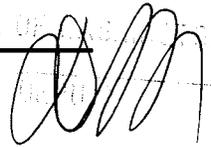


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STATE OF WASHINGTON
BY: 

No: 41509-7-II

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

Cost Management Services, Inc.

Respondent,

v.

City of Lakewood,

Appellant.

BREIF OF RESPONDENT

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I. Counterstatement of Issues Pertaining to Assignments of Error

No. 1: Cost Management Services, Inc. (“CMS”) remitted amounts to the City of Lakewood (“Lakewood”) to pay city occupation taxes which were in excess of any amounts CMS was legally required to remit. Clerk Paper’s (“CP”) 714-15 (Finding of Fact (“FF”) 21 and Conclusion of Law (“CL”) 28). Must CMS exhaust Lakewood’s administrative remedies or may CMS bring suit directly in Superior Court seeking a refund?

No. 2: CMS filed a refund claim with Lakewood dated November 6, 2008. Exhibit (“Ex.”) 1. Lakewood failed to respond to this refund claim. Is a taxpayer who properly files a refund claim under city ordinances entitled to a writ of mandamus when the city fails to act on the claim?

No. 3: CMS’ complaint, CP 1-3, raises a claim for money had and received. The money was remitted by CMS to Lakewood as city occupation taxes. Ex. 8.

- a. Is a jury trial required in tax cases?
- b. Is a jury trial required in a case that arises in equity?

No. 4: The relevant city tax is imposed on the business of selling, brokering, or furnishing artificial, natural, or mixed gas for domestic, business or industrial consumption in the City. LMC 3.52.050(D). CMS

does not engage in this business within Lakewood. CP 713 (FF 12). If the taxable event does not occur within a city, may the city still tax an out of city business because its customers are within the city?

No. 5: CMS acts as its Lakewood customers' agent in arranging for those customers to purchase gas outside Lakewood. CP 712-13 (FF 1, 2, 4-6). As an agent, CMS pays its principals' bills for gas purchased outside Lakewood. *See*, CP 473 (Fourth Declaration of Beth Beatty). The customers subsequently reimburse CMS for paying their bills. *Id.* Does gross income of an agent include amounts received to pay its principals' expenses?¹

No. 6: Testimony and exhibits directly support Findings of Fact Nos. 3, 7–16. *See*, pages 29-39. Conclusions of Law 26-30 are a correct application of law to the facts. Lakewood contends that the cited Findings are not supported by substantial evidence and apparently on that basis contends that Conclusions Nos. 26 – 30 are erroneous. Are testimony and exhibits directly supporting findings of fact substantial evidence?

¹ This issue need not be reached if this Court sustains either the Superior Court's CL 26 (that CMS did not perform the taxable event in Lakewood) or CL 27 (that CMS' activity in Lakewood was too minimal to satisfy the requisite nexus).

II. Counterstatement of the Case

Statement of Facts

CMS as agent for its clients located in Lakewood² arranges for its clients purchase of natural gas. CP 712 (FF 1). The gas which CMS arranges for its clients to purchase is sold by various third parties. CP 712 (FF 2). CMS' Lakewood customers take delivery of the gas that CMS arranged for them to purchase at the North Tacoma City Gate of NW Pipeline Company, a location outside of Lakewood. CP 712-13 (FF 4). The North Tacoma City Gate is a point of interconnection with Puget Sound Energy ("PSE"). CP 713 (FF 5).

Each of CMS' Lakewood customers entered into separate contracts with PSE for transportation and delivery of each customer's gas from the North Tacoma City Gate to each customer's business location within Lakewood. CP 713 (FF 6).³ PSE collected and paid a tax under LMC 3.52.050(D) to Lakewood for the transportation and delivery of each customer's gas from the North Tacoma City Gate to each customer's business location within Lakewood. CP 713 (FF 7) supported by Exhibit

² CMS' only two customers in Lakewood are Pierce Transit and St. Clare Hospital. RP (Trial Test. of Beth Beatty, Dec. 13, 2010 a.m.) at 24. 95% of CMS' revenues from Lakewood customers are from Pierce Transit. *Id.*

³ Lakewood has not assigned error to Findings of Fact 1-2, 4-6, and 17-21. These findings are therefore verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

71 and RP (Trial Test. of Beth Beatty, Dec. 13, 2010 a.m.) at 122 and RP (Trial Test. of Choi Halladay, Dec. 14, 2010 p.m.) at 278.

CMS' only activities in Lakewood were annual holiday visits and very occasional meetings. CP 713 (FF 13) supported by, *inter alia*, Exs. 60 and 66, RP (Trial Test. of Beth Beatty, Dec. 13, 2010 a.m.) at 21, 32-33, 49-51. *See*, pages 35-37, *infra*, for additional evidence supporting FF 13. CMS did not derive any revenue from its minimal Lakewood activities. CP 713-14 (FF14) supported by, *inter alia*, FF 17.⁴ *See*, pages 36-38 *infra* for additional evidence supporting FF 14.

All of CMS' revenues were derived from the services it performs at its Mercer Island offices of arranging for its customers to purchase gas at the interconnection point between PSE and NW Pipeline Co., coordinating with PSE for the transportation of the gas by PSE, for nominating and balancing its customers' gas, for advancing funds to pay for its customers' costs for gas and preparing single invoices for its services and the gas costs advanced by CMS. *Id.*

⁴ Lakewood does not challenge FF 17 which reads that the "lack of any Lakewood activity by CMS, since April 2010, has not altered or affected the agency relationships CMS has with its Lakewood customers nor the administration of the contracts between CMS and its Lakewood customers." That CMS not doing anything in Lakewood since April 2010 has not altered its customer relationships nor affected the administration of its contracts is substantial evidence supporting FF 14's finding that CMS did not derive any revenue from its minimal Lakewood activities. Pages 36-38, *infra*, discuss additional substantial evidence supporting the finding.

CMS did not engage in selling, furnishing or brokering gas in Lakewood. CP 713 (FF 12) supported by, *inter alia*, FF 1-2, 4-6.⁵ *See*, pages 29-36, *infra*, for additional evidence supporting FF 12.

By mistake, CMS paid \$424,803.36 of tax to Lakewood for the relevant time period. CP 714 (FF 21). At one time, CMS thought it was paying a use tax owed by its customers.⁶ It actually mistakenly paid the city utility tax imposed by LMC 3.52.050(D).⁷ That tax is imposed on the selling, brokering or furnishing in Lakewood of gas. The tax is imposed on the business performing the requisite activity in Lakewood, not on the business' customer.⁸ Once CMS discovered its error, it filed a refund claim with Lakewood. When Lakewood failed to respond to CMS' refund claim, CMS initiated suit.

⁵ FF 1-2 which find that CMS acted as its clients' agent in arranging for them to purchase gas from third parties, and FF 4-6 which find that the customers took delivery of the gas outside Tacoma and separately contracted with PSE for delivery of their gas to their Lakewood locations are undisputed findings establishing who sold the gas, where it was sold, and who delivered the gas to Lakewood. It is undisputed that CMS did not perform any of those activities. Those findings alone are substantial evidence supporting FF 12's finding that CMS did not sell, broker or furnish gas in Lakewood. *See*, CP 710-11 (letter opinion dated Dec. 20, 2010). Pages 29-36, *infra*, discuss additional evidence supporting FF 12. There is no evidence that CMS performed in Lakewood the taxable event.

⁶RP (Trial Test. of Beth Beatty, Dec. 13, 2010 a.m.) at 99 and RP (Trial Test. of Beth Beatty, Dec. 13, 2010 p.m.) at 114-15.

⁷ Any reference that the tax is a business and occupation tax, *see e.g.*, Br. of Appellants at 7, is in error. Lakewood's tax administrator testified that the tax was a utility tax. RP (Trial Test. of Choi Halladay, Dec. 14, 2010 p.m.) at 281.

⁸ Any reference to CMS paying the tax "on behalf of its customers", *see e.g.*, Br. of Appellants at 7, is in error.

