

FILED

AUG 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 305244-III

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

IGI Resources, Inc.

Respondent,

v.

City of Pasco,

Appellant.

BRIEF OF RESPONDENT

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Geoffrey P. Knudsen, WSBA # 1324
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I. Counterstatement of Issues Pertaining to Assignments of Error

No. 1: IGI Resources, Inc. (“IGI”) remitted amounts to the City of Pasco (“Pasco”) in excess of any amounts IGI was legally required to remit. Clerk Paper’s (“CP”) 86. Must IGI exhaust Pasco’s administrative remedies to obtain a refund of such amounts or may it seek a refund under a state law cause of action for money had and received?

No. 2: Where a city is ordered to refund money had and received may prejudgment interest be added to the refund?

II. Counterstatement of the Case

Statement of Facts

IGI is a natural gas supplier. CP 86. Some of its customers are located in Pasco. *Id.* Some of the gas sold to IGI customers located in Pasco is sold outside the city. *Id.* Despite such gas being sold outside Pasco, IGI erroneously paid Pasco \$128,384.33 as excise taxes attributable to such sales. *Id.* It is this amount which IGI sought to be returned. All of these facts are stipulated and not in dispute. CP 85-88.

Statement of Proceedings

IGI did not attempt to pursue any municipal administrative remedy or procedure for the refund of its overpayment to Pasco. Rather, IGI filed suit in Franklin County Superior Court asserting a single cause of action, a

state law claim for money had and received. CP 93-97. Based on the stipulated facts, IGI sought summary judgment. CP 53-60.

Pasco's Answer admitted the Superior Court's jurisdiction over IGI's cause of action was appropriate under Wash. Const. Art. IV, Sec. 6. CP 89. Despite this admission, Pasco defended and sought summary judgment that city ordinances establishing an administrative remedy and procedure for obtaining a refund of certain excess amounts paid to the City must be followed.¹

IGI replied that the City "lacks *exclusive* authority regarding procedures for obtaining recovery of money paid to the City." CP 47 (emphasis in original). IGI relied on the original jurisdiction of the Superior Courts to hear IGI's cause of action and a controlling Washington Supreme Court decision that exhaustion of administrative remedies is not required when the Superior Court has original jurisdiction. CP 47-48. Moreover, the City ordinances establishing an administrative remedy and procedure are inapposite to the state law cause of action which is the basis for the refund granted below. CP 46-52.

¹ The city ordinances permit "voluntary payment of any utility bill, fee, tax or other consideration for a service provided by the City or any of its employees" to be corrected only within one year of payment. PMC 1.17.020. The City ordinances further define "voluntary payment" as a payment without a contemporaneous written protest setting forth the reasons for the protest," PMC 1.17.101, and provide that 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 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." PMC 1.17.030.

Judge Mitchell of the Franklin County Superior Court granted IGI's motion for summary judgment and denied the City's cross motion holding the city ordinances providing a procedure to follow for refund of a voluntary payment of any utility bill, fee, tax or other consideration for a service provided by the City inapplicable to IGI payments attributable to deliveries outside the City. Judge Mitchell opined that the moneys received from IGI were not for services provided by the City or excise taxes reasoning that IGI's deliveries were made outside the City, no City services are provided outside the City and no excise taxes can be imposed on deliveries outside the City. RP 3-5 (Appended to Brief of Appellant).

The City moved for reconsideration and Judge Mitchell denied the motion for reconsideration by written order concluding "that the City of Pasco lacked the authority to assess a tax for activities conducted outside the city limits and that PMC 1.17.020 cannot properly be applied to the plaintiff's activities and/or the overpayment in this case."² CP 11-12.

² Pasco's notice of appeal fails to appeal from the Order Denying Motion for Reconsideration even though the Notice of Appeal was filed after the Order was issued. Pasco also failed to appeal from the final judgment. Rather, the notice of appeal is only from the Order granting IGI summary judgment. CP 5-7. *See also*, CP 11-12. While IGI's motion to dismiss this appeal under RAP 5.2 has been denied, the failure of Pasco to appeal from the Order Denying Motion for Reconsideration means its appeal should be dismissed on the merits as the Order provides an independent basis for the final judgment below. Having failed to appeal from the Order Denying Motion for Reconsideration, Pasco cannot now argue that the Order is incorrect.

