

Supreme Court Case No. 87964-8
Court of Appeal Case Nos. 41509-7-II & 41744-8-II

SUPREME COURT OF THE STATE OF WASHINGTON

COST MANAGEMENT SERVICES,

Respondent,

vs.

CITY OF LAKEWOOD and CHOI HALLADAY,

Petitioners.

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STATE OF WASHINGTON
BY ~~REBECCA~~

FILED
COURT OF APPEALS
DIVISION II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The Petitioners are the City of Lakewood (“City”) and its finance director, Choi Halladay. Petitioners request that the Court grant review and reverse the decision identified in Part II.

II. COURT OF APPEALS DECISION

An unpublished opinion was issued on June 1, 2012. Upon motion of a third party, Tax Analysts, the Court of Appeals ordered the opinion published in part on August 28, 2012. A copy of the decision is attached.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it concluded that the doctrine of exhaustion of administrative remedies does not bar a taxpayer’s lawsuit for a municipal tax refund when the municipality’s code has an explicit administrative process for addressing taxpayer relief, the taxpayer did not appeal a determination rendering it liable for the tax, and the administrative process would have supplied the taxpayer full relief.

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

IV. STATEMENT OF THE CASE

The City of Lakewood imposes a tax “[u]pon everyone engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption.” Lakewood Municipal Code (LMC) 3.52.050(D); *see also*, RCW 35A.82.020; RCW 35.21.870. CMS paid this tax from its inception in 1999 until November 2008 and December 2008 when CMS requested a tax refund asserting it did not do any business in Lakewood. (CP 91, 93). The City responded on May 13, 2009 with a Notice and Order: (1) advising CMS of its delinquency in taxes; (2) demanding payment of past due taxes; and (3) pronouncing the administrative determination that “Cost Management Services is engaged in or carrying on the business of selling, brokering or furnishing artificial, natural or mixed gas for domestic, business or industrial consumption.” (CP 95-96). The letter advised that any appeal could be made within ten (10) days to the City’s hearing examiner.

Rather than file a timely appeal with the City, on June 24, 2009, CMS filed a lawsuit against the City in Pierce County Superior Court, raising two causes of action: Moneys had and received and entitlement to refund under the LMC. (CP 1). The City moved to dismiss this lawsuit for failure to exhaust administrative remedies arguing that CMS failed to

use the hearing examiner system mandated to hear tax appeals under the City's Code. (CP 16). CMS countered that this Court's decision in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007) vitiated the appeal requirement because the case fell within the "legality of any tax" clause of Article IV, Section 6 of the Washington State Constitution. (CP 120). The first judge assigned this case largely agreed, and denied the City's motion,

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

In its simplest form, I'm imagining that the Plaintiff in this action believes they are a party separate from the city of Lakewood, outside of the city of Lakewood, not doing business in the city of Lakewood, and that the City of Lakewood has reached out into their pocket and taken money that they have no jurisdiction over, doesn't have the ability to take. In its simplest form, that's what I'm seeing. In that regard, they're saying the tax is illegal because they're not subject to City of Lakewood's laws or taxes. Because of that, I believe, this Court, has original jurisdiction. They're claiming that the tax itself is illegal as it pertains to them.

(2/12/2010 VRP 18).

CMS had separately sought summary judgment, which motion was continued. The second judge assigned to this case denied that motion on May 20, 2010. (CP 113, 459). CMS filed a new summary judgment

motion on June 22, 2010 and the City filed for partial Summary Judgment on July 1, 2010. (CP 461, 489). These motions were heard on September 3, 2010 by the third Superior Court judge to be assigned to the case. That judge ordered, in part, that CMS was improperly taxed but also held that CMS's claims accruing prior to June 24, 2006, were time-barred. (CP 522-24). The Superior Court also dismissed without prejudice CMS's claims arising under the municipal code, leaving the claim for moneys had and received. (Id.)

On October 5, 2010, CMS filed a second lawsuit against the City and its finance manager, Choi Halladay. (CP 731). In this suit, CMS sought a writ of mandamus ordering the City to "take action on [CMS's] claim pending since November 6, 2008 for the refund of erroneously paid taxes" (CP 735). The Superior Court consolidated the two actions and on October 22, 2010 issued the writ. (CP 628).

This matter proceeded to bench trial in December 2010 solely on CMS's claims for money had and received. The Superior Court concluded that CMS's business activities – if any – in the City of Lakewood were sufficiently minimal to preclude application of this tax, and entered judgment in favor of CMS. (CP 712).

The City appealed these decisions to the Court of Appeals. In rejecting the argument that exhaustion was required and that the issuance

of the writ was proper, that Court affirmed the trial court and held as follows:

First, that superior courts and local hearing examiners have “concurrent jurisdiction” over municipal tax refund claims. (Opinion at p. 12). The Court specifically acknowledged that the City has a hearing examiner system, but, because CMS plead its claim of money had and received as an equitable cause of action, the Superior Court has concurrent jurisdiction and thus, exhaustion is not required.

Second, that issuance of the writ of mandamus was proper. Despite being involved in litigation for a year and a half, the Court rejected the City’s arguments that CMS did not timely seek the writ, holding in part, “Lakewood never triggered CMS appeal period.” (Opinion at p. 22).

Underlying both holdings, the Court of Appeals also held the initial Notice and Order from the City is defective, because, despite three specific administrative determinations in the City’s letter to CMS and notice of appeal rights, the letter does not summarize these determinations in the word “denied”. (Opinion at p. 9-10).

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The ruling of the Court of Appeals is legally incorrect and will result in the unintended consequences of rendering municipal administrative

proceedings meaningless and thereby needlessly congest the Superior Court.

Municipal Codes uniformly include administrative requirements to address taxpayer relief for municipal taxes. As stated by Tax Analysts, a nonprofit publisher of tax news and analysis:

Utility taxes are levied by virtually all municipalities in Washington and business and occupation taxes are levied by a substantial number of primarily larger Washington cities. These taxes affect many taxpayers. Publication of this opinion would help ensure uniform application of administrative procedure and the scope of city tax jurisdiction.

(Motion to Publish at p. 4-5).

The Court of Appeals reached an outcome which is at odds with both this reality and this Court's decisions. RAP 13.4 (b)(1). Review is warranted to restore the proper and uniform application of administrative procedure in this area and to avoid unintended consequences.

The City of Lakewood, like most municipalities, has an established administrative process to resolve taxpayer disputes. Where exhaustion of administrative remedies is required, a Superior Court errs in entertaining the action, and the remedy is to reverse and dismiss the case. *Wright v. Woodard*, 83 Wn.2d 378, 518 P.2d 718 (1974). This Court has held that exhaustion will apply to claims based on local ordinances. *Lange v. Woodway*, 79 Wn.2d 45, 48, 483 P.2d 116 (1971). To that end, "there is a

strong bias toward requiring exhaustion before resort to the courts.” *Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985).