Statement of Proceedings

CMS filed suit in Pierce County Superior Court Cause No. 09-2-10518-4 asserting two causes of action, a state law claim for money had and received and a municipal law claim for refund of taxes. CP 1-3. Judge Worswick, then a Pierce County Superior Court Judge, denied Lakewood's motion to dismiss brought on its failure to exhaust administrative remedies allegation. CP 250-51. Judge Lee denied summary judgment to CMS without opinion. CP 459-60. Judge Martin subsequently granted partial summary judgment finding as a matter of undisputed fact that (a) CMS operates as an agent on behalf of its clients; (b) the only tax Lakewood alleges is owed by CMS is LMC 3.52.050(D); (c) such tax is imposed on the business of selling, brokering or furnishing artificial, natural, or mixed gas in Lakewood; (d) such tax is measured by CMS' Lakewood gross income; (e) CMS' Lakewood gross income was not greater than \$460,113.72 for the time period June 24, 2006 through September 30, 2008; (f) CMS paid \$414,367.04⁹ of tax for the period after June 24, 2006 and that (g) the amount of tax CMS owed Lakewood for the

⁹ The difference between the amount of tax found to be paid at the summary judgment hearing and the amount found to be paid at trial was the result of arithmetic errors of the parties in calculating the amount during a recess in the summary judgment hearing. *See*, RP (Trial Test. of Beth Beatty Dec. 13, 2010 p.m.) at 61. *See also*, Exs. 61 and 62.

relevant time period was not greater than \$23,005.69.¹⁰ CP 524-25 (Order).

Partial summary judgment was appropriate because Lakewood did not dispute the facts.¹¹ It only contested (and still does) an issue of law whether gross income should include amounts that CMS receives as an agent to pay expenses of its principals. RP (Sept. 3, 2010) at 9 and 14.¹² Such amounts are not “value proceeding or accruing from the sale of any tangible property or service” or “receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in”, and Judge Martin excluded such amounts from the calculation of CMS’ gross income.¹³ CP 524-25 (Order).

¹⁰ The partial summary judgment was specifically entered using the phrase “not greater than” when referring to the amount of CMS’ Lakewood gross income and the amount of CMS’ Lakewood tax liability because CMS made clear that it was not contesting that it had some Lakewood taxable activity and income for purposes of the partial summary judgment motion only and intended to contest those apparently disputed facts at trial. *See*, CP 462-63 (Motion for Partial Summary Judgment). At trial, CMS’ factual evidence that it was not engaging in the taxable event in Lakewood and earned no income from its *de minimus* activities in Lakewood was not truly disputed. Lakewood offered argument regarding the evidence but offered essentially no factual evidence demonstrating facts contrary to those offered by CMS.

¹¹ Having failed to dispute facts at the summary judgment hearing, Lakewood has not assigned error to any factual finding of the Court at the summary judgment hearing. Therefore, those facts are verities on appeal. *See, State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

¹² The Brief of Appellants at 9 incorrectly states that CMS “claimed it was improperly taxed on its net revenue and not its gross revenue.” Such a claim was not made and was not granted.

¹³ At the summary judgment hearing, Judge Martin was made aware that the Washington Department of Revenue, applying a very similar statutory definition of gross income, concluded that such amounts were not gross income (*see*, CP 472-86, Fourth Declaration of Beth Beatty). Also, property of a principal in the hands of its agent remains the principal’s property. *See, CLS Mortgage v. Bruno*, 86 Wn. App. 310, 937 P.2d 1106

A bench trial was held on the issues of what if any taxable activity CMS performed in Lakewood and whether or how much Lakewood could tax CMS.¹⁴ The Superior Court issued a written ruling. CP 708-11 (letter opinion entered Dec. 20, 2010). The ruling concluded, based on the evidence, who sold the gas and who furnished the gas. CMS did not sell the gas. CP 710.¹⁵ CMS did not furnish the gas. *Id.*¹⁶ The Court next focused on whether CMS brokered the gas in Lakewood. *Id.* CMS offered evidence that the term brokering was a term of art in the industry, RP (Trial Test. of Beth Beatty, Dec. 13, 2010 a.m.) at 22, and maintained

(1997); *See also, Utica Nat. Bank & Trust v. Assoc. Prod.*, 622 P.2d 1061 (Okla. 1980) and *see, Mechem on Agency, sec. 780 and Story on Agency, secs. 229, 230 relied on by In re Estate of Melone*, 247 Ill. App. 226 (1928). Thus, money received from a principal to pay the principal's debt, is not the agent's property. It could hardly be part of the agent's income.

¹⁴ After the Order for partial summary judgment was issued but prior to trial, Lakewood prematurely filed a notice of appeal seeking review of the Court's September 3, 2010 partial summary judgment order and the Court's February 12, 2010 order denying summary judgment. That appeal was given COA No. 41223-3-II and dismissed.

¹⁵ "The evidence at trial established that CMS did not own any natural gas – the natural gas was owned either by Shell Energy, Occidental or Avista, depending on which customer and time frame was at issue. These entities were the actual sellers of the gas." CP 710 (letter opinion entered Dec. 20, 2010).

¹⁶ "The evidence at trial further established that CMS contracts with its Lakewood-based customers called for the natural gas sold by Shell, Occidental and/or Avista to be delivered to the customers at the Tacoma City Gate distribution point from the pipeline owned/operated by NW Pipeline Co. The Tacoma City Gate is located outside of the City of Lakewood. Moreover, the evidence at trial established that Puget Sound Energy owned the distribution system for the gas and entered into separate contracts with [CMS customers] for transportation of the natural gas purchased through the CMS contracts. Puget Sound Energy delivered from the City Gate outside Lakewood to the customer's business location in the City of Lakewood. The evidence further established that PSE collected and paid a tax to the City of Lakewood under LMC 3.52.050(D) for the transportation of the gas from the City Gate distribution point to the customers' business location in the City. This Court concludes that PSE was the entity furnishing natural gas to [CMS' Lakewood customers]." CP 710 (letter opinion entered Dec. 20, 2010).

that it was an agent, not a broker.¹⁷ The Court acknowledged Lakewood's argument that broker in ordinary terms includes agents. CP 710. The Court concluded, again based on the evidence,¹⁸ that even if CMS could be considered a broker, a point on which the Court reached no conclusion,¹⁹ "CMS did not engage in brokering gas in the City of Lakewood." Thus, the Court concluded 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" CP 711(letter opinion entered Dec. 20, 2010).

¹⁷ The only testimony as to the meaning of the term "broker" within the gas industry was that the term referred to someone who works for the natural gas producer to help them sell their product. CMS is not a broker because it only helps consumers purchase gas.

¹⁸ "There was no dispute that at all relevant times, CMS' offices and employees were located outside the City of Lakewood. The contracts were administered from its offices in Mercer Island. The only contacts inside the City of Lakewood were for the purposes of annual holiday visits and very occasional marketing meetings, 1-2 per year at most. The ongoing activities of administering the contract between CMS and its customers were handled by computer and telephone, all outside the City of Lakewood. In this regard, the Court notes that CMS stopped all contacts inside the City of Lakewood in April, 2010. The testimony of the customers, Pierce Transit and St. Clare, confirmed that the lack of in-person contact between CMS' employees inside the City of Lakewood since that time has not substantively altered or affected the agency relationships with CMS or the administration of the contracts between them." CP 710-11(letter opinion entered Dec. 20, 2010).

¹⁹ The Superior Court also did not reach CMS' legal argument that the meaning of the words identifying the businesses subject to the Lakewood tax is limited by RCW 35.21.860-870, the legislative authority for the local tax. RCW 35.21.860 refers to RCW 82.16.010 for the definition of gas business and RCW 35.99.010 provides the definition of "service provider". CMS falls outside either of these statutory definitions, and LMC 3.52.050(D) may only be imposed on businesses that fit those statutory definitions.

Prior to trial, the Superior Court issued a written ruling rejecting Lakewood's request for a jury trial. CP 704-06 (letter ruling entered Dec. 2, 2010). In doing so, the Court recognized that the case arose in equity and raised issues primarily equitable in nature. It discussed that plaintiff's claim was one for refund of taxes paid by mistake and that in *Dexter Horton Bldg. v. King County*, 10 Wn. 2d 186, 116 P.2d 507 (1941), the sole Washington decision on the issue of right to a jury in a tax context, the right was rejected. The Court further noted that the City also raised equitable issues by seeking an injunction and that CMS objected to the jury trial. Thus, the Court concluded that no right to a jury trial existed.