III. Summary of Argument

IGI's cause of action is for money had and received. This well established state law claim is equitable in nature, and the Superior Courts have original jurisdiction in all cases arising in equity. City ordinances cannot diminish this state law claim. The proffered city ordinances do not even attempt to establish the limitations period applicable to the state law cause of action or procedures for resolving this cause of action. Rather, the city ordinances are naturally directed at establishing the procedures and limitations period for the city law cause of action created by those same ordinances.

For Pasco to prevail, settled law has to be overturned. The exhaustion of administrative remedies argument is an argument that the Superior Court lacks original jurisdiction. Given the cause of action in this case and Pasco's admission that Superior Court jurisdiction was appropriate, exhaustion of administrative remedies is not necessary. The doctrine does not apply in cases where the Superior Court has original jurisdiction.

In addition, Judge Mitchell's reasoning, that the proffered city ordinances are inapplicable as IGI's erroneous payments were not payments of any utility bill, fee, tax or other consideration for a service provided by the City or any of its employees, is correct.

Pasco claims that prejudgment interest should not have been awarded, but long standing case law supports the trial court's award of interest.

IV. Argument

A. Standard of Review

The standard of review of a trial court's order granting summary judgment is de novo. *Clean v. City of Spokane*, 133 Wn.2d 455, 462, 947 P.2d 1169 (1997).

As this Court undertakes the same inquiry as the trial court, we next demonstrate the existence and validity of the cause of action brought by IGI and then address the inapplicability of the City's procedural defenses to that cause of action and to IGI's payments. We then discuss the appellate court decisions that would have to be overturned for Pasco to prevail. Each of IGI's arguments provides an independent basis for affirming the decision below.

B. The Proffered City Ordinances Do Not Limit IGI's State Law Claim.

1. An Action for Money Had and Received is Well-Established.

IGI's sole cause of action is for money had and received. CP 93-97. (Complaint). Such cause of action has long and repeatedly been

recognized as appropriate to recover amounts paid to local governments in error. *See, Byram v. Thurston County*, 141 Wash. 28, 251 P. 103 (1926). *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.2d. 961 (2004); *Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967) and *Henderson Homes v. Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994).³

It is beyond dispute that the Superior Court has *original* jurisdiction over this cause of action. Wash. Const. Art. IV, Sec. 6. The City admitted the Superior Court's jurisdiction was appropriate under Wash. Const. Art. IV, Sec. 6. CP 89 (Answer).⁴

³ Pasco argues that the cause of action is inapplicable as a city can require a protest or the payments sought to be recovered must have been paid under duress. Br. of Appellant at 11. Such theories even if valid – which they are not (*see*, pg. 12-14 and n. 5. *infra*) – do not demonstrate the inapplicability of IGI's cause of action. Pasco, citing property tax cases requiring contemporaneous protest with payment, also argues that such equitable relief will not lie where a taxpayer fails to follow procedural requirements. Br. of Appellant 11-12. Pasco fails to recognize that taxes paid in error are “'moneys got through imposition' and the obligation to do justice rests upon all persons natural or artificial; and if the (government) obtains money or property from others without authority of law, [the law] independent of any statute compels restitution or compensation.” *Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967) quoting, *Puget Constr. Co. v. Pierce Cty.*, 64 Wn.2d 453, 456, 392 P.2d 227 (1964) quoting, *Byram v. Thurston County*, 141 Wash. 28, 251 P. 103 (1926). IGI satisfied all the procedural requirements for its cause of action, money had and received. Protest of excise taxes has never been required. *See*, pg. 12-14 and n. 5.

⁴ The admitted appropriateness of the Superior Court's original jurisdiction necessarily means the City's argument that the case needed to be dismissed for failure to exhaust administrative remedies is wrong. The conclusion that a case needs to be dismissed because administrative remedies were not exhausted depends on the premise that the Court lacks jurisdiction to hear the cause of action. *See, Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000) (“The doctrine of exhaustion ... prevents a party from omitting to use ... the only forum that has original jurisdiction. It functions much like RAP 2.2 and CR 54 which similarly provide that a party may not appeal from a court with original jurisdiction (the superior court) to a court with appellate jurisdiction (the Court of Appeals or Supreme Court) unless the party ‘exhausts’ his or her remedies in the sense of obtaining a final and appealable superior court order.) (footnotes omitted).

