336  
Telephone: (509) 735-1542  
Facsimile: (509) 735-0506

**FILED**

JUL 30 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 305244-III

IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

IGI RESOURCES, INC,

Respondent

v.

CITY OF PASCO

Appellant.

---

**BRIEF OF APPELLANT**

---

LELAND B. KERR, WSBA #6059  
Kerr Law Group  
7025 West Grandridge Blvd., Suite A  
Kennewick, WA 99336  
Telephone: (509) 735-1542  
Facsimile: (509) 735-0506

**TABLE OF CONTENTS**

**I. INTRODUCTION.....1**

**II. ASSIGNMENTS OF ERROR .....1**

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2**

**IV. STATEMENT OF CASE .....2**

    A. Factual Background .....3

    B. Procedural Background.....4

**V. ARGUMENT.....5**

    A. IGI's Tax Refund Claim is Subject to Pasco's One-Year .  
        Nonclaim Statute and Not the Three Year Statute of  
        Limitations .....5

        1. The tax refund process established by  
            PMC 1.17.020 is applicable to IGI's  
            requested refund.....5

        2. The three-year statute of limitation does not  
            apply.....8

        3. IGI's "money had and received" theory is  
            inapplicable..... 11

    B. A Written Protest is a Lawful Prerequisite to Initiate  
        a Claim for Refund of a Tax Overpayment ..... 12

        1. The protest requirement is enforceable..... 12

        2. No "implied" protest ..... 14

        3. Protest requirements are supported by public  
            policy..... 16

C.	Exhaustion of Administrative Remedies as a Prerequisite to Litigation.....	18
1.	IGI should be required to exhaust the available administrative remedies prior to commencing litigation .....	18
D.	Award of Prejudgment Interest was Improper .....	24
1.	General rule allowing interest should be reexamined .....	24
2.	Statutory basis of rule not well suited to allow prejudgment interest.....	25
3.	Most recent cases do not support waiver of sovereign immunity to allow prejudgment interest.....	26
4.	<i>Carrillo</i> should not be applied to this case; no unlawful tax exacted .....	32
5.	General authorities are in accord - - no interest on voluntary tax payments .....	34
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>35</b>
	<b>CERTIFICATE OF SERVICE .....</b>	<b>37</b>

Appendix:

Appendix 1: Excerpt of Transcript of the Verbatim Report Proceedings, November 7, 2011

## TABLE OF AUTHORITIES

### Cases

<i>Alhadeff v. Meridian on Bainbridge Island, LLC</i> 167 Wn.2d 601, 220 P.3d 1214 (2009).....	11
<i>Allstot v. Edwards,</i> 114 Wn.App. 625, 60 P.3d 601 (2002).....	29-30
<i>American Steel &amp; Wire Company of New Jersey v. State,</i> 49 Wn.2d 419, 302 P.2d 207 (1956).....	16
<i>Architectural Woods, Inc. v. State,</i> 92 Wn.2d 521, 598 P.2d 1372 (1979).....	27, 32
<i>Byram v. Thurston County,</i> 141 Wash.28, 251 P.103 (1926).....	11, 24
<i>Campbell vs. Saunders,</i> 86 Wn.2d 572, 546 P.2d 922 (1976).....	34
<i>Cary v. Mason County,</i> 173 Wn.2d 697, 272 P.3d 194 (2012).....	15
<i>Carrillo v. City of Ocean Shores,</i> 122 Wn.App. 592, 94 P.3d 961 (2004).....	11, 13-14, 32-33
<i>Doric Co. v. King County,</i> 59 Wn.2d 741, 370 P.2d 254 (1962).....	33
<i>Elcon Construction. Inc. v. Eastern Washington University,</i> ____ Wn.2d ____, ____ P.3d ____ (2012).....	31
<i>Foster v. State of Washington Dept. of Transp., Div. of Washington,</i> 128 Wn.App. 275, 115 P.3d 1029 (2005).....	30
<i>Great Northern Ry. v. Stevens County,</i> 108 Wash.238, 183 P.65 (1919).....	33-34

<i>Guy F. Atkinson Co. v. State,</i> 66 Wn.2d 570, 403 P.2d 880 (1965).....	9
<i>Hansen Baking Co. v. City of Seattle,</i> 48 Wn.2d 737, 296 P.2d 670 (1956).....	14
<i>Kelso v. City of Tacoma,</i> 63 Wn.2d 913, 390 P.2d 2 (1964).....	32
<i>Kringel v. State Dept. of Social and Health Services,</i> 45 Wn.App. 462, 726 P.2d 58 (1986).....	28
<i>Kramarevcky v. State, Dept. of Social and Health Services,</i> 64 Wn.App. 14, 822 P.2d 1227 (1992).....	7
<i>Lane v. City of Seattle,</i> 164 Wn.2d 875, 194 P.3d 977 (2008).....	29
<i>Lone Star Cement Corp. v. City of Seattle,</i> 71 Wn.2d 564, 429 P.2d 909 (1967).....	33-34
<i>Longview Fibre Company v. Cowlitz County,</i> 114 Wn. 2d 691, 790 P.2d 149 (1990).....	12-13, 18
<i>Millay v. Cam,</i> 135 Wn.2d 193, 955 P.2d 791 (1998).....	29
<i>Monroe Calculating Mach. Co.v. Department of Labor and Industries,</i> 11 Wn.2d 636, 160 P.2d 466 (1941).....	8
<i>Oceanographic Commission of Wash. v. O'Brien,</i> 74 Wn.2d 904, 447 P.2d 707 (1968).....	27
<i>Phillips v. King County,</i> 87 Wn.App. 468, 943 P.2d 306 (1997).....	20
<i>Prisk v. City of Poulsbo,</i> 46 Wn.App. 793, 732 P.2d 1013 (1987).....	20
<i>Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle,</i> 70 Wn.2d 222, 422 P.2d 779 (1967).....	11,15

<i>Puget Sound Energy, Inc. v. City of Bellingham, Finance Dept.</i> , 163 Wn. App. 329, 259 P.3d 345 (2011).....	7
<i>Puyallup v. Hogan</i> , ____ Wn. App. ____, ____ P.3d ____ (2012) 41017-6-11 decided May 16, 2012 .....	28
<i>Qwest Corp. v. City of Bellevue</i> , 161 Wn.2d 353, 166 P.3d 667 (2007).....	22-23
<i>R/L Associates, Inc. v. City of Seattle</i> , 61 Wn.App. 670, 811 P.2d 971 (1991).....	18
<i>Rosa Irr. Dist. v. State</i> , 80 Wn.2d 633, 497 P.2d 166 (1972).....	8
<i>Sandona v. City of Cle Elum</i> , 37 Wn.2d 831, 226 P.2d 889 (1951).....	7-8
<i>Shum v. Department of Labor &amp; Industries of State of Wash.</i> , 63 Wn.App. 405, 819 P.2d 399 (1991).....	28
<i>Silvernail v. Pierce County</i> , 80 Wn.2d 173, 492 P.2d 1024 (1972).....	26, 28, 30, 32
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	28
<i>State v. Hubbard</i> , 103 Wn.2d 570, 693 P.2d 718 (1985).....	10
<i>State v. McCaw</i> , 127 Wn.2d 281, 898 P.2d 838 (1995).....	7
<i>Sundquist Homes, Inc. v. Snohomish County</i> , 276 F.Supp.2d 1123 (2003) .....	18, 23
<i>Swartout v. City of Spokane</i> , 21 Wn.App. 665, 586 P.2d 135 (1978).....	24, 33-34

