

2012-2013 Northwest State Tax Summary: Washington

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Part I of the 2012-2013 Northwest State Tax Summary focused on developments in Oregon state taxation.¹ In this second installment, we highlight some of the major state and local tax questions and developments in Washington state.

A. Business and Occupation Tax Developments

Nexus

Taxpayers and the Department of Revenue are slowly working through questions arising from Washington's enactment of a factor presence (or economic) nexus standard for services, royalties, and some other apportionable business activities. Effective June 1, 2010, taxpayers engaged in services, royalties, and certain other business activities have nexus under Washington's factor presence nexus statute if they have:

- more than \$50,000 of property located in Washington;
- more than \$50,000 of payroll located in Washington;
- more than \$250,000 of receipts from Washington; or
- at least 25 percent of the taxpayer's total property, total payroll, or total receipts located in Washington (RCW 82.04.070).

The DOR has been diligently seeking out and assessing out-of-state service providers under the new nexus standard. The department has shown some willingness to settle economic nexus cases with prospective reporting instructions and a cancellation of assessed taxes, interest, and penalties. The

DOR's willingness to compromise past periods will probably be limited to fact patterns that present the most significant litigation risk to the department (that is, absolutely no physical presence, transitory or otherwise, in Washington; and nexus based purely on receipts from Washington customers for services performed entirely outside Washington).

To complicate Washington's business and occupation (B&O) tax nexus situation, Washington's factor presence nexus standard does not apply to retailing, wholesaling, and other non-apportionable business activities. Instead, Washington has codified the physical presence nexus standard for such activities in RCW 82.04.070(6). Two recent administrative decisions have shed light on the application of the physical presence nexus standard in Washington.

In *Sage V Foods, LLC v. Wash. Dep't of Revenue*,² the Board of Tax Appeals held that an out-of-state wholesaler did not have nexus by virtue of a single visit by the taxpayer's president to meet with its primary Washington customer coupled with monthly delivery of product via rail cars leased to the taxpayer. The board concluded that the taxpayer's visit and use of leased rail cars were not "significantly associated with [taxpayer's] ability to establish and maintain a market in [Washington] for the sales." The DOR has appealed the board's decision and the case is pending in Thurston County Superior Court.³

In another pro-taxpayer nexus decision, the DOR's Appeals Division held that a remote seller did not have B&O tax or sales tax nexus by virtue of conducting two sales visits to a customer in Washington for the sole purpose of making wholesale sales to be shipped directly to the customer's international locations from the taxpayer's location outside Washington.⁴ These two visits were not associated in any way with the taxpayer's ability to establish and maintain its market in Washington.

¹Gregg D. Barton and Robert L. Mahon, "2012-2013 Northwest State Tax Summary: Oregon," *State Tax Notes*, Mar. 25, 2013, p. 941.

²*Sage V Foods, LLC v. Wash. Dep't of Revenue*, Wash. Bd. of Tax Appeals, Dkt. No. 11-704 (2012), 2012 WL 4794242.

³Dkt. No. 12-2-01893-3 (filed Sept. 14, 2012).

⁴Wash. Dep't of Revenue, Dept. No. 11-0225, 31 WTD 52 (2012).

Rather, the taxpayer's Washington sales were made as a result of the customer's attendance at out-of-state trade shows and of Internet searches.

In city B&O tax nexus developments, the Washington Court of Appeals held in *Cost Management Services, Inc. v. City of Lakewood*⁵ that Cost Management lacked nexus with the city of Lakewood. Cost Management Services (CMS) acted as an agent in arranging for the purchase of natural gas by its customers from third parties. CMS's customers would contract directly with the third parties, and CMS would perform almost all its activities outside Lakewood. However, its employees spent about 1.5 hours per year in Lakewood for an annual holiday visit and a rare market update meeting, but in 2010 CMS employees discontinued all such Lakewood visits. The court determined that "CMS's Lakewood activity was de minimis — 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 taxation." The Washington Supreme Court has accepted discretionary review of the case.