Contrary to this doctrine, the Court of Appeals concluded that superior courts and local hearing examiners have “concurrent jurisdiction” over municipal tax disputes on the theory that an equitable cause of action vitiates the requirement of exhaustion. By so holding, the Court nullified the administrative law system governing local taxation and invites unnecessary litigation of tax appeals. The Court’s holding means that instead of administrative determinations being made at the local level and the record reviewed by the Superior Court, the record will be made by trial in the Superior Court.

First, the doctrine of concurrent jurisdiction was applied by the Court of Appeals because CMS plead its claim as an equitable cause of action. (Opinion at p. 11). Rather than analyzing the claim, the Court of Appeals accepted this cause of action at face value without analysis. “[I]t is a fundamental maxim that equity will not intervene where there is an adequate remedy at law.” *Sorenson v. Meritech Mortgage Services*, 158 Wn.2d 523, 543, 146 P.3d 1172 (2006)(citations omitted). The remedy CMS sought was a refund. (CP 1-3; I VRP 6)(“CMS is seeking a refund of Lakewood utility taxes ...”). The Hearing Examiner has the authority to grant this relief. LMC 3.52.150.

Second, the Court of Appeals disregarded the distinct roles of a hearing examiner and a Superior Court when an administrative process is present. The hearing examiner is the primary factfinder and the Superior Court acts as the appellate court. The Superior Court also has jurisdiction over those matters for which the hearing examiner lacks the authority to grant relief or for which the administrative process is inadequate.

The Court of Appeals held that CMS timely sought a writ of mandamus to compel the City to act on its refund claim. (Opinion at p. 21). However, two years earlier, the City issued its (unappealed) administrative determination that CMS is liable for the tax. CMS sought the writ only after the Superior Court had limited its recovery as time-barred. Mandamus is an extraordinary remedy. Here, mandamus undermined the administrative process, ignoring the principles of timeliness and finality.

A. The Court of Appeals' Decision Conflicts with this Court's Exhaustion Jurisprudence.

This Court has repeatedly stated, “[i]t is the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.” *Wright*, 83 Wn.2d at 381, *citations omitted*. Where an administrative process is present, the doctrine of

exhaustion will apply in tax cases. *See id.*; *Sator v. State Dep't of Revenue*, 89 Wn.2d 338, 348, 572 P.2d 1094 (1977).

This Court has gone further and has held that exhaustion takes on jurisdictional meaning. *Wright*, 83 Wn.2d at 379, 382 (“We find it necessary to discuss only one of the appellants' contentions, namely, the court erred in taking jurisdiction of the case, because the petitioners had failed to pursue the available administrative remedy.”); *Retail Store Employees Union v. Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 907, 558 P.2d 215 (1976) (citing, *Bennett v. Borden, Inc.*, 56 Cal. App. 3d 706, 128 Cal. Rptr. 627, 628 (1976))(Where statutory scheme “establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties. . . . exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.”) (Ellipsis by the Court)).¹

The Court of Appeals applied the doctrine of “concurrent jurisdiction,” and held local hearing examiners and superior courts share the factfinding role. But, “[t]he court will not intervene and administrative remedies need to be exhausted when the ‘relief sought . . . can be obtained by resort to an exclusive or adequate administrative remedy.’” *Citizens*

¹ One commentator, rather than treating the issue as jurisdictional, has treated exhaustion as a “prudential reason[] for limiting judicial activity, although not often thought of in such terms...” Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 *Seattle Univ. L. R.* 695, 715 (1999).

for *Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997) (citing, *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)) (Ellipsis by the Court; Emphasis added). Not only is there an adequate remedy here, neither CMS in their arguments nor the Court of Appeals' opinion suggest otherwise.

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

There may arguably be some overlap between hearing examiners and the Superior Court, but this overlapping authority does not constitute concurrent jurisdiction. This Court has long recognized that a local hearing examiner serves as the initial factfinder with a right of review to

the superior courts. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 307, 237 P.3d 256 (2010) (“After exhausting its administrative remedies,” taxpayer then filed suit); *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 174, 60 P.3d 79 (2002) (observing that refund claim of business & occupation taxes proceeded first to a hearing examiner).

Exhaustion is excused only when the pursuit of administrative remedies is futile, where no administrative remedy is available or where such remedy is patently inadequate. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 77, 768 P.2d 462 (1989); *Ackerley Communications, Inc. v. Seattle*, 92 Wn.2d 905, 909, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980). No such claim was made in this case.

Even the sole case cited by the Court of Appeals on this point acknowledges these differing roles. In *Chaney v. Fetterly*, 100 Wn. App. 140, 995 P.2d 1284, *review denied*, 142 Wn.2d 1001 (2000), a lawsuit was initially dismissed on summary judgment with the superior court determining that neighbors could not sue due to a failure to exhaust administrative remedies. *Id.* According to the builders, the neighbors should have appealed to the hearing examiner the County's approval of the foundation; the refusal of the County to act; and the County's withdrawal of a stop work order. *Id.* Division II reversed, holding “[i]n situations where each has jurisdiction of some kind, the agency may have original

jurisdiction, while the superior court has appellate jurisdiction; or, (2) the agency and the superior court may have concurrent original jurisdiction.” *Chaney*, 100 Wn. App. at 145 (emphasis added). In resolving this dispute, the Court looked to the relief sought and concluded that the superior court did have jurisdiction in *Chaney* because the homeowners sued for an injunction and damages, which the Superior Court had jurisdiction under state law to award. *Id.*, 100 Wn.App. at 149 fn. 23 (citations omitted). The Court also observed that the hearing examiner lacked authority to resolve the claims for damages and injunctive relief. 100 Wn.App. at 150.

In the case at bar, the Court of Appeals gave great weight to the fact that CMS styled their claim as one “for money had and received”. Money had and received is an equitable cause of action. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). This Court recognizes that the appellation of a cause of action will not control; the relevant consideration is the nature of the claim and the relief sought. *Orwick v. Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984) (citation omitted); *Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943). “[I]t is a well-established rule that an equitable remedy is an extraordinary, not ordinary, form of relief. A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate.” *Sorenson*, 158 Wn.2d at 531 (citations

omitted). Applying an equitable remedy to an administratively exhausted and time-barred claim undermines local administrative processes.

The Code both imposes the tax and provides the remedy. CMS could have and would have been entitled to apply for relief by appealing the Notice and Order within ten days. LMC 3.52.160. The hearing examiner is empowered to “receive and examine available information, conduct public hearings, prepare records and reports thereof, and make decisions, which shall be final and conclusive.” LMC 3.52.160. If CMS were to meet its evidentiary burden, the Hearing Examiner has the authority to grant either a tax credit or a refund. LMC 3.52.150. The Code further provides that appeals from adverse decisions of the hearing examiner must be filed within fourteen days. LMC 01.36.091. By invoking the doctrine of concurrent jurisdiction to avoid the presumption of exhaustion, the Court of Appeals decision contradicts decisions from this Court, thereby meriting review. RAP 13.4(b)(1).

The Court of Appeals’ decision also presents an issue of broad public interest meriting review under RAP 13.4(b)(4). Under the Court’s analysis local processes are rendered moot. Exhaustion is formulated as a means to promote more efficient local processes and removing these cases from the courts. *Citizens for Mount Vernon*, 133 Wn.2d at 866 (citations omitted). The Court of Appeals’ decision conflicts with these goals.