<i>Taylor v. Stevens County</i> , 47 Wn.App. 134, 732 P.2d 517 (1987).....	31
<i>Teevin v. Wyatt</i> , 75 Wn.App. 110, 876 P.2d 944 (1994).....	30
<i>Thun v. City of Bonney Lake</i> , 164 Wn.App. 755, 265 P.3d 207 (2011).....	20
<i>Transamerica Title Ins. Co. v. Hoppe</i> , 26 Wn.App. 149, 611 P.2d 1361 (1980).....	9-10
<i>Union Elevator &amp; Warehouse Co. v. State ex rel. Dept. of Transp.</i> , 171 Wn.2d 54, 248 P.3d 83 (2011).....	26-28, 32
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 958 P.2d 273 (1998).....	9
<i>Wells Fargo Bank, N.A. v. Department of Revenue</i> , 166 Wn.App. 342, 271 P.3d 268 (2012).....	30-31

**Statutes**

RCW 4.56.110 .....	29
RCW 4.56.115 .....	30
RCW 4.92.010 .....	31
RCW 4.92.090 .....	30
RCW 4.96.010 .....	25, 31
RCW 8.04.902 .....	27
RCW 8.26 .....	27
RCW 19.52.010 .....	25
RCW 19.52.020 .....	29

RCW 39.76.011 .....	31
RCW 80.04.440 .....	29
RCW 82.32.060 .....	9
RCW 84.68.020 .....	10, 16

**Other Authorities**

16 McQuillen on Municipal Corporation .....	34
Pasco Municipal Code 1.17.010 .....	6, 16
Pasco Municipal Code 1.17.020 .....	1-2, 5-6, 12
Pasco Municipal Code 1.17.030 .....	1, 2, 4, 7, 18, 21
Pasco Municipal Code 5.32.040 .....	3
RAP 10.3(a)(4).....	1
Washington Const. Art. IV, sec. 6 .....	22-23
Washington Const. Art. XI, sec 12. ....	9, 33

## **I. INTRODUCTION**

The Appellant City of Pasco ("Pasco"), seeks the Court of Appeals review of the Superior Court's failure to apply Pasco's Ordinance specifically tailored to provide a constitutionally and statutorily warranted process for the refund of overpaid taxes. The Court, by its action, created an unwarranted exception literally resulting in nullification of the Ordinance.

For the reasons stated below, the trial Court's Order Granting the Plaintiff's Motion for Summary Judgment and Denying the Defendant's Cross Motion for Summary Judgment should be reversed.

## **II. ASSIGNMENTS OF ERROR**

Pursuant to RAP 10.3(a)(4), Pasco assigns error to the following actions by the trial court:

1. The trial court, after affirming the validity of the Ordinance, ruled that PMC 1.17.020 which establishes the time and manner for refund of taxes does not apply to IGI's tax refund's request.
2. The trial court erred by failing to dismiss IGI's case for failure to comply with the administrative appeal for tax refund request provided by PMC 1.17.030.

3. The trial court erred in failing to dismiss IGI's case until it had exhausted the immediate and specific administrative remedies available.
4. The trial court erred in awarding prejudgment interest.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether IGI's tax refund is exempt from Pasco's one-year nonclaim statute contained in PMC 1.17.020.
2. Whether IGI is exempt from complying with the written protest required for the refunded tax overpayments as required by PMC 1.17.030.
3. Whether IGI is exempt from the requirement under PMC 1.17.030 from exhausting its administrative remedies prior to the commencement of litigation.
4. Whether the court erred in awarding prejudgment interest.

### **IV. STATEMENT OF CASE**

This case involves a taxpayer's claim for refund of an overpayment of an occupation tax paid to Pasco. At issue is Pasco's Ordinance which requires a protest, exhaustion of its administrative remedies, and a one-year claim period for tax refunds. It is the

position of Pasco that this Ordinance reasonably governs this process with no exception, and IGI's compliance should not be excepted.

**A. Factual Background**

The City of Pasco has enacted Chapter 1.17 "Time Limitation on Corrections, Adjustments, and Refunds." It succinctly provides that any voluntary payment of a tax which results in an overpayment, whether it results as a mistake of law, mistake of fact, inadvertence or error, must be adjusted by presenting a written protest to the City Manager for a written determination within sixty (60) days. It further provides for a one-year period of time within which to make the protest. (CP 90).

IGI sells natural gas to customers within the City of Pasco. The sale of natural gas is subject to an excise tax as provided by PMC 5.32.040. (CP 86). IGI filed a monthly return paying this tax, giving no indication to Pasco of any reservations or protest of taxes. (CP 86).

The point of delivery for IGI's sales to Pasco customers was initially through the "Pasco Gate", a station consisting of pumps and valves that divert the gas from the mainline for distribution to customers within Pasco. Until its annexation in May 2009, the "Pasco Gate" was just outside of the City limits of the City of Pasco. (CP 86). In September 2010, IGI began delivering gas through the alternate

"Burbank Heights City Gate" which lies just outside Pasco City limits. Since the delivery point is not identified in the tax return, the City was unaware of any potential overpayment claim arising from the returns. IGI continued to pay the excise tax until January 2011.

In February 2011, IGI initiated this action without filing a written protest, nor pursuing the administrative appeal as provided in PMC 1.17.030. Conspicuously absent is any evidence that Pasco ever attempted to collect these taxes or coerce payment.

**B. Procedural Background**

To focus on the issues of this case, the parties jointly stipulated to the facts of this case, which stipulated facts were filed with the Court on September 26, 2011 (CP 85-88).

On September 30, 2011, Pasco filed its Motion for Summary Judgment (CP 84). Shortly thereafter, IGI on October 3, 2011, filed its Motion for Summary Judgment. (CP 53-60).

On October 31, 2011, this matter came on for hearing before the Honorable Cameron Mitchell.

On November 7, 2011, the Court announced its decision holding that Pasco's Ordinances were valid and enforceable.

First I would say that I would agree with Mr. Kerr that certainly the City of Pasco has the authority to implement these codes. I think the case law is very clear, and I think

the constitution is clear, that the City does have the right to implement these codes to regulate business within the City limits. (Appendix 1).

