

**Dismissed in Part; Reversed and Rendered in Part; and Memorandum Opinion
filed March 30, 2017.**



In The

Fourteenth Court of Appeals

NO. 14-15-00915-CV

**DAVID PIWONKA, IN HIS OFFICIAL CAPACITY AS TAX ASSESSOR-
COLLECTOR FOR CYPRESS-FAIRBANKS ISD, CYPRESS-FAIRBANKS ISD,
ANN HARRIS BENNETT,¹ IN HER OFFICIAL CAPACITY AS TAX
ASSESSOR-COLLECTOR FOR HARRIS COUNTY, TEXAS, and HARRIS
COUNTY, TEXAS, Appellants**

V.

SPX CORPORATION D/B/A SPX FLOW TECHNOLOGY, Appellee

**On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2015-08078**

M E M O R A N D U M O P I N I O N

David Piwonka, in his official capacity as Tax Assessor-Collector for Cypress-Fairbanks ISD, and Cypress-Fairbanks ISD (collectively “Cy-Fair appellants”), and

¹ We substitute Ann Harris Bennett, in her official capacity, as successor to Mike Sullivan as Tax Assessor-Collector. *See* Tex. R. App. P. 7.2(a). The opinion, however, will continue to refer to “Sullivan” in accordance with the record below and the briefs.

Mike Sullivan, in his official capacity as Tax Assessor-Collector for Harris County, Texas, both appeal the denial of their pleas to the jurisdiction. The pleas were filed in a suit brought by SPX Corporation d/b/a SPX Flow Technology alleging improper correction of the tax appraisal roll.² Specifically, SPX challenges Sullivan’s assessment of taxes for Lone Star College and Harris County Emergency Services District #9 (“HCESD#9”) for tax years 2010-2013 and penalties and interest for tax year 2010 on behalf of those two taxing units. Further, SPX contests Piwonka’s assessment of taxes for Cy-Fair ISD for tax years 2010-2013 and penalties and interest for those tax years.

I. BACKGROUND

SPX owns tangible personal property (“the property”) located within Harris County, Texas. In December 2013, Sands Stiefer, Chief Appraiser for Harris County Appraisal District (“HCAD”), realized the property was not listed under the correct taxing jurisdictions on the appraisal roll. HCAD sought to correct the appraisal roll by changing the taxing jurisdictions for the property from Houston ISD (“HISD”), Houston Community College (“HCC”), and City of Houston (“COH”), where the property was incorrectly listed, to Cy-Fair ISD, Lone Star College, and Harris County Emergency Services District #9 (“HCESD#9”). In its pleadings, SPX concedes the appraisal record should have been corrected once the error was discovered.

In January 2014, HCAD filed a motion under section 25.25(c)(3) of the Tax Code to change the property’s appraisal roll entry for tax years 2010-2013, inclusive, to reflect the correct taxing jurisdictions. *See* Tex. Tax Code Ann. § 25.25(c)(3) (West 2015). The Harris County Appraisal Review Board (“ARB”) approved the motion.

² The following defendants in the underlying suit did not file pleas to the jurisdiction and are not parties to this appeal: Sands L. Stiefer, in his Official Capacity as Chief Appraiser for Harris County Appraisal District, Harris County Appraisal District, and Harris County Appraisal Review Board. We note that Sands L. Stiefer has been succeeded by Roland H. Altinger but this opinion will refer to “Stiefer” in accordance with the record below and the briefs.

According to HCAD, a letter for each tax year was sent to SPX's tax agent on February 18, 2014. The letters informed SPX that HCAD had taken action to correct the tax appraisal rolls in accordance with section 25.25(c)(3) and that a protest could be filed with the ARB within 30 days of the date of the letter. SPX contends it never received the notice.

In April and May of 2014, corrected appraisal rolls were generated to remove HISD, HCC, and COH for tax years 2010, 2011, 2012, and 2013. Also, corrected appraisal rolls were generated to add Cy-Fair ISD, Lone Star College, and HCESD#9 as the correct jurisdictions for tax years 2010, 2011, 2012, and 2013.

