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No. 87964-8

SUPREME COURT OF THE STATE OF WASHINGTON

COST MANAGEMENT SERVICES,

Respondent,

Vs.

CITY OF LAKEWOOD and CHOI HALLADAY,

Petitioners.

**SUPPLEMENTAL BRIEF OF PETITIONERS CITY OF
LAKEWOOD & CHOI HALLADAY**

Matthew S. Kaser, WSBA No. 32239
CITY OF LAKEWOOD
6000 Main Street
Lakewood, WA 98499-5027
Telephone: (253) 589-2489
Facsimile: (253) 589-3774
*Attorneys for Petitioners City of Lakewood
and Choi Halladay*

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I. INTRODUCTION

In the exercise of their taxing powers under Washington law, municipalities in the State of Washington impose a broad array of taxes. To further the exercise of these powers, municipal codes uniformly include administrative requirements to address tax refund requests.

This Court has held that claims based on local ordinances are subject to an exhaustion requirement. It has also held that state tax claims are subject to an exhaustion requirement. Although Washington cases recognize that aggrieved municipal taxpayers regularly proceed through an administrative process, neither this Court nor the Court of Appeals has explicitly issued such an on-point holding. The City of Lakewood asks that this Court hold that local administrative remedies be exhausted before an aggrieved taxpayer may proceed to court over a refund of a municipal tax, excepting those instances where the legislature has provided a remedy or where the legality of the tax is truly at issue.

II. BACKGROUND

Cost Management Services (CMS) is a Mercer Island-based company which provides energy consulting services and natural gas supplies to a wide variety of customers. (CP 2, ¶ 6, 7, 11). CMS has two Lakewood-based clients, wherein the “Customer agrees to purchase all of its natural gas supplies from CMS” (*See e.g.*, Trial Ex. 45, ¶ 1).

Pursuant to RCW 35A.82.020 and RCW 35.21.870, the City imposes a tax “[u]pon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption.” Lakewood Municipal Code (LMC) 3.52.050(D). CMS paid this tax until late 2008 when it requested a refund asserting it did not do any business in Lakewood. (CP 91, 93).

The City responded with a May 13, 2009 Notice and Order: (1) advising CMS of its delinquency in taxes; (2) demanding payment of past due taxes; and (3) issuing an administrative determination that “[CMS] is engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption.” (CP 95-96). The Notice and Order stated any appeal could be made within ten days to the City’s hearing examiner.

CMS did not appeal. Instead, on June 24, 2009, CMS filed the first of two lawsuits in Pierce County Superior Court. (CP 1). The City moved to dismiss this lawsuit for failure to exhaust administrative remedies arguing that CMS failed to use the hearing examiner system mandated to hear tax appeals under the City’s Code. (CP 16). CMS countered that this Court’s decision in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007) vitiated the appeal requirement

because the case fell within the “legality of any tax” clause of Article IV, Section 6 of the Washington State Constitution. (CP 120). The first judge assigned to this case denied the City’s motion. (CP 250).

In subsequent rounds of summary judgment motions before two other judges, the Superior Court held, in part, that CMS was improperly taxed but also held that CMS’s claims accruing prior to June 24, 2006, were time-barred. (CP 522-24). In September 2010, the Superior Court also dismissed without prejudice CMS’s claims arising under the municipal code, leaving the claim for moneys had and received. (Id.)

On October 5, 2010, CMS filed a second lawsuit against the City and its finance manager, Choi Halladay. (CP 731). CMS sought a writ of mandamus ordering the City to “take action on [CMS’s] claim pending since November 6, 2008 for the refund of erroneously paid taxes” (CP 735). The Superior Court issued the writ. (CP 628).

The first suit proceeded to bench trial on CMS’s claims for money had and received. The Superior Court concluded that CMS’s business activities – if any – in the City of Lakewood were precluded application of this tax, and entered judgment in favor of CMS. (CP 712).

