**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

| | |
|---|---|
| **SOUND INPATIENT PHYSICIANS, INC.,** a Delaware Corporation,<br><br>**Appellant,**<br><br>**v.**<br><br>**CITY OF TACOMA,** a Washington Municipal corporation, through its Finance Department, Tax & License Division,<br><br>**Respondent.** | **HEX2019-018**<br>**(CA #500052787)**<br><br>**ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT** |

**THIS MATTER** comes now before JEFF H. CAPELL, the Hearing Examiner for the City of Tacoma, Washington, on the cross-motions for summary judgment of the parties,[1] and their respective responses and replies that were filed as follows:

- Appellant's Motion for Summary Judgment, filed January 28, 2020 ("SIP Motion"),
- City's Motion for Summary Judgment, filed January 28, 2020 ("COT Motion"),
- Appellant's Response to City's Motion for Summary Judgment, filed February 28, 2020 ("SIP Response"),
- City's Response to Appellant's Motion for Summary Judgment, filed February 28, 2020 ("COT Response"),
- Appellant's Reply to City's Response, filed March 5, 2020 ("SIP Reply"), and
- City's Reply to Appellant's Response, filed March 5, 2020 ("COT Reply").

[1] The parties are as set forth in the captioned heading above. Appellant, Sound Inpatient Physicians, Inc., is referred to herein and throughout the motion pleadings as "SIP." The City of Tacoma is referred to both as the "City" and also "COT." The Tacoma Municipal Code is commonly referred to as the "TMC" and the Revised Code of Washington is referred to by its common abbreviation "RCW."



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

By the fact of their filing the motions,[2] and as also expressly stated therein, the parties are in agreement that the present appeal should be decided on summary judgment. In their respective motions, the parties frame the sole issue for resolution on summary judgment as follows:

- The only issue is the assignment of service revenue to the numerator of the service income factor. (SIP's version).
- The only issue in this case is how to apply the part of the "service-income factor"—the amount of "service income in the city." (City's version).

Despite the slightly different wording, the parties verbally confirmed that they are in agreement as to the sole issue presented by this appeal during a video-conference with the Examiner on April 3, 2020. During this video-conference, the parties also confirmed (a) that they consider this appeal to hinge entirely on the above legal issue involving statutory construction and application, (b) that any disagreement they have regarding underlying facts is not material, and (c) that given the amount of material in the record as a result of their respective motions and accompanying filings, a hearing would likely add nothing meaningful to the record. Given the foregoing agreement and the procedural posture of both parties having moved for summary judgment, this appeal ends up somewhat resembling a stipulated facts bench trial.

Hanging in the balance is the amount of Business and Occupation ("B&O") tax that is due and owing from SIP to the City for the years 2013 through 2017 (the "Subject Timeframe"). Of the total B&O tax that SIP paid over the Subject Timeframe, SIP seeks a refund of $964,766.

[2] "Indeed, '[b]y filing cross motions for summary judgment, the parties concede there were no material issues of fact.'" *Lendingtree, LLC v. Dep't of Revenue*, 2020 Wash. App. LEXIS 797 (2020), *citing Pleasant v. Regence BlueShield*, 181 Wn. App. 252, 261, 325 P.3d 237 (2014).



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

## RELEVANT BACKGROUND

After reviewing the parties' motions, as well as the other pleadings and filings of record in this matter to date, the Examiner finds that there is substantial agreement between the parties on the following, pertinent background facts:[3]

1. SIP is engaged in providing managerial and administrative services to its medical professional customers, who in effect outsource these necessities to SIP in order to focus their efforts elsewhere. SIP's services are provided to its customers pursuant to written Management and Administrative Services Agreements. SIP's services include providing training and development, billing and collections, liaison services, personnel management (which includes onboarding new physicians), financial management, recruitment, planning and budgeting, insurance services, compliance management, legal and risk management, quality improvement, and relationship maintenance, among others, as mutually agreed between SIP and its customers. These services are performed in Tacoma as well as in SIP's other locations.