Passing on of B&O Tax

In response to a certified question from the Ninth Circuit U.S. Court of Appeals, the Washington Supreme Court concluded in *Peck v. AT&T Mobility* that RCW 82.04.500, which makes the B&O tax a part of the taxpayer's overhead and not a tax on the consumer, prohibited a wireless telecommunications company from passing on its B&O tax as part of a tax recovery charge despite prior disclosure of the charge to the customer.⁶ The court reasoned that although a business is free to disclose that its selling price includes B&O tax during negotiations or afterward, that disclosure does not permit it to add B&O tax or a recovery fee to the selling price. In this case, the court concluded that "Cingular's monthly service fee, the sales price of its service contract, did not include the B&O tax surcharge." Instead, the surcharge was listed under a "regulatory recovery fee" provision and itemized separately from the service fee. The court's decision in *Peck* and its prior decision on the passthrough of B&O tax in *Nelson v. Appleway Chevrolet, Inc.*⁷ create considerable confusion about the ability of a seller to pass on its B&O tax to customers. Although it is possible to include the B&O tax as part of the selling price, sellers must

take great care in describing the selling price, particularly in the context of business-to-individual consumer sales.

B&O Tax on Intercompany Services

Washington's B&O tax is computed and reported on separate returns, and generally intercompany sales are subject to tax. This raises a number of questions usually not encountered regarding net income tax.

Getty Images v. City of Seattle

In early 2012 the Washington Supreme Court denied review and let stand the court of appeals' decision in *Getty Images (Seattle), Inc. v. City of Seattle*.⁸ Recognizing that it needed to reflect transactions with its foreign affiliates at arm's length, Getty underwent a reorganization in 2001 to do just that, without increasing its B&O tax obligations. The DOR's position has been that transactions for which there was a charge are taxable, but transactions for which there was no charge are not. So Getty Management, an out-of-state company, was created to contract out services to foreign affiliates for an arm's-length fee. Getty Management in turn contracted out those services to Getty Seattle, a company primarily doing business in Seattle, for a flat fee of \$1 million per year, which was a below-market price. The Getty affiliated group also continued using a cash management system to concentrate its cash in one place in order to use it most efficiently. When an affiliate needed cash, it would draw on the concentration account, recording an intercompany payable and receivable. Because Getty Seattle incurred expenses exceeding its income, it was a net user of cash. The city of Seattle assessed B&O tax against Getty Seattle that was measured by the income received by Getty Management from the foreign affiliates. The court of appeals upheld a city hearing examiner's decision that Getty Seattle's receipt of the funds transferred through the cash management system constituted gross income of the business on which tax should be computed.

The effects of the court of appeals' decision in *Getty* and the denial of review rippled throughout the Washington state tax world in 2012. The decision resulted in the DOR's issuance of the "Interim Statement Regarding Getty Images" (Nov. 1, 2012),⁹ stakeholder work between the state DOR and stakeholders, and the delay of the department's issuance of its "Intercompany Transactions Report," required by the Legislature.¹⁰ The decision also resulted in

⁵170 Wash. App. 260, 284 P.3d 785 (2012), *rev. granted*, ___ Wn.2d ___ (Feb. 5, 2013) (No. 87964-8).

⁶174 Wash. 2d 333, 275 P.3d 304 (2012), answering certified question issued by the Ninth Circuit, 632 F.3d 1123 (9th Cir. 2011).

⁷160 Wash. 2d 173, 157 P.3d 847 (2007).

⁸163 Wash. App. 590, 260 P.3d 926 (2011), *rev. denied*, 173 Wash. 2d 1014, 272 P.3d 246 (2012).

⁹Available at <http://dor.wa.gov/content/getaformorpublication/publicationbysubject/taxtopics/interimstatement.aspx>.