The City appealed both the writ and the monetary judgment to the Court of Appeals. In a partially published opinion, the Court of Appeals affirmed. 170 Wn. App. 260, 284 P.3d 785 (2012). In doing so, it held:

First, that superior courts and local hearing examiners have “concurrent jurisdiction” over municipal tax refund claims. 170 Wn.App. at 273-74. Under this system, exhaustion was excused and the superior court could refer claims to local hearing examiners. *Id.*

Second, that issuance of mandamus was proper. Despite being involved in litigation for a year and a half, the Court rejected the argument that CMS did not timely seek the writ, holding in part, “Lakewood never triggered CMS appeal period.” 170 Wn.App. at 277.

Underlying both holdings, the Court of Appeals also held the Notice and Order from the City was defective, because, despite three specific administrative determinations, the letter does not summarize these determinations in the word “denied.” 170 Wn.App. at 272.

This Court granted review. 176 Wn.2d 1011 (2013). The City now requests that this Court: (1) reverse the Court of Appeals; (2) direct the superior court to vacate both the trial judgment against the City and the writ of mandamus; and (3) dismiss CMS’s claims against the City.

III. ISSUES PRESENTED

The City of Lakewood obtained review on two issues:

1. Whether the Court of Appeals erred when it concluded that the doctrine of exhaustion of administrative remedies does not bar a taxpayer’s lawsuit for a municipal tax refund when the municipality’s code has an explicit administrative process for addressing taxpayer relief, the

taxpayer did not appeal a determination rendering it liable for the tax, and the administrative process would have supplied the taxpayer full relief.

2. Whether the Court of Appeals erred in affirming the trial court's writ of mandamus for the same relief forfeited when the taxpayer failed to pursue administrative remedies and which were concurrently pursued by the taxpayer via civil litigation?

Petition for Review at p. 1, ¶ III.

IV. ARGUMENT

A. CMS Was Required to Exhaust its Administrative Remedies Before Commencing Suit Against the City.

“It is the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.” *Wright v. Woodard*, 83 Wn.2d 378, 381, 518 P.2d 718 (1974), *citations omitted*. Washington courts follow a three-part test in an exhaustion analysis; “administrative remedies must be exhausted before the courts will intervene: (1) ‘when a claim is cognizable in the first instance by an agency alone’; (2) when the agency's authority ‘establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties; and (3) when the ‘relief sought ... can be obtained by resort to an exclusive or adequate administrative remedy.’” *State v. Tacoma-Pierce County Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622

P.2d 1190 (1980)(citing, *Retail Store Employees Union v. Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 906-08, 558 P.2d 215 (1976)).

Whether exhaustion is required is a question of law, even though it may involve resolution of factual matters. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 19 fn. 10, 829 P.2d 765 (1992). “We review questions of law de novo.” *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012)(citation omitted). Washington law “make[s] clear there is a strong bias toward requiring exhaustion before resort to the courts.” *Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985). One of the significant relevant policies behind the doctrine is to “insure that individuals are not encouraged to ignore administrative procedures by resort to the courts.” *Orion Corp.*, 103 Wn.2d at 456-457.

Following this well-established framework, CMS was required to exhaust its administrative remedies. The remedy for a failure to exhaust is clear: an appellate court will direct dismissal. *Wright*, 83 Wn.2d at 382.

B. CMS Had Both an Exclusive and Adequate Remedy Before the City of Lakewood Hearing Examiner.

A “local government[] may tax only pursuant to specific legislative or constitutional authority.” *Covell v. Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The City imposes a tax “[u]pon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial,

natural or mixed gas for domestic, business or industrial consumption, ... from such business in the City[.]” LMC 3.52.050(D). RCW 35A.82.020 and RCW 35.21.870, give the City express authority to impose this tax.

