[Cite as *Telsat, Inc. v. Micro Ctr., Inc.*, 2010-Ohio-5628.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Telsat, Inc.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	No. 10AP-229
v.		(C.P.C. No. 08 CV 7046)
	:	
Micro Center, Inc. et al.,		(REGULAR CALENDAR)
	:	
Defendants-Appellees,	:	
(Richard A. Levin, Tax Commissioner of Ohio,	:	
Defendant-Appellee/ Cross-Appellant).	:	
	:	

D E C I S I O N

Rendered on November 18, 2010

Law Offices of Steven M. Weiss, and *Steven M. Weiss; George Sintsirmas, Esq. LLC,* and *George Sintsirmas,* for Telsat, Inc.

Richard Cordray, Attorney General, and *Ryan P. O'Rourke,* for Tax Commissioner of Ohio.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant and cross-appellee, Telsat, Inc., appeals from a judgment of the Franklin County Court of Common Pleas denying plaintiff's summary judgment

motion and granting the summary judgment motion of defendant-appellee and cross-appellant, Richard A. Levin, Tax Commissioner of the State of Ohio ("Tax Commissioner"). Because the common pleas court erred in concluding plaintiff was not required to exhaust the administrative remedies set forth in R.C. 5739.07 before pursuing the present action, we reverse.

I. Facts and Procedural History

{¶2} On October 23, 2007, plaintiff filed a complaint in the Cuyahoga County Court of Common Pleas; Micro Center, Inc. was the named defendant. According to the complaint, plaintiff purchased a flat screen television with a retail price of $1,799.99 on April 28, 2006 from Micro Center. Plaintiff subsequently redeemed two rebates totaling $300.00 related to the purchase. Plaintiff's complaint alleged Micro Center "wrongfully charged plaintiff sales tax on the full retail price" of the television, rather than on the price as reduced following the rebates. (Complaint, ¶11-12.) Plaintiff also sought to certify a class of individuals described as "[a]ll purchasers from Micro Center who received a rebate/discount from Micro Center which was not reimbursed by a third party and who paid Ohio sales tax on the pre-rebate/discount price." (Complaint, ¶17.) Plaintiff sought a judgment on behalf of plaintiff and the class not to exceed five million dollars.

{¶3} On December 10, 2007, plaintiff filed an amended complaint. Because R.C. 5739.29 precludes vendors from refunding sales tax to consumers, plaintiff voluntarily dismissed Micro Center and instead named the Tax Commissioner as the sole defendant in the action. In the amended complaint, plaintiff sought class relief, equitable disgorgement of wrongfully assessed, collected and retained taxes, and a declaration that

it need not pursue a refund through the administrative scheme contemplated in R.C. 5739.07. (Amended Complaint, 8.)

{¶4} On the Tax Commissioner's motion, the case was transferred to the Franklin County Court of Common Pleas. Although the Tax Commissioner also filed a motion to dismiss following transfer, the common pleas court denied the motion. The parties subsequently filed cross-motions for summary judgment.

{¶5} In a February 12, 2010 decision and entry, the common pleas court granted the Tax Commissioner's summary judgment motion and denied plaintiff's summary judgment motion. The common pleas court rejected the Tax Commissioner's argument that the common pleas court lacks subject matter jurisdiction due to plaintiff's failure to pursue the administrative remedies in R.C. Chapter 5739. The court nonetheless decided the Tax Commissioner is entitled to summary judgment.

{¶6} Adopting the Tax Commissioner's interpretation of R.C. 5739.01(H)(1)(c)(i), the common pleas court determined "a post-sale mail-in rebate which requires the purchaser to perform certain actions after the sale (like mailing in a rebate application) does not reduce the 'price' for purposes of determining the amount of sales tax that should be paid." (Decision and Entry, 5.) The common pleas court thus concluded that, in the absence of genuine issues of material fact, the Tax Commissioner is entitled to judgment as a matter of law. The common pleas court journalized its decision in a February 18, 2010 judgment entry.

