

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

MARK BOLES, individually and on)	
Behalf of all others similarly situated, <i>et al.</i> ,)	
)	
Plaintiffs,)	Cause No.: 4:21-cv-00378-CDP
)	
v.)	Hon. Catherine D. Perry
)	
CITY OF ST. LOUIS, MISSOURI, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANT GREGORY F.X. DALY’S RESPONSE IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER**

Introduction

Plaintiffs’ claims cannot proceed, let alone succeed, in federal court because of the Tax Injunction Act (“TIA”), 28 U.S.C. §1341 and age-old principles of comity. Under this law, the federal courts will not entertain challenges to the administration of state and local tax collection where, as here, there is a viable procedure available to Plaintiffs under state law to raise their claims. While Defendant Gregory F.X. Daly’s answer or other responsive pleading to the Plaintiffs’ Complaint is not yet due, Defendants believe it highly likely that this Court will ultimately dismiss this suit based on the TIA, comity and related reasons.

Plaintiffs now seek a Temporary Restraining Order to prohibit the Collector from making certain public statements and to require the Collector to accept Plaintiffs’ interpretation and application of the Earnings Tax. For the reasons set forth below, Defendant asks this Court to deny Plaintiffs’ motion.

Law and Argument

Plaintiffs cannot meet the stringent requirements under federal law for obtaining the extraordinary remedy of a temporary restraining order. “The basis of injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies.” *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506–07, 79 S.Ct. 948 (1959). Plaintiffs have demonstrated neither basis. In order to obtain a temporary restraining order, Plaintiffs must demonstrate (1) the threat of irreparable harm absent an injunction, (2) the state of balance between this harm and the injury that granting the injunction will inflict on other adverse parties, (3) the probability of success on the merits, and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); *see also KForce, Inc. v. Beacon Hill Staffing Group LLC*, No. 4:14-cv-1880-CDP, 2015 WL 128060, at *6 (E.D.Mo. Jan. 8, 2015). Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008). The party requesting injunctive relief bears the “complete burden” of proving that an injunction should be granted. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

I. *Plaintiffs Are Unlikely to Succeed on the Merits Because the Court Lacks Subject-Matter Jurisdiction.*

First and foremost, this Court should consider its subject matter jurisdiction. It is axiomatic that if this Court lacks subject matter jurisdiction, Plaintiffs are unlikely to succeed on the merits, because the Court cannot reach the merits. *See, e.g., U.S. v. 24.30*

Acres of Land, 105 Fed.Appx. 134, 135 (8th Cir. 2004) (Affirming dismissal of counterclaim for lack of subject matter jurisdiction).

The TIA provides: “The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” The TIA deprives the federal district courts of any subject matter jurisdiction to grant injunctive or declaratory relief regarding the constitutionality of any tax under State law. *Diversified Ingredients, Inc. v. Testa*, 846 F.3d 994, 996 (8th Cir. 2017) (affirming dismissal for lack of subject matter jurisdiction over claims seeking injunctive and declaratory relief regarding constitutionality of Ohio business tax); *Cal. v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982) (TIA strips district courts of jurisdiction to award declaratory relief).

The principal of comity also bars a taxpayer’s action brought in federal court to redress allegedly unconstitutional administration of a state tax system. This is true for injunctive and declaratory relief as well as for claims seeking damages under 42 U.S.C. § 1983. *Great Lake Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943) (“This Court has recognized that the federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers from collecting state taxes where state law affords an adequate remedy to the taxpayer.”); *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 116 (1981) (“[W]e hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the

validity of state tax systems in federal court.”). Further, the Supreme Court has noted that the long-standing doctrine restraining federal courts from granting relief that risks disrupting state tax administration under principles of comity is “[m]ore embracing than the TIA.” *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417, 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010).

Here, the Court lacks subject matter jurisdiction over all of Plaintiffs’ Claims. In Counts I, II, and V, Plaintiffs seek damages under § 1983 for violations of their Fourteenth Amendment rights due to Collector’s refusal to grant a refund of Plaintiffs’ earning tax. These claims lack subject matter jurisdiction. *Fair Assessment*, 454 U.S. at 116. In Counts III and VI, Plaintiffs seek injunctive relief that the Collector’s actions in collecting the earnings tax are unconstitutional under the Fourteenth Amendment. These claims lack subject matter jurisdiction. *Great Lakes*, 319 U.S. at 297; *Diversified Ingredients*, 846 F.3d at 996. Count IV seeks damages under § 1983 for violations of Plaintiffs’ Fourth Amendment rights due to Collector’s refusal to grant a refund of Plaintiffs’ earning tax. This claim lacks subject matter jurisdiction. *Fair Assessment*, 454 U.S. at 116. Finally, Count VII seeks a declaratory judgment that Collector’s refusal to grant a refund of the earnings tax to Plaintiffs’ violates the Hancock Amendment to the Missouri Constitution. This claim lacks subject matter jurisdiction. *Great Lakes*, 319 U.S. at 297; *Diversified Ingredients*, 846 F.3d at 996.