B. The Court of Appeals' Decision Upholding a Writ of Mandamus Granting Otherwise Exhaustive Administrative Remedies Greatly Expands the Availability of Extraordinary Writs, to the Detriment of Municipal Corporations and Courts.

The Court of Appeals also affirmed the Superior Court's issuance of a writ of mandamus. This decision conflicts with decisions from this Court in two respects. RAP 13.4(b)(1). First, contrary to the express language of RCW 7.16.170 whereby the writ is available where there is no adequate remedy at law, by granting the writ, CMS was allowed to pursue the same remedy twice. CMS was allowed to proceed to trial and obtain a money judgment against the City. Additionally, via the writ, CMS belatedly could commence an administrative proceeding where ostensibly it would seek to obtain the same money again.

Second, to reach the conclusion that mandamus was proper, CMS argued, and the Court of Appeals agreed, that the Notice and Order was inadequate to trigger the administrative process. Although this decision is factually wrong, more importantly, the decision of the Court of Appeals upholding the issuance of the writ of mandamus also conflicts with decisions from this Court. RAP 13.4(b)(1).

1. CMS Failed to Timely Seek the Writ. The Decision to Issue the Writ was Legal Error.

Court also held that a writ was an allowable remedy for CMS to pursue its tax refund claim. (Opinion at p. 22). If this were a true case of concurrent jurisdiction, the Superior Court's jurisdiction in the first action was invoked to the exclusion of the hearing examiner. The Superior Court alone should have decided the matter. *Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991).

CMS also did not seek the writ in a timely manner. RCW 7.16.160 has no statute of limitations; the time period for seeking a writ of mandamus mirrors that for seeking review of that decision. *Teed v. King County*, 36 Wn. App. 635, 677 P.2d 179 (1984). The Court of Appeals acknowledged this holding (Opinion at p. 21-22), but concluded "CMS had no obligation to pursue administrative relief because Lakewood's Notice and Order did not constitute a final agency determination." (Opinion at p. 22).

A litigant cannot make a strategic choice to forego a possible remedy and then, only when that choice fails, be allowed to change course and seek mandamus. Indeed, where the applicant does not pursue its administrative remedies, a writ of mandate cannot issue. *State ex rel. Ass'n of Wash. Indus. v. Johnson*, 56 Wn.2d 407, 411, 353 P.2d 881 (1960). The loss of a remedy provided by an administrative mechanism by failing to timely invoke that remedy will not render the administrative

A petitioner for mandamus must meet three requirements: “[A] party seeking a writ of mandamus must show that (1) the party subject to the writ has a clear duty to act; (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the petitioner is beneficially interested.” *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 588-589, 243 P.3d 919 (2010) (citing, RCW 7.16.160, .170). We take the first and second prongs out of order, and the third prong is not in dispute.

CMS had a “plain, speedy and adequate remedy in the ordinary course of law,” in two respects. CMS has an “adequate remedy.” As outlined above, the City has a hearing examiner process which could have afforded CMS all the relief which it sought. But in this case, and on these facts, the Court of Appeals allowed CMS to obtain monetary relief in two forums: (1) a superior court monetary judgment; *and* (2) further administrative proceedings before the hearing examiner. Mandamus is only available when there is no adequate remedy. RCW 7.16.170.

On this point, the Opinion is both contrary to existing law and internally inconsistent. The Court of Appeals held “[e]ven had the hearing examiner maintained jurisdiction to hear these claims under the LMC the superior court concurrently retained original jurisdiction. Under this system of concurrent original jurisdiction CMS could refer its claim to either the hearing examiner or superior court.” (Opinion at p. 12). The

remedy inadequate or give rise to a right to an extraordinary writ. *Bock v. State*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978) (citation omitted).

Until it sought the writ, CMS disavowed that it was under any obligation to participate in any administrative process. In response to the City's motion to dismiss, CMS did not argue that the Notice and Order was somehow inadequate. Instead, CMS dedicated one paragraph to arguing that it did not have to exhaust administrative remedies and was entirely silent on this issue at oral argument. (CP 120; 2/14/2010 VRP 11-15). CMS also acknowledged that a formal denial from the City was unnecessary: "that refund claim is still pending before the City. If and when the City were to deny it, which would be a little odd since we're already in court, but we would then go through a petition, a writ petition..." (7/30/2010 VRP 12-13)(Emphasis Added).² CMS did not seek the writ until October 2010 and did so only after the Superior Court dismissed CMS's self-styled cause of action under the Lakewood Municipal Code. Mandamus is a specific and extraordinary remedy. By concluding otherwise, the Court of Appeals' decision conflicts with the decisions from this Court meriting review under RAP 13.4(b)(1).

² At a November 24, 2010 motion hearing, the City advised the trial court that it had received, the day before, a notice of appeal from CMS to its hearing examiner. (11/24/2010 VRP 4-5). CMS acknowledged the recent filing of the notice of appeal to the hearing examiner. (11/24/2010 VRP 6).

2. Factually and Legally, the City had Already Denied CMS' Claim.

As an adjunct to the above claim, CMS argued and the Court of Appeals agreed, that the City had not formally denied its claims, necessitating the writ. This is incorrect.

Without citation to any authority, the Court of Appeals concluded that “CMS is not appealing from the May 13 Notice and Order demanding payment of current and future taxes but instead was seeking a tax refund for taxes already paid. Thus CMS had no administrative mechanism to pursue a refund of taxes wrongly paid.” (Opinion at 9-10). However, an agency determination triggers the right to review when “it imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.” *Bock*, 91 Wn.2d at 99 (citing, *Department of Ecology v. Kirkland*, 84 Wn.2d 25, 523 P.2d 1181 (1974)).

Both CMS and the Court of Appeals note that the Notice and Order does not specifically address the refund demand. Not only does CMS state, as a basis for the refund, that “CMS did not owe the tax ...” (CP 91) but the City specifically concluded otherwise and determined that CMS engaged in taxable events within the City. (CP 95). To that end, the City formally demanded that CMS remit back taxes. (CP 95). The consequence of this administrative determination is that CMS engaged in

taxable events in the City of Lakewood, CMS owed back taxes, and rejected the underlying premise of the refund request. Absent an appeal, there would be no refund. Even if the Court finds the Order inadequate as to the language specifically denying the request for refund, the finding that CMS engaged in taxable events in Lakewood was not properly appealed and thus should have been treated as fact. It was not.

As this Court has reminded litigants, absent an appeal, when an agency determination becomes final,

If a party to a claim believes the [agency] erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.

Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 538, 886 P.2d 189 (1994).

CMS's failure to appeal the City's administrative determination as to both the demand for refund and that CMS engaged in taxable events in Lakewood renders the Notice and Order a final adjudication. CMS even now does not appeal the City's Notice and Order. There was no basis for the superior court to hold a trial. There is likewise no basis for that Court to have issued the writ.

CONCLUSION

The City of Lakewood requests that this Court grant review, reverse the decisions below, vacate the writ and remand this matter to the Pierce County Superior Court for any further proceedings.

DATED: September 26, 2012.