II. Assignments of Error

{¶7} Plaintiff timely appeals, assigning the following errors:

> I. The trial court erred in granting summary judgment to defendant Richard A. Levin, Tax Commissioner of the State of Ohio.
>
> II. The trial court erred in denying plaintiff's motion for summary judgment.
>
> III. The trial court erred in failing to declare that under R.C. 5739.01(H)(1)(c)(i), post-sale rebates are discounts which reduce the taxable price of a sale.
>
> IV. The trial court erred in failing to declare that plaintiff and the putative class do not have to adjudicate their claims using the administrative procedure established by R.C. 5739.07.

The Tax Commissioner timely cross-appeals, assigning the following errors:

> 1. The trial court erred in not holding that Telsat's action in equity was barred because it had an adequate statutory remedy at law under R.C. 5739.07 and R.C. Chapter 2723.
>
> 2. The trial court erred in not holding that Telsat's action was barred under R.C. 2723.01 because it failed to commence this action within one (1) year of the collection and assessment of the illegal or erroneous tax.
>
> 3. The trial court erred in not holding that Telsat's action was barred under R.C. 2723.03 because it failed to notify the Department of Taxation of its intention to sue and failed to notify the Department that it paid the tax under protest.
>
> 4. The trial court erred in not holding that Telsat's action was barred because it seeks to bypass a special statutory scheme (R.C. 5739.07) for sales tax refunds.
>
> 5. The trial court erred in not holding that Telsat's action was barred because it failed to exhaust its administrative remedies.
>
> 6. The trial court erred in not holding that Telsat's action was barred because it did not challenge the constitutionality of R.C. 5739.07.

Because plaintiff's fourth assignment of error and the Tax Commissioner's first, fourth, and fifth assignments of error on cross-appeal are interrelated and dispositive, we address them first.

III. Standard of Review

{¶8} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and the conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

IV. Plaintiff's Fourth Assignment of Error and the Tax Commissioner's First, Fourth, and Fifth Cross-Assignments of Error – Adequacy of Procedure Under R.C. 5739.07

{¶9} The Tax Commissioner's first, fourth, and fifth assignments of error all address whether the common pleas court properly could consider the merits of plaintiff's complaint when plaintiff did not first pursue the administrative remedies set forth in R.C. 5739.07.

{¶10} According to the statute, a consumer who believes sales tax was collected illegally or erroneously may file an application for refund; in response, the Tax Commissioner must determine the amount of refund, if any, to which the applicant is entitled. R.C. 5739.07(D) and (E). If the Tax Commissioner denies a portion of the refund,

the Tax Commissioner must provide notice to the applicant who has the option of either requesting a hearing or providing additional information to the Tax Commissioner, or both. R.C. 5703.70(A). The Tax Commissioner then must issue a final determination, which the applicant may appeal to the Board of Tax Appeals ("BTA"). R.C. 5717.02. The "BTA is the only statutorily recognized forum for review of a tax determination" because "[a] litigant has no inherent right to appeal a tax determination, only a statutory right." *Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation* (1992), 63 Ohio St.3d 648, 653, quoting *Avon Lake School Dist. v. Limbach* (1988), 35 Ohio St.3d 118, 119. As a last resort within the state framework, the applicant may appeal the decision of the BTA to the Supreme Court of Ohio. R.C. 5717.04.

A. The Tax Commissioner's Argument

{¶11} The Tax Commissioner's motion to dismiss in the common pleas court asserted, among other things, lack of subject matter jurisdiction. See *Zupancic v. Wilkins*, 10th Dist. No. 08AP-472, 2009-Ohio-3688, ¶6, citing *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, ¶13 (noting a motion to dismiss for lack of subject matter jurisdiction raises questions of law which we review de novo). The Tax Commissioner argued that, to the extent plaintiff sought monetary relief, R.C. 5739.07 provided plaintiff with the exclusive remedy for seeking a refund of sales taxes "paid illegally or erroneously." The Tax Commissioner asserted that, because plaintiff failed to pursue a remedy under the statutory scheme, the common pleas court lacked subject matter jurisdiction.