The TIA applies to attempts to use the federal courts to challenge municipal taxes. *Non-Resident Taxpayers Ass’n v. Municipality of Philadelphia*, 478 F.2d 456 (3rd Cir. 1973). In

Non-Resident Taxpayers, an association representing non-resident taxpayers of Philadelphia challenged the right of that city to “impose and collect a wage tax on non-residents of Philadelphia[.]” *Id.* at 457. The Third Circuit upheld the dismissal of the claims as to the municipal defendants under the TIA because “the complaint seeks a permanent injunction against the collection of a tax authorized by state law, and such an injunction is prohibited by the [TIA].” *Id.* at 458. Here, the City of St. Louis, exactly like the City of Philadelphia, is empowered by state law to adopt an earnings tax. R.S.Mo. § 92.105–92.200. Plaintiffs tacitly admit as much in their Complaint. Compl. At ¶ 85. Therefore, the TIA and the doctrine of comity are applicable to this case and the Court lacks subject matter jurisdiction.

Here, Plaintiffs have a “plain, speedy, and effective state remedy” as required by the TIA. “This TIA exception is procedural.” *Diversified Ingredients*, 846 F.3d at 997. “It addresses only whether state law provides a remedy that permits a taxpayer to challenge the state tax at issue in state court.” *Id.* “A state-court remedy is ‘plain, speedy, and efficient’ if it provides the taxpayer with a full hearing and judicial determination at which he or she may raise any and all constitutional objections to the tax, subject to eventual review by the Supreme Court.” *Burris v. City of Little Rock*, 941 F.2d 717, 720 (8th Cir. 1991). “The adequacy of the state remedy is measured according to procedural rather than substantive criteria.” *Id.*

Plaintiffs admit in their Complaint that they have a sufficient state court remedy in a refund action. Compl. at ¶ 115. The procedural mechanism for obtaining a refund is

codified at R.S.Mo. § 139.031. Moreover, it has previously been held by this Court, and affirmed by the Supreme Court, that Missouri maintains an adequate state law remedy to satisfy the requirements of the TIA. *Fair Assessment in Real Estate Ass'n v. McNary*, 478 F.Supp, 1231, 1234 (E.D.Mo. 1979), *aff'd* 454 U.S. at 116.

II. *Plaintiffs Have Failed to Show Irreparable Harm.*

Additionally, Plaintiffs have failed to show irreparable harm. First and foremost, any supposed injury to Plaintiffs is monetary. They have an action in state court to recover any money a state court determines was improperly taxed. Such a legal remedy negates any notion of irreparable harm.

Plaintiffs, citing to *M.B v. Corsi*, No. 2:17-cv-04102-NKL, 2018 WL 5504178, at *5 (W.D. Mo. Oct. 29, 2018), rest on the threadbare assertion that “a threat to a constitutional right is generally presumed to constitute irreparable harm.” However, Plaintiffs have not shown how the requested relief does anything to alleviate a harm to them. Plaintiffs admit that they have all already filed for a refund, so it is unclear how restricting the Collector from publishing that refunds will not be paid does anything to alleviate any harm to Plaintiffs.

The same is true for an injunction directing the Collector on which form to use. It does nothing to alleviate any harm to Plaintiffs who notably are not class plaintiffs at this stage. And importantly, Plaintiffs admit in their papers that any perceived harm to the potential class that Plaintiffs would attempt to represent is not irreparable: “[p]erhaps Plaintiffs will ask the Court to extend the deadline for a number of days equal to the

number of days during which the incorrect forms were posted.” Memorandum in Support, at pg. 13. Since the harm, if any, can be remedied by this Court (assuming it had jurisdiction), it is not irreparable and it would not support injunctive relief.

III. *Any Harm to Plaintiffs is Greatly Outweighed by Harm to the Defendant.*

Third, any harm to Plaintiffs (there is none) is greatly outweighed by the harm to the Defendant (and the City) from granting the injunction. The Collector, an elected County-level office, has a statutory obligation to collect the tax. Any failure to do so or unilateral decision that so-called remote or virtual earnings are not taxable could subject the Collector to liability.

Moreover, the request that this Court issue an order telling the Collector what he can, and cannot say, in public is a restraint on the Collector’s rights under the first amendment. The denial, or grant, of an injunction should lean in favor of the free exercise of first amendment rights. *See Traditionalist American Knights of the Ku Klux Klan v. City of Cape Girardeau, Mo.*, 897 F.Supp.2d 824, 827 (E.D.Mo. 2012) (holding that public interest factor weighed in favor of granting injunction prohibiting municipality from restricting free speech).

Moreover, while Plaintiffs dress their TRO request as one relating only to the forms used, what they actually appear to seek is an order commanding the Collector to allow the refunds Plaintiffs’ claim they are due. Requiring the City to grant the refunds before a decision on the merits would gut the City of a large, but presently unknown, amount of its revenue. By all estimates, the earnings tax provides up to thirty percent (30%) of the City’s

general revenue. Requiring the Collector to accept refunds at this stage would injure the City's ability to operate and place a tremendous burden on the City in collecting improperly refunded taxes.

IV. An Injunction is Not in the Public Interest.

Finally, granting the requested injunction is not in the public interest for reasons stated above regarding the importance of the tax to the operations of the City.

Conclusion

For the foregoing reasons, Plaintiffs have failed to meet their high burden of showing that the *Dataphase* factors weigh in favor of granting the requested injunctive relief.

WHEREFORE, Defendant Gregory F.X. Daly prays this honorable court deny Plaintiffs' Motion for Temporary Restraining Order and for any other and further relief the Court deems just and proper under the circumstances.

Respectfully submitted:

CAPES, SOKOL, GOODMAN & SARACHAN, P.C.

By: /s/ David H. Luce

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on all counsel of record by operation of the Court's CM/ECF system on this 5th day of April, 2021.

/s/ David H. Luce