2. The City Procedural Defenses Are Inapposite.

On appeal, the City makes no substantive argument that IGI is not entitled to a return of the money it paid in error.⁵ It solely relies on procedural arguments. Those procedural arguments are that IGI failed to follow the refund process created by the city code.

PMC 1.17.020 does create a cause of action whereby a party may seek recovery of voluntary⁶ payments of utility bills, fees, taxes or other

⁵ The stipulated facts provide the substantive basis for awarding IGI the relief it sought. The parties stipulated “IGI erroneously reported and paid utility tax for natural gas delivered to the Pasco gate (prior to it being annexed into the city) in the sum of \$113,068.90,” “IGI sold natural gas ... at the Burbank Heights Gate, which is outside the City of Pasco” and “paid \$15,315.43 for utility taxes on such sales,” and “[u]tilty taxes paid prior to annexation of the Pasco gate and from the Burbank Heights Gate were paid in error”. CP 85-88. PMC 5.32.040 limits Pasco’s tax to revenues from sales within the City. *See also, Tacoma v. Fiberchem, Inc.* 44 Wn. App. 538, 722 P.2d 1357 (1986); *Lone Star Cement Corp. v. Seattle*, 71 Wn.2d 564, 429 P.2d 909 (1967); *KMS Fin. Services, Inc. v. Seattle*, 135 Wn. App. 489, 146 P.3d 1195 (2006) and *Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 496 P.2d 504 (1972) (Cities cannot tax revenue generated by transaction within Washington but outside the city’s limits when the incident of taxation is the privilege of doing business in the City.)

⁶ Pasco does not provide a remedy for amounts paid involuntarily. Pasco’s code only provides a remedy for voluntary payments. Thus, an action for money had and received is the only remedy available to recover involuntary payments.

Here, IGI’s payments were, as a matter of constitutional law, involuntary. IGI’s payments in error were remitted as taxes to the City. IGI had no ability to contest its liability for such amounts prior to payment, PMC 5.32.095, and the City imposes penalties on any late paid taxes. PMC 5.32.090. Courts long ago decided that when, as here, amounts are remitted as taxes under a code which requires payment prior to contest and which imposes penalties for nonpayment, the amounts paid are not considered to be paid voluntarily but rather as a matter of law under duress. *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P.2d 694 (1939). *Accord, Ward v. Love County*, 253 U.S. 17, 64 L. Ed. 751, 40 S. Ct. 419 (1920); *See also, Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 228-29, 422 P.2d 799 (1969) and *Carpenter v. Shaw*, 280 U. S. 363, 74 L. Ed. 478, 50 S. Ct. 121 (1930). Pasco’s code, which defines payments without contemporaneous protest voluntary, conflicts with this principle of constitutional law.

Pasco’s citation to *American Steel & Wire Co. v. State*, 49 Wn.2d 419, 302 P.2d 207 (1956) is misleading. That case failed to find payments under duress because American Steel could have brought suit prior to payment. On that basis, it was distinguished from *Carpenter*. In *Carpenter*, an Oklahoma statute allowed a suit to challenge a tax only if

consideration for services provided by the City. It also limits such refunds to payments made within one year of payment. PMC 1.17.030 establishes an administrative process by which the cause of action is to be prosecuted. Such process includes the requirement that a written protest be filed as the first step in the administrative process. Based on these ordinances, the City argues that (i) the statute of limitations is one year, (ii) a protest was required and (iii) the City process had to be exhausted.

Below, we demonstrate that substantial case authority would have to be overturned for the City to prevail on any of its specific arguments. The City's procedural defenses can be rejected in total, however, either because the City code is (a) inapplicable to the state law cause of action for money had and received or independent of this reason (b) inapplicable to the payments made by IGI.⁷

(a) The City Code is Inapplicable to IGI's State Law Cause of Action.

IGI has not sought a refund under the city cause of action and it need not seek recovery under the city code. IGI is the plaintiff. IGI has the right to bring whatever cause of action it chooses. The City lacks the power to create the exclusive remedy for recovery of amounts paid to it in

the tax had been paid. Carpenter, as IGI here, was without a remedy unless the tax was first paid.

⁷ The fact that the city code provisions are inapplicable here does not make them a nullity. First, someone could elect to proceed under them when seeking recovery of voluntary payments of certain amounts. Second, the City could proceed under them in certain circumstances.

error. Nothing requires IGI to only seek the remedy offered by the City. Nothing permits Pasco to limit the remedy provided by state law.⁸ IGI's cause of action is under state law for money had and received. Whatever remedy the City chose to offer is inapposite. It is not the remedy sought by IGI.