¹⁰Available at <http://dor.wa.gov/content/aboutus/statisticsandreports/default.aspx>.

stakeholder work between businesses and Seattle regarding the future taxation of uncompensated or below-market intercompany services. Unfortunately, little has been clarified, and at the end of 2012, the city issued assessments on such transactions, and word is that the state is now comparing labor and industry payroll and B&O tax reporting, and when payroll exceeds gross receipts, the DOR has been issuing assessments. The DOR has more stakeholder meetings scheduled for 2013. Only the future will tell the complete repercussions of the court of appeals' decision.

Common Paymasters and Pay Agents

Affiliated groups often use common paymasters or pay agents to consolidate in one entity the process of issuing payroll checks and payroll reporting to the government. Federal law permits that reporting by a single entity on behalf of affiliates. A potential issue in gross receipt tax jurisdictions is whether the reimbursement by the employer affiliate to the paymaster affiliate constitutes taxable income.

Following *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*,¹¹ the department took a hard look at reimbursement cases under WAC 458-20-111, and even though it agreed that there is no policy reason to tax those receipts, it expressed its opinion that because federal law makes the paymaster liable for payroll taxes (but not the payroll), paymasters are subject to B&O tax on payroll reimbursements they receive. In 2012 the department floated a draft excise tax advisory proposing that in the absence of a written understanding between the affiliates and the employees, those payroll reimbursements would be subject to B&O tax. Because those agreements would not have been entered into in the ordinary course of business, that would only have been a trap for the unwary. The department postponed implementing its excise tax advisory and has been working with stakeholders to propose a legislative solution. SB 5808 proposes to provide relief for such common paymasters and pay agents. However, if it fails, the department has expressed its intent to issue the excise tax advisory in the latter part of 2013.

B&O Taxation of Import and Export Sales

In *American Honda Motor Co., Inc. v. City of Seattle*, one of the relatively few state and local tax decisions interpreting the limitations of the import-export clause of the U.S. Constitution, the Washington Court of Appeals held that the city of Seattle's imposition of its wholesaling B&O tax on imported vehicles delivered to a Seattle dealership did not

violate the import-export clause.¹² According to the court, Seattle's tax was not an impost or duty within the meaning of the clause because it did not offend any of the three concerns identified by the U.S. Supreme Court in *Michelin Tire Corp. v. Wages*¹³ — that is, it did not prevent the federal government from speaking with one voice when regulating foreign relations, it did not divert federal import revenue, and it did not disturb the harmony among the states. The court rejected the taxpayer's argument that the application of the B&O tax was invalid under *Richfield Oil Corp. v. Board of Equalization*,¹⁴ because the tax was imposed on the sale of imported goods before the termination of import transportation. The court concluded that the tax was imposed on vehicles at the end point of import transportation (delivery in Seattle) and was not imposed while the goods were in transit.

As a result of *American Honda*, the import-export clause offers little protection against the imposition of city B&O taxes on import or export sales of goods when delivery occurs within the taxing city. In contrast, Washington state law exempts most import and export sales from state B&O tax as a matter of state statute. The state B&O tax exemption, RCW 82.04.610, was adopted in 2007 as the result of concerns about the validity of the DOR's long-standing administrative position that import and export sales were exempt under the import-export clause.¹⁵

Apportionment Rules Finalized

The Washington DOR adopted final rules implementing Washington's single-factor, receipts-based apportionment system for service activities (WAC 458-20-19402) and royalty income (WAC 458-20-19403). Those rules implement 2010 legislation that changed Washington's service and royalty apportionment method from a cost method to a market-based receipts formula effective June 1, 2010. Under the statute, receipts are attributed to states based on a cascading series of steps. The most controversial provisions of the new regulations relate to the extent to which the department may require taxpayers to attribute receipts to multiple states in proportion to the customer's receipt of the benefit of the taxpayer's service or use of the intellectual property. Financial institutions are required to apportion using a separate apportionment rule for financial institutions (WAC 458-20-19404).