CITY OF LAKEWOOD

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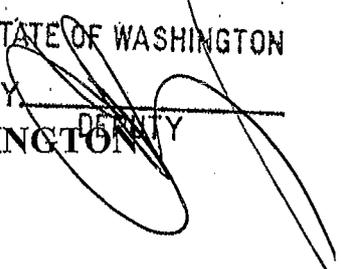
ATTACHMENT

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DIVISION II

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STATE OF WASHINGTON

BY: 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COST MANAGEMENT SERVICES, INC.,

Respondent,

v.

CITY OF LAKEWOOD, a municipal
corporation, and CHOI HALLADAY,
Assistant City Manager for Finance,

Appellants.

COST MANAGEMENT SERVICES, INC.,

Respondent,

v.

CITY OF LAKEWOOD, a municipal
corporation,

Appellant.

No. 41509-7-II

(Pierce Co. Cause #10-2-13684-9)

Consolidated with

No. 41744-8-II

(Pierce Co. Cause #09-2-10518-4)

ORDER AMENDING OPINION
AND PUBLISHING IN PART

Tax Analysts, a nonprofit publisher of tax news and analysis worldwide, moves this Court to publish in part its opinion issued on June 1, 2012. After considering the appellants' and respondent's responses to the motion to publish, the Court grants the motion to publish in part. But in order to do so, we must amend our opinion. The opinion is amended as follows:

On page 1, beginning on line 3, the entire sentence that begins "Lakewood claims that" is amended to read as follows (to reorder Lakewood's claims):

Lakewood claims that the trial court (1) lacked jurisdiction because CMS failed to exhaust administrative remedies, (2) improperly denied Lakewood's request for a jury trial, (3) erred in issuing a writ of mandamus, and (4) entered erroneous findings of fact and conclusions of law.

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On page 1, beginning on line 6, the entire sentence that begins “We affirm because” is amended to read as follows (to reorder the court’s holding):

We affirm because (1) CMS was not required to exhaust administrative remedies when Lakewood did not issue a final order on CMS’s refund claim, and the superior court maintained concurrent jurisdiction, (2) the trial court did not abuse its discretion in denying Lakewood’s request for a jury trial, (3) the trial court properly issued the writ of mandamus, and (4) the trial court’s findings of fact and conclusions of law are not erroneous.

On page 14, the entire section named “III. SUBSTANTIAL SUPPORT FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW” is renumbered as “IV.”

On page 21, the entire section named “IV. WRIT OF MANDAMUS” is renumbered as “III.” and moved up in the opinion immediately following the section named “II. RIGHT TO JURY TRIAL.”

On page 23, the following language is removed:

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Immediately following the newly renumbered section named “III. WRIT OF MANDAMUS,” the following language is inserted:

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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IT IS SO ORDERED.

DATED this 28TH day of AUGUST, 2012.

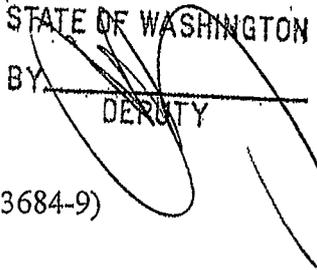
Johanson, A.C.J.
Johanson, A.C.J.

Hunt, J.
Hunt, J.

Penoyar, J.
Penoyar, J.

2012 JUN -1 PM 2:00

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COST MANAGEMENT SERVICES, INC.,

Respondent,

v.

CITY OF LAKEWOOD, a municipal
corporation, and CHOI HALLADAY,
Assistant City Manager for Finance,

Appellants.

COST MANAGEMENT SERVICES, INC.,

Respondent,

v.

CITY OF LAKEWOOD, a municipal
corporation,

Appellant.

No. 41509-7-II

(Pierce Co. Cause #10-2-13684-9)

Consolidated with

No. 41744-8-II

(Pierce Co. Cause #09-2-10518-4)

UNPUBLISHED OPINION

JOHANSON, J. —The City of Lakewood appeals a superior court decision that Cost Management Services (CMS) is not obligated to pay a utility tax for business conducted outside of Lakewood. Lakewood claims that the trial court (1) lacked jurisdiction because CMS failed to exhaust administrative remedies, (2) improperly denied Lakewood's request for a jury trial, (3) entered erroneous findings of fact and conclusions of law, and (4) erred in issuing a writ of mandamus. We affirm because (1) CMS was not required to exhaust administrative remedies when Lakewood did not issue a final order on CMS's refund claim, and the superior court maintained concurrent jurisdiction, (2) the trial court did not abuse its discretion in denying

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Lakewood's request for a jury trial, (3) the trial court's findings of fact and conclusions of law are not erroneous, and (4) the trial court properly issued the writ of mandamus.

FACTS

CMS is a Mercer Island business that arranges for the purchase of natural gas by its customers from various third parties. CMS acts as its customers' agent, and it monitors the natural gas market and informs its customers regarding natural gas prices. CMS has two Lakewood customers: Pierce Transit and Saint Clare Hospital.

Both of CMS's Lakewood customers obtain natural gas the same way. CMS works with a supplier¹ that provides natural gas via pipeline, for delivery at the North Tacoma City Gate of the Northwest Pipeline Company, a site outside of Lakewood. These customers each separately contract with Puget Sound Energy (PSE) for transportation and delivery of their natural gas from the North Tacoma City Gate to their Lakewood business locations.

CMS performs almost all of its duties from its Mercer Island headquarters. Daily, CMS's account coordinators use software to remotely read their customers' gas meters to gauge how much gas PSE delivered the previous day. After reading the meter, these account coordinators notify both the supplier and PSE how much gas they should provide and deliver to the customer at the next delivery. On average, account coordinators spend a total of 20 minutes daily performing this task for its Lakewood customers.

Over the years, CMS has maintained a limited physical presence in Lakewood. Traditionally, CMS employees spent just one-and-a-half hours per year in Lakewood—for an

¹ Suppliers include Shell Energy, Occidental, and/or Avista depending on which customer and the date of the sale.

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annual holiday visit and a rare natural gas market update meeting. According to CMS, it has direct costs of \$115 annually in Lakewood (for the annual holiday visit and occasional natural gas market update meeting) and zero indirect costs. In April 2010, CMS employees discontinued all Lakewood visits, and CMS's absence from Lakewood has not altered or affected its agency relationships or the administration of its contracts with either of its Lakewood customers.

In 1999, Lakewood passed Ordinance No. 215, codified at chapter 3.52 of the Lakewood Municipal Code (LMC), which levies a "utility" tax on:

everyone engaged in or carrying on the business of selling, brokering or furnishing [natural gas] for domestic, business or industrial consumption, a tax equal to 5.0 percent of the total gross income, not including the amount of the tax, from such business in the City during the period for which the tax is due.

LMC 3.52.050(D); Clerk's Papers (CP) at 61.

Between January 1, 2004 and October 30, 2008, CMS remitted to Lakewood \$715,940.05 under this tax. At the time, CMS believed it was paying a use tax that its Lakewood customers owed. To calculate its amount paid, CMS reported its Lakewood taxable revenues as 100 percent of the amounts Lakewood customers paid CMS. Then in 2008, CMS learned of a court case that raised doubts as to whether CMS actually owed this tax; so, CMS stopped paying it.