2. SIP has offices in the city of Tacoma, but maintains two other "major" offices located in Brentwood, Tennessee and Westlake, Texas. SIP also has 14 "regional" offices located around the country. Some SIP employees work from their homes. During the Subject Timeframe, SIP had employees in approximately 42 of the 50 states.

3. Of approximately 1,000 total general and administrative ("G&A") employees, approximately 300 work in Tacoma. Of its nine member team of executive corporate officers,

[3] These are not findings of fact in and of themselves, however. "[F]indings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974 (2015). Presumably, this is so because material facts are not supposed to be in dispute for summary judgment to be proper, and summary judgment is inherently a determination of a purely legal issue. As a result, there are no findings to be made from competing contentions. Given the lack of any dispute regarding these background facts, the Examiner does not include any citation to the record as support.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

four work from the Tacoma office. These are SIP's CEO, CFO, General Counsel, and Chief People Officer.

4. SIP considers one of its key services to be establishing, maintaining and supporting its customer's relationships with the facilities at which they work. SIP has determined that providing this service requires SIP employees to travel to the location of the facilities. One-quarter to one-third of SIP's G&A employees travel at least once a month to meet with customers and hospitals. SIP employees also travel routinely in order to provide training and development services. During the Subject Timeframe, only 6 of a total of 92 SIP training events or national conferences took place in Tacoma. In addition to training events and conferences, SIP employees will travel to conduct new physician onboarding, as well as to conduct other sundry administrative services. During the Subject Timeframe, only 6 of a total of 92 SIP training events or national conferences took place in Tacoma.

5. For purposes of its appeal, SIP used its meal expense reimbursement data to show the amount of physical contact SIP employees had with customers outside of the Tacoma city limits.

6. The parties are not in disagreement that SIP's tax liability is required to be apportioned as a general matter of law. They do disagree on the interpretation and application of state statutes and their counterpart city ordinances that control how that apportionment is to be accomplished.

//

//



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

## ANALYSIS AND AUTHORITY

1. The Hearing Examiner has general jurisdiction over this appeal under TMC 1.23.050.B.9, as an "Appeal[ ] arising out of the Tax and License Code (Title 6)." TMC 6A.10.140 also confers jurisdiction over this appeal to the Examiner.

2. More generally, the City of Tacoma's Office of the Hearing Examiner is authorized, and operates under RCW 35.63.130 and TMC 1.23. Pursuant to RCW 35.63.130, a local "[l]egislative body may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner, including but not limited to: …(b) Appeals of administrative decisions or determinations;…" Hearing examiners are creatures of statute/ordinance and have only the authority they are given by those same statutes and/or ordinances.[4]

3. Courts and lesser administrative decision making bodies in Washington State generally have jurisdictional limits placed on them. The primary exception to these limits is the state's Superior Courts, which are courts of general jurisdiction, and are empowered to hear virtually all disputes.[5] Hearing examiners' jurisdictional authority is significantly less broad.[6] As already alluded to, the extent of a hearing examiner's jurisdiction is only as extensive as what its creating body can, and does expressly grant.[7]

4. One such area of limitation is that only the courts can hear constitutional

[4] Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County, 135 Wn.2d 542, 958 P.2d 962 (1998).
[5] State ex rel. Martin v. Superior Court, 101 Wash. 81, 93-94, 172 P. 257, 261 (1918) ("The superior courts of this state are courts of general jurisdiction. They have power to hear and determine all matters, legal and equitable, and all special proceedings known to the common law, except in so far as these powers have been expressly denied.").
[6] Skagit Surveyors & Eng'rs, L.L.C., 135 Wn.2d at 558, (The power of an administrative tribunal to fashion a remedy is strictly limited by statute.).
[7] *See e.g., Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-587, 113 P.3d 494, 500-501 (2005).



