

**FILED**

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

No. 305244-III

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

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IGI RESOURCES, INC,

Respondent

v.

CITY OF PASCO

Appellant.

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**SUPPLEMENTAL REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Appellant City of Pasco (hereinafter referred to as “Pasco”) respectfully replies to the Supplemental Brief of Respondent IGI Resources, Inc. (hereinafter referred to as “IGI”).

On October 10, 2013, *Cost Management Services, Inc. v. City of Lakewood and Choi Halladay*, Dckt. No. 41509-7-II consolidated with Dckt. No. 41744-8-II (hereinafter referred to as *Cost Management Services*), dramatically altered the landscape of this case in favor of the City of Pasco. Prior to looking at *Cost Management Services*, it is helpful to review the fact pattern of this case.

## II. FACTS OF THE CASE

For the convenience of the Court, the parties submitted this case to the Court on Stipulated Facts. Clerk's Papers (CP) at 85-88. In that stipulation, the parties provided the Court with certain agreed facts, summarized here in part:

A. Pasco had a municipal utility tax on the sale of natural gas. (PMC 5.32.04) CP at 85.

B. IGI was a natural gas supplier, selling gas to customers within the City of Pasco. CP at 86.

C. IGI erroneously reported and paid utility taxes for natural gas delivered outside the City limits. CP at 86.

D. Tax payments were remitted without contemporaneous protest. CP at 86.

E. "IGI has not attempted to pursue any municipal administrative remedies for the refund of the alleged overpayment of the taxes to Pasco." CP at 86.

F. Pasco has a simple and adequate administrative appeal for the refund of overpaid taxes in PMC 1.17.030 which states in part "any person seeking correction, adjustment, refund or reimbursement for any payment of any . . . tax . . . shall prior to any judicial action, present to the City Manager, or his designee, a written protest stating the basis upon which such correction, adjustment, or refund is requested. The City Manager, or his designee, shall make a written determination on the protest within sixty (60) days, of the date of its filing with the City Clerk." Pasco has asserted as an affirmative defense, IGI's failure to exhaust this administrative remedy prior to suit.

Like the pending case, *Cost Management Services* also involved a taxpayer claim for refund of overpaid taxes. In *Cost Management Services*, however, the taxpayer did initiate the administrative review process with the tax authority, but the tax authority declined to act. Also, in *Cost Management Services*, the

taxpayer did not stipulate, as IGI did here, that it had not attempted to pursue any municipal administrative remedies for the refund of alleged overpayment of taxes.

### **III. THE HOLD IN *COST MANAGEMENT SERVICES***

In its analysis, *Cost Management Services* first examined the exhaustion rule. (Slip Op., Oct. 10, 2013) (hereinafter cited as Slip. Op.). The court affirmed the rule that where an administrative remedy is provided, it must be exhausted before the Courts will intervene. *Id.* The Court then indicated two questions should be answered to determine if exhaustion applies: 1) is there an adequate remedy; and 2) has any attempt been made to pursue that remedy?

In looking at these two questions, the Supreme Court considered a threshold issue of whether a taxpayer could simply avoid exhaustion by claiming concurrent jurisdiction. The high Court explains this was not the holding of the Court of Appeals in *Cost Management Services*. A theory of concurrent jurisdiction via the equitable claim for money had and received does not vitiate the exhaustion requirement.

Reading those passages together, we are convinced that the Court of Appeals did not hold that "an equitable cause of action vitiates the requirement of exhaustion." Pet. for Review at 7. Instead, the Court of Appeals decision that CMS did not make any further attempts to exhaust resulted

from its determination that "CMS had no administrative mechanism to pursue a refund of taxes wrongly paid" because Lakewood had never responded to CMS' refund request."

(Slip Op. at 9.)

Exhaustion procedural requirements should not be confused with jurisdictional issues. *Id.* at 14-16. The theory of concurrent jurisdiction as a means to evade exhaustion was basically the heart of IGI's theory throughout its entire case, as it continues in the substance of its latest supplemental brief. But, IGI had a clear route to present its case to the Pasco City Manager. (PMC 1.17.030) *Brief of Appellant* at 7. It stipulated that it chose not to do this. Unlike *Cost Management Services*, IGI simply failed to exhaust its available administrative remedies. Unlike *Cost Management Services*, at no time did Pasco ever issue any demand for payment of taxes, there being no refund request to respond to and the demand not otherwise having been made to IGI.

IGI's Supplemental Brief urges, however, that *Cost Management Services* provides additional grounds to affirm the trial Court and that IGI had no obligation to exhaust its available administrative remedies. *Supplemental Brief of Respondent* at 2. Quite the opposite of the case, *Cost Management Services* dismantles

the pillars upon which IGI's case is based - - that an equitable cause of action vitiates the requirements of exhaustion and the exhaustion requirement can be voided under the claim of original jurisdiction.