On November 6, 2008, CMS sent a letter to Lakewood claiming a refund on the excess taxes it paid between January 1, 2004 and September 30, 2008. The claim asserted that Lakewood owed CMS a refund because "the company does no business in the City of Lakewood" and that "the city does not impose any occupation tax but does impose utility taxes."

CP at 91:

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On May 13, 2009, Choi Halladay, Lakewood's Assistant City Manager of Finance sent CMS a "*NOTICE AND ORDER/DEMAND FOR TAX PAYMENT*" (Notice and Order). The Notice and Order specified that (1) CMS last made utility tax payments in October 2008, for taxes accrued through September 2008; (2) CMS was delinquent in its taxes from October 2008 through the Notice and Order date; and (3) CMS must obtain a Lakewood business license to conduct its utility business within the City and to pay all past due and owing utility taxes, including interest and penalties. It also provided that CMS could appeal within 10 days and that failure to appeal would waive its rights to an administrative hearing and determination in the matter. CMS applied for a business license as directed, but it did not appeal the Notice and Order.

In June 2009, CMS filed a complaint in Pierce County Superior Court raising two causes of action: (1) a state law action for "money had and received" seeking refund of amounts CMS paid in error to Lakewood and (2) an action under LMC 3.52.150 for refund of overpaid taxes.² CP at 1. Lakewood raised numerous affirmative defenses, including that the superior court lacked jurisdiction, that CMS failed to exercise its rights in a timely manner within the statute of limitations, and that CMS failed to exhaust administrative remedies before filing its superior court complaint. Lakewood also counterclaimed, arguing that CMS owed unpaid natural gas taxes under LMC 3.52 since CMS stopped paying the tax in the fall of 2008 and that Lakewood

² LMC 3.52.150 provides:

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

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was entitled to injunctive relief prohibiting CMS from making natural gas transactions in Lakewood until it paid all its natural gas taxes.

Both parties sought summary judgment. In February 2010, the trial court denied Lakewood's motion for summary judgment. In May 2010, the trial court denied CMS's summary judgment motion.

Thereafter, both parties filed additional motions for partial summary judgment. Lakewood asserted that the statute of limitations barred CMS's claims accruing more than three years before commencement of the litigation—before June 24, 2006. CMS filed a motion requesting the court to determine that (1) CMS operates as an agent on behalf of customers; (2) the only tax that Lakewood alleges CMS owes is that imposed by LMC 3.52.050(D); (3) such a tax is imposed on the business of selling, brokering, or furnishing natural gas in Lakewood; (4) such tax is measured by CMS's gross income in Lakewood; (5) CMS's gross revenue from Lakewood was not greater than \$582,328.84 between October 1, 2005, and September 30, 2008; (6) CMS paid \$523,543.36 in tax over that same time period; and (7) the amount of tax CMS owed Lakewood during that period was not greater than \$29,116.44, and thus, the trial court should award CMS partial summary judgment of \$494,426.92.³

In September 2010, the trial court granted Lakewood's motion for partial summary judgment, barring CMS's claims for refunds on taxes paid before June 24, 2006. The court also dismissed CMS's claims under the LMC. The trial court granted CMS's motion for partial

³ According to CMS, this was the difference between what CMS paid Lakewood and the maximum that CMS could possibly have owed Lakewood for the time period it listed, with interest at the judgment rate from the dates paid to the refund date.

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summary judgment, finding: (1) CMS operates as an agent on behalf of its customers; (2) the only tax Lakewood alleges CMS owes is imposed by LMC 3.52.050(D); (3) that tax is imposed on the business of selling, brokering or furnishing artificial, natural or mixed gas in Lakewood; (4) that tax is measured by CMS's Lakewood gross income; (5) CMS's Lakewood gross income was not greater than \$460,113.72 between June 24, 2006, and September 30, 2008; (6) CMS paid \$414,367.04 of tax for the time period after June 24, 2006; (7) the amount of tax CMS owed Lakewood for the relevant time period was not greater than \$23,005.69.

Then, in October 2010, while CMS's lawsuit was pending in superior court, CMS filed a petition for writ of mandamus in Pierce County Superior Court against Lakewood and Halladay. It requested that they "take action on [CMS's refund] claim pending since November 6, 2008 for the refund of erroneously paid taxes." CP at 735. Lakewood opposed the writ, but the trial court granted it on November 5, 2010, commanding Lakewood and Halladay to take action on CMS's tax refund claim by November 19, 2010. Lakewood complied with the writ, and after complying, Lakewood timely appealed the granting of the writ.⁴

Meanwhile, Lakewood requested that CMS's June 2009 complaint be resolved by jury trial. The trial court denied Lakewood's request, reasoning that CMS's claims "are primarily, if not exclusively, equitable in nature." CP at 707. Accordingly, it ordered Lakewood's jury demand stricken.

The trial court held a two-day bench trial in December 2010. The trial court ultimately issued a written ruling, concluding that CMS did not "sell" natural gas: "The evidence at trial

⁴ We consolidated the appeal of the writ of mandamus with the appeal of the trial court action on the original complaint.

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established that CMS did not own any natural gas—the natural gas was owned [by the suppliers]. These entities were the actual sellers of the gas.” CP at 710. The trial court also found that CMS did not furnish the natural gas:

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’s Lakewood customers].

CP at 710.

The trial court also addressed whether CMS served as a natural gas “broker” in Lakewood. It considered the testimony of CMS president Beth Beatty, who stated that brokering was a term of art in the industry and that CMS was an agent, not a broker. The trial court considered Lakewood’s argument that a broker typically is one who acts as an agent or intermediary. The trial court ultimately did not decide whether CMS was a broker, as “even if CMS could be considered to have engaged in brokering natural gas, a point on which this Court reaches no conclusion, CMS did not engage in brokering activity *in the City of Lakewood.*” CP at 710 (emphasis added).

The trial court also described how CMS rarely traveled to Lakewood:

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

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City of Lakewood. In this regard, the Court notes that CMS stopped all contacts inside the City of Lakewood in April 2010.

CP at 710-11. Therefore, the trial court reasoned that CMS's occasional physical presence in Lakewood did not constitute selling, furnishing, or brokering natural gas.

Consequently, the trial court ruled that CMS was entitled to a full refund of all taxes paid from June 24, 2006 through the date it discontinued payment of its Lakewood taxes, along with prejudgment interest as allowed by statute. It rejected Lakewood's counterclaim that CMS owed taxes for the period after it stopped paying them, as CMS was not engaged in a taxable event in Lakewood. Lakewood appeals the trial court's judgment, its order striking Lakewood's jury demand, its findings of fact and conclusions of law, its order granting partial summary judgment, and its order denying Lakewood's motion for summary judgment.