Exhaustion of claims arising under municipal ordinances may be had in the municipal forum. *Lange v. Woodway*, 79 Wn.2d 45, 48, 483 P.2d 116 (1971). Matters implicating interpretations of local ordinances, and claims deriving therefrom, exclusive jurisdiction over the enforcement of municipal ordinances is vested in municipal courts. *City of Seattle v. McCready*, 123 Wn.2d 260, 276, 868 P.2d 134 (1994). But, this court has also recognized that, where adequate procedural safeguards exist, municipal-based claims may also be brought before municipal hearing examiners. *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009). Washington courts consistently recognize that that hearing examiners are competent to decide tax matters. *See e.g., City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 174, 60 P.3d 79 (2002) (observing that municipal request proceeded first to a hearing examiner).

The City’s administrative process provides for a two-step review. In the first step of this process, CMS was required to appeal Mr. Halladay’s decision to the hearing examiner. The Notice and Order specifically informed CMS that it had ten days within which to appeal to

the hearing examiner. *See e.g.*, LMC 5.2.180, .190.¹ The hearing examiner is empowered to “receive and examine available information, conduct public hearings, prepare records and reports thereof, and make decisions, which shall be final and conclusive.” LMC 3.52.160. The second step of this process is also guided by the Code which further provides that appeals must be done within fourteen days “of the entering of the Hearing Examiner’s recommendation.” LMC 1.36.091. That decision, in turn, is subject to court review. *See e.g.*, *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 307, 237 P.3d 256 (2010) (“After exhausting its administrative remedies,” taxpayer then sued).

Finally, CMS could have obtained full relief by the hearing examiner process. LMC 3.52.150 identifies the available relief available:

Any money paid to the City through error, or otherwise not in payment of the tax imposed by this Chapter, or in excess of such tax, shall, upon the request of the taxpayer, be credited against any tax due or to become due from such taxpayer hereunder, or, upon the taxpayer ceasing to do business in the City, be refunded to the taxpayer.

Consequently, if CMS overpaid, but was nevertheless subject to the tax, it would have been entitled to a tax credit. If CMS was not subject to the tax at all because, as it maintained, it did not do business in the City, it would have been entitled to a tax refund. There simply is no showing

¹ While this case was on appeal, the City amended these provisions. Although the analysis is unaffected, the versions in effect at the time appear at CP 82-83.

that the relief afforded by the hearing examiner system is inadequate, nor has CMS advanced this argument. Quite the opposite, CMS's belated commencement of the administrative process suggests the contrary.

Mandating that local hearing examiners hear local tax disputes is consistent with those explicit refund provisions which courts have strictly enforced for decades. *See, e.g., Lacey Nursing Center, Inc. v. Department of Revenue*, 128 Wn.2d 40, 905 P.2d 338 (1995)(right to bring excise tax refund suits against the state must be exercised as provided by statute.).

“The requisites of judicial review also support strict adherence to the exhaustion requirement.” *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 31, 785 P.2d 447 (1990). This doctrine is of such importance that this Court speaks of it in jurisdictional terms. *Wright*, 83 Wn.2d at 382; *Retail Store Employees Union*, 87 Wn.2d at 907 (citing, *Bennett v. Borden, Inc.*, 56 Cal. App. 3d 706, 128 Cal. Rptr. 627, 628 (1976)).

Not only has this Court delineated where exhaustion is required, it has identified when exhaustion is excused. Exhaustion is excused when the pursuit of administrative remedies is futile, where no administrative remedy is available, or where such remedy is patently inadequate. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 77, 768 P.2d 462 (1989); *Ackerley Communications, Inc. v. Seattle*, 92 Wn.2d 905, 909, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980).

CMS does not cast their claims within these exceptions. Instead, CMS and the courts below relied upon separate, yet legally inapposite rationales, for allowing this action to proceed. We dissect those rationales.

