NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

BRIEF IN OPPOSITION
June 13, 2024 11:03

By: JAY R. CARSON 0068526

Confirmation Nbr. 3193059

EKATARINA WOS, ET AL.,

CV 24 993917

vs.

Judge: KEVIN J. KELLEY

THE CITY OF CLEVELAND, ET AL.

Pages Filed: 10

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO\

EKATARINA WOS, *et al.*,	)	CASE NO: CV-24-993917
	)	
Plaintiffs,	)	
	)	JUDGE: KEVIN J. KELLEY
vs.	)	
	)	
CITY OF CLEVELAND, *et al.*,	)	**BRIEF IN OPPOSITION TO**
	)	**DEFENDANTS' MOTION**
Defendants.	)	**TO DISMISS**

Plaintiffs Ekatarina Wos ("Wos") and David Steffes ("Steffes")(collectively the "Plaintiffs"), as class representatives, respectfully oppose the Defendant The City of Cleveland's ("the City") Motion to Dismiss. The City asserts that Plaintiffs have failed to exhaust administrative remedies before filing suit, and that specific factual issues present in this case will require "special expertise in tax matters." (See City's Mem. in Supp. at 4). But as set forth below, Plaintiffs have no administrative remedies to exhaust, there are no factual issues to review—much less factual issues that would require special expertise in tax matters, and the local board of tax review lacks jurisdiction to provide them the relief they are seeking. Moreover, the administrative agency lacks the capacity and is ill-suited to address the City's noncompliance with its own taxpayer protection ordinance.

Further, Plaintiffs challenge not only the City's failure to pay interest as required by Cleveland Cod. Ord. 192.28(d) and 192.29(a)(4), but the City's unconstitutional practice of taxing vacation pay and other leave of non-resident employees who are working remotely by treating their vacation days as days worked in the City. In other words, although non-resident employees who are working remotely may seek a refund of taxes withheld for days worked outside of city limits, the City—ironically—deems income earned on paid leave days (i.e., days when the

employee is not working at all) to have been earned within the City. This is a challenge to the constitutionality of that practice and thus not cognizable by any administrative agency.

I. Legal and Factual Background

This is a class action to require the City of Cleveland to abide by its own ordinances and pay interest on municipal tax refunds delivered more than 90 days after the refund was requested and also to enjoin municipal taxation of non-resident remote workers' paid leave days. Complt. at ¶¶ 60, 61.

In 2016 Cleveland City Council enacted Cleveland Cod.Ord. 192.28(d), requiring the City to pay interest on refunds that were delayed more than 90 days after the completed return was filed:

> (d) Interest shall be allowed and paid on any overpayment by a taxpayer of any municipal income tax obligation from the date of the overpayment until the date of the refund of the overpayment, except that if any overpayment is refunded within ninety (90) days after the final filing date of the annual return or ninety (90) days after the completed return is filed, whichever is later, no interest shall be allowed on the refund. For the purpose of computing the payment of interest on amounts overpaid, no amount of tax for any taxable year shall be considered to have been paid before the date on which the return on which the tax is reported is due, without regard to any extension of time for filing that return. Interest shall be paid at the interest rate described in division (a)(4) of Section 192.29 of this chapter.

Cleveland Cod. Ord. 192.28(d).

The statute is self-executing and does not require the taxpayer to make a special request for interest. Moreover, the interest requirement is mandatory. The clock begins to run when the "completed return is filed." *Id.* This determination is made by the City and Plaintiffs are not asserting that the City failed to calculate it correctly. Rather, Plaintiffs are arguing that even measuring from the date the City approved their refunds, the City still failed to pay the interest that the City's legislative body obligated the taxing authority to pay if it failed to process refunds in a timely manner. Indeed, in the complaint, Wos alleges that the City notified her that her refund had

been approved on July 24, 2023, more than three months after filing her return, but she still did not receive her refund until August 8, 2023. Complt. at ¶¶s 29-33. Further, to the extent that the City contends that Plaintiffs' tax returns were not "complete" on the date they were filed, that argument raises factual issues not in the record and not properly determined on a motion to dismiss. *See State ex rel. Bandy v. Gilson*, 161 Ohio St.3d 237, 2020-Ohio-5222, 161 N.E.3d 672 ("For a court to dismiss a complaint pursuant to Civ.R. 12(B)(6), it must appear beyond doubt from the complaint that the relator can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the relator's favor").

