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Court of Appeals

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By: JAY R. CARSON 0068526

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EKATARINA WOS, ET AL.,

CA 24 114279

vs.

Judge:

THE CITY OF CLEVELAND, ET AL.

Pages Filed: 19

IN THE COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

EKATERINA WOS, et al.	:	Appellate Case No. CA-24-114279
	:	
	:	
Plaintiffs-Appellants,	:	
	:	Trial Court Case No. CV-24-993917
v.	:	
	:	
CITY OF CLEVELAND, et al.	:	
	:	
	:	
Defendants-Appellees.	:	

OPENING BRIEF OF APPELLANTS EKATERINA WOS AND DAVID STEFFES

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS
AND ASSIGNMENTS OF ERROR

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. ASSIGNMENT OF ERROR and ISSUE PRESENTED ON APPEAL

ASSIGNMENT OF ERROR: The trial court erred in dismissing the Complaint based on failure to exhaust administrative remedies.

ISSUE PRESENTED FOR REVIEW: There is no requirement to exhaust administrative remedies when the administrative agency lacks jurisdiction or authority to provide the remedy requested. The Ohio Revised Code limits the Board of Tax Appeals' jurisdiction to the appeal of "assessments," which it defines as a written finding that taxes are owed. Are tax refunds paid without statutorily required interest to the taxpayer "assessments" and, thus, subject to the administrative remedy exhaustion requirement? No.

II. STATEMENT OF THE CASE

A. Statement of Jurisdiction

This is an appeal from the trial court's July 26, 2024 order granting Defendants' Motions to Dismiss the action in its entirety pursuant to Civ.R. 12(B)(6). (Opinion and Judgment Entry, 7/26/24). Plaintiffs-Appellants filed a timely Notice of Appeal on January 10, 2022. (Not. Of App., 8/21/24).

B. Procedural Posture

This is an appeal from an Order granting Defendants' Motions to Dismiss the action in its entirety pursuant to Civ.R. 12(B)(6). The Complaint sought declaratory and injunctive relief certifying a class to refund municipal income taxes improperly withheld and to pay interest as required by the city of Cleveland's ordinances on refunds that had been granted more than 90 days after the filing of their returns.

On March 6, 2024, Appellants Ekaterina Wos and David Steffes, as proposed class representatives, filed this action seeking declaratory relief and naming as Defendants the city of Cleveland ("the City") and Ahmed Abonamah in his official capacity as Finance Director for the City pursuant to R.C. 2723.03. Appellants also served Ohio Attorney General Dave Yost pursuant to the requirements of R.C. 2721.12 (A).

On May 15, 2024, Defendants-Appellees filed a Motions to Dismiss pursuant to Civ.R. 12(B)(6), arguing that Appellants had failed to exhaust their administrative remedies because they had not first sought relief through the Cleveland Board of Tax Appeals. Appellants filed a brief in opposition, arguing that it had no administrative remedies to exhaust because the Board of Tax Appeals was not empowered to provide the relief sought. (Trial docket, 6/13/24, Mem. in Opp.)

C. Statement of Facts

This case arises out of the city of Cleveland's collection of municipal income tax from nonresidents of the City who were working remotely in 2021 and 2022. In an attempt to ease the collection of municipal income taxes during the COVID-19 pandemic, in March 2020, the Ohio General Assembly enacted a provision in uncodified law requiring that work performed by an employee at his or her home as a result of the health crisis would be deemed to have been performed, for municipal tax purposes, at the employee's regular place of business. See 2020 Am.Sub.H.B. 197, § 29. This was a sea-change in municipal tax law, allowing cities to collect income tax from nonresidents who had performed the work outside of city limits.

Before Am.Sub.H.B. 197, the law of municipal taxation was generally that a city could tax nonresidents only on work performed within the municipality. *See, e.g., Hillenmeyer v. Cleveland Bd. of Rev.*, 2015-Ohio-1623. In some cases, however, the law required employers to withhold municipal income tax from their remote workers. *See, e.g.,* R.C. 718.011 (D)(2) (requiring employers to withhold municipal income tax where employee works more than 20 days in a municipality).