Sullivan translated these changes into tax bills and refunds for each taxing jurisdiction other than Cy-Fair ISD, but he did not process each tax year in the same manner. For tax year 2010, Sullivan processed a refund to SPX of the taxes paid to HISD, HCC, and COH in May 2014. Sullivan later sent SPX a corrected tax bill for tax year 2010 to collect taxes owed to Lone Star College and HCESD#9. Sullivan concedes the record does not reflect when the corrected tax bill was sent, but the delinquency date (when penalties and interest would begin to be owed if the bill was not paid) utilized by Sullivan was August 1, 2014.

For tax years 2011 through 2013, however, Sullivan followed a different procedure. For tax year 2011, Sullivan processed a refund to SPX of the taxes paid to HISD, HCC, and COH, and paid the taxes owed to Lone Star College and HCESD#9. Sullivan did the same for tax year 2012 and 2013. For tax years 2011, 2012, and 2013, the taxes paid to HISD, HCC and COH were more than those owed to Lone Star College and HCESD#9, so refund checks were issued for the balance.

Sullivan paid no taxes to Cy-Fair ISD because it has its own tax collector. Cy-Fair ISD issued corrected tax bills for tax years 2010 through 2013. The delinquency dates utilized for these bills were in May, June, and July 2014.

After delinquency notices were sent, SPX tendered payment, under protest, of the taxes owed to Lone Star College and HCESD#9 for tax year 2010 and to Cy-Fair ISD for tax years 2010-2013, but not the claimed penalties and interest. In September 2014, SPX filed a protest with the ARB pursuant to section 41.49(a)(9) of the Tax Code. *See* Tex. Tax Code Ann. § 41.41(a)(9) (West 2015). SPX’s protest disputed that it received notice of the correction by letters dated February 18, 2014. *See* Tex. Tax Code Ann. § 41.411 (West 2015).³ The ARB denied SPX’s protest by written orders.

On February 12, 2015, SPX filed suit against HCAD, ARB, Sullivan, in his official capacity as Tax Assessor-Collector for Harris County, Stiefer in his official capacity as Chief Appraiser for HCAD, Harris County, Cy-Fair ISD, and Piwonka, in his official capacity as Tax Assessor-Collector for Cy-Fair ISD. In its petition, SPX “does not dispute that the appraisal record should have been changed to indicate Cy-Fair ISD and the other new entities once the error was discovered.” Rather, SPX contends the changes were not made in accordance with the provisions of the Tax Code.

The Cy-Fair appellants moved to dismiss the case for lack of jurisdiction. Subsequently Harris County and Sullivan also filed a plea to the jurisdiction. The trial court denied both motions.

The Cy-Fair appellants filed a notice of interlocutory appeal from the trial court’s orders, as did Harris County and Sullivan. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) (West Supp. 2016). Subsequently, SPX entered into a Rule 11 agreement with Harris County to dismiss with prejudice SPX’s claims for the HISD, HCC, and COH taxes. Harris County did not file a brief in this appeal and was notified on March 2, 2017, that its appeal would be dismissed for want of prosecution. Because the

³ It appears SPX’s section 41.411 protest was timely filed as SPX claims it first received written notice of the taxes in question on June 11, 2014. *See* Tex. Tax Code Ann. § 41.44(c-3). Thus its protest was filed before October 14, 2014, a date “not later than the 125th day after” June 11, 2014. *See id.*

response filed March 8, 2017, does not demonstrate meritorious grounds for continuing the appeal, Harris County's appeal is dismissed for want of prosecution.

We begin by addressing Sullivan's contention that SPX does not have standing to bring its suit. We will then turn to the claims of Sullivan and Cy-Fair appellants that the trial court should have dismissed SPX's claims against them for lack of jurisdiction.

