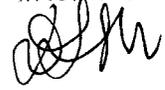


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DIVISION II

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STATE OF WASHINGTON



No. 41509-7-II

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

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COST MANAGEMENT SERVICES,

Respondent,

Vs.

CITY OF LAKEWOOD and CHOI HALLADAY,

Appellants.

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**APPELLANTS' REPLY BRIEF**

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## I. SUMMARY OF REPLY

When a superior court enters judgment, and exhaustion of administrative remedies is required, a superior court errs in entertaining the action, and the remedy is to reverse and dismiss the case for lack of jurisdiction – even after entertaining the merits. *Wright v. Woodard*, 83 Wn.2d 378, 518 P.2d 718 (1974). While certain cases may be exempt from the requirement of exhaustion of administrative remedies, CMS fails to address how *this* case should be exempted from this requirement. In order to obtain a refund for taxes allegedly overpaid under the Lakewood Municipal Code, the Code provides a remedy. CMS was required to utilize the remedy provided by the Code before filing suit. It did not.

In trying to circumvent this fatal flaw, CMS also claims that it should have been entitled to a writ of mandamus because the City (allegedly) failed to respond to their request for a refund. CMS is wrong. The City did respond to CMS' claim in 2009. The City sought CMS to pay it those back taxes which CMS owed. Although the City did not use the magic word “deny,” common sense dictates that if the City was demanding back taxes, it would not refund any monies. As an aside, CMS relies on materials outside the trial court record in support of an inference that because the City has complied with the writ, adverse consequences may flow. In the absence of a motion to supplement the record, these matters should not be considered. RAP 10.3(a)(8). Even if considered, it does not thwart review.

CMS raises a litany of counter-arguments in their *Breif [sic] of Respondent* to those matters which the City raised in its opening brief. Although those issues are important and by not directly responding to them, the City does not concede that CMS is correct. But because (1) CMS failed to exhaust administrative remedies; and (2) CMS was never entitled to a writ of mandamus and a resolution of these two issues in the City's favor can resolve this appeal, in the interests of brevity, we address only those two issues.

## **II. POINTS AND AUTHORITIES**

### A. Exhaustion of Administrative Remedies Was Required, Without It, the Superior Court Lacked Jurisdiction.

Where a procedural administrative mechanism exists – even in the general tax arena – exhaustion is mandated. The law is equally well-established requiring exhaustion of adverse actions of local governments taken under local ordinances. To the extent that this Court deems it necessary to expressly so state, in putting these two legal principles together, and hold that a taxpayer seeking a refund of a local tax must exhaust the available remedies under local tax codes, as Division I of this Court succulently stated in response to a similar argument – “[t]his is that case.” *State v. Castillo*, 150 Wn. App. 466, 475, 208 P.3d 1201 (2009).

CMS responds to this basic concept with an attempt to isolate this case as an “excise tax,” case and then claim that no Washington Court has ever required, “exhaustion of administrative remedies ... in any excise tax case in Washington.” (*Br[ie]f of Respondent* at p. 16 (emphasis omitted)). Based on

this distinction, CMS claims that review is barred. CMS does not explain why isolating this case as an “excise,” tax case or why any limitations inherent in such a label matter. Whatever the explanation might be, it is incompatible with the bright-line holding that exhaustion is required when an administrative process is present.

“It 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)(exhaustion held as bar to property tax claim). Exhaustion will also apply to those parties and claims based on local ordinances. *Lange v. Woodway*, 79 Wn.2d 45, 48, 483 P.2d 116 (1971). Exhaustion is jurisdictional. *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)).

This basic principle is well-recognized by litigants who have exhausted their administrative remedies and appellate courts observing as much. *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). CMS offers no reason to deviate from either the law or accepted practice.

Instead, CMS identifies three reasons why it was not required to utilize any administrative process. None are persuasive.

1. The Hearing Examiner can Hear Issues of “Statutory Interpretation.”

Reading in isolation the quote, “questions of statutory interpretation need not be referred to administrative agencies,” *Qwest Corp v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007), CMS suggests that this matter might have been too complex for a hearing examiner to decide. Although it is doubtful that CMS adequately preserved this argument below, CMS reads this quote out of context. More importantly, CMS fails to identify what “question[] of statutory interpretation,” the hearing examiner would have been obligated to decide.

