

Affirmed in Part and Reversed and Remanded in Part and Memorandum Opinion filed September 23, 2021.



In The

Fourteenth Court of Appeals

NO. 14-20-00098-CV

13335 DULUTH RESTAURANT AND BAR, L.L.C., Appellant

V.

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, THE OFFICE OF THE COMPTROLLER OF PUBLIC ACCOUNTS; AND KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS, Appellees

**On Appeal from the 250th District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-17-006906**

MEMORANDUM OPINION

Appellant Duluth Restaurant and Bar, L.L.C. (“Duluth”) initiated a lawsuit challenging the sexually oriented business fee assessed by appellee, The Comptroller of Public Accounts of the State of Texas, Glenn Hegar (the “Comptroller”). In response, the Comptroller filed a plea to the jurisdiction

asserting that the trial court lacked jurisdiction over Duluth's suit because the State's sovereign immunity had not been waived. The trial court agreed and granted the Comptroller's plea to the jurisdiction and Duluth appealed.¹ Upon review of the record and recent precedent from the Texas Supreme Court, as to Duluth's claims brought under Chapter 112 of the Tax Code, we reverse the trial court's dismissal order in part and remand Duluth's Chapter 112 claims to the trial court for further proceedings. *See EBS Sols. v. Hegar*, 601 S.W.3d 744 (Tex. 2020). We affirm the remainder of the trial court's dismissal order.

BACKGROUND

Duluth is a Texas limited liability company that operated a live entertainment club in Houston for the time-period at issue here. The Comptroller levied an assessment against Duluth for Sexually Oriented Business Fees from January 1, 2008, through June 30, 2015. *See* Tex. Bus. & Com. Code § 102.052 (imposing \$5-per-customer fee on sexually oriented businesses). Duluth requested a redetermination of the assessment. *See* Tex. Tax Code § 111.009. At a subsequent administrative hearing, the administrative law judge issued a proposal for decision concluding that Duluth owed \$909,636.07 in fees, interest, and penalties. The Comptroller adopted the proposal. Duluth then filed suit to protest the assessment pursuant to Chapter 112 of the Texas Tax Code. *See* Tex. Tax Code §112.052 (authorizing taxpayer protest suit). In addition, Duluth sought a declaration that (1) Duluth did not operate as a Sexually Oriented Business, (2) did not owe any assessments for Sexually Oriented Business fees for the time-period at

¹ The Texas Supreme Court ordered the Third Court of Appeals to transfer this case to this court. Under the Texas Rules of Appellate Procedure, "the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court." Tex. R. App. P. 41.3.

issue in this case, and (3) the Comptroller acted ultra vires when it assessed the Sexually Oriented Business fees. *See* Tex. Civ. Prac. & Rem. Code § 37.001, *et seq.* Duluth did not pay the assessment before filing suit. *See* Tex. Tax Code §§ 112.051, 112.108 (establishing tax protest payment requirement and an exception to that prepayment requirement). Duluth instead filed an oath of inability to pay taxes or post a bond. *See id.*

The Comptroller filed a plea to the jurisdiction in response to Duluth's suit. The Comptroller argued that Duluth could not rely on the prepayment exception found in section 112.108 of the Tax Code because it had been declared unconstitutional by the Third Court of Appeals. *See Hegar v. EBS Sols., Inc.* 549 S.W.3d 849, 863 (Tex. App.—Austin 2018), *rev'd* 601 S.W.3d 744 (holding taxpayers may avail themselves of the option of seeking declaratory relief without prepaying). The Comptroller also argued that the trial court lacked jurisdiction because Duluth could not avoid the prepayment requirement found in Chapter 112 by reframing its tax protest as a suit seeking a declaratory judgment. The Comptroller concluded by arguing that because Duluth failed to prepay the challenged tax amounts as required by the Tax Code, sovereign immunity barred the claim. *See* Tex. Tax Code § 112.051. Duluth responded arguing that taxpayers in Texas can seek declaratory judgment, not otherwise barred by sovereign immunity, without having to prepay. The trial court granted the Comptroller's plea and dismissed Duluth's suit for lack of subject matter jurisdiction.