The Court went on, however, to state:

The more difficult question is whether or not these codes apply in this particular case.

After again reviewing the cases and looking at the stipulation and the arguments of counsel, this Court finds that the Pasco Municipal Code Sections 1.17.020 and 1.17.030 setting out the statute of limitations, if you will, for filing a claim for refund of taxes for consideration paid and also setting out the administrative procedure in this matter do not apply to this particular case. (Appendix 1).

The heart of this appeal is whether the Court erred in excepting IGI's tax refund request from Pasco's valid and enacted refund procedure requirements.

## V. ARGUMENT

### A. IGI's Tax Refund Claim is Subject to Pasco's One-Year Nonclaim Statute and Not the Three-Year Statute of Limitations.

1. The tax refund process established by PMC 1.17.020 is applicable to IGI's requested refund.

As the trial court correctly recognized, Pasco has both statutory and constitutional authority not only to impose local taxes, but to establish the reasonable procedure of their administration, including the processing of refunds. PMC 1.17 is applicable to all refund requests "whether or not the result of mistake of law, mistake of fact,

inadvertence or error." In this case, IGI voluntarily made the tax payments under an admitted mistake of fact, assuming that both the Pasco Gate and the Burbank Heights City Gate were located within the City limits. The gate locations were entirely determined by IGI's internal business arrangements. Both the taxes paid and the basis for their requested refund fall specifically within the parameters of the Ordinance. IGI has neither, nor has the trial court demonstrated a distinction that creates an exception to this rule.

PMC 1.17.020 states:

PMC 1.17.020 TIME PERIOD. Except as provided for herein, in all cases of the voluntary payment of any utility bill, fee, tax, or other consideration for a service provided by the City or any of its employees, resulting in either an overpayment or underpayment of the true amount due, whether or not the result of mistake of law, mistake of fact, inadvertence or error, such payments may be adjusted and corrected only within one year (365 days) of payment. The correction, adjustment, or refund of all or any portion of such payment is barred one year (365 days) following payment to the City. Provided, in cases where the underbilling is the result of false or inaccurate information provided or procured by the customer or taxpayer, this limitation shall not apply.

The voluntary payment of a tax is defined in PMC 1.17.010 as "'Voluntary payment' means a payment made to the City of Pasco without written protest setting forth the reasons the payment is made in protest."

The procedure for a timely refund request is provided in PMC

1.17.030 which states:

PMC 1.17.030 ADMINISTRATIVE APPEAL. Any person seeking correction, adjustment, refund or reimbursement for any payment of any utility bill, fee, tax, assessment or other consideration for a service provided by the City, shall, prior to any judicial action, present to the City Manager, or his designee, a written protest stating the basis upon which such correction, adjustment or refund is requested. The City Manager, or his designee, shall make a written determination on the protest within sixty (60) days, of the date of its filing with the City Clerk. All bills, fees, assessments or taxes must be remitted prior to the filing of an appeal.

Pasco's Ordinance is clear and unambiguous. The same rules of statutory construction that apply to the interpretation of State statutes also apply to the interpretation of municipal ordinances. (*Sandona v. City of Cle Elum*, 37 Wn.2d 831, 226 P.2d 889 (1951); *Puget Sound Energy, Inc. v. City of Bellingham, Finance Dept.* 163 Wn.App. 329, 259 P. 3d 345 (2011)).

As succinctly stated in *State v. McCaw*, 127 Wn.2d 281, 898 P.2d 838 (1995):

In judicial interpretation of statutes, the first rule is 'the court should assume that the legislature means exactly what it says. Plain words do not require construction.

The basic rule of statutory construction is that where the language of the statute is clear and unambiguous, there is no room for

judicial interpretation. (*Rosa Irr. Dist. v. State*, 80 Wn.2d 633, 497 P.2d 166 (1972)).

The statutory rules for construction require that exceptions will not be assumed by implication. *Sandona, supra; Monroe Calculating Mach. Co. v. Department of Labor and Industries*, 11 Wn.2d 636, 120 P.2d 466 (1941).

The trial court's creation of the IGI exception is not supported by authority or logic. The court confuses the basis for the refund with the applicability of the procedure.

In each case of a refund, there is a reason for the refund. In this case, the taxes were mistakenly paid by IGI on sales occurring outside the City limits. There was no authority whatsoever to suggest that an exception applies based on a mistake of fact.

This Court's logic would require that every time there was a basis for a refund, there would be an exception to the Ordinance. This would make the Ordinance, which the trial court found to be constitutionally and statutorily correct, a nullity.

2. The three-year statute of limitation does not apply.

It is a false conflict to urge that the three-year state statute of limitations preempts Pasco's one-year grace period to claim a non-protested refund. Case law is clear that a state law supersedes a local

law only if the two cannot be harmonized (conflict preemption) or state law preempts the field entirely (field preemption). *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998).

Article XI, Section 12 of the Washington State Constitution recognizes municipal corporations "power to assess and collect taxes" as separate from those of the legislature. Under this constitutional design, there is no state field preemption for local taxes. Likewise, there is no insurmountable conflict between a protest requirement of a one-year grace period in a local ordinance and a three-year statute of limitations in state law. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 403 P.2d 880 (1965) explains at 572:

Although both plaintiffs and the commission in their respective briefs treat the problem posed by RCW 82.32.060 as one dealing with a statute of limitations, strictly speaking the question presented is one of nonclaim, rather than one of statute of limitations. In the present action, we are concerned with a statute which designates the time allowed for the taking of a step which is a prerequisite to the bringing of an action; we are not concerned with the time allowed for bringing the action. RCW 82.32.060 is procedural, and the limitation it imposes is addressed rather to the power of the tax commission to make a refund and the conditions under which it may be made.

Likewise, in *Transamerica Title Ins. Co. v. Hoppe*, 26 Wn.App. 149, 154-55, 611 P.2d 1361 (1980), the court explains that

claims procedures for tax refunds operate independently of statutes of limitations:

RCW 84.68.020 requires that an aggrieved taxpayer pay the tax under protest and then sue for a refund. The BTA rendered its decision raising the tax from the value assessed by the Board of Equalization. Thereafter, *Transamerica* filed its petition but failed to pay the additional tax under protest. Therefore even if the statute of limitations had not run on the refund action, *Transamerica's* petition was rightfully dismissed.

The cases relied upon by IGI in the court below dealt with tax refunds resulting from invalidated statutes or ordinances. The validity of Pasco's occupation tax is unchallenged. As noted above, the Superior Court ruled that Pasco's Ordinances establishing the procedure and timing for refund claims are lawful. IGI has not appealed this fact and it is the law of this case. *State v. Hubbard*, 103 Wn.2d 570, 573-574, 693 P.2d 718 (1985).