II. Law and Argument

A. The Plaintiffs Have No Administrative Remedies to Exhaust and Appeal to the Tax Review Board Would Be a Vain Act

A longstanding exception to the doctrine of administrative remedies is the "vain act" exception. See, e.g., *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 275, 328 N.E.2d 395 (1975), *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224. Because the board of tax review lacks jurisdiction other than to hear matters concerning assessments, it cannot afford relief to Plaintiffs in this case.

An administrative agency can exercise only the jurisdiction conferred on it by statute. *M6 Motors, Inc. v. Nissan of N. Olmsted, LLC*, 8th Dist. No. 100684, 2014-Ohio-2537, 14 N.E.3d 1054, ¶ 41; see also, *State ex rel. Shaker Square Co. v. Guion* (App.1957), 145 N.E.2d 476 (A municipal administrative agency . . . "that is created by a legislative body is limited to exercise only such authority granted to it by the legislative body.") Here, the statute creating local tax review boards, and which the City relies, limits the jurisdiction of the tax review board (and the tax administrator) to reviewing assessments: "Any person who has been issued an assessment may appeal *the assessment* to the board created pursuant to this section…" R.C. 718.11(C). (emphasis

added). An "assessment" is defined in the Revised Code as "… a written finding by the tax administrator that a person has underpaid municipal income tax, or owes penalty and interest, or any combination of tax, penalty, or interest, to the municipal corporation …" R.C. 718.01(PP)(1).

Plaintiffs and other class members are not appealing any assessments. Indeed, no assessments have been issued to them. On the contrary, the City has acknowledged that the Plaintiffs *overpaid* their taxes. Nor is there anything to appeal. Setting aside the taxation of their paid leave days, the Plaintiffs do not disagree with the City as to the amount of their refunds. They are simply insisting that the City pay them (and other taxpayers) the interest due on those refunds. They are seeking to compel the City to engage in the purely ministerial act of calculating and paying interest according to the ordinance's mandatory language.

In terms of relief that they can provide, local boards of tax review are limited to affirming, reversing or modifying the tax administrator's assessment. See R.C. 718.11 (E). Again, there is no assessment here to affirm, reverse or modify. Instead, the Plaintiffs seek an order in mandamus requiring the City to comply with its ordinance and pay the appropriate interest on refunds to all nonresident Cleveland taxpayers to whom it has determined refunds are due.

Further, Plaintiffs seek relief not only for themselves, but for the entire class of nonresident taxpayers who have been approved for refunds and are due interest because the refunds were not timely paid. Plainly, a local board of tax appeals lacks the authority to provide that remedy. The relief the Plaintiffs have sought is in essence indivisible—they seek a single order compelling the City to pay interest as mandated by the ordinance and a declaration that the practice of taxing paid leave as work performed in the City is unconstitutional. "[T]he indivisible nature of the injunctive or declaratory remedy warranted [supports] the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 360, 131 S.Ct. 2541 (2011)(quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). This type of indivisible relief in mandamus — ordering an official to perform a mandatory official duty as to an entire class — and the declaratory relief requested are simply not available in an administrative appeal.

Further, as to the Plaintiffs' declaratory judgment claim regarding the propriety of taxing the paid leave of non-resident remote employees as if they were present in the City on those days presents and legal claim with constitutional dimensions. The Ohio Supreme Court has held that absent specific legislation from the General Assembly directing otherwise, due process requires that "[l]ocal taxation of a nonresidents' compensation for services must be based on the location of the taxpayer when the services were performed." *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St. 3d 165, 2015-Ohio-1623, ¶ 43. By taxing paid leave days of nonresident remote employees, the City is taxing nonresidents not only when they are outside of the City, but while they are not performing any services. As an administrative agency, the Board of Tax Appeals is without jurisdiction to determine the constitutional issues. *State ex rel. Mallory v. Pub. Emp. Retirement Bd.* (1998), 82 Ohio St.3d 235, 240, 694 N.E.2d 1356, 1361; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 520 N.E.2d 188, paragraph one of the syllabus. It would therefore be futile to force a party to exhaust an administrative appeal to an agency that can afford no meaningful relief. *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 115, 564 N.E.2d 477, 482–483.