In June of 2021, the General Assembly revised Am.Sub.H.B. 197 to clarify that while a municipality could—as a matter of administrative convenience—withhold municipal income tax for nonresident employees whose typical place of business was within City limits but who were continuing to work from home, but it was not expanding the municipal power to tax to non-

residents. 2021 Am.Sub.H.B. 110. Thus, while non-residents would have municipal income tax withheld when working remotely for tax year 2021 going forward, the City was required to refund the withheld taxes just as it did before Am.Sub.H.B. 197. The City's codified ordinances provide that when the City owes a tax refund, the refund is subject to interest at a rate of the federal funds rate plus 5%, unless the refund is paid within 90 days after the taxpayer filed her return. Cleveland Cod. Ord. 192.28(d), 192.29(a)(4). The ordinance does not condition the payment of interest on a request or an "appeal" from the taxpayer. Cleveland Cod. Ord. 192.28(d).

During the 2022 tax year, Plaintiffs, Ms. Wos and Mr. Steffes, residents of North Olmsted and North Royalton respectively, worked from their homes outside of the City. Their employers, however, were located within the city of Cleveland. Pursuant to Am.Sub.H.B. 110 and Cleveland Cod. Ord. 192.06(19)(n)(2) and 192.28, their employers withheld Cleveland municipal income tax from their pay and remitted it to the City.

On March 12, 2023, Ms. Wos filed a municipal tax return with the City requesting a refund of the $1,294 that had been withheld amounts. On July 24, more than three months after Ms. Wos filed her returns and request for a refund, the City responded by requesting verification of Ms. Wos's employment dates, which she provided that day. On the same day that she provided the requested information, the City informed Ms. Wos by email that her "refund form [was] done, but because it is over $1,000.00 they take longer. Management does not tell us when it will be released." (Compl. at ¶ 31) Throughout this, Ms. Wos continued to contact the City regarding the status of her refund (Compl. at ¶ 32). On August 8, 2023, roughly five months after she filed her return requesting a refund, the City notified Ms. Wos that her check was "still waiting on signatures from upper management." (Compl. at ¶ 32). The City held the refund amount due to Ms. Wos until

September 21, 2023. When she received the refund, it did not include interest as required by Cleveland Cod. Ord. 192.28(d) and 192.29(a)(4).

Similarly, during 2021 and 2022, Mr. Steffes worked from his home in North Royalton, Ohio, for Stantec, a global company with an office located in downtown Cleveland. Like Ms. Wos, Mr. Steffes filed a timely municipal tax return for tax years 2021 and 2022 with the city of Cleveland, requesting a refund for the days he worked outside of the City. Throughout 2022, Mr. Steffes sought a refund for tax withheld in 2021.

The City of Cleveland's Department of Taxation requested additional information from Mr. Steffes and his employer to confirm that he had not worked within the City during 2021. Mr. Steffes and his employer timely responded to all of these requests from the City and have repeatedly provided statements verifying that Mr. Steffes—just like all other Stantec employees in Cleveland—worked remotely for all of 2021. The City, however, at first declined to provide a refund to Mr. Steffes. Indeed, the City told Mr. Steffes that to receive his refund, he needed to provide some form of verified statement from someone who was actually working in Stantec's Cleveland office in 2021, confirming that Mr. Steffes was not working out of the Cleveland office. Not only was this request inconsistent with HB 110's requirements, such verification was impossible to provide because, as set forth above, ***no one*** was working out of Stantec's Cleveland office in 2021! In late 2023, Mr. Steffes eventually received his 2021 refund, but like Ms. Wos, without the interest required by the ordinance.

In addition, in the cases of Ms. Wos and Mr. Steffes, the City of Cleveland treated paid vacation days—as income accruing within the City of Cleveland, even though they were not working in the City of Cleveland on those days. In other words, while they received a refund for days worked at home, they were taxed on their vacation days. Indeed, because those were vacation

days, they would never have been scheduled to work at their employer's typical place of work in the City on those days.

Ms. Wos and Mr. Steffes filed suit, seeking to certify a class of similarly situated plaintiffs who had had their vacation days taxed, their refunds delayed, and interest withheld. The trial court dismissed the Complaint for failure to exhaust administrative remedies before the Board of Tax Appeals. This appeal followed.

III. ASSIGNMENT OF ERROR AND LAW AND ARGUMENT

ASSIGNMENT OF ERROR: The trial court erred in dismissing the Complaint based on failure to exhaust administrative remedies.