The uncontested Declaration of Donyele Mason (CP 63) explains that Pasco, like other Washington cities, follows a statutorily mandated annual budget cycle. As such, it becomes especially important for a city to have notice of contingent liabilities, which could include refund claims extending back several years with potentially hefty interest accumulating. Having a protest requirement is a reasonable exercise of local legislative power. The fact that Pasco

softened this by allowing a one-year grace period does not reduce the point.

3. IGI's "money had and received" theory is inapplicable.

In support of its statute of limitations conflict argument, IGI cited a number of cases (*Byram v. Thurston County*, 141 Wash.2d 251, 251 P.103 (1926); *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004); and *Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wn.2d 222, 227, 422 P.2d 779 (1967)) analyzing suits for recovery of money against the government. But these same cases also acknowledge the prerogative of a tax authority to establish a requirement of a protest as a condition of a refund claim and/or describe very coercive circumstances where the government held a gun to the taxpayer's head to achieve the payment - in other words, in the cases IGI relied upon, it was clear from the outset that there was a dispute, and procedural requirements, where applicable, were carefully noted with approval and observed.

Another line of argument offered by IGI was based upon a claim for "money had and received." But the most recent authority discussing this theory of recovery, makes it clear that a foundational requirement for such claims is a recognized principle of equity. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 618,

220 P.3d 1214 (2009). In the area of taxation, Washington cases such as *Coluccio v. King County, supra*, are clear that equitable relief will not lie where a taxpayer does not follow the tax claim procedural requirements. *Id.* at 51-52, citing and quoting from *Longview Fibre Company v. Cowlitz County*, 114 Wn.2d 691, 790 P.2d 149 (1990), with approval.

The non-claim requirement of PMC 1.17.020 is valid and enforceable. It was an error for the lower court to excuse IGI's compliance. The non-claim requirement may not be avoided by a taxpayer's styling its claim as one for "monies had and received."

**B. A Written Protest is a Lawful Prerequisite to Initiate a Claim for Refund of a Tax Overpayment.**

1. The protest requirement is enforceable.

The first essential step to put the City on notice of a potential demand on its revenues resulting from an overpayment of taxes is the required protest. Under the Ordinance, the taxpayer must put the City on notice of the potential claim stating the basis for that claim. In *Longview Fibre*, at 695, the Court, likewise dealing with a tax refund case, stated:

Thus, the protest requirement is a jurisdictional prerequisite. The protest requirement serves to delineate what the court will consider.

The Court went on to explain the purpose of this doctrine.

The primary purpose of the protest requirement is notice. (cites omitted). In interpreting a statute, we must give effect to the intent and purpose of the legislation. (cites omitted). Protest gives notice to the taxing authority that the taxpayer is disputing the right to collect a tax and gives notice as to the grounds upon which the taxpayer is disputing the tax.

The Court also identifies the reciprocal benefit.

Protest of those installments serves not only to give notice to the taxing authority, but also to protect the taxpayer's rights. Protest preserves the taxpayer's right to assert that it did not pay the tax voluntarily. 72 Am. Jr. 2d STATE AND LOCAL TAXATION 1082, at 344 (1976). Without tangible protest, there is no evidence that the taxpayer paid involuntarily, subjecting it to the common law rule that taxes voluntarily paid are not recoverable.

The Court concluded by stating:

While the result we reach today is harsh because *Longview Fibre* would be entitled to a refund but for its failure to comply with the formal requirements of the protest statute, we will not give relief on equitable grounds in contravention of a statutory requirement." See also *Coluccio v. King County*, 82 Wn.App, 45, 917 P.2d 145 (1996).

Even in a principal case relied upon by IGI, *Carrillo* at 611 (dealing with an invalidated "availability charge" as a tax), the Court was careful to distinguish that a protest ". . . is not required for a refund of an illegal tax, unless required by statute." (emphasis added.)

The same distinction was made in *Hansen Baking Co. v. City of Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956) (likewise an excise tax refund case). The Court emphasized that a taxpayer can only avoid the requirement of a written protest, ". . . in absence of a legislative requirement." The *Hansen* court did not require written protest because ". . . neither the ordinance hereunder review nor any general state statute requires a written protest as a condition precedent to the obtaining of a refund of excise taxes erroneously assessed."

In the case at hand, there is a specific ordinance requiring a written protest as a condition precedent for obtaining a refund of excise taxes mistakenly paid.

As illustrated by the *Carrillo* case and the *Hansen* case, it is important to remember what this case is not. This is not a case where Pasco is seeking to enforce an illegal tax. It is, likewise, not a tax where Pasco is attempting to assert a tax upon activities beyond its boundaries. It is a case of a taxpayer seeking refund of a tax mistakenly paid for which a legislative procedure has been adopted.

2. No "implied" protest.

IGI argued to the Superior Court that its protest might be somehow implied or presumed as a matter of law because "taxes are paid under a statutory threat of penalties without the opportunity to

contest prior to payment are deemed to be involuntary," (CP 28). The Superior Court gave no indication it accepted this theory. Nor does governing case authority. *Puget Sound Alumni of Kappa Sigma, Inc.*, at 227, explain the threshold facts needed:

The courts generally favor the view that if an illegal demand is made by a person holding an official position, with the color of authority to enforce it, and such demand operates as a restraint on the exercise of an undoubted right or privilege, and in its enforcement there is no opportunity of contesting its validity, a payment of the demand in order to remove such restraint is compulsory and not voluntary.

*Id.* at 228-229, cites omitted.

Those are not the facts of this case. In *Kappa Sigma*, the city had demanded certain illegal payments as a condition of vacating a street. The street vacation ordinance needed by the party was held hostage until the fee was paid.

*Cary v. Mason County*, 173 Wn.2d 697, 272 P.3d 194 (2012), involved a tax that was actually void, so is perhaps closer to or even beyond the premise of the Superior Court's reasoning. There, our State Supreme Court upheld the tax refund, but explained: "Taxes which are void, but which have been paid under protest, may be recovered back." (Cites omitted.)

Protest requirements are a common element in tax refund cases. As pointed out above, RCW 84.68.020 provides a procedure that is extremely similar to Pasco's.

Likewise, IGI's justification that the payment is in response to an implied coercion, is without merit. *American Steel & Wire Company of New Jersey v. State*, 49 Wn.2d 419, 422, 302 P.2d 207 (1956) rejected the implied coercion argument by stating:

It appears from the agreed statement of facts, that respondent never corresponded nor dealt with the tax commission relative to the validity of the imposition of the business and occupation tax upon it; that respondent never allowed the tax to become delinquent; that the tax commission never issued an assessment against respondent, never threatened the use of any collection procedures available by reason of the statute, never threatened to impose any penalty, nor had any contract whatsoever with respondent in respect to payment of the tax.