Moreover, expressly following the seven factors outlined by the Supreme Court in *Brown v. Safeway*, 94 Wn.2d 359, 617 P.2d 704 (1980)²⁰ and discussed in the subsequent cases of *Auburn Mechanical Inc. v. Lydig Construction, Inc.*, 89 Wn. App. 893, 951 P.2d 311 (1998) and *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), the Court concluded that the seven factors favored a bench trial because both parties sought equitable relief, the main issues were primarily equitable in nature,

²⁰ The seven factors are: (i) which party seeks the equitable relief; (ii) whether the party seeking equitable relief is also demanding trial of the issues to the jury; (iii) whether the main issues are primarily legal or equitable in nature; (iv) whether the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (v) are the equitable and legal issues easily separable; (vi) in the exercise of the court's discretion, great weight should be given to the constitutional right of trial by jury; and (vii) the trial court should go beyond the pleadings to ascertain the real issues in dispute.

the case presented complex issues of statutory construction and application of tax code making the presentation of the case to a jury difficult and that to the extent there were any purely legal issues, such issues were not easily separable from the equitable claims.

Also, prior to trial, Judge Martin dismissed CMS' municipal law claim in response to Lakewood's argument regarding the statute of limitations. RP (Sept. 3, 2010) at 17-20. CMS had raised a municipal law claim in an effort to have the statute of limitations calculated from a date prior to the filing of this action. *See*, CP 393-94 (Rebuttal Memorandum). The Superior Court rejected that argument because the municipal law claim was not brought as an appeal. RP (Sept. 3, 2010) 18-19. Thus, the Court calculated the statute of limitations from the date this lawsuit was filed. RP 19. Given that ruling, the municipal law claim was meaningless to CMS in this suit, and the Court dismissed the claim. CP 522-23 (Order).²¹ No appeal was taken regarding this ruling.

²¹ Lakewood attempts to portray this ruling regarding the statute of limitations as a decision of the Superior Court requiring exhaustion of administrative remedies. Br. of Appellants at 12. Lakewood is wrong. The Court made clear that it was not ruling based on exhaustion of administrative remedies and that the prior ruling regarding exhaustion of administrative remedies not being required remained the Court's ruling. The municipal law claim was dismissed because if CMS was going to attempt to extend the statute of limitations through that claim, the claim would have to be before the Court on appeal. As CMS contends, and the trial court ruled, that Lakewood did not act on the municipal law claim, that claim could not be before the Court on appeal. Therefore, the position of CMS that the municipal law claim extended the statute of limitations back to three years prior to CMS filing its refund claim with Lakewood was not ripe and the municipal law claim was dismissed. *See*, RP (Nov. 5, 2010) 5, 8, 20 and RP (Sept. 3, 2010) 18-19.

During the argument regarding the statute of limitations, however, there was discussion regarding CMS' ability to file for a writ of mandamus to force Lakewood to act on CMS' municipal law claim (which again CMS was using for purposes of extending the statute of limitations). RP (Sept. 3, 2010) at 18-19. The Court expressed that its ruling would not bar an application for a writ, and shortly after the Court's ruling on the statute of limitations, CMS sought a writ in a new action (Pierce County Superior Court Cause No. 10-2-13684-9) which was consolidated into Pierce County Cause No. 09-2-10518-4. The Court granted the writ on November 5, 2010, based on the fact that Lakewood had failed to previously act on the refund claim.²² CP 628-630. The writ required the City to take action on the CMS refund claim by November 19, 2010. *Id.* The City complied with the writ.

Subsequent to complying with the writ, Lakewood appealed the Court's granting of the writ by filing a notice of appeal dated November 30, 2010. That appeal was given COA No. 41509-7-II, and in a ruling signed by Commissioner Skerlec, this Court stayed that appeal until resolution of any matters remaining in Pierce County Cause No. 09-2-10518-4. On January 31, 2011, Lakewood appealed the final judgment in

²² The Brief of Appellants at 7-8 argues that the May 13 Notice and Order (Ex. 3) requiring CMS to pay whatever taxes it owed for a period subsequent to the period for which CMS claimed refund was a response to CMS' refund claim. This argument is erroneous and was rejected by the trial court for the reasons described at page 23, *infra*.

Pierce County Cause No. 09-2-10518-4. That appeal was given COA No. 41744-8-II. On February 11, 2011, in a ruling signed by Commissioner Skerlec, this Court lifted the stay previously entered in COA No. 41509-7-II, consolidated COA 41744-8-II into COA 41509-7-II and ordered that all future pleadings should reference COA No. 41509-7-II but that the perfection notice dated February 3, 2011 in COA 41744-8-II should be used to perfect this appeal.

III. Summary of Argument

Neither the facts nor the law support any of Lakewood's assignments of error. For Lakewood to prevail, settled law has to be overturned and facts need to be ignored.

Lakewood claims that exhaustion of administrative remedies is required. But, no case has ever required an excise taxpayer to exhaust administrative remedies, and the Washington Supreme Court recently issued a decision explaining why: Exhaustion is not required when the court has original jurisdiction or when a case raises questions of statutory interpretation.

Lakewood claims that a jury trial is required. But, no excise tax case has ever permitted a jury trial, and the trial court's letter opinion cites three cases, none of which were even mentioned in the Brief of Appellant,

explaining why: cases primarily involving issues of equity do not get tried to a jury.

Lakewood claims that it responded to CMS' municipally filed refund claim. But, no response was made. Thus, mandamus was proper.

Lakewood claims that the trial court's decision is not supported by substantial evidence and that the trial court misapplied the law to the evidence. But, substantial evidence exists for every factual finding, and the trial court properly applied the law which requires that the taxable event occur within the taxing jurisdiction and that the measure of the tax be fairly related to the taxpayer's activity within the taxing jurisdiction for a city tax to be applied.

Lakewood claims that CMS' gross income should include amounts it obtains to pay its principals' bills. But, such amounts are not CMS' property, and Washington law is settled that agents do not take such amounts into income.

IV. Argument

A. Standard of Review

On review, unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Challenged findings are reviewed under the substantial evidence standard: the record must contain a sufficient quantity of evidence to persuade a rational, fair

mindful person of the truth of the premise in question. *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). If the standard is satisfied, a reviewing court will not substitute its judgment for the trial court's even though it might have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957). When findings of fact and conclusions of law are entered following a bench trial, appellate review is limited to determining whether the findings are supported by substantial evidence, and if so, whether the findings support the trial court's conclusions of law and judgment. *Holland v. Boeing Co.* 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

In reviewing a trial court's conclusions of law, the appellate court first determines whether the trial court applied the correct legal standard to the facts under consideration. That review is *de novo*. Every conclusion of law, however, necessarily incorporates factual determinations made in arriving at the legal conclusion. For example, the conclusion of law that a driver running a red light was negligent includes a factual finding, that a driver ran a red light, a decision which is accorded deference on review. Only the trial court's conclusion of law, that the defendant ran the light and was therefore negligent, involves a conclusion (running a red light is negligent) which is to be reviewed *de novo*. See, *Rasmussen v. Bendotti*, 107 Wn. App. 947, 955, 29 P.3d 56 (2001).

The Superior Court's ruling on the availability of a jury trial is reviewed under a clear abuse of discretion standard. *Brown v. Safeway*, 94 Wn.2d 359, 617 P.2d 704 (1980) ("determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse").

The issue of whether Lakewood ever responded to CMS' municipally filed refund claim, the nature and extent of CMS' Lakewood activities and issues regarding the several findings to which error have been assigned are all issues of fact which need to be sustained as they are supported by substantial evidence in the record.

Lakewood's claim regarding the need to exhaust administrative remedies and its claim concerning what an agent must include in its gross income raise issues of law.

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

Lakewood does not, cannot and will not 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. 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, city utility taxes).

The Supreme Court gave two independent 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).

Lakewood attempts to distinguish *Qwest* by claiming that this case is not a case involving the legality of a tax and therefore the Superior Court did not have original jurisdiction. Br. of Appellant at 15–18.

Lakewood's attempt must fail because:

(i) Lakewood is silent regarding the second reason *Qwest* held exhaustion of administrative remedies is not required in excise tax cases: excise tax cases involve issues of statutory construction and "questions of statutory interpretation need not be referred to administrative agencies." This reason is as controlling here as it was in *Qwest*.