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

challenges.[8] As such, the Hearing Examiner cannot decide any constitutional issues raised in the parties' motions, and cannot either invalidate or uphold the City's B&O tax assessment on that basis.

5. The summary judgment process is intended to eliminate a trial or hearing if only questions of law remain for resolution, and neither party contests facts necessary to reach a legal determination.[9] The applicability of a city taxation ordinance is considered a legal question and therefore appropriate for determination on summary judgment.[10]

6. B&O taxes, such as the one at issue here, are assessed for the privilege of conducting business in the taxing jurisdiction, which includes municipalities.[11] SIP does conduct business in the city of Tacoma. RCW 35.102 governs the assessment of B&O taxes at the municipal level in Washington.[12] For its part, and in harmony with RCW 35.102, the City enacted TMC 6A.30 to govern implementation of B&O taxes in Tacoma.[13]

7. The specific provision at issue here is found at RCW 35.102.130(3)(b)(i)~(iii),[14] which provides the following:

> (3) Gross income derived from activities taxed as services shall be apportioned to a city by multiplying apportionable income by a fraction,

---

[8] Id. ("An administrative agency has no authority to determine the constitutionality of the statute it administers"); see also Prisk v. Poulsbo, 46 Wn. App. 793, 798, 732 P.2d 1013, 1017 (1987).
[9] *Marincovich v. Tarabochia,* 114 Wn.2d 271, 274, 787 P.2d 562 (1990); *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982); *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007).
[10] *Wedbush Sec., Inc. v. City of Seattle*, 189 Wn. App. 360, 363, 358 P.3d 422 (2015) c*iting Avanade, Inc. v. City of Seattle*, 151 Wn. App. 290, 297, 211 P.3d 476 (2009).
[11] Wedbush Sec., Inc., 189 Wn. App. at 363, citing Ford Motor Co. v. City of Seattle, Exec. Servs. Dep't, 160 Wn.2d 32, 44, 156 P.3d 185 (2007).
[12] This compares with the state B&O statute which is found at RCW 82.04. As SIP pointed out in the SIP Motion at pages 3~4, the state system is based solely upon receipts and receipts are assigned on where the customer receives services. *See e.g., Lendingtree, LLC v. Dep't of Revenue*, 2020 Wash. App. LEXIS 797 (2020). Cities, on the other hand, are granted more flexibility in their formulations using a two factor test based on payroll and sales.
[13] Unless otherwise expressly stated, all RCW and TMC references herein are to the provisions that were in effect during the Subject Timeframe, as provided by the parties.
[14] RCW 35.102.130 is titled "Allocation and apportionment of income." This same provision was enacted by the City as TMC 6A.30.077.F.2. Following the parties' motions, most references herein are to the RCW.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

> the numerator of which is the payroll factor plus the service-income factor and the denominator of which is two.
> * * *
> (b) The service income factor is a fraction, the numerator of which is the total service income of the taxpayer in the city during the tax period, and the denominator of which is the total service income of the taxpayer everywhere during the tax period. Service income is in the city if:
>
> (i) The customer location is in the city; or
> (ii) The income-producing activity is performed in more than one location and a greater proportion of the service-income-producing activity is performed in the city than in any other location, based on costs of performance, and the taxpayer is not taxable at the customer location; or
> (iii) The service-income-producing activity is performed within the city, and the taxpayer is not taxable in the customer location.[15]

Within this overall paradigm, the parties specific issue is which of the subsection (b)(i)~(iii) criteria apply here to determine SIP's service income, or as SIP put it, "what is the service income of the taxpayer in the city?"[16] This is the issue, and its resolution comes through the Examiner deciding the correct criteria to apply, and the proper interpretation thereof.