(b) *The City Code Code is Inapplicable to IGI's Payments.*

By its terms, the City code provisions proffered by Pasco only apply to payments of utility bills, fees, taxes, assessments or for services provided by the City. IGI did not pay utility bills, fees, taxes, assessments or for services provided by the City. This is the basis for the ruling below. RP 3-5 (Appended to Brief of Appellant). *See also*, CP 11-12 (Order Denying Motion for Reconsideration). The Superior Court found that IGI did not pay taxes. The amounts remitted by IGI were not taxes because Pasco has no authority to levy any tax on deliveries outside the City. The fact that IGI erroneously remitted the amount as taxes does not make them such. Therefore, the code provisions at issue are not applicable to IGI's activities or its erroneous payments.

⁸ The remedy provided by the City is more restrictive than the remedy provided by state law. The city remedy only permits refunds within one year of payment, and the City has no provision for prejudgment interest. The state law remedy permits refunds three years after payment. State law also provides for prejudgment interest. As cities are subordinate to the state, Pasco lacks the power to limit the state law remedy. The state law remedy sought by IGI is the only cause of action that could provide the relief sought by IGI, a return of amounts paid up to three years prior to suit with prejudgment interest. Clearly, the creation of a city remedy cannot abolish a state law remedy otherwise available. Yet, that is the position Pasco is forced to adopt.

3. The City's Specific Arguments Conflict With Prior Cases.

(a) Exhaustion of Administrative Remedies Is Not Required To Recover Amounts Paid As City Excise Taxes.

Pasco does not, cannot and will not cite a single Washington excise tax case for the proposition that exhaustion of administrative remedies is required to recover amounts paid as excise taxes. That is because exhaustion of administrative remedies has never been required in any excise tax case in Washington. Not only is there no excise tax case requiring exhaustion of administrative remedies, there is a recent Washington Supreme Court decision explaining why and holding the opposite. *Qwest Corp. v. Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007) (a case concerning, as here, amounts paid as city utility taxes).

The Supreme Court gave two reasons why exhaustion is not required in cases seeking recovery of amounts paid as excise taxes: (i) the Court's original jurisdiction in tax cases under both the Constitution and RCW 2.08.010 and (ii) excise tax cases involve issues of statutory construction and "questions of statutory interpretation need not be referred to administrative agencies". *Qwest Corp. v. Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007).

Pasco attempts to distinguish *Qwest* by claiming that "*Qwest* turned on complex questions of state and federal issues ... and ... 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.’” Br. of Appellant at 22.⁹

Pasco’s attempt to distinguish *Qwest* fails because:

(i) The fact that Pasco is not attempting on appeal to argue that the amounts paid by IGI were proper taxes does not mean that the case could have been resolved by the Superior Court without reference to issues of statutory interpretation. The Superior Court had to interpret Pasco’s code (or the United States and/or Washington’s Constitution) in order to find that the amounts paid were not legally due Pasco. This reason is as controlling here as it was in *Qwest*.¹⁰

(ii) The basis for the Superior Court’s original jurisdiction here is Washington Constitution Art. IV, Sec. 6 -- exactly the same as in *Qwest*.¹¹ The Superior Court has original jurisdiction in cases in equity, *id.*, and

⁹ Pasco’s also cites to a 2003 federal court opinion that allegedly conflicts with *Qwest*. Br. of Appellant at 23. Where on a matter of state law the federal court and the Washington Supreme Court disagree, the Washington Supreme Court is the correct authority. Whether or not Pasco correctly reads the federal court’s opinion, such opinion is irrelevant. The Washington Supreme Court has decided that exhaustion is not required when the Superior Court has original jurisdiction or when a case involves statutory construction. *Qwest Corp. v. Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007). *See also, Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000). Pasco is arguing that the Washington Supreme Court is incorrect.

¹⁰ *See*, n. 5, *supra* for a discussion of the controlling substantive authority.

¹¹ In *Qwest* and here, original jurisdiction was also proper under RCW 2.08.010. Exhaustion is not required where the Court has original jurisdiction. Such jurisdiction may be statutorily or constitutionally based.