¹²167 Wash. App. 578, 273 P.3d 498 (2012), *rev. denied*, 175 Wash. 2d 1004, 285 P.3d 884 (2012).

¹³423 U.S. 276, 96 S. Ct. 535, 46 L. Ed. 2d 495 (1976).

¹⁴329 U.S. 69, 67 S. Ct. 156, 91 L. Ed. 80 (1946).

¹⁵See WAC 458-20-193C.

¹¹171 Wash. 2d 548, 252 P.3d 885 (2011).

B&O Deduction for Offshore Bunker Fuel Sales

In *Tesoro Refining & Marketing Co. v. Wash. Dep't of Revenue*, the Washington Supreme Court in January 2012 unanimously reversed the court of appeals' decision and held that a manufacturer of bunker fuel could not deduct the amount of its "offshore" bunker fuel sales from state B&O tax on manufacturing activity.¹⁶ The court concluded that a 1985 fuel sales tax deduction, codified under former RCW 82.04.433(1), allows for a deduction against B&O taxes only on wholesale and retail sales, not manufacturing activity. Because the court based its decision on the plain language of the statute, the court sidestepped the constitutional question whether a 2009 amendment enacted to retroactively clarify the 1985 deduction statute violated the due process clause of the U.S. Constitution.

Use of Professional Employer Organizations By Hotels

Hotel owners regularly engage hotel managers to operate their hotels, including acting as the employer of the labor on a cost-plus-fee basis. Because the manager is the employer, reimbursement of the labor costs are typically subject to B&O tax. A DOR memorandum dated October 29, 2012, explains that some owners and managers have implemented the use of professional employer organizations (PEOs) to try to avoid this tax. Under RCW 82.04.540, a PEO may exclude amounts received from clients to pay employee wages, benefits, and taxes. Under that scenario, the manager would create a separate entity to act as the PEO, and the owner and manager would agree to be co-employers. However, it is the department's position that even though reimbursements are made directly from the owner to the PEO, because the hotel manager is a party to the arrangement, the payment to the PEO is in fact an obligation owed to the hotel manager and the hotel manager is subject to B&O tax on such amount. According to the memorandum, that question is pending in the DOR's Appeals Division, and the department is also working on issuing an excise tax advisory on the question.

B. Sales and Use Tax Developments

Sales Tax Included in the Selling Price

In *Dep't of Revenue v. Bi-Mor, Inc.*, the court of appeals held that the plain language of Washington's statutes governing tax-included sales precluded the DOR from assessing sales tax measured by the tax-included selling price.¹⁷ The retailer in this case advertised that its prices included sales tax

but failed to itemize the sales tax on the receipt or invoice. According to the court, RCW 82.08.050 required only that the retailer advertise that its price included sales tax in order to benefit from the lower selling price. The court concluded that the DOR's administrative rule conditioning the lower tax base on the retailer's separate statement of tax on an invoice or receipt was inconsistent with the statute and invalid.

Sale vs. Gift, and Who Is the Consumer?

On January 10, 2013, the court of appeals heard oral argument in the review of *Sprint Spectrum L.P. v. State of Washington, Department of Revenue*,¹⁸ in which the board held that Sprint did not owe use tax on cellular phones that the DOR argued it "gave away free" but that Sprint argued were sold as part of its one- or two-year wireless services contracts.¹⁹ In its briefing before the board, the department conceded that had Sprint made even a nominal charge for the phone, "such as \$1," no use tax would have been due. The department's position is that in the absence of an expressed sales price, the transaction is a gift of a promotional item intended to induce other purchases, whereas the taxpayer's position is that it is a bundled sale on which sales tax is being collected. The case illustrates extremely different tax results when the facts are effectively the same, and the wireless industry is not alone in experiencing/facing such issues. Similar questions are on appeal in Washington for retailers' loyalty programs (is sales or use tax due on products customers receive in redemption of points or certificates) and in the hotel industry (complimentary breakfast with a room).