B. This Case Involves Purely Legal Issues and No Specialized Expertise in Tax Matters

The exhaustion of administrative remedies requirement is tied to the notion that the administrative agency has particular expertise to offer in evaluating the factual or legal questions brought to it and that the court will be aided by the administrative agency's creating a record for

judicial review. As the Ohio Supreme Court has explained "[t]he purpose of the doctrine [of administrative remedies] '… is to permit an administrative agency to apply its special expertise and in developing a factual record without premature judicial intervention.'" *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St. 3d 109, 111, 564 N.E.2d 477, 480 (1990) (citing *Southern Ohio Coal Co. v. Donovan* 774 F.2d 693, 702 (6th Cir. 1985). Because administrative experts may be best able to determine complex facts, for example relating to tax assessments, the presumption is that administrative review is both more efficient and accurate than judicial review.

But that rationale does not apply here, where the suit seeks the enforcement of an unambiguous statute mandating the payment of interest on amounts that have already been determined. While the City is correct that local boards of tax appeals may have special expertise in tax matters, those tax matters typically concern application of complex tax code provisions, appraisals, and property valuation models. *See, e.g. Amsdell v. Cuyahoga Cty. Bd. of Revision*, 69 Ohio St.3d 572, 575, 635 N.E.2d 11, 14 (1994)(Douglas, J., dissenting)("The Board of Tax Appeals is not required to adopt the valuation fixed by any expert or witness * * * "; "[t]he Board of Tax Appeals is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses which come before the board * * * "; and "[t]he fair market value of property for tax purposes is a question of fact, the determination of which is primarily within the province of the taxing authorities, and this court will not disturb a decision of the Board of Tax Appeals with respect to such valuation unless it affirmatively appears from the record that such decision is unreasonable or unlawful. * * * ")(citing *Cardinal Fed. S & L. Assn. v. Cuyahoga Cty. Bd. of Revision,* 44 Ohio St .2d 13, paragraphs two three and four of the syllabus (1975)).

Again, this case neither requires nor involves specialized tax or valuation expertise. The issue here has nothing to do with tax policy or determining valuations. The City has determined

that refunds are due. The statute requires payment of interest if the refund is not made within 90 days of the request. There is no apparent dispute concerning those dates. It is at this point, a matter of arithmetic. Indeed, courts outside of Ohio have held that "[e]xhaustion [of administrative remedies] is also not required where only an issue of law is involved (*see Apex Air Frgt. v. O'Cleireacain,* 210 A.D.2d 7, 619 N.Y.S.2d 38 [1994], *lv. denied* 86 N.Y.2d 712, 635 N.Y.S.2d 949, 659 N.E.2d 772 [1995]), or where the issue involved "is purely the construction of the relevant statutory and regulatory framework." *Coleman v. Daines,* 79 A.D.3d 554, 560, 913 N.Y.S.2d 83, 89 (2010), *cjf'd sub nom. Coleman ex rel. Coleman v. Daines,* 19 N.Y.3d 1087, 979 N.E.2d 1158 (2012).[1]

C. Public Policy Favors Hearing this Case as a Class Action Rather than Through Piecemeal Appeals.

Requiring Plaintiffs' to individually "exhaust" the administrative procedures provided by Defendant's own administrative department would preclude the efficiency of resolving the common elements of this case as a class action. The City seems to hope that taxpayers abandon their rights either because they are unaware of the interest requirement or because the administrative burden in seeking to vindicate those rights outweighs the modest financial reward. But this type of situation is exactly why the class action mechanism exists. In *Musial Cjfs., Ltd. v. Cuyahoga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, after dispensing with a similar argument concerning the plaintiff's failure to exhaust administrative remedies in a tax assessment case, the