#### **IV. REPLY TO IGI'S SUMMARY OF ARGUMENT**

Summarizing its argument, IGI first urges that the trial court held Pasco's ordinance did not apply at the outset to this case. Pasco urges that *Cost Management Services* adds nothing to IGI's position on this issue. Moreover, it has always been clear that this was a case about a tax overpayment claim.

IGI next urges that exhaustion is not required under *Cost Management Services* because: (i) IGI's claim for money had and received is different from the one for which an administrative remedy is provided by the city code; and (ii) the relief sought could not be obtained under Pasco's administrative proceedings. *Supplemental Brief of Respondent* at 2-3.

The first point, as noted above, was rejected by the Supreme Court. An equitable claim in Superior Court based on money had and received is not a basis to avoid exhaustion under the law of *Cost Management Services*. The second point is new, but appears to be an effort to retreat from the binding stipulation that IGI simply chose not to exhaust its administrative remedies. Nowhere is the suggestion in

the stipulated facts that such remedies (administrative appeal of a refund request) was unavailable. The Pasco Municipal Code expressly provides for such a remedy.

A. **IGI's Argument that *Cost Management Services* Clarified the Exhaustion Doctrine to Support its Position.**

In this section, IGI urges that *Cost Management Services* supports its position based on the rationale that *Cost Management Services* held that exhaustion was not required where there is no adequate administrative remedy. *Cost Management Services* reaches this result, explains IGI, because Lakewood's Notice and Order to the Taxpayer was not a response to the taxpayer's claim for a refund. *Supplemental Brief of Respondent* at 4. As argued above, there was no refund request in this case, and no demand from Pasco.

IGI urges that *Cost Management Services* stands for the premise that ". . . exhaustion might be required in cases of concurrent jurisdiction." *Supplemental Brief of Respondent* at 4-5 n.3. Rather, *Cost Management Services* is clear that ". . . the exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power of a court to hear a case." Slip Op. at 6. As if responding to IGI's argument in this case, the Supreme Court further explains ". . . [Taxpayer] CMS asserts that . . . no exhaustion is

required if the court has original jurisdiction, and thus it cannot be required to exhaust its remedies. For the reasons discussed, CMS's argument is incorrect." *Id.* at 16, n.4.

IGI closes with the argument that because the Pasco remedy was "not applicable to CMS's state law refund claim, it need not be exhausted." *Supplemental Brief of Respondent* at 4. Pasco urges that this is simply a rehash of the independent state law claim/separate jurisdiction arguments. *Cost Management Services* teaches that the jurisdictional point does not excuse compliance with exhaustion, which is a rule of judicial administration and not of jurisdiction. *Cost Management Services* at 15.

**B. IGI's Argument that its "State Law" Claim Could Not be Granted or Heard Before any City Administrative Remedy.**

Here, IGI argues that its "state law" claim (for refund of taxes) could not be dealt with through Pasco's administrative procedures. This is incorrect. Pasco's administrative procedure as established by PMC 1.17.010 through PMC 1.17.030 is precisely for the purpose of hearing and determining claims for overpayment of taxes to refund overpaid taxes. IGI may seek to assert a court's independent jurisdiction under an equitable claim for money had and received does not change the nature of relief available through the Pasco

administrative process that would involve a sorting out of the facts from fiction at an administrative hearing level, followed by issuance of a decision to grant or deny the refund request, and possible appeal to superior court following. As noted above, *Costs Management Services* stands for the premise that issues of Superior Court jurisdiction should not be confused with judicial administration rules of exhaustion. If IGI prevailed in whole or in part at the administrative level initially, or late on appeal through the courts, it would get the relief it prematurely sought through the courts - - a tax refund.

IGI urges, however, that although the Pasco Code may provide a remedy for voluntary payments, it provides no remedy for involuntary payments. *Supplemental Brief of Respondent* at 5. IGI explains this point in footnote 4, arguing that its payment must be deemed "involuntary" because it had no ability to contest its liability prior to payment and because the City imposed penalties for nonpayment, citing *Great Northern R. Co. v. State*, 200 Wash.392, 93 P.2d 694 (1939) and other authorities. IGI urges that Pasco's code conflicts with these decisions.

This appears to be trying to bootstrap the protest requirement to hide from an exhaustion burden. In any case, Pasco urges that IGI is

not correct. Neither prepayment nor penalties for nonpayment make an unprotested tax payment involuntary. *Brief of Appellant* at 14.

In *Great Northern, Id.* at 422, the Court found coercion:

Here, we have other very convincing evidence of coercion. Had the payments of the statutory prescribed filing and license fees not been made by the power corporation at about the time they were paid, the business rights of that corporation within this state would have been, by the express terms of the statutes above noticed, seriously threatened in the particulars above noted.