Purchases of Transmission Services to Provide Internet Service

On May 9, 2012, in *AOL Inc. v. Wash. Dep't of Revenue*, the Washington State Board of Tax Appeals granted summary judgment to AOL Inc., holding that AOL's purchases of services permitting its customers to connect with AOL's data center and the Internet were not subject to retail sales tax.²⁰ The managed modem services were purchased from third-party network services providers to answer members' calls at access modems, translate the signal, and connect to AOL's data center and the Internet. The department took the position that the managed modem service was a "network telephone service" and thus subject to retail sales tax. The board concluded that the managed modem service

¹⁶173 Wash. 2d 551, 269 P.3d 1013 (2012).

¹⁷171 Wash. App. 197, 286 P.3d 417 (2012).

¹⁸Wash. Bd. of Tax Appeals Dkt. No. 08-152 (2010), 2010 WL 4514885.

¹⁹*Sprint Spectrum, LP v. State of Washington, Department of Revenue*, Court of Appeals Dkt. No. 42304-9-II.

²⁰Wash. Bd. of Tax Appeals Dkt. No. 11-076 (2012).

was statutorily excluded from the definition of network telephone service as it satisfied the meaning of an “Internet service.” The DOR filed for review in Thurston County Superior Court, and argument was heard on March 8, 2013. *State of Washington, Department of Revenue v. AOL Inc.*, Thurston County Superior Court No. 12-2-01200-5 (filed June 6, 2012). A successor to Verizon in Washington has a similar action pending for its purchase of DSL service from an affiliate.²¹

C. Other Taxes

Application of the Real Estate Excise Tax to Transfers of Controlling Interests in Entities

In *Watts v. Wash. Dep’t of Revenue*, an unpublished decision, the Washington Court of Appeals held that the transfer of 50.01 percent of a limited liability company that owned Washington real property triggered real estate excise tax measured by 100 percent of the fair market value of the real property owned by the LLC in Washington. The court concluded that the tax did not violate the uniformity clause of the state constitution because the uniformity clause applies only to property taxes, not excise taxes on the sale of property.²² Although several other state and local taxing jurisdictions apply real property transfer taxes to controlling interest transactions, Washington stands out because of its broad measure (the fair market value of the Washington real property owned by the entity without proration) and high tax rates (ranging from 1.28 percent to 2.78 percent).

D. Administrative and Procedural Developments

Administrative Procedures Act Requirements in Some DOR Disputes

In *Wells Fargo Bank v. Wash. Dep’t of Revenue*, a case that highlights an unusual but significant procedural pitfall, the court of appeals held that a taxpayer failed to comply with the 30-day period for filing a petition for judicial review under the Administrative Procedures Act (APA) when contesting the DOR’s refusal to pay interest on a refund paid under a settlement agreement.²³ A closing agreement between the taxpayer and the DOR provided that the department would issue a refund of a specific dollar amount to the taxpayer. Following the execution of the closing agreement, the taxpayer asserted that it

was entitled to interest on the agreed refund. During subsequent communications regarding the interest issue, the department sent the taxpayer a letter stating that “the payment made constituted the total settlement amount.” The court held that the department’s letter was the final agency action for purposes of judicial review under the APA, despite subsequent communications and settlement negotiations between the parties.

