TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00121-CV

Office of the Comptroller of Public Accounts for the State of Texas; Glenn Hegar, Individually and in his Official Capacity as Comptroller of Public Accounts of the State of Texas; and Ken Paxton, Attorney General of Texas, Appellants

v.

Pakse, Inc. and Hong Lee Xayaseng, Appellees

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-15-002980, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING**

MEMORANDUM OPINION

The Comptroller of Public Accounts and the Attorney General (collectively, the Comptroller) appeal the trial court's denial of a plea to the jurisdiction in the underlying suit, which was initiated by taxpayers Pakse, Inc. and Hong Lee Xayaseng (collectively, Pakse) under the Administrative Procedure Act (APA), *see* Tex. Gov't Code §§ 2001.001-.902, and the Uniform Declaratory Judgments Act (UDJA), *see* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011. The Comptroller contends that Pakse is unlawfully attempting to use the APA and the UDJA to challenge a tax assessment without meeting the prepayment requirements set out in the Tax Code, *see* Tex. Tax Code §§ 112.051, .052, and that the trial court lacks subject-matter jurisdiction to hear such a suit. Pakse counters that the court's jurisdiction was properly invoked under independent grants of jurisdiction in the APA and the UDJA regarding rule challenges and ultra vires acts by state officials.

Because we conclude the Comptroller is immune from suit under the facts presented, we reverse the trial court's order and render judgment dismissing Pakse's APA and UDJA claims for lack of jurisdiction.

BACKGROUND

Pakse operates four convenience stores in Texas. Following an audit, the Comptroller assessed additional tax liability of $744,100.43 against Pakse for the audit period of September 1, 2007 to March 31, 2011. In performing the audit, the auditor utilized procedures set out in two audit memoranda, AP 92 and AP 122, issued by the Comptroller. AP 92 directs audit staff as to how to conduct estimated convenience-store audits, mark-up percentages, and product percentages when records are unavailable or inadequate. Following the passage of House Bill 11 (HB 11) in 2007, which requires sellers of alcohol and tobacco products to report certain sales information, AP 122 was issued to direct audit staff to use "HB 11 information" in estimated convenience-store audits to produce more uniform audit results. *See* Act of May 3, 2007, 80th Leg., R.S., ch. 129, §§ 1-3, 2007 Tex. Gen. Laws 159, 159-62; *Sanadco Inc. v. Office of the Comptroller of Pub. Accounts*, No. 03-11-00462-CV, 2015 WL 1478200, at *1-2 (Tex. App.—Austin Mar. 25, 2015, pet. denied) (mem. op.) (providing overview of relevant governing framework: Tax Code provisions, AP 92, and AP 122).

Pakse requested a redetermination hearing before the State Office of Administrative Hearings (SOAH). *See* Tex. Tax Code § 111.009. While the administrative proceeding was pending, Pakse filed its original petition in district court. Pakse's petition first seeks a declaration under APA Section 2001.038 that AP 92 and AP 122 are rules and that they are invalid because they

were not properly promulgated, noting that such a determination would make audits in which the memoranda were utilized null and void. *See* Tex. Gov't Code § 2001.038. The petition also requests a declaration concerning allegedly ultra vires acts taken by the Comptroller, including authorization of the use of AP 92 and AP 122 in audits without properly adopting them as rules. *See* Tex. Civ. Prac. & Rem. Code § 37.004(a). In addition, Pakse seeks judicial review of the Comptroller's order, which was not final at the time the petition was filed, under the APA. *See* Tex. Gov't Code §§ 2001.171-.174. Pakse's petition lastly challenges the constitutionality of several provisions in Chapter 112 of the Tax Code. Pakse did not prepay the assessed tax or file a protest, as required by Chapter 112 of the Tax Code, prior to filing suit in district court. *See* Tex. Tax Code §§ 112.051, .052. On this basis, the Comptroller filed a plea to the jurisdiction on the claims brought under the APA and the UDJA, and a non-evidentiary hearing was held on the plea.