1. **CMS's Stated Rationale Relies on a Misreading of *Qwest Corp.***

Throughout this case, CMS has placed reliance on one case, *Qwest Corp. v. City of Bellevue, supra*, in support of the claim that exhaustion is not required in municipal tax cases. *See e.g.*, CP 152-153. *Qwest Corp.* does not reject exhaustion for municipal claims. Rather, exhaustion is excused in those circumstances where the legality of the tax is challenged.

In *Qwest Corp.*, Qwest challenged the City of Bellevue's imposition of a utility operations tax for certain telecommunications activities, claiming Bellevue was prohibited from taxing certain charges imposed under federal law. Qwest pursued two courses of action. It appealed a tax assessment to Bellevue's hearing examiner. Qwest also filed a lawsuit challenging Bellevue's tax. Bellevue sought dismissal of the lawsuit, claiming that Qwest failed to exhaust its administrative remedies. The trial court denied this motion, and this Court affirmed.

In affirming, this Court dedicated two paragraphs (and a footnote) in rejecting the City's exhaustion argument, noting in relevant part:

But Qwest explains it did not invoke the Superior Court's appellate jurisdiction over a decision by the City hearing

examiner or Department of Finance. n19 Instead, Qwest explains, it “invoked the Superior Court’s original jurisdiction, pursuant to the Uniform Declaratory Judgments Act, RCW 7.24.010, and the Washington Constitution, Article IV, Section 6 and RCW 2.08.010, which vest the Superior Court with original jurisdiction over all cases involving the ‘legality of any tax, impost, assessment, toll or municipal fine.’” Qwest Resp. Br. at 37 (emphasis added). And Qwest cites *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000) for the proposition that where a court has original jurisdiction over a dispute, the administrative exhaustion requirement does not apply.

161 Wn.2d at 370-371 (emphasis by the Court).

In context, this analysis does not hold that a superior court would always have jurisdiction to entertain a claim for a municipal tax refund under Article IV, § 6 of the State Constitution.

This Court has recognized two forms of challenges to governmental levies² which implicate an Article IV, section 6 “legality,” analysis implicating a superior court’s original jurisdiction. *See e.g., Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 236, 119 P.3d 325 (2005). The first form of a challenge is a broad challenge to the underlying regulatory scheme as well as some limited challenges to the manner in which the governmental entity seeks to enforce the levy. *Id.*,

² *Tiffany Family Trust* addresses “assessments,” for a Local Improvement Districts. However, because Article IV, section 6 also addresses the “the legality of a tax, impost, assessment, toll, municipal fine, ...,” by implication, this language could be read to mean any of the enumerated items in Article IV, section 6. For readability, we use the word, “levy,” to describe those itemized things in Article IV, section 6.

155 Wn.2d at 235-36 (collecting cases). A second form of challenge, to specific amounts of those levies, will not trigger Article IV, section 6, “Challenges directed toward the amount of a specific assessment or the methodology employed to determine assessments are not jurisdictional defects and must be brought within the existing statutory framework.” *Tiffany Family Trust*, 155 Wn.2d at 236 (citing, *City of Longview v. Longview Co.*, 21 Wn.2d 248, 252, 150 P.2d 395 (1944)).

The challenge in *Qwest Corp.* fell into the former category. As this Court recognized, the taxpayer “d[id] not seek a factual determination either about whether the data it provided to the City in the tax audit is accurate or whether the City's classification of that data is accurate. Qwest seeks the Court's declaration that as a matter of law the City cannot tax charges for access to interstate services.” *Id.*, 161 Wn.2d at 370 fn. 18 (Ellipsis by the Court removed; Emphasis added). Because Qwest challenged whether Bellevue could even impose the tax at all, an extended discussion of “legality of [the] tax” by the *Qwest* court was unnecessary.

By contrast, CMS does not challenge the City’s legal authority to impose the tax. (CP 1-3). CMS challenges the applicability of the tax as to its conduct. It seeks a refund of taxes, asserting it did not conduct any taxable functions within the City of Lakewood. (CP 2, ¶ 6). In trying to classify their claims in this matter, CMS misapprehends two related, but

distinct concepts. The power to hear a case under article IV, section 6, should not be confused with any procedural prerequisites to hear that case. *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005).