Context matters. The “question[] of statutory interpretation,” which was at issue in *Qwest*, was identified by Qwest and repeated in a footnote by the Supreme Court, the taxpayer “d[id] not seek a factual determination either about whether the data it provided to the City in the tax audit is accurate or whether the City's classification of that data is accurate. Qwest seeks the Court's declaration that as a matter of law the City cannot tax charges for

access to interstate services.” *Id.*, 161 Wn.2d at 370 fn. 18 (Ellipsis by the Court removed). Placed in context, *Qwest* challenged whether Bellevue could even impose the tax at issue, and thus, sought to enjoin the enforcement of the tax. This interpretation involved an analysis of the interplay between various federal taxing regimes and provisions of the Revised Code of Washington. It is this analysis which constituted the “question[] of statutory interpretation,” which both superior court and the Supreme Court conducted, and ultimately concluded that the City was precluded from imposing the tax. It did not address, nor did it have to reach any determinations which *Qwest* challenged in a connected administrative appeal before the City’s hearing examiner.

CMS did not identify below, nor does it identify on appeal, what issues of statutory construction, the hearing examiner (hypothetically) would have to interpret. Consistent with *Dravo Corp. v. City of Tacoma*, 80 Wn.2d 590, 496 P.2d 504 (1972), in determining whether an entity is subject to a local tax, the hearing examiner would have to decide three dominant questions: what is the relevant taxable event; whether the taxable event occurred within the municipality's territorial limits; and was there minimum connection between the municipality and what was the transaction to be taxed. *Id.*, 80 Wn.2d at 595, 594, 589-99. These are factual questions. *See e.g., Tyler Pipe Indus. v. State*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982)(observing that there was an issue of fact as to taxpayers’ nexus with the State so as to merit preliminary injunction).

The primary issue which the hearing examiner would have to address in the case at bar is whether CMS conducted a taxable event as proscribed by the Lakewood Municipal Code § 3.52.050(D) and is there a sufficient nexus between CMS and the City of Lakewood. This is not an issue of statutory interpretation. It is the application of a local ordinance to a set of disputed facts. Such a determination is entirely within the authority of local hearing examiners to decide, and upon invocation of appropriate procedural mechanisms, for judicial review. *See e.g., City of Tacoma v. Mary Kay, Inc.*, 117 Wn. App. 111, 70 P.3d 144 (2003).

2. Labeling Its Claim as “Money Had and Received,” Is Insufficient to Evade The Administrative Process.

CMS also claims that by styling their claim as one for “monies had and received,” this matter falls within the ambit of Article IV, section 6 of the Washington Constitution, and thus, exempt from exhaustion. CMS is incorrect. A party will not be allowed to evade a procedural bar on their ability to pursue a claim by disguising the true nature of their claim. *Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943). Where the appellation of the cause of action potentially implicates jurisdictional concerns, “[t]he relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought.” *Orwick v. Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984)(citing, *Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wn.2d 519, 522, 445 P.2d 334 (1968)).

The rationales behind the exhaustion doctrine are well-stated:

The exhaustion requirement (1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Not all of these policies apply in every case.

*Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 30, 785 P.2d 447 (1990).

Although many of these principles apply throughout this case, these principles are interrelated. We, however, emphasize the last principle. If a party's label of their cause of action were to control, a party could simply thwart and evade the administrative process. Such a label then could be used to ignore whatever administrative procedures may be available and permit a litigant direct access to the court to resolve what could otherwise be resolved at an administrative level. Such an approach is fundamentally inconsistent with the policy that litigants are required to use the administrative process before resorting to the courts. *See id.*

One does not have to go very far to determine the true nature of their claim and relief sought in this case. CMS sought a refund of allegedly overpaid taxes paid under the Lakewood Municipal Code. This was evident at the beginning of the case in their Complaint. (CP 1-3). At trial, with only its self-styled claim for money had and received left, CMS confirmed this impression in their opening statement. I VRP 6 ("CMS is seeking a refund of

Lakewood utility taxes that it mistakenly paid to the city and the city's counterclaiming that CMS owes additional utility taxes.”). The same Lakewood Municipal Code under which these taxes were allegedly overpaid also proscribes the remedies for seeking a refund. CMS simply failed to avail themselves of this remedy. The label “monies had and received,” does nothing to surmount the jurisdictional bar imposed by their duty to exhaust their administrative remedies.