Meanwhile, the administrative proceeding progressed, and the Comptroller issued his final order six days before the district-court hearing on the plea to the jurisdiction. Pakse exhausted its administrative remedies approximately six weeks later when its motion for rehearing was denied by the Comptroller. Having agreed that Pakse's challenges to the constitutionality of certain Tax Code provisions were not a part of the plea to the jurisdiction, the parties filed cross-motions for summary judgment on those claims while the plea was pending. The trial court subsequently denied the Comptroller's plea to the jurisdiction, and the rest of the proceedings were stayed pending this interlocutory appeal.

ANALYSIS

The Comptroller contends that the trial court erred in denying his plea to the jurisdiction because the trial court lacks jurisdiction over a tax-assessment challenge that is brought under the APA and the UDJA rather than the Tax Code. In the alternative, the Comptroller argues that the trial court lacks jurisdiction because AP 92 and AP 122 are not rules and are no longer in use, and because Pakse failed to plead facts alleging a cognizable ultra vires claim. Pakse argues in response that the APA and the UDJA grant the trial court jurisdiction to hear rule challenges and ultra vires actions, respectively, that is independent of the jurisdiction to review the Comptroller's orders set out in the Tax Code. Pakse also argues that AP 92 and AP 122 fit the statutory definition of the word "rule," that the impact on Pakse supercedes any mootness that may arise out of the rules no longer being in effect, and that the Comptroller's actions exceeded his statutory authority.

Standard of Review

A plea to the jurisdiction is a dilatory plea that challenges a trial court's subject-matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). We review the trial court's ruling on a plea to the jurisdiction based on governmental immunity de novo because the question of whether a court has subject-matter jurisdiction is a matter of law. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "In Texas, sovereign immunity deprives a trial court of subject-matter jurisdiction for lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit." *Id.* at 224. Where, as here, a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Texas Ass'n of Bus. v. Texas Air Control Bd.*,

852 S.W.2d 440, 446 (Tex. 1993). Our inquiry focuses on the plaintiff's petition to determine whether the facts pled affirmatively demonstrate that jurisdiction exists. *Id.* We construe the pleadings liberally, looking to the pleader's intent. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007).

Rules challenge under the APA

Pakse's petition first asserts that the trial court has jurisdiction under Section 2001.038 of the APA to rule on its challenge to the validity of the Comptroller's audit memoranda, AP 92 and AP 122. Section 2001.038 allows a petitioner to seek a determination of the validity or applicability of a rule "in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." Tex. Gov't Code § 2001.038; *Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 529 (Tex. App.—Austin 2002, pet. denied). Pakse asserts that AP 92 and AP 122 are rules that are invalid because they were not adopted pursuant to the procedural requirements set out in the APA, and that their application will interfere with or impair Pakse's right to a fair and equitable audit. It further argues that its legal rights or privileges are threatened because application of AP 92 and AP 122 potentially subjects Pakse to loss of its business and its license, illegal tax assessments, and liens on its property that could lead to a forcible sale. Pakse seeks relief in the form of a declaration that AP 92 and AP 122 are invalid administrative rules and that audits utilizing these procedures are therefore invalid and unenforceable.

The Comptroller contends that Pakse's petition does not affirmatively plead facts that demonstrate the existence of jurisdiction under Section 2001.038 because its claims are actually tax-assessment challenges governed by Tax Code Chapter 112 disguised as APA claims to avoid the requirements in Chapter 112 that the assessed taxes be paid before suit is brought. *See* Tex. Tax Code §§ 112.051, .052. This Court has addressed a markedly similar situation before. In *Sanadco Inc. v. Office of the Comptroller of Pub. Accounts*, Sanadco, a convenience-store operator, was audited, and additional taxes were assessed. *See* No. 03-11-00462-CV, 2015 WL 1478200, at *2 (Tex. App.—Austin Mar. 25, 2015, pet. denied) (mem. op.). Sanadco did not request redetermination or a hearing under Chapter 111 or challenge the assessment in court under Chapter 112. *Id.* at *3. The Comptroller sued to recover the taxes owed, and in response, Sanadco brought counter-claims under the APA and the UDJA, alleging that AP 92 and AP 122 were invalid rules and that the Comptroller had committed ultra vires acts in assessing taxes using the memoranda. *Id.* We concluded: "Regardless of the taxpayer's claims, the *only* permitted taxpayer actions challenging state taxes are 'a suit after payment under protest, suit for injunction after payment or posting of a bond, and a suit for a refund.'" *Id.* at *5 (quoting *In re Nestle USA, Inc.*, 359 S.W.3d 207, 211 (Tex. 2012)). Furthermore, we stated:

> While Sanadco frames its declaratory requests in terms of the validity or constitutionality of "rules," statutes, and alleged ultra vires actions, it is not merely seeking to obtain such declarations but to be relieved, thereby, of its tax assessment and penalty. Chapter 112 of the Tax Code provides an exclusive remedy therefor, and *Nestle* explicitly prohibits any attempt at relief from assessed state taxes on *any* basis except as provided in the chapter.