{¶12} To the extent plaintiff's complaint also seeks declaratory and equitable relief, the Tax Commissioner asserted actions for declaratory judgment and equitable

relief are inappropriate "where special statutory proceedings would be bypassed." *Zupancic* at ¶19, citing *State ex rel. Albright v. Court of Common Pleas* (1991), 60 Ohio St.3d 40, 42 (stating "it is always inappropriate for courts to grant declaratory judgments and injunctions that attempt to resolve matters committed to special statutory proceedings," a conclusion "tantamount to a holding that courts have no jurisdiction to hear the actions in the first place"). See also *State ex rel. Iris Sales Co. v. Voinovich* (1975), 43 Ohio App.2d 18, 23 (stating "[d]eclaratory relief pursuant to Rule 57 of the Ohio Rules of Civil Procedure is inappropriate where it would result in the by-pass of a special statutory proceeding" because "[t]he circumvention of these special statutory procedures would nullify the legislative intent to have specialized tax questions initially determined by boards and agencies specifically designed and created for that purpose").

{¶13} The Tax Commissioner thus argues the common pleas court erred in exercising subject matter jurisdiction over plaintiff's complaint when plaintiff's proper course was to pursue the special statutory proceeding outlined in R.C. 5739.07.

B. Plaintiff's Response

{¶14} Plaintiff responds that its failure to pursue a refund under R.C. 5739.07 is better described as a failure to exhaust administrative remedies, which is an affirmative defense rather than a jurisdictional defect. Plaintiff further asserts that, in any event, the procedure available in R.C. 5739.07 does not apply to plaintiff and the putative class. According to plaintiff, the refund procedure contemplated in the statute applies to instances where the vendor collected the taxes "illegally or erroneously," a position plaintiff asserts it does not take. Plaintiff lastly contends that, even if the statute applies to the facts presented, it does not provide an adequate remedy.

C. Resolution of Arguments

{¶15} Initially, we need not resolve whether the statutory scheme presents an exclusive remedy as the Tax Commissioner argues or an exhaustion issue as plaintiff contends. Pursuant to the exhaustion doctrine, a person must exhaust administrative remedies before seeking redress from the judicial system. *Jain v. Ohio State Med. Bd.*, 10th Dist. No. 09AP-1180, 2010-Ohio-2855, ¶10, citing *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 290, 2002-Ohio-794, citing *Noernberg v. Brook Park* (1980), 63 Ohio St.2d 26. "The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes." Id., citing *Nemazee v. Mt. Sinai Med. Ctr.* (1990), 56 Ohio St.3d 109, 111; *Prairie Twp. Bd. of Trustees v. Hay*, 10th Dist. No. 01AP-1198, 2002-Ohio-4765, ¶26.

{¶16} "The failure to exhaust administrative remedies is not a jurisdictional defect, but is rather an affirmative defense if timely asserted and maintained." *Jain,* citing *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, syllabus. Not timely asserting the affirmative defense of failure to exhaust administrative remedies will waive the affirmative defense. *The Salvation Army v. Blue Cross & Blue Shield of N. Ohio* (1993), 92 Ohio App.3d 571, 577, citing *Gannon v. Perk* (1976), 46 Ohio St.2d 301, 309-10. In general, an affirmative defense is deemed waived if it is not asserted in an answer or amended answer. See Civ.R. 8(C); see also *Mossa v. W. Credit Union, Inc.* (1992), 84 Ohio App.3d 177, 180-81.

{¶17} In its answer, the Tax Commissioner asserted multiple defenses. Among them, the Tax Commissioner asserted both that plaintiff's action was barred for failure to exhaust administrative remedies and that R.C. 5739.07 was the sole avenue for pursuing

a refund of sales tax. (Answer, ¶49, 51.) The Tax Commissioner thus did not waive the argument invoking the exhaustion doctrine and bore the burden of proving plaintiff's failure to exhaust administrative remedies, a matter not disputed in this case. *Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906, ¶48, citing *Olentangy Condo. Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶23 (stating " '[i]t is well settled in Ohio that the defendant asserting an affirmative defense has the burden of proof in establishing such defense' ").

{¶18} As a result, whether we construe the procedure available in R.C. 5739.07 as an exclusive statutory proceeding or an administrative remedy to be exhausted before an action may be filed in the common pleas court, the issue resolves to whether the common pleas court should have reached the merits of plaintiff's complaint or should have determined plaintiff's action to be inappropriate because the procedure set forth in R.C. 5739.07 was available.