(ii) The Superior Court's original jurisdiction extends far beyond cases involving the legality of a tax. Washington Constitution Art. IV, Sec. 6. *See also*, RCW 2.08.010. The Superior Court has original jurisdiction in

cases in equity, *id.*, and CMS' state law cause of action for money had and received is an equitable claim.²³ The Superior Court has original jurisdiction in all cases where the demand is for more than \$3,000, *id.*, and CMS' 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.* Lakewood does not even contend any other court has jurisdiction over CMS' state law claim.²⁴ It is beyond debate that the Superior Court had original jurisdiction of this case.

(iii) This case does involve the legality of a tax. CMS is only entitled to a refund if the tax it paid cannot be legally imposed on CMS in the amount CMS paid. CMS argued and the Superior Court agreed that the tax could not be legally imposed on CMS.²⁵

²³ 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).

²⁴ Lakewood admits that 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 P.2d 1190 (1980) (emphasis added).

²⁵ Lakewood's argument that CMS must exhaust administrative remedies must also fail because there were no relevant administrative remedies to exhaust. Lakewood's argument seems directed to the municipal law claim that was dismissed, not to the state law claim for money had and received on which relief was granted. Lakewood's administrative process is not designed to handle the state law claim.

**C. Jury Trials Are Not Required In Tax Cases or In Cases In
Equity.**

Lakewood argues that it was entitled to a jury trial without mentioning the three cases cited by the trial court setting forth the seven factors to be considered in determining whether a case involves primarily equitable or legal claims or even mentioning the seven factors.²⁶

The trial court “was guided by the principles set forth in *Brown v. Safeway*, 94 Wn.2d 359, 617 P.2d 704 (1980) and *Auburn Mechanical Inc. v. Lydig Construction, Inc.* 89 Wn. App. 893, 951 P.2d 311 (1998) and subsequent case law (e.g., *Jackowski v. Borchelt*, 1512 Wash. App. 1, 209 P.3d 514 (2009)).” CP 704-06 (Dec. 2, 2010 letter opinion). Those cases establish that

[w]here a case involves both legal and equitable claims, or even arguably involves both equitable and legal claims, the trial court must determine whether the claims are primarily legal or equitable. In making this determination, [courts should] consider the following factors ...

- 1) Which party seeks the equitable relief
- 2) Whether the party seeking the equitable relief is also demanding trial of the issues to the jury
- 3) Whether the main issues are primarily legal or equitable in nature

²⁶ Lakewood also fails to mention RCW 4.44.080 which requires all questions of law to be decided by the court. The construction of statutes is specifically listed as a question of law, and this case required Lakewood’s law to be construed. The trial court necessarily had to construe the meaning of the taxable event in determining whether CMS performed such an activity within Lakewood. The trial court also had to construe the meaning of the term gross income in determining the proper measure of the tax.

- 4) Whether the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury
- 5) Are the equitable and legal issues easily separable.
- 6) In the exercise of the court's discretion, great weight should be given to the constitutional right of trial by jury.
- 7) The trial court should go beyond the pleadings to ascertain the real issues in dispute.

Id. *Brown v. Safeway* further holds that where a case is primarily equitable in nature, there is no right to a jury.

Here, as recognized and evaluated by the trial court, the primary claim asserted by CMS is for refund of taxes paid by mistake, an action for money had and received. This claim is equitable in nature. *See*, n. 23, *supra*, for citations to authorities recognizing that an action for money had and received is equitable in nature, and *see*, *Dexter Horton Bldg. v. King County*, 10 Wn.2d 186, 116 P.2d 507 (1941) (action seeking a tax refund is equitable in nature).²⁷ Lakewood is just wrong when it argues that the

²⁷ Lakewood attempts to distinguish the sole tax case on point, *Dexter Horton Bldg. v. King County*, by first baldly claiming that most tax disputes come before the Superior Court following an administrative determination or pursuant to an express authorizing statute and then concluding that as such, the Superior Court would be acting in its appellate capacity and it would be improper to have a jury review the administrative determination. Br. of Appellants at 27. Not only is Lakewood's premise (that most tax cases come before the Superior Court following an administrative determination or pursuant to an express authorizing statute) without any support in the record and contested by CMS, RP (Nov. 24, 2010) at 13 – 14 and 26, but the conclusion (that the Superior Court would be acting in its appellate capacity and therefore it would be improper to have a jury) does not follow. A statute cannot deprive a litigant of its constitutional right to a jury trial. In addition, a statute could expressly authorize a tax refund suit and not require any administrative determination. In such a case, the Superior Court would, as here, have original jurisdiction. Indeed, RCW 82.32.180 authorizes *de novo* "appeals" of state excise tax cases in Superior Court regardless of any prior administrative process and does not require the taxpayer to have exhausted any administrative process. If Lakewood were correct, most state tax cases would require

action for money had and received is “tort-like”. *See*, Br. of Appellant at 26.²⁸ The action is based on a quasi-contract and equitable in nature. *See*, n. 23, *supra*.

Here, as recognized and evaluated by the trial court, Lakewood itself sought equitable relief in seeking an injunction against CMS. Lakewood is silent on this point.

Here, as recognized and evaluated by the trial court, this case “would present complexities, involving statutory construction and application of tax code, making the presentation of the case to a jury difficult. To the extent there are any purely legal issues, such issues are not easily separable from the equitable claims.” CP 706 (Dec. 2, 2010 letter opinion).

Lakewood cannot demonstrate that the trial court clearly abused its discretion in determining that this case is primarily equitable in nature and not suitable for a jury. The trial court carefully evaluated the case under the relevant factors announced by the Supreme Court and correctly determined that the case raised primarily equitable issues and questions of law, not fact.

jury trials. In addition, the *Dexter Horton* case determined that a jury was not required because, as here, the case involved equitable issues. Lakewood even admitted as much in its brief. Br. of Appellants at 27.

²⁸ Lakewood is similarly wrong when it argues, at Br. of Appellants at 26, that the determination of whether an action is equitable or legal is determined from the pleadings. The cases cited by the trial court make clear that the court should go beyond the pleadings.

D. Mandamus Was Proper. CMS Deserved Some Response To Its Municipal Refund Claim.

1. Basis for the Writ.

On November 6, 2008, CMS filed a refund claim with the Finance Department of Lakewood. Ex. 1. By letter dated December 8, 2008, CMS increased its refund claim filed with Lakewood. Ex. 2. Prior to the issuance of the writ of mandamus, Lakewood²⁹ took no action regarding the refund claim. Lakewood had a duty to act on the refund claim so that the Lakewood municipal code's administrative process could be concluded. *See generally*, LMC 3.52.150, .180 and .190. *See also*, LMC 1.36. CMS demanded Lakewood act on CMS' refund claim so that the administrative process with the respect to the municipal law refund claim could be concluded. CP 734 (Verified Petition for Writ). Lakewood refused to act on the refund claim claiming that its Notice and Order/Demand for Payment sent to CMS on May 13, 2009, Ex. 3, demanding payment of an unspecified amount of taxes for periods unrelated to CMS' refund claim constituted action on CMS' November 6, 2008 refund claim. CP 744.³⁰ Upon reviewing the verified petition for

²⁹ The writ was issued to both Lakewood and Choi Halladay, the individual employed by Lakewood to administer LMC 3.52. In text, we refer solely to Lakewood, but that reference is intended to include Choi Halladay as well.

³⁰ CP 744 and CP 552 are both citations to the same letter from Lakewood dated September 30, 2010. Oddly, the Brief of Appellants at 24 argues that "CMS supported their claim for the writ, in part, on a September 30, 2010 letter authored by the City. (CP 552). But this letter does not alter the result that CMS' petition was time-barred." The argument misses the point. The letter is evidence that Lakewood refused to grant or deny the refund claim. CMS does not contend the letter was such action. Promptly upon

writ of mandamus (CP 731-44), the application for issuance of preemptory writ of mandamus (CP 555-59), Lakewood's response to the petition for writ, motion to dismiss and declarations filed in support of that motion (CP 560-621), CMS' rebuttal in support of its application and in reply to Lakewood's motion (CP 622-27) and hearing the arguments of the parties and otherwise being fully advised of the facts and circumstances, the Superior Court issued the writ. Lakewood complied with the writ on November 17, 2010. (Appendix A). Subsequent to complying with the writ, Lakewood appealed the Superior Court's granting of the writ by filing a notice of appeal dated November 30, 2010.

