

Supreme Court Case No. 87964-8

SUPREME COURT OF THE STATE OF WASHINGTON

Cost Management Services, Inc.

Respondent,

v.

City of Lakewood and Choi Halladay,

Petitioners.

**ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS**

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I. Introduction

The Washington Association of Municipal Attorneys' ("the Association") amicus brief contends that the Petition for Review should be granted because the Court of Appeals allegedly improperly categorized¹ the May 2009 Notice and Order of the City and because the Association believes *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P3d 667 (2007) merits further review.²

The first reason continues the City of Lakewood's factual mischaracterization of the May Notice and Order.³ The May Notice and Order is properly characterized in the Answer to Petition for Review at 7-8, in the Brief of Respondent at 12 and n. 31, and by the Court of Appeals (*Cost Management Services v. Lakewood*, Dckt. No. 41509-7-II (June 1, 2012) (hereinafter cited as Slip Op.) at 10-11.

The second reason, *Qwest Corp. v. City of Bellevue*, is actually a reason for denying the Petition. *Qwest Corp. v. City of Bellevue* has already settled the issue of law involving the exhaustion of administrative remedies raised by the Petition. Excise tax refund cases need not exhaust administrative remedies because Superior Courts have original jurisdiction over such cases and because such cases involve issues of statutory

¹ Brief of Amicus Curiae on behalf of the Washington Association of Municipal Attorneys ("Amicus Brief") at 3.

² Amicus Brief at 9.

³ See, Answer to Petition for Review at 7-8.

construction which need not be referred to administrative agencies. *Qwest Corp. v. Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007).

II. Argument

A. **The May 13, 2009 Notice and Order Was Not Action on The Refund Claim. It is Irrelevant to the Instant Case.**

The May 13 Notice (Ex. 3) was not action on Cost Management Services, Inc.'s ("CMS") refund claim. It is merely a demand for payment for an unspecified amount of taxes for periods other than, and subsequent to, those for which CMS claimed refund. By its terms, the May Notice seeks payment of taxes which were allegedly due and owing after October 2008, after CMS stopped paying taxes to Lakewood. CMS' refund claim seeks refund of taxes paid by September 2008. Ex. 1. The May Notice does not reference CMS' refund claim or the period for which the claim was made. It does not deny the claim.

Despite these facts, the Association argues that the Court of Appeals conclusion -- that the Notice and Order did not constitute a denial of CMS' refund claim, but was, instead, a demand for payment of taxes -- "improperly categorizes the Notice and Order while ignoring the affirmative determination that CMS was subject to Lakewood's utility tax." Amicus Brief at 3. The Association is incorrect in criticizing the Court of Appeals. The Notice and Order was not a denial of CMS' refund claim. The Notice and Order relates to a later period, does not reference the refund claim, and does not use the word

deny or denial. As for the Notice and Order's alleged determination that CMS is subject to the utility tax, *for a later period not in litigation*, such alleged determination does not specify any amount of such taxes allegedly owed.⁴

B. Exhaustion of Administrative Remedies Is Not Required To Recover City Excise Taxes.

The Association acknowledges *Qwest Corp. v. Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007) (a case concerning, as here, city utility taxes and holding that exhaustion of administrative remedies is not required when the Superior Court has original jurisdiction of the matter in controversy.) The Association argues that the decision merits further review. Amicus Brief at 9.

But, the Association, like the Petitioner--Appellant, cannot cite a single excise tax case for the proposition that exhaustion of administrative remedies is required to recover excise taxes. That is because exhaustion of administrative remedies has never been required in any excise tax case in Washington. The Supreme Court gave two reasons why exhaustion is not required in excise tax cases: (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).

⁴ CMS complied with the May 13 Notice. All it ordered CMS to do was apply for and obtain a Lakewood business license and pay all past due and owing utility tax payments. CMS promptly filed an application for the license and it owed no past due utility taxes. Therefore, all such taxes were paid. There was no reason for CMS to appeal the Notice.

Despite the *Qwest* holding and the history of not requiring excise taxpayers to exhaust administrative remedies, the Association argues that the exhaustion doctrine does not contain an original jurisdiction exception. Amicus Brief at 10.⁵

The Association fails to recognize that the Superior Court's jurisdiction over excise cases is expressly set forth in the State Constitution. Washington Constitution Art. IV, Sec. 6. The exhaustion doctrine is a judicial doctrine. Therefore, even if the Association's arguments concerning the scope of the exhaustion doctrine were otherwise correct, which they are not for the reasons set forth below, the constitutional right of taxpayers to have their cases originally heard by the Superior Court cannot be destroyed by such a doctrine.⁶

Moreover, the Association's understanding of the exhaustion doctrine is incorrect. First, as recognized even by Petitioner, City of Lakewood, an original jurisdiction exception is built into the doctrine. Exhaustion is required only "when a claim is cognizable in the first instance by an agency alone." Br. of Appellants at 12, *citing*, *State v. Tacoma Pierce County Multiple Listing Service*, 95 Wn.2d 280, 284, 622

⁵ Nothing the Association says indicates any dispute with the second independent reason for not requiring excise taxpayers to exhaust administrative remedies, "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). Here, the trial court necessarily engaged in answering questions of statutory interpretation in determining CMS' entitlement to a refund.

⁶ The right to bring the case directly in Superior Court is especially important where as here "[a]bsent Lakewood's taking any direct express action on CMS' refund claim, CMS had no administrative remedies to pursue regarding it refund claim." *See*, Slip Op. at 22.

P.2d 1190 (1980) (emphasis added). Second, Lakewood's administrative law judge has no special expertise over the questions of statutory interpretation that were involved in determining CMS' entitlement to a refund, 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). *See, Smith v. Bates Technical College*, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000) (Exhaustion principle founded on belief that judiciary should give deference to bodies possessing expertise in areas outside conventional expertise of judges.) Third, CMS raised constitutional arguments in support of its statutory interpretations and these arguments were part of the basis of the trial court's substantive ruling.⁷ Constitutional issues need not be referred to an administrative agency. *See, Bare v. Gorton*, 84 Wn.2d 380, 382-83, 526 P.2d 379 (1974). Fourth, CMS sought and was awarded interest on its refund claim. Lakewood's municipal code does not provide for interest on tax refunds. *See generally*, LMC 3.52.150. Thus, complete relief for CMS was not available under the City administrative process. Also, as the City issued its Notice and Order related to a later period without the benefit of any factual hearing, CMS could conclude that an administrative process in connection with the refund claim for an earlier period would be futile. *See*

⁷ *See*, CP 711 (letter opinion entered Dec. 20, 2010) concluding based on the evidence and "consistent with the authority set forth in *City of Tacoma v. Fiberchem* that the very occasional meetings between employees of CMS and its Lakewood-based customers were not activities constituting the selling, furnishing or brokering of natural gas"

generally, *Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985) (The showing of factual or legal futility excuses the failure to exhaust otherwise mandatory administrative procedures).

III. Conclusion

For the reasons stated above and in the Answer to the Petition for Review, the Petition for Review should be denied.

Respectfully submitted, this 31st day of December, 2012.

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IV. Appendix

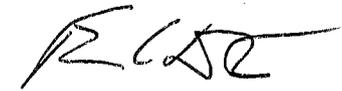
Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 31st day of December, 2012 I placed in the United States mail, postage prepaid, Answer to Brief of Amicus Curiae, Washington Association of Municipal Attorneys, addressed to:

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