II. SPX'S STANDING TO SUE

Challenges to standing may be raised for the first time on appeal and are questions of law that we review de novo. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 149-50 (Tex. 2012). Because standing is a constitutional prerequisite to suit, a court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it. *Id.* at 150. "Thus, if a plaintiff lacks standing to assert one of his claims, the court lacks jurisdiction over that claim and must dismiss it." *Id.* at 150-51 (footnotes and citations omitted). There are three elements to standing: (1) the plaintiff has suffered an injury in fact, (2) there is a causal connection between the injury and the complained-of conduct, and (3) it is likely the injury will be redressed by a favorable decision. *Id.* at 154-55.

Sullivan argues SPX's claims fail on all three counts because: (1) SPX did not suffer an injury in fact since the corrections decreased its tax liability, (2) he did not "cause" the corrections, and (3) if SPX prevails, its tax liability will increase. Sullivan's arguments are based solely upon the difference between the base taxes owed to HISD, HCC, and COH and those owed to Cy-Fair ISD, Lone Star College, and HCESD#9. Even if Sullivan's arguments are correct (which we need not decide), Sullivan fails to address the penalties and interest imposed upon SPX when it was delinquent on the taxes owed, after the corrections were made, to Cy-Fair ISD for all four years and to Lone Star College and HCESD#9 for tax year 2010.

SPX's petition alleges the corrections were done improperly; those improper corrections resulted in an incorrect delinquency date; that delinquency date led to the unlawful imposition of penalties and interest; and the assessed penalties and interest should be voided. Thus SPX's claims contend it did suffer an actual injury caused by the improper correction of the tax appraisal rolls, and if it prevails it will not have to pay the penalties and interest. Sullivan does not explain his argument that he did not "cause" the corrections but it appears to be based upon the fact that the motion to correct was filed by HCAD and the corrected appraisal rolls were generated by HCAD. While these facts are relevant to Sullivan's argument that he is not a proper party to this suit, it does not negate SPX's allegation that there is a causal connection between the injury and the complained-of conduct. Accordingly, we conclude SPX has standing.

III. THE TRIAL COURT'S JURISDICTION

We now address the crux of these appeals, whether the trial court erred in denying the pleas to the jurisdiction filed by Sullivan and the Cy-Fair appellants. Sullivan contends SPX has failed to plead facts that, if true, would establish a valid waiver of governmental immunity. Specifically, he asserts as follows:

- Sullivan did not act *ultra vires* with regards to the taxes, penalties, and interest assessed against SPX on behalf of Lone Star College and HCESD#9;
- SPX is limited to the Tax Code's exclusive remedies to obtain a tax refund or stop the collection of taxes;
- SPX cannot obtain retrospective relief on its *ultra vires* claims against Sullivan;
- SPX does not meet the five exceptions to the exhaustion requirement; and
- Sullivan is not a proper party to SPX's suit.

The Cy-Fair appellants raise the following issues:

- SPX's pleadings fail to allege a valid waiver of:

- Governmental immunity as to Cy-Fair ISD;
- Official immunity regarding Piwonka;
- The trial court lacks jurisdiction over SPX’s claims for:
 - Declaratory judgment;
 - Mandamus relief;
 - Injunctive relief; and
- Section 42.031(b) of the Tax Code bars SPX’s suit against any taxing unit.⁴

Before discussing these issues, we note what will not be considered. In its petition, SPX seeks declaratory, mandamus, and injunctive relief as well as a review of the ARB’s denial of its protest. *See* Tex. Tax Code Ann. § 42.21 (West 2015); *see also* *MAG-T, L.P. v. Travis Cent. Appraisal Dist.*, 161 S.W.3d 617, 629-30 (Tex. App.—Austin 2005, pet. denied) (recognizing a property owner may protest the failure of the taxing authorities to give the proper notice to which a property owner is entitled and if the protest to the appraisal review board is unsuccessful, the owner may appeal the board’s order to the district court). As noted above, SPX’s protest complained of the delinquency date determined by the ARB, which was the basis of the penalties and interest assessed by Sullivan and the Cy-Fair appellants. SPX further challenged the utilization of section 25.25(c)(3) by Stiefer, HCAD and the ARB to correct the appraisal rolls. Because they are not properly before us in this appeal, we do not address SPX’s claims against those defendants or the merits of SPX’s petition for review of the ARB’s denial of its protest.