CMS's challenge is "directed toward the amount of a specific [tax] or the methodology employed to determine [the tax.]" *Tiffany Family Trust*, 155 Wn.2d at 236. Such nexus-based challenges are a part of any tax dispute. *Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 598, 496 P.2d 504 (1972). As such, it must "be brought within the existing statutory framework," to wit: an administrative appeal before the Lakewood Hearing Examiner. *Tiffany Family Trust*, 155 Wn.2d at 236.

2. The Superior Court Misapprehended the Nature of the Jurisdictional Challenge.

In denying the City's motion to dismiss, the Pierce County Superior Court took a different view of its jurisdiction,

With regard to the jurisdiction issue, it appears as though the City is claiming, almost, that the jurisdiction of the Court hinges on whether or not the other party is saying that the taxing statute is unconstitutional or void. And I think that if the statutes meant that, if the constitution meant that, it would have said that. It doesn't say that. It says, "The legality of any tax."

In its simplest form, I'm imagining that the Plaintiff in this action believes they are a party separate from the city of Lakewood, outside of the city of Lakewood, not doing business in the city of Lakewood, and that the City of Lakewood has reached out into their pocket and taken money that they have no jurisdiction over, doesn't have the

ability to take. In its simplest form, that's what I'm seeing. In that regard, they're saying the tax is illegal because they're not subject to City of Lakewood's laws or taxes. Because of that, I believe, this Court, has original jurisdiction. They're claiming that the tax itself is illegal as it pertains to them.

(2/12/2010 VRP 18).

As the Superior Court comments indicate, it associated the geographical acts with a legal jurisdiction requirement. But in *Dravo Corp. v. Tacoma, supra*, this Court has identified that in any local tax case two nexus-related issues arise: (1) whether the taxable event occurred within the municipality's territorial limits; and (2) was there minimum connection with the municipality? 80 Wn.2d at 589-99. These are factual questions. See e.g., *Tyler Pipe Indus. v. State*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982)(observing that there was an issue of fact as to taxpayers' nexus with the State so as to merit preliminary injunction). The superior court treated this factual nexus question with a jurisdictional gloss. The question of whether a taxpayer has the requisite nexus to the taxing jurisdiction is one which a hearing examiner is competent to decide and for a court to review. See e.g., *General Motors v. Seattle*, 107 Wn. App. 42, 25 P.3d 1022 (2001)(upholding hearing examiner's determination that out-of-state taxpayer subject to municipal Business & Occupation tax).

3. **The Court of Appeals Misapplied the Concept of “Concurrent Jurisdiction.”**

In reaching its conclusion to affirm, the Court of Appeals concluded that local hearing examiners have “concurrent jurisdiction,” to entertain municipal tax refund cases. The doctrine is misapplied.

When forums have “concurrent jurisdiction,” this phrase simply refers to “[j]urisdiction that might be exercised simultaneously by more than one court over the same subject matter and within the same territory, a litigant having the right to choose the court in which to file the action.” BLACK’S LAW DICTIONARY at p. 868 (West 2004 Ed). It does not, however, mean that both forums can grant identical relief or have identical authority. *See e.g., Herring v. Texaco, Inc.*, 161 Wn.2d 189, 195, 165 P.3d 4 (2007) (noting state and federal courts share jurisdiction over dischargability issues, state courts powerless over certain orders); *see also, Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 224 P.3d 761 (2010)(state and federal courts have concurrent jurisdiction over Jones Act claims but forum’s procedural law governs right to jury).

There may arguably be some overlap between hearing examiners and the Superior Court, but this overlapping authority does not constitute “concurrent jurisdiction” in the sense that both forums retain identical fact-finding authority. Where an administrative process is present, the

hearing examiner is the fact-finder, weights the evidence and enters the decision on the issues before the agency.