2. The May 13, 2009 Notice and Order/Demand for Payment Was Not An Action on The Refund Claim.

The May 13 letter (Ex. 3) is not action on CMS' refund claim. It is merely a demand for payment for an unspecified amount of taxes for periods other than those for which CMS claimed refund. By its terms, it seeks payment of taxes which were allegedly due after October 2008, after CMS stopped paying taxes to Lakewood. The letter orders CMS to apply for a Lakewood business license and to pay past due taxes.

CMS' refund claim seeks refund of taxes paid by September 2008.

Ex. 1. Nowhere in the May 13 Notice does the City reference the refund claim and nowhere in the Notice does the City deny the claim.

receiving notice from Lakewood that it was not going to take action on the refund claim and within two years of filing the claim, CMS sought the writ.

3. CMS Lacked An Adequate Remedy At Law To Require Lakewood to Act On CMS' Refund Claim.

Lakewood contends that CMS should have appealed the May 13 letter. *See e.g.*, Br. of Appellant at 14. But, that letter was not action on the refund claim.³¹ Thus, while Lakewood has an administrative process to seek refunds and to appeal the denial of refunds, all CMS could do is start that process by properly filing its claim. It had no adequate remedy at law to require Lakewood to take action on the refund claim so that the administrative process could be completed. Thus, the writ of mandamus was appropriately issued.

E. The Superior Court's Decision is Supported by Substantial Evidence and Correctly Applied the Law to the Evidence.

1. For a City Tax to be Applied, the Taxable Event Must Occur Within the Taxing Jurisdiction and There Must be a Reasonable Relationship Between the Taxpayer's Activity Within the Taxing Jurisdiction and the Measure of the Tax.

As the Brief of Appellant at 32 recognizes, under state law, a city tax must satisfy a three-part test to be sustained. First, the relevant taxable event must be identified. Second, the identified taxable event must occur within the city's territorial limits. Third, there must be a minimum

³¹ Lakewood also fails to recognize that CMS complied with the May 13 letter. 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 nothing left for CMS to appeal.

connection between the municipality, the taxpayer and the event sought to be taxed. *Tacoma v. Fiberchem*, 44 Wn. App. 538, 543, 722 P.2d 1357 (1986).

Lakewood's reliance on *Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 496 P.2d 504 (1972) is misplaced. Far from contradicting these principles, *Dravo* is an example of the principles being applied. In *Dravo*, the taxable event was contracting with Tacoma. That event occurred within Tacoma. The measure of the tax, the revenue from the contract entered into in Tacoma, was reasonably related to the taxpayer's Tacoma activity (entering into the contract in Tacoma). Thus, the tax in *Dravo* was sustained.

Here, as detailed below, the taxable event did not occur in Lakewood. CP 713-14 (FF 12 and CL 23).³² Thus, the Lakewood tax cannot be sustained.

The Brief of Appellants appears more focused on demonstrating a minimum connection exists between CMS and Lakewood (part of the third test described above) rather than the taxable event occurred within Lakewood (the second test described above). *See*, Br. of Appellants at 29 and 35. But, both tests have to be met for the tax to apply to CMS.

Moreover, for the minimum connection to exist, there must be both a reasonable relationship between the taxing entity and the taxable event and

³² Lakewood did not assign error to the Conclusion of Law that LMC 3.52.050(D) is a tax on the privilege of engaging in the activities of selling, brokering or furnishing natural gas in Lakewood.

the measure of the tax must be fairly and closely related to the taxed activities of the taxpayer within the boundaries of the municipality.

Tacoma v. Fiberchem, 44 Wn. App. 538, 543, 722 P.2d 1357 (1986).³³

Here, as detailed below, even if the taxable event could somehow be construed as occurring within Lakewood, the measure of the tax would be zero because CMS did not derive any revenue from its *de minimus* activities in Lakewood. CP 713-14 (FF 14). Thus, Lakewood's tax cannot be sustained.

The Brief of Appellants also materially misstates the facts in *Tacoma v. Fiberchem*, 44 Wn. App. 538, 543, 722 P.2d 1357 (1986) in a flawed attempt to demonstrate that the Superior Court misapplied the case.

Lakewood contends that "Fiberchem had sporadic contacts – at best – with the City of Tacoma, maintaining no office there, and its sole contacts were via telephone contact, apparently initiated by its customers." Br. of Appellants at 28. In truth, Fiberchem had a sales representative spend about 6 percent of his working time, 12 hours per month, contacting customers in Tacoma. About one-third of Fiberchem's customers were contacted in-person by the sales representative. Fiberchem also made some deliveries to Tacoma customers in its own trucks. Despite these activities, which far exceed the *de minimus* activities of CMS in

³³ The Brief of Appellants also appears more focused on demonstrating that CMS performed some activity in Lakewood than CMS performed the taxable event in Lakewood or that the measure of the tax is fairly and reasonably related to CMS' activity within Lakewood.

Lakewood, this Court determined that Fiberchem's Tacoma activities did not bear any fair and reasonable relation to the proceeds of sales to Tacoma customers. Therefore, the Tacoma tax could not be applied to Fiberchem. Here too, CMS' Lakewood activities bear no fair relationship to proceeds it receives from Lakewood customers – even if the taxable event somehow is deemed to occur in Lakewood. Thus, Lakewood's tax cannot be applied to CMS.

2. The Superior Court Found As a Matter of Fact that CMS Did Not Perform the Taxable Event In Lakewood and that CMS Derived No Revenue From Its Lakewood Activities.

Here, the taxable event was the selling, brokering, or furnishing of natural gas in Lakewood. CP 714 (CL 23).³⁴ Lakewood has never disputed that this is the taxable event.³⁵ Lakewood does argue that CMS

³⁴ The individual employed by Lakewood to administer the tax at issue admitted that if CMS was performing the taxable event outside Lakewood, Lakewood would not tax CMS. RP (Trial Test. of Choi Halladay, Dec. 14, 2010 p.m.) at 269. Mr. Halladay further admitted that if someone engages in the taxable event of selling, brokering or furnishing natural gas within Lakewood, but they make the delivery of the gas outside Lakewood, Lakewood would not impose the tax at issue on the business in regard to the revenue from the sales delivered outside Lakewood. RP (Trial Dec. 14, 2010 p.m.) at 277. Mr. Halladay also admitted that both Puget Sound Energy and CMS could not be supplying the same unit of gas for Lakewood tax purposes and that the correct taxpayer for each unit of gas is the party who brings the gas to Pierce Transit in Lakewood. RP (Trial Test. of Choi Halladay, Dec. 14, 2010 a.m.) at 279-80. The testimony of Mr. Halladay alone is sufficient to sustain the judgment below. *See, Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985) (The judgment of the trial court will not be reversed if it can be sustained on any theory supported by the record and the law).

³⁵ Not only has no error been assigned to this Conclusion, but the partial summary judgment entered on September 3, 2010 determined that the only tax Lakewood alleged was owed by CMS was that imposed by LMC 3.52.050(D) and that such tax is imposed on the business of selling, brokering or furnishing gas in Lakewood. No error has been

performed the taxable event, Br. of Appellant at 31 – 35, but it fails to demonstrate in any manner that CMS performed such an event in Lakewood, and the Superior Court found as a matter of fact that CMS did not perform the taxable event in Lakewood. CP 713 (FF 12).

Here, CMS' Lakewood activities were limited to annual holiday visits and very occasional meetings. CP 713 (FF 13). CMS did not derive any revenue from its minimal Lakewood activities. CP 713 (FF14).³⁶

CMS' revenues were derived from the services it performed at its Mercer Island offices. Mercer Island is where CMS arranged for its customers to purchase gas at the interconnection point between PSE and NW Pipeline Co.; it is where CMS coordinated with PSE for the transportation of the gas by PSE; it is where it nominated and balanced its customers' gas; it is where it read the customers' meter;³⁷ it is where it advanced funds to pay for the customers' gas, and it is where CMS prepared invoices for its services and the gas costs which it advanced. CP 713-14 (FF 14).

assigned to that portion of the summary judgment ruling. It would be too late for Lakewood to contend otherwise.

³⁶ Choi Halladay admitted that Lakewood should include in the measure of the tax at issue only income derived from activities performed within the city. RP (Trial Dec. 13, 2010 p.m.) at 270. Thus, Lakewood should levy no tax on CMS.