ISSUE PRESENTED FOR REVIEW: There is no requirement to exhaust administrative remedies when the administrative agency lacks jurisdiction or authority to provide the remedy requested. The Ohio Revised Code limits the Board of Tax Appeals' jurisdiction to the appeal of "assessments," which it defines as a written finding that taxes are owed. Are tax refunds paid without statutorily required interest to the taxpayer "assessments" and, thus, subject to the administrative remedy exhaustion requirement? No.

A. Appellants 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 (1975); *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs.*, 2012-Ohio-1861. Because the Board of Tax Appeals lacks jurisdiction other than to hear matters concerning assessments, it cannot afford relief to Appellants in this case. Courts will not force a party to exhaust an administrative appeal to an agency that can afford no meaningful relief. *BP Communications Alaska, Inc. v. Cent. Collection Agency*, 136 Ohio App.3d 807, 813 (8th Dist.2000), citing *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990).

An administrative agency can exercise only the jurisdiction conferred on it by statute. *M6*

Motors, Inc. v. Nissan of N. Olmsted, LLC, 2014-Ohio-2537, ¶ 41 (8th Dist.); *see also Bierlein v. Grandview Heights Bd. of Zoning Appeals*, 2020-Ohio-1395, ¶ 17 (noting that 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, on 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 . . . ." (Emphasis added.) R.C. 718.11(C). The Ohio Revised Code defines "assessment" for purposes of municipal taxation and appeals to the board of tax appeals 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). In addition to defining what an assessment is, the Ohio Revised Code also explains what it is not:

> "Assessment" does not include an informal notice denying a request for refund issued under division (B)(3) of section 718.19 of the Revised Code, a billing statement notifying a taxpayer of current or past-due balances owed to the municipal corporation, a tax administrator's request for additional information, a notification to the taxpayer of mathematical errors, or a tax administrator's other written correspondence to a person or taxpayer that does not meet the criteria prescribed by division (PP)(1) of this section.

R.C. 718.01(PP)(2).

The City's Codified Ordinances (as required by statute) incorporate these same definitions at section 192.06(b)(1):

> "Assessment" means any of the following:
>
> A. 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;

B. A full or partial denial of a refund request issued under division (b)(2) of Section 192.14 of this chapter;

C. A Tax Administrator's denial of a taxpayer's request for use of an alternative apportionment method, issued under division (b)(2) of Section 192.14 of this chapter;

D. A Tax Administrator's requirement for a taxpayer to use an alternative apportionment method, issued under division (b)(3) of Section 192.14 of this chapter; or

E. For purposes of division (b)(1) of this section, an assessment shall commence the person's time limitation for making an appeal to the Local Board of Tax Review under Section 192.40 of this chapter, and shall have "ASSESSMENT" written in all capital letters at the top of such finding.

Cleveland Cod. Ord. 192.06(b)(1).

Under the plain language of the Revised Code and the City's Codified Ordinances, a refund is categorically not an assessment. On the contrary, the City has acknowledged that Appellants *overpaid* their taxes. Nor did the City deny the claimed refunds or communicate that it was imposing an "ASSESSMENT" as required by Cleveland Cod. Ord. 192.06(b)(1)(E).[1] There is not anything to appeal. Setting aside the taxation of their paid leave days, which presents a statutory question of law, Appellants 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, Appellants seek an order in mandamus

[1] The Appellants would have no reason to request, nor ability to calculate interest due at the time they requested the refund—i.e. when they filed their tax returns.

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, Appellants 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. See *Hillenmeyer.,* 2015-Ohio-1623, at ¶ 43 ("[L]ocal taxation of a nonresidents' compensation for services must be based on the location of the taxpayer when the services were performed."); (Compl. at ¶¶ 43–45, ¶ 70). "[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 (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.

Moreover, as to Appellants' declaratory judgment claim regarding the propriety of taxing non-resident remote employees' paid leave as if they were present in the City on those days, presents a 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* at ¶ 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.*, 82 Ohio St.3d 235, 240 (1998); *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988), 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*, 56 Ohio St.3d at 115.