Turning to SPX’s claims against Sullivan and the Cy-Fair appellants, we first address whether SPX is limited to the Tax Code’s exclusive remedies. Sullivan raises this argument in his brief, but the Cy-Fair appellants do not. Neither Sullivan nor the

⁴ Subsection (b) provides “[a] taxing unit may not intervene in or in any other manner be made a party, whether as defendant or otherwise, to an appeal of an order of the appraisal review board determining a taxpayer protest under Subchapter C, Chapter 41.1 if the appeal was brought by the property owner.” Tex. Tax Code Ann. § 42.031(b) (West 2008) (footnote omitted).

Cy-Fair appellants made this argument in their pleas to the jurisdiction. This does not prevent us from considering the issue; rather it affects our disposition because SPX may not have had fair opportunity to address this jurisdictional issue by amending its pleadings or developing the record. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012). We therefore must construe the pleadings in SPX’s favor, and, if necessary, review the record for evidence supporting jurisdiction. *Id.* If the pleadings or record conclusively negate the existence of jurisdiction, the suit should be dismissed. *Id.* Otherwise, Sullivan and the Cy-Fair appellants have the burden to show that SPX would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and SPX was afforded such an opportunity. *Id.* If that burden is satisfied, the case should be dismissed; if not, it should be remanded and SPX allowed to replead. *Id.* at 96-97.

The Tax Code is an example of a pervasive regulatory scheme, evidencing a legislative intent to vest the appraisal review boards with exclusive jurisdiction. *See Jim Wells Cty. v. El Paso Prod. Oil & Gas Co.*, 189 S.W.3d 861, 871 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). The Tax Code sets forth administrative procedures for aggrieved property owners to protest their tax liabilities. *See generally* Tex. Tax Code Ann. ch. 41-42 (West 2015). Therefore, the ARB has exclusive jurisdiction over property tax disputes, and property owners generally must exhaust its administrative remedies before seeking judicial review via a petition brought against the appraisal district. *See* Tex. Tax Code Ann. § 42.21(b); *MAG-T*, 161 S.W.3d at 624. The Code provides that such remedies “are exclusive, and a property owner may not raise any of those grounds [of protest] . . . as a basis of a claim for relief in a suit by the property owner . . . to obtain a refund of taxes paid.” Tex. Tax Code Ann. § 42.09(a)(2) (West 2015). As to claims against government officials for declaratory, mandamus, or injunctive relief that could not be pursued through the administrative process, the

property owner must show that a waiver or exception to immunity applies. *See Stiefer v. Moers*, No. 14-14-00617-CV, 2015 WL 6950104, at *3 (Tex. App.—Houston [14th Dist.] Nov. 10, 2015, pet. denied) (mem. op.).

SPX’s pleadings seek declarations in regard to the Tax Code statutes utilized to correct the appraisal rolls.⁵ Essentially, the relief sought by SPX is a declaratory judgment that the actions taken to correct the appraisal rolls were not done in accordance with the statutes, entitling SPX to a full refund of the taxes paid, without penalty or interest.

The declarations SPX seeks are encompassed in the grounds of its protest, and SPX is not entitled to redundant remedies. *See Local Neon Co., Inc. v. Strayhorn*, No. 03-04-00261-CV, 2005 WL 1412171, at *7 (Tex. App.—Austin June 16, 2005, no pet.) (mem. op.). Because SPX’s claims for declaratory relief fail to state a basis for the trial court to exercise its jurisdiction, they are precluded by the exclusive remedies of the Tax Code. *See* Tex. Tax Code Ann. § 42.09(a)(2).