8. SIP began the motion cycle by contending that the City incorrectly "pretend[s] that all service income is in the City, despite there being no customers there,"[17] and that service income should be assigned strictly based on where SIP had in-person physical contact with its customers. As mentioned above, SIP used its meal expense reimbursement data to represent in-person physical contact SIP employees had with customers outside of the Tacoma city limits. SIP contends that because it has in-person, physical contact with customers outside the Tacoma city limits, only the (b)(i) criterion has any application in apportioning its service

[15] The service income determining criteria just listed from RCW 35.102.130(3)(b)(i)~(iii) are referred to hereafter by their subsection designation only, e.g., the "(b)(i) criteria." Again, these same criteria were incorporated into the City's Code at TMC 6A.30.077.F.2.
[16] *SIP Motion*, at p. 4.
[17] *Id.*



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

income. Going a step further, SIP contends that the only way that the (b)(ii) criterion can apply is if SIP has no physical contacts whatsoever.[18] Lastly, SIP argues that the (b)(ii) and (b)(iii) criteria cannot apply here in any event because SIP is taxable at all of its customer locations, thereby making (b)(ii) and (b)(iii) inapplicable. SIP bases that argument on the current status of the law regarding when a person/business has established a significant enough "nexus" in the taxing jurisdiction to be subject to taxation generally.

9. For its part, the City appeared to argue that placing the entire determination of service income on in-person physical meetings with customers results in an unfair ignorance of all the income generating work that SIP does in Tacoma, and is an incorrect reading of the statute/ordinance because it stops at the (b)(i) criterion without any regard for the factors that follow at (b)(ii) and (b)(iii). The City further contends that its review of requested SIP records showed that it was not taxable in its other business locations, and therefore the cost of performance methodology was the "fairest way to apportion SIP's service income."[19]

10. SIP's argument appeared to morph somewhat over the course of the motion cycle. In its response (the SIP Response), SIP does allow "[t]hat its income producing activity occurs in more than one location" and that it does have customers in Tacoma—although SIP characterizes the number as *de minimus*.[20] By the time it filed its reply (the SIP Reply), SIP stated that "there is no factual dispute that while SIP performs income generating activities in Tacoma, it has much more such activity outside Tacoma, and SIP does not assert that no income should be apportioned to Tacoma."[21] The City argued in its reply (the COT Reply) that

[18] *SIP Response*, at p. 7.
[19] COT Motion, at p. 8.
[20] *SIP Response*, at pp. 7 and 8.
[21] *SIP Reply*, at p. 1.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

"By that admission alone [that income producing activity occurs in more than one location], the parties need to apply RCW 35.102.130(3)(b)(ii)."[22]

11. The City comes to the table having the benefit of the principle that "[t]axes are presumed to be just and legal, and the burden rests upon one assailing the tax to show its invalidity."[23] This is embodied in the City's code at TMC 6A.10.140.D which expressly puts the burden on the taxpayer by a preponderance to prove that a tax paid by it is incorrect and that the taxpayer is entitled to a refund.

12. Under TMC 1.23.060, the Examiner's review and determination in this appeal is conducted *de novo*. When questions regarding applicability and construction arise, municipal ordinances and state statutes are treated the same and are subject to the same rules.[24] The same is true in construing "revenue statutes."[25]

13. "Where a statute is clear on its face, its plain meaning should 'be derived from the language of the statute alone.'"[26] But if the statute or ordinance in question remains susceptible to more than one reasonable meaning after the plain language inquiry, the statute is ambiguous and subject to being construed.[27] "A statute is not ambiguous merely because different interpretations are conceivable.'"[28]

14. In the present appeal, the parties take diverging views as to both the interpretation

---

[22] *COT Reply*, at p. 2 of 6, ¶ 3.
[23] Ford Motor Co., 160 Wn.2d at 41, citing 72 Am. Jur. 2D State and Local Taxation § 1000 (2006).
[24] *Ford Motor Co.,* 160 Wn.2d at 41-42, *citing McTavish v. City of Bellevue,* 89 Wn. App. 561, 565, 949 P.2d 837 (1998).
[25] Wedbush Sec., Inc., 189 Wn. App. at 365, citing 3A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 66:3 (7th ed. 2010).
[26] *Ford Motor Co.,* 160 Wn.2d at 41.
[27] *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 240~241, 208 P.3d 5, 7 (2009), *citing Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002).
[28] *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155, 158 (2006).