In another procedural pitfall, the court of appeals in *Northwest Territorial Mint v. State of Washington Department of Revenue* affirmed the dismissal of an appeal from the Board of Tax Appeals to superior Court for the failure to serve the board.²⁴ RCW 34.05.542(2) “requires that a petition seeking judicial review of an agency action ‘be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order’” (emphasis added). What causes confusion for some is that the DOR is not the agency referred to but is only a party. The board is the agency. In case one thinks, though, that that is an isolated situation, it follows on the heels of a nearly identical case, *Sprint Spectrum, LP v. Department of Revenue*,²⁵ and an older but also nearly identical case, *Banner Realty, Inc. v. Dep’t of Revenue*.²⁶

Closing Agreements

In addition to serving as a warning regarding the application of the APA to some tax matters, *Wells Fargo* is a lesson on the need for careful drafting and review of closing agreements. As described above, the closing agreement in *Wells Fargo* called for the payment of a specific dollar amount with no mention of interest. Clearer drafting could have addressed the interest issue and prevented the dispute.

In *RealNetworks, Inc. v. Wash. Dep’t of Rev.*, the board considered the interpretation of a closing agreement that resolved “all of Taxpayers’ [B&O] tax liability arising out of” the taxpayer’s receipt of a \$761 million antitrust settlement.²⁷ In a later audit, the taxpayer and the department disputed whether the settlement payment should have been used in computing the taxpayer’s research and development credit. The taxpayer argued that the settlement agreement resolved only the pre-credit tax liability and that the settlement amount could be used in determining the size of the taxpayer’s B&O tax credit. The board concluded that the closing agreement reflected the parties’ intention to “resolve completely and finally all issues related to RealNetworks’

²¹*Frontier Communications Northwest Inc. (f/k/a Verizon Northwest Inc.) v. State of Washington Department of Revenue*, Thurston County Superior Court No. 11-2-01252-0 (amended complaint filed June 28, 2011).

²²169 Wash. App. 1006 (2012) (unpublished).

²³166 Wash. App. 342, 271 P.3d 268 (2012), *rev. denied*, 175 Wash. 2d 1009, 285 P.3d 885 (2012).

²⁴2013 WL 811758 (Wash. Ct. App. 2013) (unpublished).

²⁵156 Wash. App. 949, 235 p. 3d 849 (2010).

²⁶48 Wash. App. 274, 738 p. 2d 279 (1987).

²⁷Wash. Bd. of Tax Appeals Dkt. No. 11-665 (2012), 2012 WL 4794241.

payment of B&O taxes on the [] settlement proceeds and that the parties expressed no intention . . . to permit a subsequent partial refund of RealNetworks' agreed-upon B&O tax payment."

Failure to Prosecute Appeal Before the Board of Tax Appeals

In *Sage Business Consulting, LLC v. Wash. Dep't of Revenue*, an unusual procedural decision in the Board of Tax Appeals, the board granted the DOR's motion *in limine* precluding the taxpayer from introducing any evidentiary documents or exhibits at the taxpayer's hearing.²⁸ The taxpayer had failed to adequately respond to the department's written discovery requests and had ignored the board's deadline for submitting proposed hearing exhibits. Also, the board granted the department's motion to dismiss the taxpayer's appeal based on the absence of documentary evidence and the nonappearance of the taxpayer's only proposed witness.

Transparency in Appeals Division Decisions

For years the Washington State Bar, the Washington Society of CPAs, and the Association of Washington Business have expressed concern about the insignificant number of Appeals Division determinations that are published each year. For example, over the last three years, the DOR has published 46 of the 1,536 determinations it issued, or less than 3 percent. In 2012, *State Tax Notes* published several articles on the matter.²⁹

Inconsistency with decisions and that those decisions are the largest unavailable source of DOR interpretations are great concerns for practitioners. For example, in *Steven Klein, Inc. v. State of Washington Department of Revenue*.³⁰ The DOR moved to strike from the taxpayer's brief an unpublished Appeals Division determination upon which the taxpayer relied but that concerned a different taxpayer. The DOR made three arguments in support of its motion to strike: (1) the determination of another taxpayer is confidential and privileged (despite the fact that it was filed in redacted form and not by the department); (2) unpublished determinations may not be relied on as precedent; and (3) "allowing the unpublished determination to be considered would set a bad precedent that is contrary to legislative intent and prejudicial to the Department and tax-