³⁷ Lakewood mistakenly contends that CMS' daily monitoring, nomination and balancing which involves reading the number on the customer's meter is a Lakewood activity. Br. of Appellants at 29-30. This argument is factually wrong. CMS performs all of these activities solely at its Mercer Island offices. CP 713-14 (FF 14). Lakewood apparently does not understand that Puget Sound Energy forwards to CMS's Mercer Island office all the information it needs to read the customer's meter via telephone lines. RP (Trial Test. of Beth Beatty, Dec. 13, 2010 a.m.) at 26.

As CMS derived no revenue from its Lakewood activities and as CMS did not perform the taxable event in Lakewood, Lakewood's tax cannot be applied to CMS.

3. Substantial Evidence Supports Each Finding of Fact.

Lakewood assigned error to a dozen factual findings made by the Superior Court. While we address each in turn detailing some of the substantial evidence introduced supporting each finding, the evidence as a whole supports the findings in their entirety. Focusing on individual bits of evidence risks minimizing the force of the evidence in its entirety which fully supports the findings.

Finding of Fact 3: CMS sold no gas to its Lakewood customers.

The substantial evidence that supports this finding includes:

a. Beth Beatty's negative response to the question "Does CMS sell gas? RP (Trial Dec. 13, 2010 a.m.) at 21 as well as her testimony that CMS does not sell gas to St. Clare Hospital, RP (Trial Dec. 13, 2010 a.m.) at 86 and 87, and that Pierce Transit never purchased gas from CMS. RP (Trial Dec. 13, 2010 p.m.) at 151.

b. Beth Beatty's testimony that CMS arranges as its clients' agent for gas to be purchased by its clients from third parties. RP (Trial Dec. 13, 2010 a.m.) at 14-15 as well as her testimony on cross-examination that CMS is an agent of its Lakewood customers. RP (Trial Dec. 13, 2010 a.m.) at 81.

c. Finding of Fact No. 1's undisputed finding that CMS, as agent for its clients located in Lakewood, arranges for its clients' purchase of gas.

d. Beth Beatty's testimony on redirect that Shell is a supplier to Pierce Transit, Occidental is a supplier to St. Clare and Avista used to be a supplier to St. Clare. RP (Trial Dec. 13, 2010 p.m.) at 112.

e. Doug Betzold's testimony at RP (Trial Dec. 13, 2010 p.m.) at 180-86 where he explains that CMS cannot sell gas because the local utilities and the interstate pipeline coupled with a Federal Energy Regulatory Commission Rule have made it impossible, and as a result, CMS always acts as its clients' agent in purchasing gas on its clients' behalf.³⁸

Finding of Fact 7: [Puget Sound Energy (PSE)] collected and paid a tax under LMC 3.52.050(D) to Lakewood for the transportation and delivery of each customer's gas from the North Tacoma City Gate to each customer's business location within Lakewood.

The substantial evidence that supports this finding includes:

a. Beth Beatty's testimony in response to a question from Judge Martin that "Puget Sound Energy is taxed for their transportation service under [LMC 3.52.050]." RP (Trial Dec. 13, 2010 a.m.) at 122.

³⁸ Lakewood attempts to portray CMS acting as its clients' agent in arranging their purchase of gas as CMS selling gas. Br. of Appellants at 30. Such a portrayal is contrary to the facts discussed in text as well as the undisputed FF 1-2 and 4-6.

b. Choi Halladay’s testimony that PSE is paying tax to Lakewood on their gross revenue from their activities in Lakewood. RP (Trial Dec. 14, 2010 a.m.) at 278.

c. Exhibit 71, an invoice from Puget Sound Energy to Pierce Transit. It bills Pierce Transit an amount for Lakewood taxes. *See also*, RP (Trial Test. of Beth Beatty, Dec. 14, 2010 p.m.) at 308 for testimony concerning Exhibit 71.

Finding of Fact 8: PSE furnished to CMS’ Lakewood customers the gas CMS arranged for its Lakewood customers to purchase from Shell Energy, Occidental and/or Avista at the North Tacoma City Gate.

The substantial evidence that supports this finding includes:

a. Finding of Fact No. 2’s undisputed finding that “[t]he gas which CMS arranges for its clients located in Lakewood (Lakewood customers) to purchase is sold by Shell Energy, Occidental and/or Avista depending on the customer and the date of sale.”

b. Finding of Fact No. 4’s undisputed finding that “CMS Lakewood customers take delivery of the gas that CMS arranged for them to purchase from Shell Energy, Occidental and/or Avista at the North Tacoma City gate of NW Pipeline Co.”

c. Finding of Fact No. 5’s undisputed finding that “[t]he North Tacoma City Gate of NW Pipeline Co is a point of interconnection with Puget Sound Energy, ‘PSE’, and is outside Lakewood.”

d. Finding of Fact No. 6's undisputed finding that "PSE entered into separate contracts directly with each of CMS' Lakewood customers for the transportation and delivery of each of the customer's gas from the North Tacoma City Gate to each customer's business location within Lakewood."

e. Exhibit 67, the contract between Pierce Transit and Puget Sound Energy for transportation of Pierce Transit's gas from the city gate to their facility.

f. Beth Beatty's testimony that CMS's function with the gas is complete once Puget Sound Energy takes delivery of the gas. RP (Trial Dec. 13, 2010 a.m.) at 23.³⁹

g. Gisela Ratajski's⁴⁰ testimony that CMS' function with the gas that it arranges for Pierce Transit to purchase is completed once Puget Sound Energy has the gas and that CMS has completely earned its fee at the time the gas is delivered to Puget Sound Energy. RP (Trial Dec. 14, 2010 a.m.) at 214.⁴¹

³⁹ In Brief of Appellants at 31, Lakewood attempts to make an argument out of the fact that CMS bills for its services once an amount of gas is delivered to the customer in Lakewood by Puget Sound Energy. Beth Beatty explained that this was done as a convenience to the customer. CMS strives to issue easy to understand single bills for its services and the principal's gas costs which CMS advanced as the customers' agent. RP (Trial Dec. 13, 2010 a.m.) at 96.

⁴⁰ Gisela Ratajski is Pierce Transit's Director of Procurement, Warehousing and Administrative Services. RP (Trial Test. of Gisela Ratajski, Dec. 14, 2010 a.m.) at 194. She has more knowledge about Pierce Transit's acquisition of gas and its relationship with CMS than Wayne Franshier, the other Pierce Transit employee who testified. RP (Trial Test. of Wayne Franshier, Dec. 14, 2010 a.m.) at 225. Both Ms. Ratajski and Mr. Franshier were called to testify by Lakewood.

⁴¹ Lakewood wrongly attempts to minimize the significance of CMS' function being complete once the gas is owned by the customer and in the hands of Puget Sound Energy

Finding of Fact No. 9: CMS did not furnish gas to its Lakewood customers.

The substantial evidence that supports this finding includes:

- a. All the evidence described above supporting FF No. 8.
- b. Beth Beatty’s testimony that CMS does not furnish gas. RP (Trial Dec. 13, 2010 a.m.) at 21.
- c. Choi Halladay’s testimony that both Puget Sound Energy and CMS could not be supplying the same unit of gas for Lakewood tax purposes and that the correct taxpayer for each unit of gas is the party who brings the gas to Pierce Transit in Lakewood. RP (Trial Dec. 14, 2010 a.m.) at 279-80.

Finding of Fact No. 10: CMS neither delivered the gas nor ever owned the gas purchased by and delivered to CMS’ Lakewood customers.

outside Lakewood by arguing that “where title to natural gas passes, is not determinative in analyzing the application of local taxes in the natural gas contact (sic).” Br. of Appellants at 35 citing *GP Gypsum Corp. v. Department of Revenue*, 169 Wn.2d 304, 237 P.3d 256 (2010). *GP Gypsum* involved a use tax. The Supreme Court determined that use occurred at the place the gas was consumed (burned), not at the place it was purchased. Nothing in that case indicates that a business selling, brokering or furnishing the gas would also be taxed at the place of consumption, rather than the place of sale. Thus, *GP Gypsum* is inapposite to the case at bar. Lakewood also argues that “the location where title passes is not determinative in the application of B&O taxes.” Br. of Appellants at 35, citing, *Ford Motor Co. v. Seattle*, 160 Wn.2d 32, 156 P.3d 185 (2007). In *Ford*, the tax measure was limited to cars delivered into Seattle. The case stands for the proposition that a business and occupation tax on selling may be measured by proceeds from the sale of cars delivered into the jurisdiction if the taxpayer is engaged in selling activity in the jurisdiction. Here, CMS is not engaged in selling, brokering or furnishing gas in Lakewood. Moreover, here, it is not just paper title that passes to the customer outside of Lakewood. Here, the customer hires a third party (Puget Sound Energy) to take possession of its gas from the seller (another third party) outside of Lakewood, and CMS’ function concerning the gas delivered to Puget Sound Energy is completed at that point. *Ford* is also inapposite.