[1] *See also, Ind. Dep't cf Envtl. Mgmt. v. Twin Eagle* LLC, 789 N.E. 839, 845(Ind. Sup. Ct. 1991) (Developers not required to exhaust administrative remedies where issues raised "are pure issues of law."); *Blue Spirits Distilling, LLC v. Washington State Liquor & Cannabis Bd.*, 15 Wash.App.2d 779, 792, 478 P.3d 153, 161 Wash.App. 2020)("[F]ailure to exhaust administrative remedies does not necessarily preclude" resolution of purely legal issue); *Schlumberger Technology Corp. & Subsidiaries v. State, Dept. cf Revenue*, 331 P.3d 334, 341 (Alaska 2014)(Requiring exhaustion of administrative remedies "unless the claim involves only a pure issue of law that requires no factual context."); *MAG-T, L.P. v. Travis Cent. Appraisal Dist.*, 161 S.W.3d 617, 634–35 (Tex.App. 2005)("[A] party need not exhaust all administrative remedies when pure questions of law are involved.")

Eighth District Court of Appeals engaged in a lengthy review of the practicalities of resolving, through class action, the ministerial dereliction of duty of a taxing authority. The Court of Appeals stated, "… facts [relating to amount of damages] are readily ascertainable from the county's Fiscal Officer's computer system… Since there is no need to litigate these facts, there would be no need for mini trials to establish them." The procedural economy available by determining this matter as a class is substantial. The dis-economy of case-by-case administrative adjudication before overburdened tax review boards would serve only to increase the delay and frustration of taxpayers. As in *Musial*, facts which the City points to in its motion to dismiss as "complex" are readily ascertainable from the City's own files or computer systems. Such facts do not require any specialized acumen to establish.

The City appears to seek to exploit the lack of a class action remedy in the administrative context to undercut the economic viability of pursuing relief. Because any single individual is likely to receive only nominal interest, the cost of each individual appeal before the administrative agency becomes uneconomical. Adjudicating these matters as a class, however, they become economically viable while remaining factually uncomplicated. Any concerns over disparate dates and other facts not common to class members should be addressed in an objection to class certification, not through a motion to dismiss for failure to state a claim.

Moreover, there is a significant public policy interest in allowing the Plaintiffs to proceed as a class rather than requiring individual appeals. The City enacted an ordinance to protect taxpayers against delays in receiving their refunds. Unfortunately, most taxpayers are probably unaware of Cleveland Cod. Ord. 192.28(d). Allowing the City to avoid its interest requirements under the ordinance would likely cause minimal harm to individual plaintiffs but might allow the

City to keep a windfall[2]. Taxpayers should not have to acquaint themselves with all the remedies of the City's tax code and then file an appeal to get what the City owes them. And a taxpayer who failed to remit an overdue tax deficiency would not be permitted to avoid statutory interest on the basis that the City had not specifically requested it. Kicking the interest question to an administrative agency would allow the City to avoid the requirements enacted for the protection of taxpayers by requiring them to go through a lengthy and burdensome process to recover a modest amount to which the taxpayer is undoubtedly entitled.

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss Plaintiffs' complaint for failure to state a claim.

Respectfully submitted,

/s/ Jay R. Carson
Jay R. Carson (0068526)
WEGMAN HESSLER VALORE
6055 Rockside Wood Blvd., Ste 200
Cleveland, Ohio 44131
Telephone: (216) 642-3342
Email: jrcarson@wegmanlaw.com

David C. Tryon (0028954)
Alex Certo (0102790)
The Buckeye Institute
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 224-4422
Email: d.tryon@buckeyeinstitute.org

Attorneys for Plaintiffs
Ekaterina Wos and David Stefes

[2] Or in the alternative, if the amount of interest owed will be insignificant, why make taxpayers jump through the hoop of requesting the statutorily required interest.

CERTIFICATE OF SERVICE

The foregoing Response was served on all counsel of record via the Court's electronic filing system this 12th day of June, 2024.

/s/ Jay R. Carson
One of the attorneys for the Plaintiffs