Id. We determined that because Sanadco had not complied with the mandatory Chapter 112 requirements for tax-assessment challenges, the district court had no jurisdiction over its counter-claims. *Id.* at *8.

Here, the Comptroller argues that Pakse's situation is "on all fours" with the *Sanadco* case and that our decision there controls. Pakse counters that this case is distinguishable because the taxpayer in *Sanadco* took no action to protest the tax assessment through available administrative remedies. In contrast, it argues, Pakse requested redetermination and participated in a contested-case hearing before SOAH under Chapter 111 of the Tax Code. The Comptroller replies that while Pakse pursued administrative remedies that Sanadco did not, it still did not meet the requirement of compliance with Chapter 112. On the record before us, we agree. Our decision in *Sanadco* was based largely on the Texas Supreme Court's holding in *Nestle* that Chapter 112 provides the exclusive remedies for challenging state taxes covered by the chapter. *See id*. at *5. In *Nestle*, the supreme court concluded that the statute "allows no other actions to challenge or seek refunds of the taxes to which it applies." *In re Nestle*, 359 S.W.3d at 209. Moreover, in *Sanadco* we explained that any grounds for jurisdiction provided in the APA or UDJA "are preempted by Chapter 112 of the Tax Code, which the supreme court has held provides exclusive remedies for relief from assessed taxes on *any* basis." *Sanadco*, 2015 WL 1478200, at *4. Pakse's initial foray into the Chapter 111 administrative remedies did not satisfy Chapter 112 requirements for judicial remedies or create judicial remedies otherwise unavailable to Pakse.

Pakse argues that the Comptroller mischaracterizes its suit as challenging the tax assessment, when it instead legitimately challenges the validity of AP 92 and AP 122. However,

review of Pakse's second amended petition, the live pleading at the time the plea to the jurisdiction was denied, shows that Pakse is, in fact, seeking to avoid paying the taxes assessed by the Comptroller. Primary to the facts set out in the petition are the audit performed by the Comptroller and the taxes assessed as a result. Pakse claims a right to "relief of tax liability." Pakse's complaint challenging the validity of AP 92 and AP 122 expressly seeks a determination that audits based on the procedures set out in the memoranda are "invalid and unenforceable." Lastly, in its prayer, Pakse requests that the court allow it "to proceed with [its] claims in protest of the taxes, penalties and interest assessed in the decisions complained of without regard to the prepayment provisions of [Chapter 112]," and claims that the Comptroller's ultra vires acts entitle Pakse to "declaratory and injunctive relief from the collection of these illegal, invalid, and unenforceable taxes, penalties and interest." We conclude that the holdings in *Nestle* and *Sanadco* control and prohibit such an action. As explained by the supreme court, if taxpayers could avoid the prepayment requirements of Chapter 112 and challenge a tax assessment by attacking the rules on which the assessment was based in a separate action under Section 2001.038, it would undermine the legislature's intent that Chapter 112 provide the exclusive remedy for challenged tax assessments. *See In re Nestle*, 359 S.W.3d at 211-12.