Duluth appealed and the case was transferred to this Court. Because the issues in this appeal overlapped with the issues raised in the *EBS Solutions* appeal then pending in the Texas Supreme Court, we abated this appeal. Once the Texas Supreme Court issued its decision in *EBS Solutions*, we lifted the abatement and reinstated the appeal. Both parties subsequently filed briefs addressing the

Supreme Court's *EBS Solutions* opinion. See *EBS Sols., Inc.*, 601 S.W.3d at 750. Duluth asserts that based on the Supreme Court's decision in *EBS Solutions* upholding the validity of Section 112.108 of the Tax Code, the trial court erred in dismissing its suit. See Tex. Tax Code § 112.108 (permitting court in certain circumstances to excuse party from first prepaying the taxes due). The Comptroller responded by arguing that *EBS Solutions* did not change the lack of subject matter jurisdiction in this case. It also argued that Duluth failed to preserve its argument that it was entitled to a remand for the trial court to consider its oath of inability to pay because it failed to set the oath for a hearing with the trial court.

ANALYSIS

Duluth raises three challenges to the trial court's order granting the Comptroller's plea to the jurisdiction: (1) "the newly-announced safe harbor in *EBS Sols v. Hegar*" applies to taxpayers who do not prepay but otherwise comply with the requirements of Texas Tax Code section 112.108; (2) sovereign immunity does not bar its declaratory judgment claim; and (3) sovereign immunity does not bar its ultra vires claim. All of Duluth's issues on appeal arise out of the trial court's granting of the Comptroller's plea to the jurisdiction.

I. Standard of review

Sovereign immunity bars a trial court's subject matter jurisdiction unless the State expressly consents to the suit. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The State asserts its sovereign immunity in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). When the State challenges a trial court's subject matter jurisdiction based on sovereign immunity, the burden falls on the plaintiff to demonstrate the Legislature's express consent to the suit. *Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). Whether a court has subject matter

jurisdiction is a question of law. *Id.* at 855. As a result, a trial court’s order granting or denying a plea to the jurisdiction is reviewed de novo. *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929 (Tex. 2010).

II. The trial court erred when it granted the Comptroller’s plea to the jurisdiction on Duluth’s Chapter 112 claim.

The Legislature has expressly waived the State’s sovereign immunity as to three types of tax challenges—protests, injunctions, and refunds. *EBS Sols.*, 601 S.W.3d at 749–50. “For each of these suits, the taxpayer normally must meet some prepayment prerequisite prior to bringing the tax suit.” *Id.* at 750 (citing Tex. Tax Code §§ 112.001, .051, .101, .108). A taxpayer seeking to initiate a protest suit must first “pay the amount claimed by the state” and submit a written protest that states “fully and in detail each reason for recovering the payment.” Tex. Tax Code § 112.051(a), (b). Similarly, a taxpayer seeking an injunction must either pay “all taxes, fees, and penalties then due” or file a “good and sufficient” bond equal to twice the amount of taxes, penalties, and fees due “that may reasonably be expected to become due during the period the order or injunction is in effect.” *Id.* at § 112.101(a). If the taxpayer complies with the prerequisites, sovereign immunity is waived. *In re Nestle USA, Inc.*, 359 S.W.3d 207, 211–12 (Tex. 2012) (orig. proceeding). A taxpayer’s suit against the state can then proceed. *Hegar v. Alam, Inc.*, No. 03-18-00044-CV, 2021 WL 1031342 at *2 (Tex. App.—Austin Mar. 18, 2021, no pet.) (mem. op.). If the taxpayer does not meet all of the prepayment requirements before filing suit, then immunity is not waived, and the court does not have jurisdiction over the claim. Tex. Tax Code § 112.052; *see Dan Ingle, Inc. v. Bullock*, 578 S.W.2d 193, 194 (Tex. App.—Austin 1979, writ ref’d) (holding sovereign immunity was not waived because taxpayer failed to comply with both requirements).