3. This Case Does Not Involve the Legality of a Tax.

Finally, without citation to authority, CMS claims that this involves the legality of the tax. At the risk of undue repetition from our opening brief, a challenge to the legality of the classes of charges under Article IV, section 6 looks to the tax itself and evaluates the legal issue of whether the tax was properly enacted or is otherwise proper; it does not entail the factual challenges whether the taxpayer conducts a taxable event or the amount of a tax or refund. *See generally, Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 235-236, 119 P.3d 325 (2005)(collecting cases). Although a party may raise a question under a constitutional garb of whether they are subject to the jurisdiction of a taxing authority, the question of whether a taxpayer has the requisite nexus to the taxing jurisdiction is one which a hearing examiner is competent to decide and for a court to review. *See e.g., General Motors v. Seattle*, 107 Wn. App. 42, 25 P.3d 1022 (2001)(upholding hearing examiner's determination that out-of-state taxpayer subject to municipal Business &

Occupation tax). CMS cites no law, nor makes any attempt to distinguish why this limitation applies. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978)(courts may assume that, where no authority is cited in support of a proposition, “counsel, after diligent search, has found none”).

\* \* \*

CMS had a remedy by appealing the City’s administrative determination that it was subject to this tax to the hearing examiner. CMS also recognized that the Lakewood Municipal Code had afforded it a remedy. (CP 3, ¶¶ 14-15). Instead of properly invoking this remedy, it elected to sue. Exhaustion of administrative remedies is jurisdictional. *Wright*, 83 Wn.2d at 379. CMS’ failure to properly use the administrative remedy should have precluded the Pierce County Superior Court from exercising jurisdiction over this case. Because the superior court lacked jurisdiction, the remedy is to reverse the superior court’s decision. *Id.*

B. The Issuance of the Writ Was Error.

Barring a timely administrative appeal of this determination, CMS was liable for the tax at issue. If an adequate administrative remedy was available, a writ is not available and any issuance of a writ is error. *Bock v. State*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978).

Below, CMS claimed that the City’s alleged failure to respond to its request for a refund is what necessitated the writ. The City’s position in this

matter has remained clear: the City did respond to CMS' refund claim. It did so in May 2009. (Trial Ex. 3). The position is best summarized thusly:

It has been and remains the City of Lakewood's position that the City responded to the requests for refunds through a Notice and Order/Demand for Payment sent to Cost Management[] Services via certified mail on May 13, [2009]. That demand for payment was for all past due taxes and included a determination that CMS was then and had always been subject to the tax.

(CP 552).

In those instances where some form of an administrative notice is required, "adequate notice is the statutorily required event that triggers the period for a timely appeal." *See e.g., Felida Neighborhood Assn. v. Clark County*, 81 Wn. App. 155, 161, 913 P.2d 823 (1996)(citing, *Leson v. Department of Ecology*, 59 Wn. App. 407, 410, 799 P.2d 268 (1990)). 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)). The City's notice was more than "adequate," to put CMS on notice that they were obligated to undertake some form of action to appeal Mr. Halladay's May 2009 determination that CMS was subject to this tax.

The City's response unambiguously, "imposes an obligation, denies a right, or fixes a legal relationship." *Bock*, 91 Wn.2d at 99. The City makes an

administrative determination that CMS is subject to the tax set forth in LMC

3.52.050(D):

**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. As such, pursuant to Lakewood Municipal Code (LMC) 3.52.050(D), Cost Management Services is required to pay a utility tax to the City of Lakewood in the amount of 5% of total gross income not including the amount of the tax.**

The City directs CMS to take two actions within thirty (30) days:

**YOU ARE HEREBY ORDERED to take the following actions within thirty (30) days from the date of this letter:**

- 1. Apply for and obtain a City of Lakewood Business License to conduct utility business within the City. You will find a business license application enclosed with this Notice and Order.**
- 2. Pay all past due and owing utility tax payments, including interest and penalties as set forth in LMC sections 3.52.140 and 3.52.180.**

Finally, CMS is advised of its right to appeal:

**You may appeal the determinations made in this Notice and Order, as stated in LMC section 3.52.160, provided that the appeal 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. Failure to appeal shall constitute a waiver of all rights to an administrative hearing and determination of this matter. A \$450 hearing examiner fee must accompany the appeal of an administrative decision of the City Manager or his designee.**

(Trial Exhibit 3).