In support of its argument that *Sanadco* does not control here, Pakse emphasizes a footnote in the *Sanadco* opinion that limits the extent of the holding to the particular fact situation before the court at that time. Footnote 9 states:

> We limit our holding to cases in which a taxpayer seeks relief from a tax assessment that has become a final liability and is no longer subject to review through administrative procedures; we do not hold that Chapter 112 preempts every suit

> challenging a Comptroller rule or tax statute's constitutionality. *Cf., Texas Entm't Ass'n, Inc. v. Combs*, 431 S.W.3d 790, 795 (Tex. App.—Austin 2014, pet. denied) (citing *Combs v. Texas Entm't Ass'n, Inc.*, 287 S.W.3d 852, 864-65 (Tex. App.—Austin 2009), *rev'd on other grounds*, 347 S.W.3d 277 (Tex. 2011)) (on remand, citing with approval its previous opinion holding that declaratory-judgment action challenging constitutionality and implementation of new tax statute was not preempted by Chapter 112 of Tax Code); *Combs v. Entertainment Publ'ns Inc.*, 292 S.W.3d 712, 723 (Tex. App.—Austin 2009, no pet.) (affirming trial court's denial of plea to jurisdiction in suit in which taxpayer sought declaratory and injunctive relief to prevent Comptroller from implementing allegedly invalid rule). Because Sanadco sought injunctive relief from liability for the tax long after completion of the administrative process and the deficiency assessment had become final, the facts here are distinguishable from those cases in which the taxpayers sought declarations of the validity or constitutionality of rules and statutes and their threatened enforcement prior to finality of an agency determination.

Sanadco, 2015 WL 1478200, at *6 n.9. Pakse contends that this footnote allows its challenge to the validity of a rule because its administrative proceeding was not yet final when the petition was filed. However, we read this footnote as a limitation of the decision to the factual situation presented. We do not read this footnote to condone every suit challenging a Comptroller rule in which an agency determination is not yet final. Moreover, the cases cited in footnote 9 are challenges to the constitutionality of statutes or validity of rules *prior* to their implementation. *See Texas Entm't Ass'n*, 431 S.W.3d at 795; *Entertainment Publ'ns*, 292 S.W.3d at 714. In neither of the cases was an actual tax assessment at issue. *See, e.g.*, *Entertainment Publ'ns*, 292 S.W.3d at 724 ("[H]ere, Entertainment has not sought to prohibit the assessment or collection of a state tax . . . . Indeed, no tax had yet been assessed."). In neither of the cases did the petitioner seek reversal of an agency order assessing taxes in coordination with the ruling on the validity of the rule or the constitutionality of the statute. *See id.*; *Texas Entm't Ass'n*, 431 S.W.3d at 795. Each sought to prevent implementation of a rule or statute rather than to attack its application following an audit. *See*

Entertainment Publ'ns, 292 S.W.3d at 724; *Texas Entm't Ass'n*, 431 S.W.3d at 795. We understand Pakse's situation to be more closely aligned with Sanadco's because Pakse is explicitly seeking relief from tax liability that has already been assessed against it. Moreover, the lack of finality in Pakse's administrative proceeding actually means that an avenue for challenging the outcome of that proceeding was still available through the Chapter 112 judicial-review process at the time Pakse petitioned for declaratory relief. "When a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies." *Strayhorn v. Raytheon E-Sys., Inc.*, 101 S.W.3d 558, 572 (Tex. App.—Austin 2003, pet. denied).

Ultra vires claims under the UDJA

In its petition, Pakse also asserts claims under the UDJA, seeking declarations that various audit methods employed by the Comptroller were outside the Comptroller's statutory authority and were therefore non-discretionary ultra vires acts. Specifically, Pakse argues that authorizing the implementation of AP 92 and AP 122 without proceeding through proper rulemaking procedures, directing the use of information gathered pursuant to HB 11 in estimated audits, and relying on findings of gross underreporting in fraud determinations were all ultra vires acts. We addressed similar claims in *Sanadco* and conclude for the same reasons explained above regarding the rule challenge that Pakse may not utilize the UDJA to avoid the prerequisites to judicial review of a tax-assessment challenge under the Tax Code.

Moreover, even if the UDJA claims were not barred by the Tax Code as set out in *Sanadco*, they nevertheless are barred by sovereign immunity because no facts alleging an ultra vires act were pled. Pakse relies on *City of El Paso v. Heinrich* to argue that where a state official acts