IGI's state law cause of action for money had and received is an equitable claim.¹² The Superior Court has original jurisdiction in all cases where the demand is for more than \$3,000, *id.*, and IGI's claim is for more than \$3,000. The Superior Court has original jurisdiction over all cases in which jurisdiction has not been vested exclusively in some other court. *Id.* Pasco cannot even contend any other court has jurisdiction over IGI's state law claim.¹³ It is beyond debate that the Superior Court had original jurisdiction of this case. That is probably why Pasco admitted that the Superior Court's jurisdiction was appropriate. *See*, CP 89 (Answer).

(iii) This case, like *Qwest*, also involves the legality of a tax. IGI is only entitled to a refund if the amount it paid as tax cannot be legally

¹² *See generally*, *Coast Trading v. Parmac, Inc.*, 21 Wn. App. 896, 587 P.2d 1071 (1978) ("The count for 'money had and received' is an ancient common law remedy with equitable overtones; it is based upon quasi contract or contract implied in law.") and *see*, *Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 223, 422 P.2d 799 (1967) ("Such action is not a claim for damages, but rests on equitable principles." ... "Such action is based upon quasi-contract, or as it is sometimes termed, constructive contract, or contract implied in law.") *Accord*, *Byram v. Thurston Cty.*, 141 Wash. 28, 251 P. 103 (1926).

¹³ Exhaustion is required only "when a claim is cognizable in the first instance by an agency alone." *State v. Tacoma Pierce County Multiple Listing Service*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980) (emphasis added). Here, IGI's state law claim may only be brought in the Superior Court. The City's administrative process is inapposite.

Pasco's argument, Br. of Appellant at 21, that the "request for refund of a local tax is specifically 'cognizable' to Pasco alone" because it has "sole authorization for imposition of the tax as well as the administrative organization to evaluate the nature, amount and appropriateness of the requested refund" must be dependent on an odd definition of "cognizable". When a court has jurisdiction over a claim, the claim is not cognizable by an agency alone. The Superior Court is also more expert than the City Manager on the statutory and constitutional issues raised by IGI's request for recovery of amounts paid. *Qwest* finds that reason an independent basis for concluding that exhaustion is not required.

imposed on IGI.¹⁴ IGI argued and the Superior Court agreed that the tax could not be legally imposed on IGI.¹⁵

Qwest is controlling Supreme Court authority. It is indistinguishable. IGI did not need to exhaust administrative remedies before seeking recovery of the amounts it erroneously paid as excise taxes to Pasco.

(b) The Protest Argument Is A Red Herring.

Below, we discuss that protest has never been required in an excise tax case. Moreover, the only type of protest the failure of which makes a payment potentially voluntary and therefore potentially unrecoverable is a protest contemporaneous with payment. The Pasco protest requirement is not that type of protest.

Pasco does not require a protest contemporaneous with payment as a prerequisite to recovery of the amounts paid. Rather, Pasco's ordinance

¹⁴ Pasco contends that the cases relied upon by IGI dealt with tax refunds resulting from invalidated statutes or ordinances, and that the validity of Pasco's tax is unchallenged. Br. of Appellant at 10. Neither statement is true. For example, in *Byram v. Thurston County*, 141 Wash. 28, 39, 251 P. 103 (1926), the property taxes it paid were deemed excessive, but not all property taxes paid by anyone were invalidated. In *Qwest Corp. v. Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007), the city utility taxes it paid were barred by statute from being applied to Qwest, but the city utility tax could apply to others. In *Hansen Baking Co. v. Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956), the business and occupation tax it paid was incorrectly measured, but the tax could be applied to others. At the same time, Pasco's tax cannot be legally measured by amounts IGI derives from sales outside Pasco. Thus, Pasco's tax as applied to IGI is illegal. This is the same invalidity present in cases relied upon by IGI.

¹⁵ Pasco's argument that IGI must exhaust administrative remedies must also fail because there were no relevant administrative remedies related to IGI's state law claim. Pasco's argument is directed to the municipal law claim that was not brought, not to the state law claim for money had and received on which relief was granted. Pasco's administrative process is not designed to handle the state law claim, and IGI, not Pasco, may choose the cause of action on which to seek recovery of the money it mistakenly paid Pasco.

requires that a protest be filed with the City Manager as the first step of its administrative appeal process and provides that failure to file a protest at the time of payment makes the payment recoverable for one year under the city code. *See*, PMC 1.17.010, .020 *and see*, PMC 1.17.030. Failure to file a protest at the time of payment does not prohibit a recovery of the amounts paid. The protest required by the Pasco code is closer to a complaint than it is to a protest contemporaneous with payment. That is, by filing the protest (the complaint) the City Manager is required to make a written determination (an answer) on the protest. PMC 1.17.030.