Section 112.108 provides an “inability to pay” exception to the prepayment requirement. Tex. Tax Code § 112.108. Under section 112.108, certain taxpayers are excused from the prepayment requirement normally imposed by Chapter 112 if they can establish their “inability to pay the tax, penalties, and interest due.” *Id.*; *EBS Sols.*, 601 S.W.3d at 750. *EBS Solutions* sets out the procedure a trial court must use to evaluate its jurisdiction when the taxpayer seeks to invoke the inability to pay exception created by section 112.108:

Under [section 112.108], a taxpayer is excused from the prepayment prerequisites otherwise required to waive the State’s sovereign immunity only if: (1) the taxpayer files an oath of inability to pay the tax, penalties, and interest due; (2) a hearing is set and notice provided; (3) the trial court conducts a hearing; and (4) the trial court finds that “prepayment would constitute an unreasonable restraint on the party’s right of access to the courts.”

EBS Sols., 601 S.W.3d at 760–61 (quoting Tex. Tax Code § 112.108).

In *EBS Solutions*, the taxpayer filed suit challenging an assessment by the Comptroller. *Id.* at 748. Instead of paying the entire amount assessed before filing suit, EBS filed an oath of inability to pay as permitted by section 112.108. *Id.* The trial court found that requiring EBS to pay the full amount before being able to file the suit violated its “right of access to the courts.” *Id.* The Third Court of Appeals, however, held that because it had previously determined that section 112.108 was unconstitutional, the oath of inability to pay provision contained therein was also invalid. *Id.* at 749. As a result, the Third Court of Appeals held that the trial court did not have jurisdiction over the case. *Id.* The Supreme Court of Texas reversed and remanded the case to the trial court to reconsider the plea to the jurisdiction after conducting a hearing on EBS Solutions’ oath of inability to pay. *Id.* at 762–63. The Supreme Court of Texas held that a taxpayer who properly follows section 112.108’s oath of inability to pay requirements could

proceed with an injunction and tax protest suit even if the taxpayer has not satisfied the prepayment requirements. *Id.* at 755–56, 761. The court specified, however, that the proper filing of an oath of inability to pay does not automatically waive sovereign immunity, it simply “leads to the next steps in the process,” which is the trial court’s determination of whether prepayment would pose an unreasonable restriction on access to courts. *Id.* at 762. If the trial court subsequently makes such a finding, then sovereign immunity is waived. *Id.* at 761.

In this case, as in *EBS Solutions*, Duluth sought judicial review of an assessment under Chapter 112 without first paying the entire amount assessed. Similarly, as well, Duluth filed an oath of inability to pay seeking to invoke the exception under section 112.108. *EBS Solutions* had not been decided at the time Duluth filed its oath, and governing precedent at the time held that section 112.108 was unconstitutional. In its plea to the jurisdiction, the Comptroller asserted that Duluth could not rely on section 112.108 because it was unconstitutional thereby making the oath of inability to pay invalid. Without the benefit of the Texas Supreme Court’s decision in *EBS Solutions*, the district court granted the plea to the jurisdiction without holding a hearing on Duluth’s oath of inability to pay. On appeal, Duluth argues that this Court should reverse and remand this case based on these circumstances. The Comptroller argues in response that because Duluth did not set its oath of inability to pay for a hearing, it waived or failed to preserve its oath-of-inability-to-pay argument and the right to remand.