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

and application of the (b)(i)~(iii) criteria. These diverging views appear, at least in part, to be the result of the parties' differing interpretations of the holding in *Wedbush*. Neither side's interpretation is necessarily completely untenable leading to the need for construction.

15. The State Supreme Court has consistently stated the following as one of the cardinal rules of statutory construction:

> In interpreting a statute, we are obliged to construe the enactment as a whole, and to give effect to *all* language used. Every provision must be viewed in relation to other provisions and harmonized if at all possible.[29]

The construing tribunal is also to "[a]void interpretations 'that yield unlikely, absurd or strained consequences.'"[30] Phrased slightly differently, but in a way that may be helpful here, our courts have stated constructions that would render a portion of a statute or ordinance "meaningless or superfluous," or that otherwise nullify any provisions thereof should be avoided,[31] and legislation generally "[m]ust be construed as a whole, and effect should be given to all the language used…"[32]

16. Also applicable in this appeal is the rule of statutory construction that a reviewing tribunal may not import additional language into the statute that the Legislature did not expressly use, even when doing so might correct an apparent error or omission.[33]

17. Both parties cite extensively to *Wedbush*. *Wedbush* is instructive here for a

---

[29] *In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810, 814 (1998), *citing State ex rel. Royal v. Bd. of Yakima County Comm'Rs*, 123 Wn.2d 451, 459, 869 P.2d 56, 61 (1994).
[30] Centrum Fin. Servs., Inc. v. Union Bank, NA, 1 Wn. App. 2d 749, 759-760, 406 P.3d 1192, 1197 (2017), internal cites omitted.
[31] *Ford Motor Co.,* 160 Wn.2d at 41-42; *Centrum Fin. Servs., Inc.,* 1 Wn. App. 2d at 759-760, *Locke v. City of Seattle*, 133 Wn. App. 696, 704, 137 P.3d 52, 56, 2006.
[32] State ex rel. Royal v. Bd. of Yakima County Comm'Rs, 123 Wn.2d 451, 459, 869 P.2d 56 (1994); Centrum Fin. Servs., Inc., 1 Wn. App. 2d at 759-760.
[33] *Dot Foods Inc. v. Dep't of Revenue,* 166 Wn.2d 912, 920, 215 P.3d 185 (2009); *see also State v. Delgado,* 148 Wn.2d, 723, 727, 63 P.3d 792 (2003).


City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

number of reasons. First, *Wedbush* deals with the imposition of municipal B&O taxes on a service based business, the same as here. Wedbush challenged the city of Seattle's B&O assessment "arguing that the City misapplied the service income factor in the statutory apportionment formula by including income derived from all customers rather than income derived only from those customers who had Seattle addresses."[34] Wedbush had an office and employees in Seattle, but also had offices and customers throughout the United States.[35] Prior to being audited by the city of Seattle, "Wedbush only reported revenue that was obtained from those clients with Seattle addresses."[36] The majority of Wedbush's contacts with customers occurred through the telephone and the Internet, not through in-person meetings.[37]

18. Just as here, in *Wedbush*, customer location and physical contacts were placed at issue. The city of Seattle had, for some time, interpreted "customer location" to mean "the place where the majority of physical contacts with a customer occur." The parties in *Wedbush* disagreed over the interpretation and application of "physical contacts" to determine customer location and ultimately the amount of service income. In the end, the court determined that even though "some of Wedbush's activities that occur outside the Seattle area probably generate some revenue, Wedbush failed to provide any documentation or support thereof."[38] As a result, the court concluded that the record could only show that the majority of income as defined in RCW 35.102.130(3)(b)(ii) takes place in Seattle, presumably from Wedbush's contacts

[34] *Wedbush Sec., Inc.,* 189 Wn. App. at 363.
[35] *Id*., at 362.
[36] *Id*.
[37] *Id.* The court determined that "When [ ] service income is derived from customer contacts by telephone and the Internet, the entire amount is subject to the B&O tax."
[38] *Id.*, at 366.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

with customers through the telephone and the Internet.[39]

19. Along the way, the *Wedbush* court stressed that "courts assume that every clause in a legislative enactment is intended and has meaning, giving effect to all language, rendering no portion meaningless or superfluous."