ANALYSIS

I. EXHAUSTING ADMINISTRATIVE REMEDIES

Lakewood incorrectly argues that CMS's failure to exhaust administrative remedies bars CMS from obtaining judicial relief in superior court. Whether exhaustion is required is a question of law. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 19 n.10, 829 P.2d 765, cert. denied, 506 U.S. 1028 (1992). And, we review questions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The exhaustion doctrine requires parties to exhaust administrative remedies (1) when a claim is cognizable in the first instance by an agency alone; (2) when the agency's authority establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties; and (3) when the relief sought can be obtained by resort to an exclusive or

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adequate administrative remedy. *Phillips v. King County*, 87 Wn. App. 468, 479, 943 P.2d 306 (1997), *aff'd*, 136 Wn.2d 946 (1998). If the administrative mechanisms available can alleviate the harmful consequences of the governmental activity at issue, a litigant must first pursue those remedies before resorting to court. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 763, 265 P.3d 207 (2011). A party's failure to employ and exhaust available administrative remedies merits dismissal of its lawsuit as premature. *See Wright v. Woodard*, 83 Wn.2d 378, 382-83, 518 P.2d 718 (1974).

Whether the exhaustion doctrine applies depends on the nature of the relationship between the administrative agency and the superior court. By law, an agency and the superior court may share concurrent original jurisdiction. *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284, *review denied*, 142 Wn.2d 1001 (2000). And, although concurrent original jurisdiction enables the referral of a claim from the court to an administrative agency, it does not deprive the superior court of its own jurisdiction. *Chaney*, 100 Wn. App. at 148.

A. No Final Administrative Decision

Lakewood argues that CMS's failure to appeal the May 13, 2009 Notice and Order bars it from contesting the application of the Lakewood tax to its activities. CMS filed its refund claim in November 2008, and on May 13, 2009, Lakewood sent CMS its Notice and Order providing simply, "OFFICIAL NOTICE that Cost Management Services is delinquent in payment of utility taxes to the City of Lakewood. The City of Lakewood does hereby make a DEMAND FOR PAYMENT of all past due taxes, including interest and penalties." CP at 95.

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CMS persuasively argues that this Notice and Order did not constitute a denial of CMS's refund claim but was, instead, a demand for payment of taxes.⁵ The Notice and Order (1) seeks payment of taxes due after October 2008, when CMS stopped paying the tax; (2) does not reference CMS's November 2008 refund claim, nor does it deny the claim; and (3) simply orders CMS to apply for a Lakewood business license and pay past due taxes. Lakewood cannot now characterize that Order to pay taxes as a final agency determination denying CMS's refund claim. Because the Notice and Order did not constitute a final administrative action on CMS's refund claim, CMS's failure to appeal the Notice and Order to the hearing examiner does not preclude CMS from contesting, in superior court, as part of its refund claim, the application of Lakewood's tax to its business activities.

B. No Need To Exhaust Administrative Remedies

The Lakewood Municipal Code outlines a hearing examiner system to review administrative decisions. LMC 1.36. Under this system, parties wishing to appeal a notice and order issued by a city administrator must file an appeal with the city hearing examiner within 10 business days from receipt of a notice and order. LMC 5.02.180(A)(4). Upon receipt of a written appeal, the city clerk shall set a hearing date "[a]s soon as practicable." LMC 5.02.190(C). Failure to appeal waives all rights to an administrative hearing and determination of the matter. LMC 5.02.180(A)(4).

CMS did not pursue any administrative remedy on the Notice and Order before filing in superior court. Lakewood contends that its hearing examiner system provides adequate

⁵ By May 2009, Lakewood believed CMS owed six months' worth of taxes.

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administrative remedies to review its Notice and Order and, thus, CMS may not enjoy judicial review without exhausting these available administrative procedures. The LMC provides an administrative remedy only for review of a final order. CMS is not appealing from the May 13 Notice and Order demanding payment of current and future taxes but instead was seeking a tax refund for taxes already paid. Thus, CMS had no administrative mechanism to pursue a refund of taxes wrongly paid.

CMS contends that the trial court maintained proper jurisdiction because (1) the superior court's original jurisdiction extends to cases in equity, including this one; (2) parties need not exhaust administrative remedies in excise tax cases because those cases involve issues of statutory construction, and parties do not need to refer statutory construction questions to administrative agencies; and, (3) this case involves the legality of a tax. Because CMS's case primarily involved an action in equity for money had and received, the superior court retained original jurisdiction. Accordingly, we need not explore CMS's other arguments.

Under the Washington Constitution, article IV, section 6, as well as RCW 2.08.010, the superior court could take original jurisdiction over actions in equity. CMS's state action⁶ was "for money had and received." CP at 1. A claim for money had and received is an equitable claim. *Coast Trading Co., Inc. v. Parmac, Inc.*, 21 Wn. App. 896, 902, 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.").

⁶ CMS's original complaint listed two causes of action, a state law action and an action under Lakewood's municipal code. Before trial, the trial court dismissed the municipal claim for lack of jurisdiction.

Ultimately, CMS's claim was an action in equity for "money had and received"; and, under both the Washington Constitution and state statute, the superior court properly maintained original jurisdiction to hear the equity claim. Even had the hearing examiner maintained jurisdiction to hear these claims under the LMC, the superior court concurrently retained original jurisdiction. Under this system of concurrent original jurisdiction, CMS could refer its claim to either the hearing examiner or superior court. *See Chaney*, 100 Wn. App. at 145-46.

II. RIGHT TO JURY TRIAL

We review a superior court's ruling on the availability of a jury trial for a clear abuse of discretion. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980) ("In 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."). We may vacate the judgment and remand the entire matter for a jury trial if the trial court wrongfully denied a plaintiff's request for a jury trial. *See Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

Under RCW 4.40.060, "[a]n issue of fact, in an action for the recovery of money only . . . shall be tried by a jury, unless a jury is waived." And, there is a right to a jury trial where the civil action is purely legal in nature. *Peters v. Dullen Steel Prods., Inc.*, 39 Wn.2d 889, 891, 239 P.2d 1055 (1952). Conversely, there is no right to a jury trial where the action is purely equitable in nature. *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 193, 116 P.2d 507 (1941). For cases with both equitable and legal issues, "[t]he overall nature of the action is determined by considering all the issues raised by all of the pleadings." *Brown*, 94 Wn.2d at 365.

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When evaluating whether a matter is primarily equitable or legal, the trial court should exercise its discretion with reference to a nonexhaustive factor list. Factors include (1) who seeks the equitable relief; (2) if the person seeking the equitable relief also demands a jury trial; (3) if the main issues concern primarily matters of law or equity; (4) if the equitable issues present complexities at trial that will affect the orderly determination of such issues by the jury; (5) if the equitable and legal issues may be easily separated; (6) if the nature of the action is doubtful, a jury trial should be allowed; and (7) if the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether to grant a jury trial on all or part of the issues. *Brown*, 94 Wn.2d at 368.

The trial court recognized that CMS's primary claim was an equitable action for money had and received—a refund of taxes paid by mistake. The trial court stated, “[T]he real issues in dispute, all of which arise in the context of a taxpayer dispute for refund of taxes allegedly paid by mistake, arise in equity and are not legal issues.” CP at 705. A claim for money had and received is an equitable claim. *Coast Trading*, 21 Wn. App. at 902. Furthermore, the court characterized Lakewood's counterclaim, seeking an injunction barring CMS from selling, brokering, or furnishing natural gas to Lakewood customers, as equitable.