outside the bounds of his statutory authority, sovereign immunity does not protect against suit for prospective injunctive remedies. *See* 284 S.W.3d 366 (Tex. 2009). The Comptroller responds that all of the actions of which Pakse complains are discretionary acts within the authority conferred on the Comptroller by the Tax Code. 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 or failed to perform a purely ministerial act." *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. v. City of Hous.*, 487 S.W.3d 154, 158 (Tex. 2016). In contrast, erroneously carrying out a discretionary act authorized by statute is not 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 Tax Code authorizes the Comptroller to examine and audit the sales records that are required to be kept by convenience-store owners. *See* Tex. Tax Code §§ 111.004, 151.025. In addition, where records are inadequate or insufficient, the Tax Code explicitly authorizes the Comptroller to estimate the amount of taxes owed using sampling and projection methods. *See id.* § 111.0042(b). Moreover, the Comptroller is statutorily authorized to determine the amount of taxes owed using taxpayer-provided reports or "any other information available to the comptroller." *See id.* § 111.008. The statute does not except from this "other information" the reports that sellers of alcohol or tobacco products are required to file with the Comptroller, sometimes referred to as HB 11 information. *See id.* §§ 151.462, 154.201, 155.105. Lastly, the Comptroller 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. The actions of which Pakse complains, regarding the information used to estimate the amount of taxes owed, the manner of determining whether to assess penalties, and the manner in which audits are conducted generally, are all well within this realm of statutorily granted authority. Therefore, sovereign immunity bars Pakse's claims under the UDJA, and the trial court lacks jurisdiction over those claims.

Judicial review

Pakse lastly presents an argument in support of its petition that the Tax Code and the APA offer two alternatives for seeking judicial review of a Comptroller order assessing taxes. It points out that following an audit and assessment of taxes, Chapter 111 of the Tax Code allows a taxpayer to seek redetermination and to a request a hearing to be held before SOAH. *See id.* § 111.009. Additionally, it recognizes that Chapter 112 of the Tax Code provides for judicial review of a tax assessment following payment under protest or a request for refund of taxes already paid. *See id.* §§ 112.051, .052. The parties agree that these provisions offer administrative and judicial remedies, respectively, to address an allegedly improper tax assessment. Pakse argues that the APA affords taxpayers an additional avenue to obtain judicial review following a redetermination hearing at SOAH. Specifically, Pakse claims that the trial court has jurisdiction under Sections 2001.171 and 2001.178 of the APA. Section 2001.171 authorizes judicial review of a contested case following exhaustion of all administrative remedies. *See* Tex. Gov't Code § 2001.171. Section 2001.178 states that the right to judicial review provided in the APA is "cumulative of other means of redress

provided by statute." *Id.* § 2001.178. Pakse contends that these two sections mean that judicial review of a Comptroller order assessing taxes can be obtained under either Section 2001.171 of the APA or Chapter 112 of the Tax Code. However, the supreme court has concluded that the APA creates an "independent right to judicial review of a contested-case decision *when the agency's enabling statute neither specifically authorizes nor prohibits judicial review of the decision*." *Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 173 (Tex. 2004) (emphasis added). Because the Tax Code specifically authorizes judicial review in Chapter 112, Section 2001.171 does not create an independent right to judicial review in this case. In addition, the supreme court has directed that where the enabling statute does authorize judicial review, its provision so doing "'should be read in conjunction and harmony with'" Section 2001.171. *Id.* at 186 (quoting *Hooks v. Texas Dep't of Water Res.*, 611 S.W.2d 417, 419 (Tex. 1981); citing *Dan Ingle, Inc. v. Bullock*, 578 S.W.2d 193, 193-94 (Tex. Civ. App.—Austin 1979, writ ref'd)). Accordingly, we conclude that Section 2001.171 does not offer Pakse an alternative avenue, independent of the requirements set out in Chapter 112, through which to pursue judicial review of the Comptroller's tax-assessment order. The legislature has expressly required that a petition for judicial review of a tax assessment meet the requirements set out in Chapter 112. Pakse cannot avoid those requirements by reading Section 2001.171 as an entirely independent grant of entitlement to judicial review unfettered by statutory prerequisites that apply under the Tax Code.

For the reasons above, we conclude that the trial court did not have jurisdiction over Pakse's claims under the APA and the UDJA. Accordingly, we sustain the Comptroller's first issue.

CONCLUSION

Having sustained the Comptroller's issue on appeal, we reverse the judgment of the trial court and render judgment dismissing Pakse's claims under the APA and UDJA that were the subject of the plea to the jurisdiction.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Reversed and Rendered

Filed: October 10, 2017