In the case at hand, IGI unsolicited by Pasco, voluntarily paid the excise tax based on its own mistaken determination of liability. The total absence of any knowledge, let alone threat from Pasco negates coercion. Likewise, IGI's failure to protest, as defined by PMC 1.17.010, confirms the payment was voluntary.

3. Protest requirements are supported by public policy.

The protest requirement is also supported by public policy considerations in not rewarding taxpayers who make careless filing

and payment of tax obligations. Enforcement properly puts the burden of making sure a payment is accurate upon the taxpayer.

The discussion in *Kramarevcky v. State, Dept. of Social and Health Services*, 64 Wn.App. 14, 822 P.2d 1227 (1992) at 25 is helpful here. In that case, the shoe was on the other foot and the government was seeking a refund from the citizen for a government overpayment under a benefits program. The Court evaluated the case based upon an inquiry into which party could have best prevented the mistakes which had occurred, and who would be in a better position to assure that future errors would not occur. In that case, the job to determine eligibility for benefits under a specified governmental program was upon the government's shoulders according to statute. Prevention of mistakes and avoidance of future mistakes was also best placed upon the government, and the claim was denied. Likewise here, the burden of initially preparing accurate tax returns and payments and thereafter preventing error and avoiding future mistakes should remain with IGI. Pasco's procedure equitably shared that burden with the City bearing one year of that burden.

Pasco's protest requirement should have been upheld.

C. **Exhaustion of Administrative Remedies as a Prerequisite to Litigation.**

1. IGI should be required to exhaust the available administrative remedies prior to commencing litigation.

There is no dispute that Pasco provided a specific and immediate administrative appeal remedy for refunds under PMC 1.17.030. The exhaustion requirement is a mandatory prerequisite to litigation. IGI totally disregarded this clearly defined and adequate remedy.

Failure to exhaust this clearly available administrative remedy requires dismissal.

- (a) Exhaustion doctrine alive and well in Washington.

In *R/L Associates, Inc. v. City of Seattle*, 61 Wn.App. 670, 674, 811 P.2d 971 (1991). The Court explains:

It has long been the policy of this state "that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges." . . . Hence, "when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.

A key rationale of the exhaustion requirement echoes the point above that sound fiscal management principles support the requirement. *Longview Fibre*, is quoted in *Sundquist Homes, Inc. v. Snohomish County*, 276 F.Supp.2d 1123 (2003) at 1125:

The primary purpose of the protest requirement is notice . . . which aids the County in its fiscal planning and in making decisions concerning potential refund lawsuits. The notice is important not only to the County Treasurer but to junior taxing districts such as school and fire districts. These districts receive funds from the County. It is important that they be aware of possible reductions in allocations of tax funds due to potential refunds.

The Court went on to identify the policy reasons for this doctrine:

The doctrine (1) prevents against premature interruption of the administrative process, (2) allows the agency to develop the necessary factual background on which to base a decision, (3) allows the exercise of agency expertise, (4) provides a more efficient process and allows the agency to correct its own mistake, and (5) insures that individuals are not encouraged to ignore administrative procedures by resorting to the courts.

These considerations, supported by the previously referenced and uncontested Declaration of Dunyele Mason, are particularly applicable to the case at hand. Until Pasco was aware of the problem, it could take no administrative action to correct it. Requiring taxpayers to respect the administrative process as opposed to the more burdensome formalities of litigation should invoke the same judicial deference as any other legislative requirement. Taxpayers should not be encouraged by the result of the trial court ruling to ignore a reasonable administrative process.

A more recent exhaustion case, *Thun v. City of Bonney Lake* 164 Wn.App. 755, 265 P.3d 207 (2011) affirmed the granting of summary judgment to the city on the basis of failure to exhaust administrative remedies where the appealing party did not meet its burden to show exhaustion would be futile. It is hard, as it should be, Pasco submits, for IGI to establish that a remedy never attempted could never provide relief. Even cases recognizing exceptions to the exhaustion doctrine such as *Prisk v. City of Poulsbo*, 46 Wn.App. 793, 732 P.2d 1013 (1987) acknowledge that our State Supreme Court recognizes a "strong bias" towards requiring exhaustion before resorting to the courts. Exhaustion is clearly the rule, not the exception.

(b) Exhaustion doctrine specifically applicable to tax refund setting.

The Court in *Phillips v. King County*, 87 Wn.App. 468, 943 P.2d 306 (1997), succinctly stated the rule when the exhaustion of administrative remedies is required.

Exhaustion of administrative remedies is required when (1) a claim is cognizable in the first instance by an agency alone, (2) the agency's authority establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties, and (3) the relief sought can be obtained by resort to an exclusive or adequate administrative remedy.

The Court restated the necessity of this doctrine by stating:

The doctrine is founded on the principle that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges, so that the administrative process will not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the court's prematurely.

In the case at hand, the request for refund of a local tax is specifically "cognizable" to Pasco alone. It is Pasco that has sole authorization for the imposition of the tax as well as the administrative organization to evaluate the nature, amount, and appropriateness of the requested refund. It, likewise, has the sole authority to administratively solve the problem.

PMC 1.17.030 establishes "clearly defined machinery for the submission, evaluation and resolution" of refund requests.

This process also defines the exclusive means by which refund requests can be received, evaluated and considered. It is without challenge, that the administrative remedy provided by PMC 1.17.030 is adequate.

(c) Qwest case distinguishable.

One case merits further examination, *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007). IGI relied on *Qwest* below as a free pass to the exhaustion obligation. Here, because of how the lower court reached its result, there was not even a threshold exercise of judicial discretion, to avoid the strong preference of the exhaustion doctrine.

*Qwest* held at 371, that exhaustion was not required because the taxpayer had invoked the Court's constitutional jurisdiction to decide the legality of a tax rather than seeking review through the court's appellate jurisdiction to review an administrative process. *Qwest* should not apply here for two reasons: first, unlike this case, *Qwest* turned on complex questions of state and federal issues; and second, the basis of jurisdiction approved there was Article IV, Section 6 of the Washington State Constitution. It provides for original superior court jurisdiction to hear questions concerning the "legality of any tax."

On the first point, *Qwest*, which involved almost \$600,000,000, continues on for 20 pages with a highly complex analysis of state laws and federal telephone tariffs, which were quite tangled with the ordinances. These issues ran far afield of any local government's

administrative agency expertise, strongly pointing to the propriety of excusing exhaustion there.

On the second point, as noted earlier, this case is not about the legality of Pasco's tax, which the lower court did not disturb. In addition, the Federal Court, albeit a few years before *Qwest*, rejected a similar Article IV, Section 6 constitutional challenge in face of an exhaustion requirement for reasons that resonate in this case and do not in *Qwest*. *Sundquist Homes Inc.*, like the case at hand, did not present complex statutory or constitutional questions. A citizen simply failed to file a protest or make a timely refund claim.