{¶19} Plaintiff first argues R.C. 5739.07 does not apply because plaintiff does not allege an illegal or erroneous tax per the statutory language. The argument is unpersuasive. Plaintiff's amended complaint both asserts "[t]he State of Ohio Department of Taxation and/or defendant Micro Center has unlawfully retained the sales tax on the non-taxable rebates" and describes the amount of tax plaintiff challenges as "the unauthorized sales taxes collected." (Amended Complaint, ¶36.) Plaintiff's amended complaint further states that, "[p]ursuant to the wrongful conduct of defendant Micro Center and defendant State of Ohio Department of Taxation, Defendants have charged and retained or otherwise wrongfully appropriated amounts rightfully belonging" to plaintiff and members of the proposed class. (Amended Complaint, ¶37.) In its request for

declaratory relief, plaintiff describes its action as one regarding "the request for a refund of the wrongfully collected and retained sales tax * * *." (Amended Complaint, ¶41.)

{¶20} Plaintiff thus at various times in its amended complaint refers to the tax it seeks to recover as "unlawfully retained," "wrongfully appropriated," and "wrongfully collected and retained." Plaintiff fails to explain how it alleges something other than the illegal or erroneous collection of sales tax when it used the terms "unlawful" or "wrongful." See *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, ¶12, citing *Carter v. Youngstown Div. of Water* (1946), 146 Ohio St. 203, paragraph one of the syllabus (stating that in the construction of a statute, "all of the terms used should be given their usual and ordinary meaning and signification").

{¶21} To the extent plaintiff's argument suggests the statutory procedure does not apply absent language employing the specific words "illegal" or "erroneous," nothing in R.C. 5739.07 indicates "magic language" be used to bring a refund request within its ambit. Cf., e.g., *Snyder v. Snyder*, 5th Dist. No. 2008CA00219, 2009-Ohio-5292, ¶37, citing *Winkelman v. Winkelman*, 4th Dist. No. 2008-G-2834, ¶22 (finding no "magic language" is required for finding that a parent is voluntarily unemployed or underemployed pursuant to R.C. 3119.01(C)(11)(a)); *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, ¶89 (finding a trial court's statements during sentencing that clearly indicate the court considered the appropriate matters and made the required findings are sufficient to meet the requirements of R.C. 2929.14(E)(4) even where the court "did not specifically restate the 'magic' language" of the statute). Indeed, to accept plaintiff's argument would allow parties to circumvent the provisions the General Assembly

prescribed by avoiding specific words in their allegations. Plaintiff's allegations of wrongful conduct fall within the parameters of R.C. 5739.07's statutory provisions.

{¶22} In a variation of its first argument, plaintiff next suggests the statutory provisions do not apply because plaintiff concedes the tax was lawful when Micro Center initially collected it; plaintiff contends Micro Center only acted wrongfully in retaining what plaintiff characterizes as excess sales tax following the rebates. The statute, however, does not draw such a distinction. R.C. 5739.07 contemplates a refund procedure for "the full amount of taxes the consumer paid illegally or erroneously" and does not address when the tax became improper. Whether the tax was erroneous at the time of collection, or later became erroneous, is immaterial to whether R.C. 5739.07 applies under these circumstances. See, e.g., *CommuniCare, Inc. v. Wood Cty. Bd. of Commrs.*, 161 Ohio App.3d 84, 2005-Ohio-2348, ¶50 (concluding that because R.C. 307.86 "does not draw a distinction between county funds and other monies used to pay contract costs," the source of the revenues a county "uses to pay contract costs is wholly irrelevant to the applicability of" the statute). Indeed, the material allegations of plaintiff's complaint fall within the situation the General Assembly intended R.C. 5739.07 to cover: a consumer seeking a refund of sales tax it claims was wrongfully collected or retained. See *Bergmoser v. Smart Document Solutions*, *LLC* (C.A.6, 2008), 268 Fed.Appx. 392, 395 (citing with approval Ohio Adm.Code 5703-9-07(B), which expressly references R.C. 5739.07, as setting forth the "proper method of pursuing a tax refund").