IGI did not seek an administrative remedy. Therefore, it did not file a protest. While that failure is a basis for the City's arguments regarding exhaustion of administrative remedies, it means the protest argument is a red herring. Pasco's protest requirement is just a procedural step in its administrative process. Pasco does not require any protest at the time of payment, and IGI need not exhaust Pasco's administrative remedies.

(c) Protest of Excise Taxes Has Never Been Required In Washington.

Not only are there no cases requiring protest of amounts paid as excise taxes as a prerequisite to bringing an action for money had and received, there are Washington appellate cases holding the opposite.

Protest has never been required to recover amounts erroneously paid as excise taxes.¹⁶ *Great Northern R. Co. v. State*, 200 Wash. 392, 93 P.2d 694 (1939); *See also, Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 228-29, 422 P.2d 799 (1969); *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.2d. 961 (2004); *Hansen Baking Co. v. Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956); *Swartout v. Spokane*, 21 Wn. App 665, 586 P.2d 135 (1978) and *Henderson Homes v. Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994).¹⁷

¹⁶ Protest is required by RCW 84.68.020 to recover property taxes, and all the tax cases requiring a protest involve property taxes. This requirement is contained within the property tax title of the RCWs and has long been held to not apply to excise taxes. *See, Great Northern R. Co. v. State*, 200 Wash. 392, 93 P.2d 694 (1939). Pasco's tax is an excise tax imposed on the privilege of engaging in business in the City. PMC 5.32.040.

Property taxes are an unavoidable demand imposed on ownership. Excise taxes are imposed on the exercise of a privilege, and therefore may be avoided by not engaging in the privilege. *See generally, Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951); *Aberdeen Sav. & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930) and *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) (collectively these cases are the "income tax cases" that explain why an income tax is a tax on property).

Pasco also relies on dicta in *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004) and *Hansen Baking Co. v. Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956). But, in both *Carrillo* and *Hansen Baking*, the holding is that a refund of excise taxes was permitted despite the absence of protest. Those same facts are present here. Pasco, like the jurisdictions in *Carrillo* and *Hansen Baking*, does not require a protest at the time of payment. Moreover, as discussed at n. 6, *supra*, amounts erroneously paid as taxes which are unable to be contested prior to payment and which are paid under threat of statutory penalties, are paid involuntarily as a matter of law. No case has ever required an excise tax to be paid under protest as a condition of it being able to be recovered and the settled law is as described in n. 6. Thus, to the extent dicta supports Pasco's position, such dicta would be erroneous. Protest is not a requirement to bring an action for money had and received.

¹⁷ Property tax statutes typically permit a taxpayer to litigate prior to payment (see, e.g. RCW 84.40.038). Thus, if a taxpayer fails to litigate and fails to file a protest with payment, its taxes may be considered voluntary. *See e.g., Byram v. Thurston County*, 141 Wash. 28, 39, 251 P. 103 (1926) and *Longview Fibre Company v. Cowlitz County*, 114 Wn.2d 691, 790 P.2d 149 (1990).

(d) The Statute of Limitations for IGI's Cause of Action Is Three Years.

IGI's cause of action is for a return of money had and received. CP 93-97 (Complaint). This cause of action is subject to a three year statute of limitation. *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004); *See also, Henderson Homes, Inc. v. Bothell*, 124 Wn.2d 240, 248, 877 P.2d 176 (1994) and *Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 231-32 422 P.2d 799 (1967).

Pasco contends that the statute of limitations is one year. Br. of Appellant at 5.¹⁸ But the city ordinance creating such a limitation applies to a different cause of action, a cause of action arising out of the city code not the state law cause of action which is the subject of this case.

(e) Prejudgment Interest Was Properly Awarded.