payers." The board deferred a decision on the motion to strike, and the DOR later withdrew its motion. But the lack of transparency continues, and the DOR's response thereto is disturbing. A similar lack of consistency arose in another case when it was revealed that the department had previously issued determinations inconsistent with its litigation position — *Tesoro Refining and Marketing Co. v. State Dept. of Revenue*.³¹ The Association of Washington Business is sponsoring SB 5647 to require that the DOR publish all its Appeals Division determinations. Simultaneously, the DOR studied the cost to publish all its determinations. The DOR employs 16 administrative law judges to issue approximately 500 decisions annually. The DOR first estimated that to publish all its determinations, it would have to add nearly 27 employees at a two-year cost of \$5.2 million, which the DOR later reduced to \$2.7 million. The DOR's primary cost assumption is that it would be required to conduct "extensive research of all relevant published taxpayer guidance to ensure unique facts and circumstances can be clearly articulated to minimize taxpayer confusion." It has been expressed orally as meaning the DOR would have to do more research in its decision-making process in order to ensure consistent decisions are issued. The proposed legislation appears to be stalled because of the department's cost estimates.

Judicial Review of City B&O Taxes

In *Cost Management Services, Inc. v. City of Lakewood*, discussed above regarding nexus developments, the court of appeals also held that CMS was not required to exhaust its administrative remedies before seeking judicial review of its refund claim.³² Although the result is satisfactory for the particular taxpayer, the decision, on which the Washington Supreme Court has granted review, could present a conflict regarding judicial review of city tax assessments, depending on how it is interpreted.³³

In 2008 CMS filed a refund claim on which the city never acted except that in 2009 the city issued a notice and order asserting unpaid taxes by CMS. CMS did not appeal the assessment, but later in 2009, CMS filed an action in superior court seeking its refund, Lakewood counterclaimed for the unpaid taxes and asserted lack of jurisdiction for failure to exhaust administrative remedies.

Lakewood argued that because CMS did not appeal the assessment, it was barred from contesting the application of the tax to its activities. The court

²⁸Wash. Bd. of Tax Appeals Dkt. No. 11-688 (2012).

²⁹See "Washington Guidance Policies May Affect Tax Avoidance Provision," *State Tax Notes*, Feb. 4, 2013, p. 349; Cara Griffith, "Washington State Falls Short on Transparency," *State Tax Notes*, June 18, 2012, p. 815; Brad Flaherty, "Washington DOR Responds to Transparency Article," *State Tax Notes*, July 2, 2012, p. 59.

³⁰Wash. Bd. of Tax Appeals Dkt. No. 10-270 (2012), 2012 WL 2708061, *pet. for rev. filed*, Thurston County Superior Court No. 12-2-01380-0 (filed July 2, 2012).

³¹173 Wash. 2d 551, 269 P.3d 1013 (2012).

³²170 Wash. App. 260, 284 P.3d 785 (2012), *rev. granted*, ___ Wn.2d ___ (Feb. 5, 2013) (No. 87964-8).

³³See *Quest v. City of Bellevue* 161 Wash. 2d 353, 166 P.3d 667 (2007), (holding that superior courts have original jurisdiction in tax and declaratory judgment actions).

of appeals explained that because the assessment 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." The court went on to explain that 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."

It is unclear whether the court of appeals' bases for not requiring exhaustion are as limited as the decision might imply. First, a challenge of an assessment will ordinarily not be an action in equity. Second, the decision seems to imply that, had the city taken action regarding the refund claim, CMS would have been obligated to pursue its administrative appeal rights. However, under both the state's statutes (RCW 2.08.010 and 7.24.010) and its constitution (Art. IV, section 6), the superior courts have original jurisdiction in tax and declaratory judgment matters, and the court noted in its decision that an agency and court may have concurrent jurisdiction. Although a court may in its discretion defer to an agency, there is no requirement.³⁴ ☆

³⁴*Id.*

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