This is not to say that a court is without authority; its authority is simply limited in scope. The superior court retains an appellate role of the hearing examiner's decision (brought ostensibly via writ of review). Similarly, the superior court retains the right to declare that a local tax ordinance is unconstitutional, illegal, or otherwise violates the law. And, as we discuss *infra*, if an agency action is inadequate to initiate the administrative adjudicatory process, the superior court retains the right to issue appropriate writs. But under no circumstances where an administrative process is available may the superior court exercise the fact finding role in the first instance.

The import of the Court of Appeals' decision is to provide a license for litigants to evade exhaustion requirements. In order to reach the determination that the superior court had authority, the Court of Appeals emphasized that CMS's claim was styled as an equitable claim for money had and received. But an equitable remedy will not be fashioned if an adequate remedy at law exists. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). "The true nature of a cause of action stated in a complaint must be determined by its allegations and the evidence offered in support of its prayer for relief, and not by the pleader's conclusions as to

its nature nor the label he places upon it.” *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 595, 277 P.2d 708 (1954). As discussed above, what the City’s tax code imposed as a burden, it also supplies a remedy.

The nature of this action is a tax refund case, which is fully cognizable and resolvable via an administrative process. CMS was required to utilize this administrative process before it resorted to superior court. The remedy for the failure to use the administrative process is also clear: reversal and vacation of the superior court’s decisions.

C. Although Mandamus May be An Appropriate Remedy for an Unresponsive Agency Response, it is Not Available Here.

Under the Court of Appeals reasoning and ruling, an aggrieved taxpayer, such as CMS, is allowed to pursue two remedies to obtain a refund of municipal taxes. The first remedy is to pursue a judicial process resulting in a monetary judgment, and second an administrative process pursuant to a writ of mandamus and obtain relief under the local code.

Mandamus is an extraordinary remedy. *Goldmark v. McKenna*, 172 Wn.2d 568, 576, 259 P.3d 1095 (2011). “A writ of mandamus ‘must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.’” *Farm Bureau Fed’n v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005)(quoting, RCW 7.16.170). The issuance of a writ of mandamus is subject to a mixed standard of review;

whether duty exists is a question of law while whether there “is a plain, speedy, and adequate remedy in the ordinary course of the law,” is reviewed for an abuse of discretion. *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). An abuse of discretion will necessarily be found if the trial court “based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). This Court should hold that mandamus may be appropriate to trigger the administrative process only where there has been an abject failure by the agency to act and that failure affects the taxpayer’s ability to pursue a proper remedy.

Central to obtaining mandamus relief, CMS has repeatedly claimed that the writ was necessary to get the City to act on its purported refund claim because the City allegedly failed to act. Assuming for the sake of argument that CMS is correct, CMS had an adequate remedy at law: a *timely* request for a petition for a writ of mandamus *before* filing its 2009 lawsuit. CMS filed these actions backwards. CMS was not entitled to mandamus at all for two reasons: it neither (1) timely sought the writ; nor (2) was the agency unresponsive.

1. The Application for the Writ Was Untimely.

“[A]lthough there is no statutory provision governing the time in which [a writ of mandamus] must be sought, the proper rule is that it

should be sought within the same period as that allowed for an appeal.” *Teed v. King County*, 36 Wn. App. 635, 641, 677 P.2d 179 (1984) (quoting, *State ex rel. Von Herberg v. Superior Court*, 6 Wn.2d 615, 618, 108 P.2d 826 (1940)(brackets by the *Teed* Court)). A loss of the remedy provided by an administrative process through failure to file a timely appeal does not render that remedy inadequate, or give rise to a right to an extraordinary writ. *Bock v. State*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978).