20. SIP takes the *Wedbush* court's emphasis on physical contacts and conflates it into more than it was intended to be creating almost the reverse situation analyzed in *Wedbush*. SIP contends that if there are physical contacts, and those physical contacts are outside the city, then *de facto,* no income is attributable to the city. This is neither what the statute actually says, nor is it what *Wedbush* holds. SIP latches onto the sentence in *Wedbush* that reads "If there are no contacts, then clauses (ii) or (iii) come into play,"[40] to mean that if there are contacts you stop at clause (i) and go no further, ***and*** not only do you stop at clause (i) you essentially preclude any analysis of what income producing activities might be happening in the taxing authority city simply because there are physical contacts outside the city. That approach would also render clauses (b)(ii) and (b)(iii) meaningless or superfluous, violating the cardinal rule of statutory construction that requires the construction of the enactment as a whole, giving effect to *all* language used.

21. SIP's argument requires adding words to the (b)(i) clause that are not there,[41] and it conflates the importance of physical contact to the point of subsuming the importance of all else in the (b)(i)~(iii) criteria. SIP takes the *Wedbush* court's characterization of the (b)(i)~(iii)

---

[39] *Id*. Given the amount of importance the *Wedbush* court placed on actual physical contact, it seems like there is a step missing in its analysis unless the court considered the telephone and Internet business to be conducted in Seattle.

[40] *Id.*, at 365.

[41] SIP's interpretation of the (b)(i)~(iii) criteria would need added language that directed the taxing authority and the taxpayer to end their analysis at criterion (b)(i) if there are physical contacts outside the city.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

criteria as "cascading"[42] to mean that if there are physical contacts outside the city, then not only is the customer not located in the city, but there can be no income producing activity in the city beyond what happens in that external physical contact, and therefore the cascade ends as soon as it has begun. Before the end of the summary judgment motion cycle, however, SIP admitted that its income producing activity does occur in more than one location, and that it has at least some customers in the city of Tacoma. Nothing in the statute or in the *Wedbush* holdings says that when such is the case, the taxing authority must still myopically focus only on physical contacts, or that external physical contacts preclude analyzing what income producing activity does occur in the city. To the contrary, the (b)(ii) clause specifically addresses situations where income producing activity is performed in more than one location.

22. In any event, similar to *Wedbush*, the record presented by the parties as part of the cross-motions for summary judgment does not provide a sufficient picture to determine by a preponderance that all, or even an overwhelming majority, of SIP's income producing activities occur outside Tacoma such that SIP would be entitled to the refund it seeks in this appeal, or that would negate the application of the (b)(ii) criterion. SIP's meal expense reimbursement data showed that SIP's claimed physical contacts most likely took place, but there is no concrete record of what type of income producing activity took place during the business trips that precipitated the meals. SIP representatives offered statements about what would typically

//

[42] Webster's online defines "cascade" as something arranged or occurring in a series or in a succession of stages so that each stage derives from or acts upon the product of the preceding. Nothing in this definition suggests that you do not move on to the next stage of the cascade if the first one has some application. The disjunctive nature of the (b)(i)~(iii) clauses suggests that they should all be looked at and analyzed for whatever application they might have.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

take place on business trips that resulted in meals,[43] but this does not, by a preponderance show that income producing activity took place outside Tacoma to the level that SIP contends, nor does it even show by a preponderance what income producing activity took place on any given meal-inducing instance of physical contact outside Tacoma.