One of the underlying central questions in *Sundquist* was whether the payments should be regarded as "taxes" for purposes of protest requirements associated with tax payments. *Id.* at 1126. Although the payments in *Sundquist* were developer impact fees, hence not taxes in the traditional sense, the Court had no problem dismissing the claim for procedural noncompliance. *Sundquist* noted that substantial compliance, as a minimum, is necessary to avoid the acceptance of the exhaustion doctrine. *Id.* at 1127. This point was not examined in *Qwest*, but is squarely raised here.

*Sundquist* also echoes the above case law rejecting the argument that the tax payment was "coerced", noting that the

legislature had established remedial measures to address that issue at 1125-1126.

The exhaustion requirement should be upheld in this case.

**D. Award of Prejudgment Interest was Improper**

The unfairness of subjecting the citizens of Pasco to pay for the mistake of IGI's bookkeeping with a resulting windfall interest rate, requires a reexamination of case law allowing prejudgment interest on tax refunds. In this case, IGI made unsolicited excise tax payments just like deposits into an unexpected savings account. Pasco was without notice or knowledge of that error for three years. Now requiring repayment of those funds together with an interest that grossly exceeds any market opportunity is a grossly unfair result.

1. General rule allowing interest should be reexamined.

A number of cases do approve the idea of allowing prejudgment interest on liquidated sums. These include tax refund cases against the government. Principal cases on this point cited by IGI below included the *Byram* case, and *Swartout v. City of Spokane*, 21 Wn.App. 665, 676, 586 P.2d 135 (1978), *review denied*, 91 Wn.2d 1023 (1979). Pasco invites a reconsideration of this rule based on a closer reading of those cases compared to the facts of this case.

2. Statutory basis of rule not well suited to allow prejudgment interest.

The issue turns upon a review of two statutes. First is RCW 19.52.010, which says nothing about governmental entities. That statute provides in relevant part:

19.52.010. Rate in absence of agreement--Application to consumer leases

(1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties . . .

Here, there is no loan or forbearance, so the reliance would appear to be upon a “thing in action”. Pasco urges that application of the statute to this case should not be automatic. Rather, it requires also a review of the sovereign immunity waiver as applicable to local governments. The city sovereign immunity waiver statute is RCW 4.96.010:

4.96.010. Tortious conduct of local governmental entities--Liability for damages

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the

commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

Initially, it may be observed that if there is a waiver of sovereign immunity to support an award of interest on a tax refund claim, as a minimum, it would appear that failure to comply with the claim filing procedures is still fatal to the claim. There is no issue of substantial compliance raised here, as the failure to comply is total.

Looking at the waiver statute, it would appear to be limited to tortious conduct. It is clear that this case does not involve tortious conduct, so Pasco urges that the statute is of no assistance to IGI.

3. Most recent cases do not support waiver of sovereign immunity to allow prejudgment interest.

Cases such as *Silvernail v. Pierce County*, 80 Wn.2d 173, 492 P.2d 1024 (1972), which involved post judgment interest, make it clear that even where the waiver is clear, as in a tort case, absent statutory approval, interest is not allowed on judgments against local governments.

In the more recent case of *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept of Transp.*, 171 Wn.2d 54, 248 P.3d 83 (2011), the Court held that no interest would be allowed as part of relocation assistance benefits awarded under our state Relocation

Assistance Act in Chapter 8.26 RCW. The case notes, at 59 ¶ 9, that as a general principle, under the doctrine of sovereign immunity, the State is not liable for interest on its obligations "unless it has placed itself expressly, or by reasonable construction of a contract or statute, in a position of attendant liability." While it was established that the State had waived sovereign immunity so that interest would be allowed on condemnation proceedings under RCW 8.04.902 (state eminent domain), this did not apply to a waiver allowing an award of interest on damages granted under the state Relocation Assistance Act. There was neither an express provision allowing interest, nor could it be implied from the language of the statute.

Distinguished in *Union Elevator was Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979). That case involved a construction contract. There, the Court explained that the government was acting in a private capacity, just as any other private business might have entered into a contract for construction of a facility. Here, Pasco submits that the subject is taxation, which is uniquely governmental, not an action of a private party. See *Oceanographic Commission of Wash. v. O'Brien*, 74 Wn.2d 904, 910, 447 P.2d 707 (1968) (sovereign power manifests itself by the power of taxation, the

power of eminent domain, and through the government's police power).

*Union Elevator* also examined *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997), which allowed interest against Seattle in a condemnation case. But there, the Court upheld the precedent to *Silvernail, Fosbre v. State*, 76 Wn.2d 255, 456 P.2d 335 (1969) *Id.* at 657. In *Sintra*, the award was not prejudgment interest, but rather was based upon condemnation damages, required as part of the mandated just compensation. The Court most recently addressed the same point in *Puyallup v. Hogan*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ (2012) (41017-6-II decided May 16, 2012).

The Court in *Union Elevator* noted that its conclusion denying interest was in line with other cases examining the issue, including *Shum v. Department of Labor & Industries of State of Wash.*, 63 Wn.App. 405, 819 P.2d 399 (1991) and *Kringel v. State Dept. of Social and Health Services*, 45 Wn.App. 462, 726 P.2d 58 (1986).

*Shum* concerned prejudgment interest to pensioners. The Court determined that interest was only allowed on awards to pensioners prevailing after an appeal, but not otherwise. No express or implied waiver of sovereign immunity could be found. *Kringel* concerned an award of back pay to reinstated employees; again, no express or

implied waiver of sovereign immunity to allow interest. In reaching this conclusion, the courts followed mainstream Washington law that courts do not add to or subtract from statutory language. *Millay v. Cam* 135 Wn.2d 193, 203, 955 P.2d 791 (1998).

*Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) at 887 explains (cites omitted):

Governments cannot be sued for money without their consent ... More to the point, local governments cannot be sued for interest without the State's consent ... But absent sovereign immunity, parties must pay 12 percent interest on judicial awards from the time of judgment to the time of payment. RCW 4.56.110; RCW 19.52.020. They must also pay 12 percent on the time from the injury to the judgment if the damages are liquidated, that is, if it is "possible to compute the amount with exactness, without reliance on opinion or discretion."

*Lane* concluded that Seattle must pay interest on the illegal overcharges based upon RCW 80.04.440. That statute provides for a right granted by statute to customers to sue water companies for "all loss, damage or injury" resulting from an illegal act. No statute granting an interest waiver, as in *Lane*, has been identified for local tax refund claims.

*Allstot v. Edwards*, 114 Wn.App. 625, 635, 60 P.3d 601 (2002) involved a post judgment interest issue, but explains that:

The state and its political subdivisions are not liable for interest on judgments against them unless the liability

arises from the reasonable construction of a statute or contract.