⁵ Those declarations are as follows:

- a. the relevant statutes do not permit Defendants Stiefer, HCAD and the ARB Board to make changes to prior year appraisal records and appraisal rolls without the taxing units first exhausting their administrative remedies in those years;
- b. the relevant statutes do not allow the approval of changes to the appraisal records that increase the property owner’s liability without notice and a hearing;
- c. the relevant statutes make these 2010-2013 changes void ab initio and any payments are not voluntary and should be refunded;
- d. the relevant statutes do not allow the assessment of penalty and interest prior to notice and hearing and the property application of the delinquency statutes;
- e. the relevant statutes do not permit Defendant Stiefer to hold ex parte communications with the ARB and/or its members without notice and a hearing; and
- f. the relevant statutes as applied to SPX by the various Defendant in this case violate the due process and equal protection clauses of the Texas Constitution.

SPX's pleadings also include a claim for mandamus relief against Sullivan and Piwonka on the basis they had a duty to refrain from "imposing penalties and interest on the newly assessed tax liability increase until the time-frame allowed by the delinquency statutes," and from "sending tax bills until the administrative process validating the taxes has been completed." SPX further seeks injunctive relief against Piwonka "seeking to collect assessments from [SPX] for prior years on behalf of Cy-Fair ISD, which assessments this lawsuit seeks to have declared void." The relief SPX seeks is based upon the outcome of its petition for review. Thus SPX's claims for mandamus and injunctive relief are likewise precluded by the exclusive remedies of the Tax Code. *See* Tex. Tax Code Ann. § 42.09(a)(2). As noted in *Rio Valley, LLC v. City of El Paso*, "[a]n appeal taken pursuant to Chapter 42 of the Tax Code is [appellant's] exclusive remedy and it is prohibited from raising any of the grounds of protest in defense to a suit to enforce collection of delinquent taxes or as a basis for a claim for relief in a suit by the property owner to arrest or prevent the tax collection process or to obtain a refund of taxes paid." 441 S.W.3d 482, 489-90 (Tex. App.—El Paso 2014, no pet.) (citing Tex. Tax Code Ann. § 42.09(a)); *see also Houston Indep. Sch. Dist. v. 1615 Corp.*, 217 S.W.3d 631, 636 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (recognizing that *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501 (Tex. 2006) (per curiam), holds the application of section 42.09's exclusive-remedies provision deprives a court of jurisdiction). SPX's appeal seeking judicial review by the trial court is its exclusive remedy; SPX is therefore prohibited from raising, as a basis for a claim for relief in its suit against Sullivan and the Cy-Fair appellants, any of the grounds of protest. Because SPX's claims for mandamus and injunctive relief are dependent upon the grounds of its protest, they are within the purview of the exclusive remedies of the Tax Code. *See* Tex. Tax Code § 42.09(a)(2).

This does not end our inquiry, however, because SPX contends it is not subject to the exhaustion-of-administrative-remedies doctrine and the exclusive remedies of the Tax Code. There are several long-recognized exceptions to the exhaustion-of-administrative-remedies doctrine: (1) when an injunction is sought and irreparable harm would result; (2) when the administrative agency cannot grant the requested relief; (3) when the issue presented is purely a question of law; (4) when certain constitutional issues are involved; and (5) when an administrative agency purports to act outside its statutory powers. *See Gibson v. Waco Indep. Sch. Dist.*, 971 S.W.2d 199, 200-03 (Tex. App.—Waco 1998) (enumerating the exceptions), *vacated on other grounds*, 22 S.W.3d 849 (Tex. 2000); *see also Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d 772, 780 (Tex. App.—Austin 2004), *aff'd*, 209 S.W.3d 83 (Tex. 2006). If one of these exceptions is established, the purposes underlying the exhaustion rule are not applicable, judicial and administrative efficiency are not served by waiting for remedies to be exhausted, and agency policies and expertise are irrelevant if the agency’s final action will be a nullity. *Strayhorn*, 128 S.W.3d at 780.

SPX contends that the exhaustion-of-administrative-remedies doctrine is inapplicable to its claims because Sullivan and the Cy-Fair appellants exceeded their statutory authority by illegally utilizing a section 25.25(c)(3) motion to correct the property’s taxing units on the appraisal rolls. SPX argues their failure to follow the statutory process to correct the appraisal rolls is a violation of its constitutional right to due process. SPX claims it has no other remedy to correct this due process violation because the actions of an assessor or taxing unit are not reviewable by the ARB.