23. Lastly, it is difficult to conclude, based on SIP's nexus argument that SIP is taxable in all its customer locations, thereby negating the application of the (b)(ii)[44] criterion based on its final clause. SIP is correct that the under the current state of the law surrounding taxable nexus generally, based on business contacts with a given taxing jurisdiction, very little is required for a business or person to become generally taxable. That is not, however, the criteria for determining whether the taxpayer in question is "taxable in the customer location" under RCW 35.102 and TMC 6A.30. Under state and local law, the inquiry must look specifically at whether "[t]he government where the customer is located has the authority to subject the taxpayer to [a] gross receipts tax."

24. The City concluded from SIP document production that SIP is not paying a gross receipts tax in any customer location, and therefore, none of these jurisdictions has the authority to levy a gross receipts tax. It is certainly possible that such is the case. It is not hard to presume that if a jurisdiction has a gross receipts tax enacted and in effect that businesses with a sufficient nexus would be taxed. Although government may have the inherent authority to tax generally, it is not true across all jurisdictions that all types of taxes are authorized. Just one example is that although Washington State may have the inherent authority to tax generally, a

[43] These same representatives also provided the City with a significant amount of information about the activities that SIP does conduct in the City of Tacoma, all of which appear to be the kind of activities that generate compensation.
[44] And (b)(iii) criterion as well.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

personal income tax is not currently authorized in Washington. SIP's argument that all government has the inherent authority to tax, and all businesses such as SIP meet the minimum nexus standards to be taxed, so therefore SIP is taxable in all its customer locations is not borne out by a preponderance, and SIP is the party here that bears this burden.

## CONCLUSIONS

1. The City's application of RCW 35.102.130(3)(b)(ii) was not in error because SIP performs income producing activity in more than one location, and it was not unreasonable for Tacoma to conclude that a greater proportion of the service-income-producing activity is performed in Tacoma given the number and type of SIP employees in Tacoma and the activities performed here.

2. Although SIP showed by a preponderance that it has physical contact with its customers outside Tacoma, it did not show by a preponderance how these contacts proved that the greater proportion of SIP's service-income-producing activity is performed outside Tacoma.

3. SIP's interpretation of RCW 35.102.130(3)(b)(i)~(iii) is erroneous because it would require words to be added that are not present, and places too much emphasis on physical contacts the (b)(i) clause resulting in an exclusion of any consideration of the (b)(ii) and (b)(iii) clauses any time there are any physical contacts outside the city, rendering the (b)(ii) and (b)(iii) clauses superfluous and subject to circumvention by creating physical contacts of whatever nature outside the taxing jurisdiction.

//

//



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org

4. SIP's argument regarding the inherent authority to levy taxes generally does not show by a preponderance that SIP is indeed subject to a gross receipts tax in all its customer locations.

5. Lastly, the Examiner is without jurisdictional authority to determine the constitutional sufficiency of the City's B&O tax assessment.

## ORDER

NOW THEREFORE, the Appellant's appeal requesting a refund of its B&O taxes in the amount of $964,766 is HEREBY denied.

**ORDERED** this 14th day of April, 2020.

**JEFF H. CAPELL, Hearing Examiner**

## NOTICE

**TMC 6A.10.150 Judicial review, provides the following:**

The decision of the Hearing Examiner may be appealed by any person having paid any assessment as required by the Department, except one who has failed to keep and preserve books, records, and invoices as required in this chapter, by filing a proper request for a writ of review with the Pierce County Superior Court. A request for a writ of review must be filed within 21 calendar days following the date that the decision of the Hearing Examiner was delivered to the parties. Review by the superior court shall be on, and shall be limited to, the record on appeal created before the Hearing Examiner. The Department shall have the same right of review from a decision of the Hearing Examiner as does a taxpayer.



City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
P: (253) 591-5195 F: (253) 591-2003
hearing.examiner@cityoftacoma.org