No such facts to show involuntary payment under case law are presented here. That case further affirms the rule that taxes voluntarily paid are not recoverable. "There is general rule that a tax paid voluntarily cannot be recovered back after the statute levying the tax has been declared unconstitutional . . . " *Id.* at 419. (The court goes on to distinguish cases where taxes are in fact not paid voluntarily.)

The court may take judicial notice that virtually all unpaid taxes to any tax authority are subject to penalties. If penalties make tax payment involuntary, then Pasco urges there would be no such thing as voluntary payment. IGI's other footnoted authorities are well addressed in Pasco's Reply Brief, pp. 3-8.

C. **IGI's Argument that it Cannot Possibly Recover the Relief Sought Through an Administrative Remedy.**

In its last point, IGI appears to abandon its jurisdictional arguments and urge instead that Pasco's administrative remedy was inadequate because the Pasco code provides that as to voluntary payments, a taxpayer must protest its taxes within a year to be able to recover a refund. This is not correct. To begin with, Pasco urges that this posture predicts the result of an administrative proceeding that never happened. Because Pasco ordinances impose a protest requirement, but further allows a one-year grace period to bring such a protest for voluntary payments, IGI jumps to concede that it would not prevail in administrative hearing. In fact the greater probability is that Pasco would refund those taxes to which IGI was entitled to under the ordinance. But whatever posture this case has now assumed, there was never an administrative hearing even attempted in the earlier stages.

Even assuming the result urged by IGI, Pasco submits it does not excuse exhaustion. IGI's argument is again, basically a back door attack on the protest obligation. *Cost Management Services* says nothing about the enforceability of a protest requirement. Both parties have, however, briefed and submitted this issue for the Court's consideration in this case. Pasco urges IGI's Supplemental Brief may

not rely on *Cost Management Services* to urge that because it failed to comply with a lawful tax protest requirement, ergo, it would have lost in any administrative process and thus it could skip that obligation by styling its cause as an independent claim under state law. If IGI loses on the protest requirement, either at an administrative level or in the courthouse, Pasco urges this has nothing to do with exhaustion. Again, what might happened had IGI availed itself as to its administrative remedies; whether the Pasco City Manager, after examining the files and hearing the matter under the administrative review process would have found there was an adequate protest or that protest was not timely, all these things should abide the result of an administrative hearing, Pasco urges.

IGI confuses the availability of an adequate remedy as opposed to the remedy and result they desire. As pointed out in *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d 186 (1997), the available remedy must be adequate and not perfect.

Although a remedy is not the precise relief sought, or will not give the litigant "complete relief," the remedy may be adequate for purposes of requiring exhaustion. See *Dioxin/Organochlorine Ctr. v Department of Ecology*, 119 Wn.2d 761, 777, 837 P.2d 1007 (1992) (where the appellants sought both declaratory and injunctive relief and the Pollution Control Hearings Board could grant declaratory relief and stay the agency order relief was adequate. However, "[w]here there is no possible remedy

at all there can scarcely be a failure to exhaust remedies." *Stevedoring Serv. of Am., Inc v. Eggert*, 129 Wn.2d 17, 43, 914 P.2d 737 (1996).

The purpose of Pasco's administrative appeal is precisely what was requested by IGI -- the refund of overpaid taxes.

**D. Remaining Issues on Appeal.**

As speculated above, had this matter gone to an administrative appeal, the primary issue would undoubtedly had still been the issue upon which Pasco based its appeal that IGI's tax refund claim is subject to Pasco's one-year nonclaim statute, and not the three-year statute of limitations. *Brief of Appellant* at 5. In the event the Court agrees with Pasco and remands this case for IGI's exhaustion of its available administrative remedy, or continues its consideration of this appeal, this paramount issue remains to be resolved by this Court. Therefore, its consideration is respectfully requested.

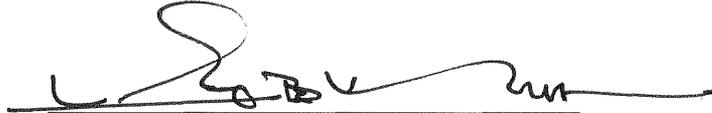
**V. CONCLUSION**

In light of the simple facts of this case, the availability of a simple and adequate administrative remedy, the enlightenment from the Supreme Court's decision in *Cost Management Services* compels the trial court in this case be reversed.

For these additional reasons, Pasco urges the court should apply *Cost Management Services* to this case and reverse the trial court.

**DATED** this 13<sup>th</sup> day of December, 2013.

Respectfully submitted,  
KERR LAW GROUP

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

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

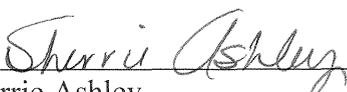
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13<sup>th</sup> day of December 2013, I caused to be served a true and correct copy of the foregoing SUPPLEMENTAL REPLY BRIEF OF APPELLANT to the following:

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