Pasco acknowledges that a "number of cases do approve the idea of allowing prejudgment interest on liquidated sums. These include tax refund cases against the government." Despite this controlling authority, Pasco invites reconsideration of this rule. Br. of Appellant at 24. That is,

¹⁸ Pasco also argues that its one year limitation period resulting from the failure to file a protest is a nonclaim statute, a statute that sets forth a procedural prerequisite to the bringing of an action, not a statute of limitations to the time to bring an action. Br. of Appellant at 9-10. A procedural prerequisite to bringing suit is just another way of phrasing a requirement to exhaust administrative remedies. Thus, the argument must fail. IGI need not file a protest with the City; it need not exhaust any administrative remedy or process prior to bringing an action for money had and received, an independent state law cause of action of which the Superior Court has original jurisdiction.

Pasco seeks the overruling of a large number of cases. Pasco seeks this change in law arguing that Pasco did not waive its sovereign immunity, that Pasco's tax was not unlawful, that the rule permitting interest is not well suited to taxes and that general authorities are in accord that interest should not be paid on refunds of voluntary taxes. *Id.* at 24 – 34.

The law in this state is extremely well settled. Interest is permitted on the refund of amounts paid as excise taxes. For example, in *Swartout v. Spokane*, 21 Wn. App. 665, 586 P.2d 135 (1978) the court, *citing Doric Co. v. King County*, 59 Wn.2d 741, 370 P.2d 254 (1962), “summarily affirmed the granting of interest by reference to a number of prior cases in which interest was allowed. This case is dispositive of the issue here and accordingly, the trial court erred in denying interest.” Thus, the Washington Supreme Court has spoken on this issue: prejudgment interest is proper in cases refunding amounts paid as taxes, cases such as this case.¹⁹

Prejudgment interest is also awarded when a claim is liquidated. *See, Plywood Marketing v. Astoria Plywood*, 16 Wn. App. 566, 578, 558 P.2d 283 (1976). “A claim is liquidated if the evidence furnishes data, which if believed, makes it possible to compute the amount with exactness

¹⁹ *See also, Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004) (“Moreover, long-standing case law supports the trial court’s award of interest ruling.” *See also, Byram v. Thurston County*, 141 Wash. 28, 39, 251 P. 103 (1926).

... Examples are Claims for money had and received ... “ McCormick on Damages 213 §54 relied on by *Plywood Marketing v. Astoria Plywood*. Thus, prejudgment interest is proper in cases refunding liquidated amounts, cases such as this case.

Pasco’s argument that sovereign immunity protects Pasco from being required to pay prejudgment interest is incorrect. Subdivisions of the state, such as cities, do not enjoy sovereign immunity in tax refund cases. *See generally, Columbia Steel v. State*, 34 Wn.2d 700 at 712, 209 P.2d 482 (1949). *See also, Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004) (rejecting city claim of sovereign immunity in a tax case quoting *Kelso v. Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964) (“In the exercise of those administrative powers conferred upon, or permitted to, (cities) solely for their own benefit in their corporate capacity, whether performed for gain or not, and whether the nature of a business enterprise or not, they are neither sovereign nor immune. (Cities) are only immune in so far as they represent the state. They have no sovereignty of their own; they are in no sense sovereign per se.”).

Pasco also repeats its argument that the Pasco tax is not illegal. In this section, it contends interest should not be awarded on that basis. Again, Pasco fails to understand that Pasco’s tax cannot legally be applied to IGI’s revenues from outside the City. That type of illegality has led to

an award of interest. *See e.g., Lone Star Cement Corp. v. Seattle*, 71 Wn.2d 564, 429 P.2d 909 (1967).

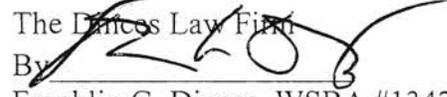
Pasco similarly repeats its argument that the amounts at issue here were paid voluntarily. Here, it argues on that basis that interest should not be awarded. Again, the amounts at issue here were paid as a matter of law involuntarily. *See, n. 6, supra*. The fact that excise taxes were paid without protest has not led any Washington Court to deny interest on a tax refund.

Nothing Pasco argues demonstrates that the settled law of this state is wrong. Pasco ignores the fact that it had the ability to use the funds erroneously paid by IGI to it. For that reason alone, IGI is entitled to prejudgment interest. The settled law in this state is correct.

VI. Conclusion

For the reasons stated above, the Superior Court Findings of Fact, Conclusions of Law and Judgment are correct and should be affirmed.

Respectfully submitted, this 22nd day of August, 2012.

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Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 23rd day of August, 2012 I placed in the United States mail, postage prepaid, a copy of Brief of Respondent, addressed to:

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