The trial court also recognized potential difficulties a jury might have with this case. It considered Lakewood's proposed jury instructions. But the trial court stated that a trial “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 at 706. Despite the “great weight

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to the right of the defendant to a jury trial,” the trial court held that the claims were not suited for a jury trial. CP at 705.

The trial court carefully weighed the facts and applied the *Brown* factors before it denied Lakewood’s jury demand. Given that the trial court appreciated the importance of one’s jury trial rights, but at the same time weighed those rights against the complexities of this case, the trial court did not base its decision on unreasonable or untenable grounds. Accordingly, the trial court did not clearly abuse its discretion in denying Lakewood’s motion for a jury trial. Absent any clear abuse of discretion, we affirm the trial court’s decision to strike Lakewood’s demand for a jury trial.

III. SUBSTANTIAL SUPPORT FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lakewood next argues that substantial evidence does not support the trial court’s findings of fact and that the trial court misapplied the law. Specifically, Lakewood asserts that substantial evidence did not support findings of fact 7 through 16, which in turn did not support conclusions of law 26 through 30; thus, Lakewood claims the trial court erroneously determined that CMS’s Lakewood activities are so minimal that a jurisdictional nexus could not be satisfied. Lakewood also claims the trial court misapplied *City of Tacoma v. Fiberchem, Inc.*, 44 Wn. App. 538, 722 P.2d 1357, *review denied*, 107 Wn.2d 1008 (1986). These arguments fail.

A. Standard of Review

Where a party challenges a trial court’s findings of fact and conclusions of law, we limit review to determining whether substantial evidence supports the findings and whether those findings, in turn, support its legal conclusions. *Panorama Vill. Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018

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(2001). Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *In re Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984).

B. Challenged Findings of Fact and Conclusions of Law

Lakewood assigns error to findings of fact 3, and 7 through 16 and conclusions of law 26 through 30. Finding 3 states, "CMS sold no gas to its Lakewood customers." CP at 712. Beatty testified that CMS does not sell gas. Doug Betzold, CMS's founder and CEO, testified that CMS cannot sell gas itself in part because the Federal Energy Regulatory Commission does not allow it. This evidence sufficiently supports finding 3.

Finding of fact 7 states that 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 Lakewood location. Beatty testified that PSE is taxed for its transportation service under LMC 3.52.050. Halladay testified that PSE pays taxes to Lakewood on its gross revenue from its Lakewood activities, including transportation of gas. Also, CMS presented a PSE invoice to Pierce Transit, which contained an amount for Lakewood city taxes.

This evidence sufficiently supports finding 7.

Finding of fact 8 states that PSE furnished CMS's Lakewood customers the gas that CMS arranged for its Lakewood customers to purchase from suppliers at the North Tacoma City Gate. Undisputed findings 2 and 6 support finding 8.⁷ Finding 2 states that the gas that CMS arranges for its Lakewood clients to purchase is sold by suppliers Shell Energy, Occidental, or Avista. In finding 6, the trial court found that PSE entered into separate contracts with CMS's Lakewood

⁷ Unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

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customers for the transportation and delivery of their gas from the pipeline to the customers' Lakewood locations. Further, Beatty testified that CMS completes its services once PSE takes delivery of the gas. Finally, Gisela Ratajski, a Pierce Transit administrator, testified that CMS completely earns its fee once PSE takes the gas. This evidence sufficiently supports finding 8.

Lakewood challenges finding of fact 9, which states that CMS did not furnish gas to its Lakewood customers. In addition to the evidence supporting finding 8, Beatty testified that CMS does not furnish gas. Also, Halladay testified that PSE and CMS cannot both furnish the Lakewood customers the same unit of gas for purposes of the Lakewood tax; and he added that the proper taxpayer on each unit of gas is the party actually delivering the gas to the Lakewood customers in Lakewood—in this case, PSE. This evidence sufficiently supports finding 9.

Lakewood next challenges finding of fact 10, which states that CMS neither delivered the gas nor owned the gas purchased by and delivered to CMS's Lakewood customers. But, unchallenged finding 2 states that CMS arranges for its Lakewood clients to purchase gas sold by Shell Energy, Occidental or Avista. Beatty then testified that CMS never owns the gas, never has title to the gas, and never possesses the gas. She testified that the Federal Energy Regulatory Commission requires that "the person who moves the gas on the pipeline, the person, company, et cetera, must be the owner of the gas. So the owner of the capacity and the owner of the gas must be the same." 2 Verbatim Report of Proceedings (VRP) at 113-14. Betzold testified that CMS could not sell gas because it never owned the gas; and it could not own the gas because PSE had a monopoly on gas sales and distribution. Finally, unchallenged finding 6 states that PSE contracts separately with CMS's Lakewood customers to transport the customers' gas to Lakewood. This evidence sufficiently supports finding 10.

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Lakewood next challenges finding of fact 11, which states that CMS conducts its agency business—the balancing of gas usage by its clients, as well as single payer invoicing for the gas and transportation services provided by PSE—from Mercer Island. Beatty testified that CMS employees perform all revenue-earning services related to its Lakewood customers from Mercer Island; these services include arranging for transportation and the purchase of gas by its customers, coordinating the transportation of the gas, and paying customer bills as their agent. Beatty testified that CMS's Lakewood activities before April 2010 “were so insignificant and did not generate any revenue” such that after CMS discontinued any Lakewood activity, “[b]usiness [remained] the same.” 2 VRP at 110. Finally, Ratajski testified that CMS did nothing for Pierce Transit in Lakewood to earn its fee. This evidence sufficiently supports finding 11.

Lakewood next assigns error to finding of fact 12, which states that CMS did not engage in selling, furnishing, or brokering gas in Lakewood. Evidence supporting findings 8 through 10 also applies to finding 12. Moreover, Beatty testified that CMS does not broker gas. Ratajski testified that CMS did nothing in Lakewood for which Pierce Transit paid it. Finally, CMS demonstrated that it visited Lakewood no more than 1.5 hours per year for holiday visits and occasional natural gas update meetings. This evidence sufficiently supports finding 12. Similarly, Lakewood challenges conclusion of law 26, in which the trial court concluded that CMS has not engaged in the activity of selling, brokering or furnishing of natural gas in Lakewood, as those terms are understood in LMC 3.52.050(D). This conclusion logically

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offices and that CMS's activities in Lakewood before April 2010 "were so insignificant and we did not generate any revenue" such that when CMS discontinued activity in Lakewood, "[b]usiness [remained] the same." 2 VRP at 110. This evidence sufficiently supports finding 15.

Lakewood next challenges finding of fact 16, which states that CMS ceased engaging in any and all activities in Lakewood in April 2010. Beatty testified that CMS ceased going to Lakewood for any and all purposes after April 2010, and neither Lakewood customer complained or commented on CMS's absence. Also, undisputed finding 17 states that CMS's lack of Lakewood activity 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. This evidence sufficiently supports finding 16.