The substantial evidence that supports this finding includes:

a. All the evidence described above demonstrating that the gas is sold by third parties to CMS' customers and is delivered from the North Tacoma City gate to the customers' Lakewood locations by Puget Sound Energy.

b. Beth Beatty's testimony that CMS never has title to the gas, never takes possession of the gas and has an agency relationship with its clients. RP (Trial Dec. 13, 2010 a.m.) at 21-2.

c. Beth Beatty's testimony that a Federal Regulatory Commission Rule requires that "the person who moves the gas on the pipeline, the person, company et. certera, must be the owner of the gas. So the owner of the capacity and owner of the gas must be the same" together with her testimony that Shell owns the capacity on the pipeline and is the owner of the gas at that point. RP (Trial Dec. 13, 2010 p.m.) at 114.

d. Undisputed Finding of Fact No. 6 that Puget Sound Energy contracts directly with the Lakewood customers to transport the customers' gas from the interconnection point between Puget Sound Energy and NW Pipeline Co.

e. Beth Beatty's testimony that CMS never owned gas. RP (Trial Dec. 13, 2010 p.m.) at 119.

f. Doug Betzold's testimony that CMS did not sell gas because it never owned any gas and the reasons why it could not sell gas included the

local utility's monopoly concerning supplying CMS' customers at their Lakewood locations. RP (Trial Dec. 13, 2010 p.m.) at 180-86.

Finding of Fact No. 11: CMS conducts its agency business, which consists of not only the arranging of the purchase of gas by its clients but also the nomination for such gas, the balancing of gas usage by its clients and single payer invoicing for the gas and transportation services provided by PSE, at its Mercer Island offices.

The substantial evidence that supports this finding includes:

a. Beth Beatty's testimony that Mercer Island is where CMS performs its services for Pierce Transit and St. Clare. RP (Trial Dec. 13, 2010 a.m.) at 32.

b. All the evidence detailed below supporting Finding of Fact 14.

Finding of Fact No. 12: CMS did not engage in selling, furnishing or brokering gas in Lakewood.

The substantial evidence that supports this finding includes:

a. All the evidence detailed above demonstrating that CMS does not sell or furnish gas.

b. Beth Beatty's testimony that CMS does not broker gas. RP (Trial Dec. 13, 2010 a.m.) at 21.

c. Exhibit 60 which details the *de minimus* time and expense to CMS of CMS' Lakewood activities.

d. Beth Beatty's testimony regarding Exhibit 60 including her description of CMS' Lakewood activities being limited to no more than

1.5 hours per year for holiday visits and natural gas update meetings at a cost of \$115 per year to CMS. RP (Trial Dec. 13, 2010 a.m.) at 49–51.

e. Gisela Ratajski’s testimony, RP (Trial Dec. 14, 2010 a.m.) at 212:

Q. Did CMS do anything In Lakewood that Pierce Transit paid for?

A. No.

Finding of Fact No. 13: CMS’ only activities in Lakewood were annual holiday visits and very occasional meetings.

The substantial evidence that supports this finding includes:

a. The evidence detailed above concerning Exhibit 60 and Beth Beatty’s testimony concerning CMS’ activities in Lakewood being of no more than 1.5 hours per year and being limited to holiday visits and natural gas update meetings.

b. The evidence detailed below that CMS derives no revenues from its Lakewood activities and derives all of its revenues from the services it performs at its Mercer Island offices.

Finding of Fact No. 14: CMS did not derive any revenue from its minimal Lakewood activities. CMS’ revenues were derived from the services it performs at its Mercer Island offices of arranging for its customers to purchase gas at the interconnection point between PSE and NW Pipeline Co., coordinating with PSE for the transportation of the gas by PSE, for nominating and balancing its customers’ gas, for advancing

funds to pay for its customers' costs for gas and preparing single invoices for its services and the gas costs advanced by CMS.

The substantial evidence that supports this finding includes:

a. Beth Beatty's testimony that all services for Lakewood customers are performed at its Mercer Island offices, that no one from CMS performs any services for which CMS earns revenues from Lakewood customers anywhere other than Mercer Island, and that the activities which earn CMS its fee are: arranging the transportation and arranging the purchase of gas by its customers, coordinating the transportation of the gas⁴² and paying certain bills on the customers' behalf as their agent. RP (Trial Dec. 13, 2010 a.m.) at 32-33.

b. Exhibit 66 which illustrates that CMS' tax to Lakewood would only be \$28.77 if it was apportioned based on time spent in Lakewood.

c. Beth Beatty's specific testimony on cross examination that CMS' activities prior to April, 2010 in Lakewood "were so insignificant and did not generate any revenue" and that there were no activities in Lakewood after that date and CMS' "business is the same". RP (Trial Dec. 13, 2010 p.m.) at 110.

d. Gisela Ratajski's testimony at RP (Trial Dec. 14, 2010 a.m.) at 212:

Q. Did CMS do anything in Lakewood that Pierce Transit paid for?

⁴² Other testimony of Beth Beatty indicated that the phrase "coordinating the transportation of gas" included the nomination and balancing of gas needs with Puget Sound Energy. RP (Trial Dec. 13, 2010 a.m.) at 19 and 30.

A. No.

Finding of Fact No. 15: The administration of the contracts between CMS and its Lakewood customers were handled entirely outside Lakewood.

The substantial evidence that supports this finding includes:

- a. The evidence detailed above concerning where services for CMS' customers were performed and
- b. The evidence detailed above concerning the absence of any service being performed in Lakewood.

Finding of Fact No. 16: CMS ceased engaging in any and all activities within Lakewood in April, 2010.

The substantial evidence that supports this finding includes:

- a. Beth Beatty's testimony that CMS ceased going into Lakewood for any and all purposes no later than April, 2010. RP (Trial Dec. 13, 2010 a.m.) at 70 -71.
- b. Undisputed FF 17 that the lack of any Lakewood activity by CMS, since April 2010, has not altered or affected the agency relationships CMS has with its Lakewood customers nor the administration of the contracts between CMS and its Lakewood customers.
- c. Beth Beatty's testimony that CMS ceasing going into Lakewood for any and all purposes no later than April, 2010 has not

resulted in any customer paying CMS any less or caused any customer to complain or even comment. RP (Trial Dec. 13, 2010 a.m.) at 70–71.

d. Gisela Ratajski’s testimony that she sees CMS so rarely that she would not have noticed that CMS ceased going into Lakewood for any purpose, that CMS never going into Lakewood would not result in Pierce Transit not doing business with CMS, that CMS never going into Lakewood would not result in Pierce Transit paying CMS any differently and that if CMS never came into Lakewood, Pierce Transit would still have done business with them. RP (Trial Dec. 14, 2010 a.m.) at 212-13.

Substantial evidence, evidence sufficient to persuade a rational person of the fact in question, supports each of the challenged Findings of Fact. Therefore, each of the Findings must be sustained.

4. The Challenged Conclusions of Law Correctly Apply the Law To The Facts.

Lakewood has assigned error to five Conclusions of Law. We address each in turn.

Conclusion of Law 26: CMS has not engaged in the activity of selling, brokering or furnishing of natural gas in the City of Lakewood.

This Conclusion of Law logically follows from Finding of Fact 12 that CMS has not sold, furnished or brokered gas in Lakewood. That finding is supported by substantial evidence. *See*, pg. 29-36, *supra*. It is labeled a Conclusion of Law as well as a finding of fact because that is the taxable

incident under LMC 3.52.050(D), the tax at issue.⁴³ Therefore, this conclusion must be sustained.⁴⁴

Conclusion of Law 27: CMS activities in Lakewood are too minimal to satisfy the requisite nexus.