Since the Texas Supreme Court’s *EBS Solutions* opinion issued, the Third Court of Appeals has been called upon to resolve similar tax disputes to the one present in the pending appeal. In *Manana Entertainment, Inc., v. Hegar*, the taxpayer did not set a hearing for its oath of inability to pay; it merely filed the oath with the trial court. No. 03-19-00753, 2021 WL 2587170 *1 (Tex. App.—Austin

June 24, 2021, no pet.) (mem. op.). The trial court granted the Comptroller's plea to the jurisdiction and dismissed the suit without holding a hearing on Manana's oath. *Id.* The Third Court of Appeals held that because the trial court had jurisdiction to consider Manana's oath of inability to pay, it erred in dismissing the claim. *Id.* The Third Court of Appeals remanded the oath question to the trial court for a hearing. *Id.* The Third Court of Appeals reached this decision even though the trial court did not conduct a hearing on Manana's oath. *Id.* The Third Court of Appeals concluded that Manana had taken sufficient steps toward showing its intent to preserve the issue. *Id.* We are required to follow this precedent from the transferor court. *See* Tex. R. App. P. 41.3.

Here, as in *Manana*, Duluth filed an oath of inability to pay with the trial court. By doing so, it took the necessary step to preserve its argument for appellate review. *See Manana*, 2021 WL 2587170 at *1 (stating that due to the *EBS Solutions* circumstances, reversal and remand appropriate when trial court grants plea to the jurisdiction without holding hearing on properly filed oath of inability to pay). Because we conclude that the trial court erred when it granted the Comptroller's plea to the jurisdiction on Duluth's Chapter 112 claims, we sustain Duluth's first issue. We therefore reverse the trial court's order granting the Comptroller's plea to the jurisdiction on Duluth's Chapter 112 claim and remand to the trial court for it to consider Duluth's oath of inability to pay.² *See Texley Inc. v. Hegar*, 613 S.W.3d 322, 328 (Tex. App.—Austin 2020, no pet.) (remanding for reconsideration of plea to the jurisdiction in light of *EBS Solutions*); *see also South Houston Taverns, Inc. v. Hegar*, No. 03-18-00722-CV, 2020 WL 7233611 (Tex. App.—Austin Dec. 9, 2020, no pet.) (mem. op.) (same).

² Because we sustained Duluth's first issue, we need not reach Duluth's second issue, which was contingent on this court overruling Duluth's first issue.

III. The district court did not err when it granted the Comptroller’s plea to the jurisdiction on Duluth’s remaining claims.

A. Duluth’s declaratory judgment claim.

Turning to the trial court’s dismissal of Duluth’s declaratory judgment claim, we affirm the district court’s dismissal. Duluth sought a declaratory judgment that it was not operating as a Sexually Oriented Business because it was not providing nude performances as defined in section 102.051(1) of the Texas Business & Commerce Code. Tex. Bus. & Com. Code Ann. § 102.051(1) (defining “nude” as applied to sexually oriented businesses). The absence of jurisdiction over Duluth’s claim for declaratory relief is unchanged by the *EBS Solutions* decision. The Legislature has waived the State’s sovereign immunity for only three types of tax challenges: protests, injunctions, and refunds. *EBS Sols.*, 601 S.W.3d at 749–50. The Legislature has not waived immunity for the declaratory relief requested here. *See In re Nestle*, 359 S.W.3d at 209 (“Chapter 112 allows no other actions to challenge or seek refunds of the taxes to which it applies”). Section 112.108 specifically precludes declaratory relief for taxpayers. *See* Tex. Tax Code § 112.108 (stating that “a court may not issue . . . declaratory judgment . . . relating to the applicability, assessment, collection, or constitutionality of a tax or fee”); *see also EBS Sols.*, 601 S.W.3d at 755 (stating Legislature revoked the right to declaratory relief when it amended section 112.108 of the Texas Tax Code to add the prepayment requirement exception). The Texas Supreme Court, in *EBS Solutions*, did not overturn the Legislature’s exclusion of declaratory judgment claims against the State. *See EBS Sols.*, 601 S.W.3d at 759 (recognizing that Legislature retained ban on declaratory relief in tax protests cases when it amended section 112.108 of the Texas Tax Code). This jurisdictional bar continues to apply here.