Compare also *Teevin v. Wyatt*, 75 Wn.App. 110, 876 P.2d 944, (1994) (no statutory waiver of prejudgment interest in tort case).

Pasco submits that no statutes are available to support a waiver of sovereign immunity to allow prejudgment interest in tax cases. *Allstot* cites to *Fosbre v. State*, 76 Wn.2d 255, 456 P.2d 335 (1996) which was the precedent for *Silvernail*, above. *Fosbre* denied prejudgment and post judgment interest on tort claims against the state based on an interpretation of the state sovereign immunity waiver statute, RCW 4.92.090. The legislature subsequently enacted another statute to allow post judgment interest, as explained in *Foster v. State of Washington Dept. of Transp., Div. of Washington*, 128 Wn.App. 275, 115 P.3d 1029 (2005). This latter statute applies to both the state and local governments. RCW 4.56.115. But it only applies to "[j]udgments founded on the tortious conduct of the state of Washington or of the political subdivisions, municipal corporations..." *Id.* (*Emphasis added*). Even when allowed there, the rate is comparatively modest (two percentage points above 26 week treasury bills). Prejudgment interest on a tax refund would not be covered by this statute in absence of both a judgment and a tort. *Wells Fargo*

*Bank, N.A. v. Department of Revenue*, 166 Wn.App. 342, 271 P.3d 268

(2012) states:

Because RCW 4.92.010 created the right to sue the State, it is not a fundamental right; thus, because the State gave the right to sue it, the State can prescribe limitations on that right.

Case law is clear that the enactment of RCW 4.96.010 permitted tort suits against a local governmental entity. However, it did not create any new causes of action, duties, or liabilities where none existed before. *Taylor v. Stevens County*, 47 Wn.App. 134, 136, 732 P.2d 517 (1987).

A recent case discussing prejudgment interest against the government came out March 29, 2012 from the Washington State Supreme Court in *Elcon Construction, Inc v. Eastern Washington University*, \_\_\_ Wn.2d \_\_\_, 273 P.3d 965 (2012). That case involved a contractor payment dispute. There, the contractor requested interest based on a statute, RCW 39.76.011, which expressly provides for interest whenever the government fails to make timely payment on unpaid public contracts. There is no statute here. Pasco did not fail to make timely payments to IGI. *Elcon* ended up rejecting the statute and denying interest nonetheless because the case involved an arbitration award.

4. *Carrillo* should not be applied to this case; no unlawful tax exacted.

The *Carrillo* case invites further discussion. Initially, Pasco urges that as a 2004 Court of Appeals case, *Carrillo*, should be read in light of later authority from our State Supreme Court discussed above. *Union Elevator* also cites to *Carrillo* in fn. 3 at 63, however, for the point that subsequent cases did not accept the government's effort to limit *Architectural Woods*. *Carrillo* is cited there for the point that interest should be allowed "on amounts collected by an unlawful tax."

It is easy to distinguish this principle in *Carrillo* from this case. There the city tried to force payment of an unlawful utility rate for utility service it never furnished; even so far as to try to impose the charge on undeveloped empty lots. *Carrillo* appears also to acknowledge a distinction between its rationale and *Silvernail* with a "but see" comment and summary of the case holding, but without much further analysis. *Carrillo* at 616, fn. 14. This case does not involve an unlawful tax.

To support the allowance of interest, *Carrillo* cites a tort case, *Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964) denying sovereign immunity for Tacoma in a police car crash. Again, Pasco urges this case offers no tort.

*Carrillo*, itself, did not involve a charge enacted as a tax. There was no exercise of Article 11, Section 12 constitutionally vested tax power by the city. Rather, that case involved a utility “availability” charge. It was enacted as a water and sewer rate. The Court found it was a “tax” for purposes of distinguishing it from lawful utility rates, which are classified in a category of “regulatory fees” for purposes of distinguishing them from unlawful charges. But *Carrillo* should not be read to encompass items enacted as taxes. Nor should *Carrillo* be extended to circumstances here, where the case presents no issue of an “unlawful” tax and does not involve coercive governmental conduct to force capitulation.

The other cases cited in *Carrillo* at 616-617, *Doric Co. v. King County*, 59 Wn.2d 741, 370 P.2d 254 (1962); *Great Northern Ry. v. Stevens County*, 108 Wash.238, 183 P. 65 (1919); *Lone Star Cement Corp. v. City of Seattle*, 71 Wn.2d 564, 429 P.2d 909 (1967), and *Swartout v. City of Spokane*, 21 Wn.App. 665, 586 P.2d 135 (1978) can also be similarly distinguished. *Doric* involved a tax levied and paid under protest. *Id.* at 741. Pasco submits that cases cited to support the award of interest on tax refund claims raise the issue of a protest requirement and compulsory levy anew in the context of this issue,

where it is clear that a sovereign immunity waiver for interest must be shown by express or implied statutory construction.

*Great Northern* involved a tax in excess of specifically allowed millage where the taxpayer was forced to pay an illegal tax by the government—a clear and direct conflict of law and illegal tax. To the same effect are *Lone Star* and *Swartout*. The analysis in these cases is also quite cursory and reflects no extensive discussion or examination of the question. *Swartout* distinguished a case relied upon by the local government in that case, *Campbell v. Saunders*, 86 Wn.2d 572, 546 P.2d 922 (1976) on the basis that it was a tort case, but offers no further explanation of the source for waiver in non-tort cases.

5. General authorities are in accord--no interest on voluntary tax payments.

16 *McQuillin on Municipal Corporations* specifies at sec 44.184.50 on p. 834, that the judgment for a successful taxpayer should include the amount of a "wrongful exaction", costs and interest.

It then continues:

However, where the tax refund statute is silent as to interest, interest is not recoverable even though the payment of a disputed tax was involuntary.

The treatise also states that where interest is allowed, it is not from the date of payment, but generally from the date the taxpayer

notified the government that the taxpayer considered the payment unlawful. *Id.* page 835. As already often stated, there is no “wrongful exaction” here. There is no provision for interest.

The apparent distinction intended by these cases is culpability, or at least it should be.

Case law allowing prejudgment interest for tax refunds should be reexamined in light of the facts of this case and prejudgment interest should be denied or, at most, limited to run only from the time when IGI first notified Pasco of its claim for refund.

## **VI. CONCLUSION**

This case presents a simple question of the enforceability of lawful city tax code procedural requirements. The lower court fully accepted Pasco's authority to enact such requirements, and was fully supported by our State Constitution and case law in this regard. The lower court then fundamentally erred in concluding that Pasco's code did not apply when the reason for the refund was based on taxes mistakenly paid on sales made outside Pasco's boundaries.

This case is not about the application of a tax to extraterritorial business activities, but rather, the requirements attendant upon all taxpayers seeking refunds, whether due to mistake of fact or law. This case involves no coercive activity by Pasco and no illegal tax or

charge. This is also a case where the mainstream rule of exhaustion should be upheld.