This Conclusion of Law logically follows from the totality of Findings of Facts 3 through 18. The correctness of the principle of law being applied (there must be both a reasonable relationship between the taxing entity and the taxable event and the measure of the tax must be fairly and closely related to the taxed activities of the taxpayer within the boundaries of the municipality) is demonstrated at pages 24-27, *supra*.

Conclusion of Law 28: CMS is entitled to a refund of the entire \$424,803.36 it paid to the City as tax between June 24, 2006 and October 1, 2008.

⁴³ Choi Halladay admitted that if CMS was not selling, brokering or furnishing gas in Lakewood, Lakewood would not impose tax on CMS. RP (Trial Dec. 14, 2010 a.m.) at 269.

⁴⁴ This Conclusion of Law also is independently required under RCW 35.21.860-870 which provides limited authority for cities to impose utility taxes. LMC 3.52 is the city's utility tax. It is imposed on utilities and denominated as such. CMS is not a utility. It is not a gas business. The referenced state statutes define a gas distribution business to mean the business of operating a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural. RCW 82.16.010(7). There is no evidence whatsoever that CMS operates a plant or system for the production or distribution for hire or sale of gas, whether manufactured or natural. Therefore, as a matter of state law, as well as the city code, even if CMS were selling, furnishing or brokering gas in Lakewood as a matter of fact, which it is not, Lakewood's utility tax could not as a matter of law be applied to CMS. This issue of law was not reached by the trial court as it decided the matter on the basis of the fact that CMS does not sell, broker or furnish gas in Lakewood as those words are given their everyday meaning. It similarly need not be reached by this Court unless this Court was inclined to reverse the trial court's factual finding.

This Conclusion of Law is the logical conclusion of the two preceding conclusions of law (that CMS did not perform the taxable event and the minimal connection to sustain a tax does not exist) coupled with the undisputed fact, CP 714 (FF21), that CMS paid that amount of tax to the City for that period of time.

Conclusion of Law 29: CMS is entitled to pre and post judgment interest on the amounts to be refunded calculated at the judgment rate from the date the amounts were paid until the date of the refund.

While error has been assigned to this Conclusion of Law, the Brief of Appellant does not address this conclusion in any manner. Pre and post judgment interest are awarded in tax refund actions and actions for money had and received. *Carrillo v. Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004); *Hansen Baking Co. v. Seattle*, 48 Wn.2d 737, 296 P.2d 670 (1956) and *Swartout v. Spokane*, 21 Wn. App. 665, 586 P.2d 135 (1978); *Byram v. Thurston Cty.*, 141 Wash. 28, 39, 251 P. 103 (1926); *Puget Sound Alumni Kappa Sig. v. Seattle*, 70 Wn.2d 222, 227, 422 P.2d 799 (1967). This principle of law was also essentially conceded in open court by Lakewood. RP (Hearing, Sept. 3, 2010) at 22.

Conclusion of Law 30: CMS owes Lakewood no tax for periods after October 1, 2008.

This Conclusion of Law logically follows from the earlier Conclusions of Law 26-28 (CMS did not perform the taxable event; the minimal connection to sustain a tax does not exist; and CMS is entitled to a full

refund) and Finding of Fact No. 16 (CMS has ceased any activity in Lakewood from April, 2010 forward).

F. CMS, An Agent, Does Not Include In Gross Income Amounts That Pass Through It To Pay Principals' Bills.

This issue need not be reached by this Court so long as the trial court's Finding of Fact 12 and Conclusion of Law 26 are sustained. That is, this issue is only of import if the Court determines that CMS is subject to Lakewood's tax. In such an event, Lakewood contends that amounts CMS receives as its customers' agent to pay the customers' costs for gas to third parties should be part of CMS' gross income.

Lakewood is incorrect because:

a. Property of a principal in the hands of its agent is still the principal's property. *See, CLS Mortgage v. Bruno*, 86 Wn. App. 310, 937 P.2d 1106 (1997); *See also, Utica Nat. Bank & Trust v. Assoc. Prod.*, 622 P.2d 1061 (Okla. 1980) and *see, Mechem on Agency*, sec. 780 and *Story on Agency*, secs. 229, 230 *relied on by In re Estate of Melone*, 247 Ill. App. 226 (1928). Thus, the money CMS obtains from its principals to pay the cost for the principals' gas is not the property of CMS.

b. LMC 3.52.020(A) defines "Gross income" to mean

the value proceeding or accruing from the sale of any tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees, or other emoluments, however designated ... and without any deduction on

account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever

Money which CMS obtains as an agent to pay the gas costs of its principals is not value proceeding or accruing to CMS. Therefore, it is not part of CMS' gross income.

c. The determination of CMS' gross income is important for Washington State business and occupation tax purposes,⁴⁵ and the Washington State Department of Revenue ("WDOR") has determined and instructed CMS that the amounts it receives to pay its principals' bills are not part of CMS' gross income. This determination was made as part of an audit of CMS by the WDOR covering the time period 2004 through 2007. In that audit, CMS was instructed that "[r]eimbursements for purchases of natural gas made for principals and city and state use taxes paid on their behalf is 'pass through reimbursements' and are not considered revenue subjected to excise B&O taxes."⁴⁶ Thus, the WDOR has determined that CMS is an agent of its customers and that amounts it receives for its principals' costs are not part of its gross income. The state and city definitions of gross income are so similar that the fact that amounts CMS obtains as an agent to pay its customers' costs for gas are

⁴⁵ Compare RCW 82.04.080 ("Gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services ... rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, or any other expense whatsoever") with LMC 3.52.020(A).

⁴⁶ CP 472-86, Fourth Declaration of Beth Beatty.

not included in its gross income for state purposes means that such amounts should not be included in its gross income for city purposes.

V. Conclusion

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

Respectfully submitted, this 27th day of June, 2010.

The Dinces Law Firm

By 

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Geoffrey P. Knudsen, WSBA 1324
Attorneys For Appellant
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Gig Harbor, WA 98335
(253) 649-0265

VI. Appendix

A. City of Lakewood's Compliance With the Writ



Douglas G. Richardson
Mayor

Don Anderson
Deputy Mayor

Claudia B. Thomas
Council Member

Walter Neary
Council Member

Michael D. Brandstetter
Council Member

Mary Moss
Council Member

Jason Whalen
Council Member

Andrew E. Neiditz
City Manager

Heidi Ann Wachter
City Attorney

Alice M. Bush, MMC
City Clerk

November 17, 2010

Doug Betzold
Chief Executive Officer
Cost Management Services, Inc.
2737 78th Avenue SE #101
Mercer Island, Washington 98040

**NOTICE AND ORDER
SECOND DENIAL OF REQUEST FOR REFUND**

Dear Mr. Betzold,

As the designated official of the City of Lakewood, and pursuant to a Writ of Mandamus, issued by Judge E. Martin in Pierce County Superior Court on November 5, 2010, this is OFFICIAL NOTICE that the City of Lakewood does again hereby deny your requests dated November 6, 2008 and December 8, 2008 for a refund of utility occupation taxes. A copy of the Writ of Mandamus is attached hereto for your convenience.

As Cost Management Services was originally advised in a Notice and Order Demand for Payment dated May 13, 2009, and reiterated in a letter dated August 27, 2009, any appeal of this denial must be made in writing as set forth in LMC 5.02.180 and LMC 5.02.190 and filed with the Lakewood City Clerk within ten (10) days from the date of your receipt of this Notice and Order. A \$450 hearing examiner fee must accompany your appeal of this administrative determination.

Respectfully,

Choi Halladay
Assistant City Manager, Finance

cc: Andrew Neiditz, City Manager
Heidi Wachter, City Attorney

NOTICE AND ORDER
COST MANAGEMENT SERVICES

VI. Appendix

B. Certificate of Mailing

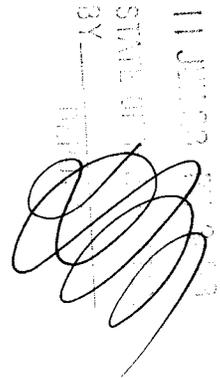
Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 29th day of June, 2011 I placed in the United States mail, postage prepaid, a copy of Brief of Respondent, addressed to:

Michael L. McKenzie and Matthew S. Kasser
City of Lakewood
6000 Main Street
Lakewood, WA 98499-5027



Franklin G. Dinces



11 JUN 2011
STATE OF WASHINGTON
COUNTY OF DUBLUQUE