B. Duluth’s ultra vires claims.

Duluth also sought declaratory relief on its ultra vires claims against appellees Glenn Hegar, individually, and Ken Paxton, individually, for allegedly acting outside the scope of their legal authority when Sexually Oriented Business fees were assessed against Duluth. Duluth again asserts that it was not a sexually oriented business during the relevant time. Appellees argue that all actions of which Duluth complains are discretionary acts within the authority the Legislature conferred on the Comptroller. We agree.

The Texas Supreme Court “has long recognized that [sovereign] immunity does not bar claims alleging that a government officer acted ultra vires.” *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 157–58 (Tex. 2016). Ultra vires acts are acts beyond the statutory authority granted to state officials. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 371–73 (Tex. 2009). Under *Heinrich*, to fall within the ultra vires exception to sovereign immunity, “a suit must not complain of a government officer’s exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority.” *Id.* at 372 (citations omitted). A government official has no discretion to violate the law and commits an ultra vires act if he or she acts in conflict with the law. *See Houston Belt & Terminal Ry. Co.*, 487 S.W.3d at 158. Erroneously carrying out a discretionary act authorized by statute is not, however, an ultra vires act that can be the subject of a declaratory judgment. *See Hall v. McRaven*, 508 S.W.3d 232, 242 (Tex. 2017).

The Comptroller has broad general powers provided by the Legislature regarding the assessment and collection of taxes, including the authority to “adopt regulations the Comptroller considers essential to the speedy and proper

assessment and collection of state revenues” and “examine and settle the account of each person indebted to the state, verify the amount or balance, and direct and supervise the collection of the money.” Tex. Gov’t Code § 403.011(2), (11). The Comptroller is statutorily authorized to determine the amount of taxes owed using taxpayer-provided reports or “any other information available to the Comptroller.” *Id.* § 111.008. The Comptroller also may assess penalties on delinquent taxes or tax reports. *See id.* § 111.061. Within this authority, the Comptroller has discretion as to how to carry out his statutorily-mandated duties. *Office of the Comptroller of Pub. Accounts v. Pakse, Inc.*, No. 03-16-00121-CV, 2017 WL 4583213 at *5 (Tex. App.—Austin Oct. 10, 2017, no pet.) (mem. op.).

The Comptroller’s authority extends to the assessment and collection of Sexually Oriented Business fees like those at issue here. *See* Tex. Bus. & Com. Code § 102.056 (stating the Comptroller’s authority applies to the administration, collection, and enforcement of fees imposed on certain sexually oriented businesses). Because the Legislature has delegated broad authority and discretion to the Comptroller to interpret the Texas Business and Commerce Code and Tax Code and assess taxes, the Comptroller’s alleged misinterpretation of the Sexually Oriented Business fee statute is not an ultra vires act. Duluth’s claim complains only of the merits of the Comptroller’s assessment of Sexually Oriented Business fees against Duluth, which is within the Comptroller’s authority. Because the Comptroller is authorized to use its discretion when issuing an assessment of taxes and penalties, no proper ultra vires action over which this Court has jurisdiction is present. Having overruled both arguments Duluth raised in its third issue, we overrule that issue.

CONCLUSION

Because sovereign immunity bars Duluth’s declaratory judgment claims, we

affirm the trial court's order granting the Comptroller's plea to the jurisdiction to the extent that it dismissed Duluth's claims for declaratory relief. Because the trial court has jurisdiction to consider Duluth's oath of inability to pay, we reverse the trial court's dismissal of Duluth's claims under Chapter 112 of the Tax Code, and we remand the case to the trial court to reconsider the Comptroller's plea after conducting a hearing on Duluth's oath of inability to pay. *See* Tex. R. App. P. 43.2(d).

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Wise, Bourliot, and Zimmerer.