By any measure, the writ application was untimely. Promptly after the deadline by which it could have appealed the Notice and Order, CMS filed a lawsuit,³ pursued two summary judgment motions (CP 113, 461); and obtained partial summary judgment (CP 531-32). Over a year later and when some of its claims were determined to be statute of limitations-barred (CP 523, ¶ 2.1; CP 532, ¶ 7), did CMS seek mandamus in October 2010. (CP 539). Any perceived inaction by the City was not viewed as a bar in seeking judicial relief.

2. The City’s Administrative Action Was Final.

Central to CMS’s claims before the trial court and the Court of Appeals is the assertion that the City’s Notice and Order was not a final agency action. Without any authority or analysis, the Court of Appeals agreed. Under this Court’s jurisprudence, it is a final agency action.

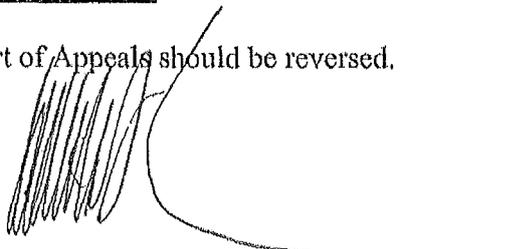
³ The City extended the deadline to respond to the Notice and Order until June 12, 2009. (CP 577). Suit was filed two weeks later on June 24, 2009. (CP 1).

This Court holds: an agency action is reviewable when it “imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.” *Bock*, 91 Wn.2d at 99. The City’s response unambiguously, “imposes an obligation, denies a right, or fixes a legal relationship.” *Bock*, 91 Wn.2d at 99. The sole basis of CMS’s claim is its assertion that it does not do business in the City of Lakewood. The City administratively rejected this claim, and *ordered* payment of those taxes which CMS had stopped paying and undertake other remedial actions. Despite the City’s clear language that an obligation was being imposed, CMS elected not to appeal. The failure to appeal renders these administrative determinations final. *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). As an unappealed administrative determination of CMS’s liability under the Code, there was nothing further which mandamus relief should have gained.

CONCLUSION

The decisions of the Court of Appeals should be reversed.

DATED: March 5, 2013.

By: 

Matthew S. Kaser, WSBA No. 32239
Acting City Attorney

CERTIFICATE OF SERVICE

The undersigned certify under penalty of perjury under the laws of the State of Washington, that on this day I served VIA DEPOSITING INTO THE US MAIL and EMAIL, the foregoing document:

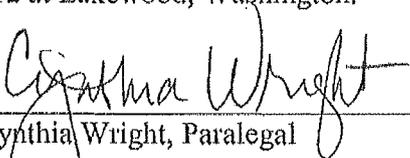
The Dinces Law Firm
Attn: Geoffrey P. Knudsen
316 Occidental Ave South, Ste 500
Seattle, WA 98104

The Dinces Law Firm
ATTN: Franklin Dinces
5314 28th Street NW
Gig Harbor WA 98335

And to via email (by agreement):

Mark D. Orthmann
Porter Foster Rorick LLP
800 Two Union Square
Seattle, WA 98101
mark@pfrwa.com

Dated this 5th day of March, 2012 at Lakewood, Washington.



Cynthia Wright, Paralegal

OFFICE RECEPTIONIST, CLERK

To: Cynthia Wright
Cc: gknudsen@comcast.net; 'fgdinces@comcast.net'; 'mark@pfrwa.com'
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Rec'd 3-5-13

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Attached please find the City of Lakewood's Supplemental Brief in the matter of CMS v. City of Lakewood and Choi Halladay, No. 87964-8 being submitted to you by Acting City Attorney, Mathew S. Kaser, WSBA#32239, Lakewood City Attorney's Office, 253-983-7838. Email is mkaser@cityoflakewood.us

Thank you,

Cynthia Wright | Paralegal | Legal & City Clerk
City of Lakewood
6000 Main Street SW | Lakewood, WA 98499
Ph: 253.589.2489 Ext 7822 | Fax: 253.589.3774 |

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