{¶23} Plaintiff lastly asserts that, even if plaintiff falls within the statutory ambit, R.C. 5739.07 is not an adequate remedy for plaintiff and the proposed class because pursuing the administrative remedy would be futile, onerous, and expensive. See *Karches*

v. Cincinnati (1988), 38 Ohio St.3d 12, 17. More specifically, plaintiff argues (1) pursuing a refund is not cost-effective due to the small amount sought in the refund, (2) the information necessary to pursue a refund is cumbersome, and (3) the process is futile since the Tax Commissioner will deny any and all refund claims.

{¶24} Information in the record refutes plaintiff's suggestion that individual claimants will not pursue refunds due to the small value of each individual claim. The supervisor of the sales and use tax refund unit of the Ohio Department of Taxation, Vickie Atkinson, averred in her affidavit that in the past ten years she has reviewed and processed 1,656 refund applications pursuant to R.C. 5739.07, each of which sought a refund for $25 or less. She further stated she processed nearly 6,000 refunds for amounts of $100 or less in that same time frame. (Atkinson Affidavit, ¶3.) Her evidence indicates individuals have been willing in the past to pursue the relief under R.C. 5739.07 despite the small amounts of their claims. Plaintiff submitted no evidence to dispute Atkinson's affidavit.

{¶25} Moreover, plaintiff's argument is unpersuasive insofar as it contends the information required to pursue a refund under R.C. 5739.07 is so cumbersome as to deter consumers from seeking the refund. The number of claims involving small amounts processed in the past ten years indicates the process is not overly burdensome. Indeed, the information necessary to request a refund under R.C. 5739.07 includes only the claimant's name and contact information, as well as the refund amount, date of purchase, and proof of payment. The same information was necessary to complete Micro Center's rebate form and likely would be necessary to submit a claim in a class action. See Appendix to Tax Commissioner's Motion for Summary Judgment, Exhibits 6 and 7. The

statutory requirement that a purchaser submit such information to the Tax Commissioner to pursue a refund under R.C. 5739.07 does not render the process overly burdensome or onerous.

{¶26} Finally, plaintiff's assertion that the Tax Commissioner will deny all refunds sought through R.C. 5739.07 itself does not render the remedy inadequate. If the Tax Commissioner were to deny a refund, the claimant could appeal the decision to the BTA and eventually to the Ohio Supreme Court. See R.C. 5717.02 and 5717.04. As a result, even if the Tax Commissioner were to deny requests for the refunds at issue, his decision does not end the avenue of relief set in motion through the administrative procedure.

{¶27} Without question, the costs of pursuing a small sales tax claim to the BTA and the Supreme Court well may dwarf the amount to be refunded. The General Assembly, however, was aware that sales tax issues typically involve small amounts but nonetheless prescribed the process set forth in R.C. 5739.07, presumably because the initial cost of seeking a refund through the administrative process is less than if litigation were to be initiated to collect the illegal or erroneous tax. Moreover, should appeal of an adverse decision of the Tax Commissioner result in a decision favorable to plaintiff, that decision presumably would resolve the claims of all remaining class members when the Tax Commissioner implements the appellate determination. The administrative remedies set forth in R.C. 5739.07 thus are adequate.

{¶28} In the final analysis, plaintiff's request for a sales tax refund falls within the statutory provisions set forth in R.C. 5739.07. The Tax Commissioner asserted as an affirmative defense plaintiff's failure to pursue a refund under the statutory procedures. As a result, even if the R.C. 5739.07 refund procedure is not an exclusive remedy that

deprives the common pleas court of jurisdiction for plaintiff's failure to pursue it, the refund procedure under R.C. 5739.07 is an adequate remedy such that plaintiff and the proposed class first must exhaust their remedies under that scheme before seeking relief in the common pleas court. The common pleas court erred in reaching the merits of the parties' arguments regarding the definition of "price" under R.C. 5739.01(H)(1)(c)(i) and instead should have determined plaintiff's action was improper for failure to pursue the refund procedure in R.C. 5739.07. We overrule plaintiff's fourth assignment of error and sustain the Tax Commissioner's first, fourth, and fifth cross-assignments of error, rendering moot the remaining errors assigned on appeal and cross-appeal. App.R. 12(A).

V. Disposition

{¶29} Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand with instructions to dismiss plaintiff's complaint. The parties' motions regarding appellate briefs are denied.

Judgment reversed;
motions denied.

TYACK, P.J., and BROWN, J., concur.

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