The facts alleged in SPX’s petition, however, are that Stiefer and HCAD found the errors in the appraisal rolls described above and HCAD then sought to have them corrected. SPX alleges Stiefer, HCAD, and the ARB “utilized a motion filed by Stiefer under Tax Code § 25.25(c)” to effectuate the changes. SPX further alleges in its petition

that the motion was granted without Stiefer or HCAD requesting a hearing and without the ARB holding a hearing. According to SPX's petition, the ARB approved the change and "HCAD and/or the ARB claim to have delivered" notice of the pending correction. Based on these facts, SPX concludes Stiefer, HCAD and ARB lacked the statutory authority to utilize section 25.25(c) to make changes to the appraisal rolls, thus the changes are void. These allegations, if true, do not establish *Sullivan* or the *Cy-Fair appellants* either acted without statutory authority or violated SPX's constitutional right to due process. Thus there is also no support for SPX's argument that it should be allowed to avoid the exhaustion-of-administrative-remedies doctrine on the grounds it lacks a remedy for the violation of its rights to due process by Sullivan and the Cy-Fair appellants.

Moreover, the constitutional-claim exception to the exhaustion-of-administrative-remedies doctrine was created to protect property owners from the loss of property without an opportunity to be heard at the administrative level and without recourse to judicial review. *Denton Cent. Appraisal Dist. v. C.I.T. Leasing Corp.*, 115 S.W.3d 261, 266 (Tex. App.—Fort Worth 2003, pet. denied). In tax cases, Texas courts have held that due process is satisfied if the taxpayer is given an opportunity to be heard before an assessment board at some stage of the proceedings. *ABT Galveston Ltd. P'ship v. Galveston Cent. Appraisal Dist.*, 137 S.W.3d 146, 155 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *C.I.T. Leasing Corp.*, 115 S.W.3d at 266. Because SPX's protest was heard by the ARB, SPX had an opportunity to be heard at the administrative level. SPX is now appealing the denial of that protest and therefore has recourse to judicial review. "The simple allegation of constitutional misdeeds does not suffice to avoid the administrative process." *MAG-T*, 161 S.W.3d at 632. SPX has not alleged facts that, if true, would demonstrate its right to be heard has been violated. Thus SPX has not

established a constitutional claim exception to the exhaustion of administrative remedies doctrine.

The only factual allegation in SPX's petition regarding the Cy-Fair appellants is that SPX demanded the withdrawal of Cy-Fair ISD's claim for penalties and interest and Cy-Fair ISD has refused. There are no alleged facts of actions taken by Piwonka. These facts do not establish any of the recognized exceptions to the exhaustion-of-administrative-remedies doctrine.

For these reasons, we sustain that portion of Sullivan's second issue, as well as that part of the Cy-Fair appellants' only issue, contending SPX's pleadings do not allege facts which affirmatively demonstrate the trial court's jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Accordingly, we conclude SPX has not shown itself entitled to seek relief outside the exclusive remedies provided by the Tax Code. Because the facts alleged in SPX's suit are the basis of its grounds for protest, which is pending on appeal in the trial court via SPX's petition for review, we conclude that SPX would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and SPX was afforded an opportunity to replead or offer additional evidence. Therefore, SPX's claims against Sullivan and the Cy-Fair appellants must be dismissed. *Rusk State Hosp.*, 392 S.W.3d at 96–97.

IV. CONCLUSION

We dismiss Harris County's appeal for want of prosecution. Although SPX has standing to sue, its pleadings failed to establish a waiver of immunity as to its claims against Sullivan, Piwonka and Cy-Fair ISD. Accordingly, we hold the trial court erred in denying both pleas to the jurisdiction, and we reverse the trial court's orders and render judgment dismissing SPX's claims against Sullivan, Piwonka, and Cy-Fair ISD with prejudice. *See* Tex. R. App. P. 43.2; *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 846 (Tex. 2007).

/s/ John Donovan
Justice

Panel consists of Justices Busby, Donovan, and Wise.