Lakewood next challenges conclusion of law 27, which states that CMS's Lakewood activities are too minimal to satisfy the requisite nexus and asserts that the trial court incorrectly applied *Fiberchem*.⁹ The trial court's conclusion, however, logically follows from findings of fact 3 through 18, which demonstrate the lack of reasonable relationship between CMS's activities and any taxable event occurring in Lakewood. As in *Fiberchem*, CMS's Lakewood activity was *de minimus*—CMS discontinued all activity in Lakewood without any effect on its revenue-earning services—such that CMS's minimal activities could not subject it to Lakewood

⁹ *Fiberchem*, a plastic distributor, had no office in Tacoma, it never advertised there, and its primary contact with Tacoma occurred when a sales representative contacted its Tacoma customers a total of about 12 hours a month. *Fiberchem*, 44 Wn. App. at 540. *Fiberchem* successfully challenged Tacoma's assessment of a B&O tax against it, as *Fiberchem*'s Tacoma activities were so minimal that it could not be said to be engaging in business there and ruled that such activities could not form a nexus with Tacoma sufficient to give Tacoma jurisdiction to tax *Fiberchem*'s sales to its Tacoma customers. *Fiberchem*, 44 Wn. App. at 540-41, 545.

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taxation. *See Fiberchem*, 44 Wn. App. at 545. Accordingly, substantial evidence sufficiently supports conclusion 27.

Lakewood next challenges conclusion of law 28, which states that CMS is entitled to a refund of the entire amount it paid in taxes between June 24, 2006 and October 1, 2008. The trial court's prior conclusions state that CMS did not perform a taxable event in Lakewood. Accordingly, substantial evidence supports conclusion 28.

Lakewood next challenges conclusion of law 29, which states that CMS is entitled to pre and postjudgment interest on the amounts to be refunded, calculated at the judgment rate from the date the amounts were paid until the refund date. Lakewood does not brief this issue; thus, its failure to argue this assignment of error in its opening brief results in Lakewood's abandonment of the issue. *See* RAP 10.3(a)(6), (g); *see Dickson v. U.S. Fid. & Guaranty Co.*, 77 Wn.2d 785, 787, 466 P.2d 515 (1970).

Finally, Lakewood challenges conclusion of law 30, which states that CMS owes Lakewood no tax after October 1, 2008. As we indicated above, CMS never engaged in a taxable event in Lakewood; therefore, the trial court's findings of fact support conclusion of law 30, that CMS does not owe Lakewood taxes for the period after October 1, 2008.

Ultimately, substantial evidence supports each of the trial court's findings of fact, which in turn support the conclusions of law Lakewood challenges on appeal. Accordingly, we affirm the trial court's findings of fact and conclusions of law.

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follows from finding of fact 12.⁸ Given that substantial evidence sufficiently supports finding 12, the court's finding, in turn, supports conclusion 26.

Lakewood next challenges finding of fact 13, which states that CMS's only activities in Lakewood were annual holiday visits and occasional meetings. CMS presented evidence demonstrating that, when it still had a physical presence in Lakewood, CMS spent no more than 1.5 hours annually in Lakewood for holiday visits and occasional natural gas update meetings. This evidence sufficiently supports finding 13.

Lakewood next assigns error to finding of fact 14, which states:

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.

CP at 713-14. Beatty testified that all revenue-generating services for CMS's Lakewood customers are performed at CMS's Mercer Island offices. She also testified that activities that earn CMS its fee include arranging for transportation and purchase of gas for CMS's customers, coordinating the transportation of the gas, and paying certain customer bills as the customers' agent—services performed from Mercer Island. This evidence sufficiently supports finding 14.

Lakewood next challenges finding of fact 15, which states that CMS handled the administration of contracts for its Lakewood customers entirely outside of Lakewood. Beatty testified that CMS provided all services for its Lakewood customers at CMS's Mercer Island

⁸ Finding of fact 12 states, "CMS did not engage in selling, furnishing or brokering gas in Lakewood." CP at 713.

IV. WRIT OF MANDAMUS

Lakewood next argues that the superior court erred by issuing the writ of mandamus because (1) Lakewood already acted on CMS's refund claim, (2) CMS failed to exhaust administrative remedies, and (3) CMS belatedly sought the writ. We disagree.

A statutory writ is an extraordinary remedy which a court should only issue when there is no plain, speedy, and adequate remedy available in the ordinary course of law. *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996). We will not disturb a trial court's decision regarding a plain, speedy, and adequate remedy unless the trial court's exercise of its discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

Before a court may issue a writ, the applicant must satisfy three elements: "(1) [T]he party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no 'plain, speedy and adequate remedy in the ordinary course of law,' RCW 7.16.170; and (3) the applicant is 'beneficially interested.'" *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *review denied*, 151 Wn.2d 1027 (2004). Furthermore, a party must generally exhaust available administrative remedies before seeking a writ of mandamus. *Summit-Waller Citizens Ass'n v. Pierce County*, 77 Wn. App. 384, 397-98, 895 P.2d 405, *review denied*, 127 Wn.2d 1018 (1995). And, although there is no statutory provision governing the time in which a plaintiff must seek a writ of mandamus, the plaintiff must seek the writ within the same period as that allowed for an appeal. *Teed v. King County*, 36 Wn. App. 635, 641, 677 P.2d 179 (1984). Lakewood asserts that the trial court erred in issuing the writ because Lakewood's May 13, 2009 Notice and Order constituted a final action on CMS's refund claim. Thus, it reasons that CMS's

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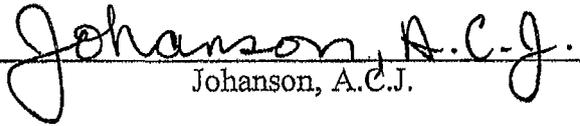
failure to appeal the Notice and Order to the local hearing examiner bars a writ of mandamus because CMS failed to exhaust administrative remedies. As noted above, CMS had no obligation to pursue administrative relief, because Lakewood's Notice and Order did not constitute a final agency determination. Absent Lakewood's taking any direct express action on CMS's refund claim, CMS had no administrative remedies to pursue regarding its refund claim.

Lastly, Lakewood claims CMS belatedly sought the writ of mandamus. The statutory grounds for granting a writ, RCW 7.16.160, do not include a statute of limitations; so a timely period for seeking a writ of mandamus would mirror that allowed for a timely appeal under Lakewood municipal law. *See Teed*, 36 Wn. App. at 641. But again, because Lakewood's Notice and Order was not a final administrative order responding to CMS's refund claim, Lakewood never triggered CMS's appeal period. Therefore, we hold that the writ of mandamus was properly issued, as the trial court's issuance of the writ of mandamus was not manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *See River Park Square, LLC*, 143 Wn.2d at 76.

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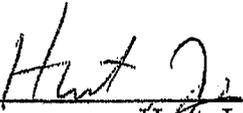
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

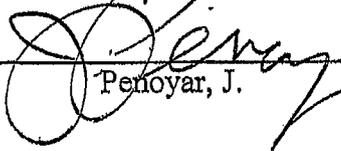


Johanson, A.C.J.

We concur:



Hunt, J.



Penoyar, J.