CMS responded in a June 12, 2009 letter. (CP 578). CMS did the first act which it had been directed to do; CMS “submit[ted] as ordered,” a license application. (CP 578). But it did not pay past due taxes. CMS was clearly advised of their right to appeal the City’s administrative determination. It was also expressly reminded via email that same day, to “refer to the Notice and Order/Demand for Tax Payment for specific information regarding the

appeals process and remedies available to you.” (CP 577). But instead of appealing the determination, CMS simply advised the City that it was “not a utility and is, therefore, not subject to payment of utility taxes.” (CP 578). CMS further represented that it believed it submitted the “proper response,” to the Notice and Order. (CP 578). Rather than consult the Notice and Order in full, and appeal the City’s administrative determination, CMS sued twelve days later. (CP 1). The failure to appeal barred CMS from contesting that it was not subject to this tax and determined that it was liable, with the amount of their tax arrearage to be determined.

CMS’s central claim below (and on appeal) appears to be that seeking the writ was necessary because the City did not respond to its refund claim. Although strongly disputed by the City, assuming for the sake of argument that CMS’ position is true, such a claim only underscores the need to utilize its administrative remedies prior to the commencement of suit and undercuts their claim to relief in their first lawsuit. If CMS truly believed in June 2009, when they filed their first lawsuit, that the City had not responded to their self-classified, “refund claims,” and thus, “Lakewood had a duty to act on the refund claim so that the *Lakewood municipal code’s administrative processes could be concluded.*” (*Br[ie]f of Respondent* at p. 22; Emphasis added), the appropriate course of conduct was not to file this litigation. (CP 1). It was to do what they sought to do in November 2010: seek a writ to trigger the administrative process. (CP 731). If, following the administrative process,

either party was aggrieved, that party could then seek relief in superior court.

*City of Tacoma v. Mary Kay, Inc., supra.*

A writ of mandamus is available only when “there is not a plain, speedy and adequate remedy in the ordinary course of law.” RCW 7.16.170. CMS had “a plain, speedy and adequate remedy.” *Id.* The City had already issued a determination which affixed the party’s legal relationship. If CMS wished to contest this determination, it was obligated to administratively appeal this determination in a timely fashion. CMS’s failure to timely appeal this determination should have precluded the superior court from issuing the writ of mandamus. The superior court’s decision to issue the writ was error and should be reversed.

C. Motion to Strike Appendix A.

Attached as Appendix A to CMS’s brief is a November 17, 2010 letter from Choi Halladay, the City’s Assistant City Manager, Finance. We are unable to locate this document in the record below and conclude that it is not part of the record on appeal. Accordingly, the City moves to strike Appendix A. RAP 10.3(a)(8).

To the extent that CMS may suggest at oral argument (and further assuming that this Court were to consider this letter), that because the City may have “acted,” and thus, relief may be moot, any contention to this effect is unavailing. A case is moot only if it cannot provide effective relief. *West v. Reed*, 170 Wn.2d 680, 682, 246 P.3d 548 (2010). Here, because CMS

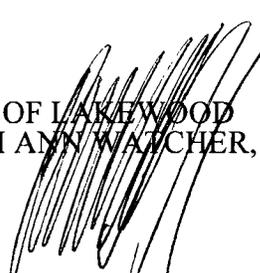
belatedly invoked the administrative process, effective relief to the City is still available. If this Court concludes that that the decision to issue the writ was error, it therefore follows that any subsequent administrative proceedings are lacking in authority.

**CONCLUSION**

For the foregoing reasons, the City of Lakewood requests that this Court reverse the judgment of the Pierce County Superior Court.

DATED: July 28, 2011.

CITY OF LAKEWOOD  
HEIDI ANN WATCHER, CITY ATTORNEY

By:   
\_\_\_\_\_  
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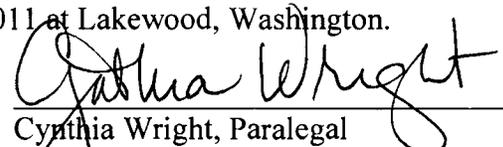
**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on this day I served VIA ABC LEGAL MESSENGER SERVICE and EMAIL, the foregoing document:

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Dated this 29<sup>th</sup> day of July 2011 at Lakewood, Washington.

  
\_\_\_\_\_  
Cynthia Wright, Paralegal