Last, a careless taxpayer should not reap a reward of generous prejudgment interest over a one-year or a three-year period where Pasco had no knowledge and no opportunity to know of IGI's internal business arrangements with its customers of claim for refund. Absent a clear waiver of sovereign immunity by statute, prejudgment interest should be denied, or at most, restricted to run from the time Pasco had first knowledge of the refund demand.

For these reasons, Pasco respectfully, but earnestly, requests reversal of the lower court and dismissal of the IGI refund claim.

**DATED** this 27<sup>th</sup> day of July, 2012.

Respectfully submitted,  
KERR LAW GROUP

A handwritten signature in black ink, appearing to read 'Leland B. Kerr', written over a horizontal line.

Leland B. Kerr, WSBA #6059  
Attorney for Appellant, City of Pasco

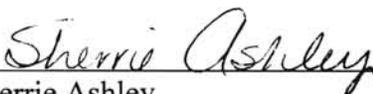
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27<sup>th</sup> day of July 2012, I caused to be served a true and correct copy of the foregoing BRIEF OF APPELLANT to the following:

<u>          </u> INTER-CITY	FRANKLIN G. DINCES
<u>XXXX</u> U.S. MAIL	THE DINCES LAW FIRM
<u>          </u> OVERNIGHT MAIL	5314 28TH STREET NW
<u>          </u> FAX TRANSMISSION	GIG HARBOR WA 99335-7608

Sent via UPS Next Day Air for filing with:

Court of Appeals, Division III  
500 North Cedar Street  
Spokane WA 99201

  
\_\_\_\_\_  
Sherrie Ashley



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES:

FOR THE PLAINTIFF:

FRANKLIN G. DINCES  
Attorney at Law  
316 Occidental Ave. South  
Seattle, WA 98104

FOR THE DEFENDANT:

LELAND B. KERR  
Attorney at Law  
7025 W. Grandridge Blvd.  
Kennewick, WA 99336

1 November 7, 2011

2 Pasco, WA

3 THE COURT: Jump ahead to Number 4, IGI  
4 Resources versus City of Pasco. I can see the  
5 gentleman that are seated there.

6 MR. KERR: Thank you, Your Honor.

7 THE COURT: This matter was before the  
8 court last week on the, I guess, cross motion for  
9 summary judgment on this matter on the issue of  
10 whether or not, one, the plaintiff in this case was  
11 bound by the one year statute of limitations, if you  
12 will, and the City code; and two, whether or not they  
13 were required to exhaust their administrative  
14 remedies pursuant to the Pasco Municipal Code.

15 I've had a chance to review the cases in this  
16 matter and also to go back over the pleadings filed  
17 in this case. First I would say that I would agree  
18 with Mr. Kerr that certainly the City of Pasco has  
19 the authority to implement these codes. I think the  
20 case law is very clear, and I think the constitution  
21 is clear, that the City does have the right to  
22 implement these codes to regulate business within the  
23 City limits. The more difficult question is whether  
24 or not these codes apply in this particular case.

25 After again reviewing the cases and looking at

1 the stipulation and the arguments of counsel, this  
2 court finds that the Pasco Municipal Code Sections  
3 1.17.020 and 1.17.030 setting out the statute of  
4 limitations, if you will, for filing a claim for  
5 refund of taxes or consideration paid and also  
6 setting out the administrative procedure in this  
7 matter do not apply in this particular case. Those  
8 codes, by their terms, refer to bills and utility  
9 taxes, fees and consideration paid for service  
10 provided by the City or any of its employees; and it  
11 does not appear to this court that this situation  
12 involves a service that was provided by the City or  
13 any of the City's employees.

14 The ordinance that, I guess, was the basis for  
15 the underlying payments, Pasco Municipal Code  
16 5.32.040, says it applies to businesses engaged  
17 within the City of Pasco.

18 Based on the stipulation of the parties, it  
19 does not appear that the subject matter of this case,  
20 the fees that were paid, the taxes that were paid by  
21 the plaintiff were lawfully collected under this  
22 particular municipal code since the transaction, the  
23 delivery of the natural gas in this case, was not  
24 within the city limits of the City of Pasco. So I  
25 don't think that the code provisions would apply to

1 the moneys received from the plaintiff in this case  
2 by the City of Pasco since it was not for services  
3 provided by the City or its employees or an excise  
4 tax based on the supply of commodities in this case,  
5 natural gas, within the city limits of the City of  
6 Pasco.

7 So for that reason the court finds, as I said,  
8 those codes do not apply to the plaintiff's claim for  
9 refund of the moneys paid, that the statute of  
10 limitations applicable to this case is in fact the  
11 State three year statute of limitations rather than  
12 the municipal code's one year limitation and that the  
13 plaintiffs are not bound by the code requiring them  
14 to exhaust their administrative remedies before  
15 bringing this matter to the superior court. So the  
16 court's going to grant the motion in favor of the  
17 plaintiffs in this case.

18 MR. KERR: Your Honor, he has just prepared  
19 an order, which I really don't have any problems with  
20 because it's succinct. There is still one issue that  
21 the order presents that we still need a ruling from  
22 the court in regards to the application of both  
23 prejudgment and post-judgment interest.

24 THE COURT: And in that regard -- thank you  
25 for reminding me, Mr. Kerr -- the court does find

1           that the plaintiffs are entitled to both prejudgment  
2           and post-judgment interest, as this is a liquidated  
3           sum in this particular case. The court does not  
4           believe there is any bar to the plaintiffs receiving  
5           that interest both prejudgment and post-judgment.

6           I have signed that order. I understand, Mr.  
7           Kerr, you are not signing that.

8           MR. KERR: That's true. Doesn't make any  
9           difference at this stage. Thank you, Your Honor.

10          THE COURT: Thank you.

11          MR. DINCES: Thank you, Your Honor.

12                               (End of requested  
13                               proceedings.)

1 STATE OF WASHINGTON )  
2 ) ss.  
3 COUNTY OF FRANKLIN )

4 I, CHERYL A. PELLETIER, Official Court Reporter of  
5 the Superior Court of the Pasco Judicial District, State  
6 of Washington, in and for the County of Franklin, hereby  
7 certify that the foregoing pages comprise a full, true and  
8 correct transcript of the proceedings had in the  
9 within-entitled matter, recorded by me in stenotype on the  
10 date and at the place herein written; and that the same  
11 was transcribed by computer-aided transcription.

12  
13 That I am certified to report Superior Court  
14 proceedings in the State of Washington.

15  
16 WHEREFORE, I have affixed my official signature this  
17 14th day of November, 2011.

18  
19  
20  
21   
22 Cheryl A. Pelletier, RPR, CCR  
23 Official Court Reporter  
24  
25