B. Appellants Exhausted All the Processes Required to Obtain Interest on Their Refunds.

The City further seemed to argue below that it is not required to pay interest (or consider paying interest) until the taxpayer makes a separate request from the tax administrator for that interest. This is manifestly not the law. In *L.J. Minor Corp. v. Breitenbach*, this court held that the payment of interest on refunds is mandatory and does not require an additional request to the tax administrator, explaining that "[q]uite clearly, R.C. 718.06(D) does not require, as the city argues, the taxpayer obtaining the refund of a tax overpayment to first request interest as a prerequisite to obtaining interest." 123 Ohio App.3d 84, 86–87 (8th Dist.1998). Indeed, the ordinance makes clear that "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." (Emphasis in original.) *Id.*, quoting R.C. 718.06(D); *see also* Cleveland Cod.Ord. 192.28(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 . . . .").

Neither the statute nor the ordinance require or allow for the taxpayer to request interest from the tax administrator, and reading such an obligation into them is plainly inconsistent with their purpose and fundamental fairness. When a taxpayer overpays—or in this case, funds are

withheld in excess of the tax obligation—the City essentially receives a no-interest loan from the taxpayer for the course of that tax year. Indeed, the statute and ordinance allow the City to keep that interest and merely require that the City pay interest on the refund due after 90 days.

The City is presumed to know of its obligation to pay interest yet takes the position that it is not required to do so without a new, separate request filed after the (already late) refund is received. No court would countenance a similar refusal to pay interest lawfully due on a private contract. Indeed, when the City does issue assessments, it requires the taxpayer to pay interest on any late amounts. One suspects that a taxpayer who declined to pay interest on delinquent taxes because the City did not ask for interest separately would not get far with the tax commissioner or a court.

The conclusion to be drawn is that the City appears to be intentionally ignoring the mandate of its own ordinances and R.C. 718.06 by slow-walking refunds and not paying interest unless asked. While interest accruing on any individual refund is minimal, when extrapolated across the class of non-resident taxpayers seeking refunds, it is a substantial no-interest loan from taxpayers who neither live nor work in the City. Again, a court would not countenance this sharp behavior towards consumers by a private company. This Court should not allow the City to evade the obligations owed to Appellants and the potential class members imposed on it by the State and its own ordinances

C. 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 creation of a record for judicial review. As the Ohio Supreme Court has explained, the "purpose" of the exhaustion of

administrative remedies doctrine "'is to permit an administrative agency to apply its special expertise * * * and in developing a factual record without premature judicial intervention.'" *Nemazee*, 56 Ohio St.3d at 111, quoting *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 the 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 (1994) (Douglas, J., dissenting), quoting *Cardinal Fed. S & L. Assn. v. Cuyahoga Cty. Bd. of Revision,* 44 Ohio St.2d 13 (1975), paragraphs two, three, and four of the syllabus ("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. * * * ").

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, or where the issue involved 'is purely the construction of the relevant statutory and regulatory framework.'" (Citation omitted.) *Coleman v. Daines,* 79 A.D.3d 554, 560 (2010), *aff'd sub nom. Coleman ex rel. Coleman v. Daines,* 19 N.Y.3d 1087 (2012).[2]

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

Requiring Appellants' 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 Cafs., Ltd. v. Cuyahoga Cty.*, 2014-Ohio-602 (8th Dist.), after dispensing with a similar argument concerning the plaintiff's failure to exhaust administrative remedies in a tax assessment case, this Court engaged in a lengthy review of the practicalities of resolving, through class action, the ministerial dereliction of duty of a taxing authority. This Court stated, "facts [relating to the amount of damages] are readily ascertainable from the county's Fiscal Officer's computer system. . . . Since

[2] *See also Ind. Dep't of Envtl. Mgmt. v. Twin Eagle* LLC, 789 N.E.2d 839 (Ind.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 (2020) ("failure to exhaust administrative remedies does not necessarily preclude" resolution of purely legal issue); *Schlumberger Technology Corp. & Subsidiaries v. State, Dept. of 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.").

there is no need to litigate these facts, there would be no need for mini trials to establish them." *Id.* at ¶ 36. 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 that 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 Appellants 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 payment obligation under the ordinance would likely cause minimal harm to individual plaintiffs but might allow the City to keep a windfall.[3] 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

[3] 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.

an administrative agency would allow the City to evade the mandatory requirements that it 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, Appellants respectfully request that the Court reverse and remand the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of September, the forgoing Opening Brief was served on all counsel via the Court's electronic filings system.

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