IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
STATE OF MISSOURI

MARK BOLES, individually and on behalf of all other similarly situated, *et al.*,	)	Cause No.: 2122-CC00713
Plaintiffs,	)	Div. No.: 19
v.	)	
CITY OF ST. LOUIS, MISSOURI, *et al.*,	)	
Defendants.	)	

DEFENDANTS' JOINT MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED PETITION

Defendant Gregory F.X. Daly, in his official capacity as the collector of revenue for the City of St. Louis ("Collector") and Defendant City of St. Louis, Missouri ("City") (together, "Defendants"), jointly move this Court to dismiss Plaintiffs' Second Amended Petition for failure to state a claim. In support of their motion, Defendants state as follows:

Introduction

Although Plaintiffs complain that they have had to pay a tax they do not owe, instead of presenting a straight-forward and properly pleaded refund action, they cast their claims as violations of various federal and state constitutional provisions. The Collector and City believe that the earnings tax applies to services rendered virtually or remotely. But after literally making a federal case of the issue, Plaintiffs appear to want to avoid that core issue and turn this case into something akin to a mass tort action for violation of their constitutional rights.

The claims presented in the Second Amended Petition fail for a variety of reasons. First, Plaintiffs' new claims for declaratory judgment fail because Plaintiffs have not, and cannot, show that they lack an adequate remedy at law. Second, Plaintiffs' attempt to form a class to pursue a

refund claim under R.S.Mo. § 139.091 (the "Refund Statute") is barred by binding precedent.[1] Third, their claims under the Fourth and Fourteenth Amendments to the U.S. Constitution and their claims under 42 U.S.C. § 1983 fail to state a claim because they are barred by the remedy afforded to Plaintiffs under the Refund Statute. Finally, Plaintiffs' claims under the Hancock Amendment fail to state a claim because the facts alleged, taken as true at this stage, fail to show that Defendants have instituted a new tax or expanded the tax base.

As such, all counts of Plaintiffs' Second Amended Petition, save a portion of Count III, should be dismissed.

Standard

To determine whether a petition states a cause of action upon which relief can be granted, the court tests the adequacy of the petition. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001). "In order to avoid dismissal, the petition must invoke substantive principles of law entitling plaintiff to relief and . . . ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial." *Jordan v. Bi-State Development Agency*, 561 S.W.3d 57, 59 (Mo. App. E.D. 2018). "[T]he facts contained in the petition are assumed true and construed in favor of the plaintiffs." *Ward v. West County Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. banc 2013). However, "conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief can be granted." *A.F. v. Hazelwood Sch. Dist.*, 491 S.W.3d 628, 632 (Mo. App. E.D. 2016) (citing *Hendricks v. Curators*

[1]As currently stated, Count III appears to seek a class action refund under R.S.Mo. §139.031. As set forth in the text, Missouri does not recognize such a claim. To be clear, Defendants, without waiving any claims, defenses, or arguments, would not seek *dismissal* of a refund action under R.S.Mo. §139.031 pursued by the four individual Plaintiffs for the taxes they claim they did not owe. Defendants do not understand Count III to be such a claim and, thus, seek dismissal of it.

of University of Missouri, 308 S.W.3d 740, 747 (Mo. App. W.D. 2010)). Failure to state a claim for which relief can be granted demands dismissal, pursuant to Rule 55.27(a)(6).

Law and Argument

I. Plaintiffs' Declaratory Judgment Counts Fail as a Matter of Law.

In their Second Amended Petition, Plaintiffs allege two new counts for declaratory judgment. In Count I, they seek a declaration as to whether the City's Earnings Tax ordinance applies to teleworking. In Count II, they seek a declaration as to when the statute of limitations runs for the submission of a protest. Neither of these claims are properly the subject of a declaratory judgment action.

An action for a declaratory judgment is proper where a party presents: (1) a justiciable controversy; (2) legally protectable interests; (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law. *Khali v. 3HB Corp.*, 621 S.W.3d 1, 10 (Mo.App. E.D. 2021). "A petitioner who satisfies all three of these elements must also demonstrate that he or she does not have an adequate remedy at law." *Kinder v. Holden*, 92 S.W.3d 793, 805 (Mo.App. W.D. 2002); *see also Snelling v. Kenny*, 491 S.W.3d 606, 615 (Mo.App. E.D. 2016) ("An essential element of a declaratory judgment action is that the plaintiff does not have an adequate remedy at law.").

As discussed below, and discussed in previous briefings before the Court, Plaintiffs have an adequate remedy at law. The Refund Statute provides Plaintiffs with a mechanism to seek a refund of taxes that they allege they do not owe. In that process, a determination will be made as to whether each Plaintiff's teleworking activities are encompassed within the City's Earnings Tax ordinance. Each Plaintiff will also be required to prove that they complied with language of the Refund Statute, including the timely submission of a protest to the Collector. Because both of

these issues encompassed in Counts I and II will be determined within Plaintiffs' adequate remedy at law, Plaintiffs' declaratory judgment counts should be dismissed.

What Plaintiffs attempt to do here is procure an advisory opinion on when non-parties can submit protests to the earnings tax and whether those non-parties' teleworking is subject to the earnings tax. Such advisory opinions are not the purpose of the declaratory judgment act. For instance, in *Snelling*, the plaintiff appealed a dismissal of his declaratory judgment claim to determine whether the posting of a publication on the internet gave rise to a separate cause of action from the printed publication. 491 S.W.3d at 615. The court of appeals affirmed the dismissal, holding that the plaintiff "merely sought an advisory opinion on a legal issue related to his other claims, wherein he would have an adequate remedy at law if successful." *Id.* The same is true here. If Plaintiffs are able to show under Count III that they timely submitted a protest of the earnings tax and that the earnings tax should not apply to teleworking, then they will be entitled to a refund. Therefore, the Court should dismiss Counts I and II because Plaintiffs have an adequate remedy at law.

II. Plaintiffs' Constitutional Claims Fail to State a Claim Upon Which Relief Can be Granted since §139.031 is the Only Mechanism by Which They Can Seek Relief.

In Counts IV through VIII, Plaintiffs seek relief on the same facts, but under various provisions of the United States Constitution. However, a multitude of cases stand for the proposition that Plaintiffs' exclusive remedy to recover overpayments of taxes, or illegally assessed taxes, is the Refund Statute. *Pac-One, Inc. v. Daly*, 37 S.W.3d 278, 281 (Mo.App. E.D. 2000); *Lett v. City of St. Louis*, 948 S.W.2d 614, 620 (Mo.App. E.D. 1996) ("The [Missouri] Supreme Court has consistently held that taxes once paid can **only** be recovered through proper statutory proceedings[.]") (emphasis added); *Metts*, 84 S.W.3d at 109 ("Once paid, taxes, even

taxes collected under an unconstitutional statute, can only be recovered through proper statutory proceedings.").

Counts IV through VIII are attempts to get around the required statutory proceedings set out in the Refund Statute. These types of end-runs around the Refund Statute are specifically prohibited. *Id*. For example, in *Stufflebaum v. Panethiere*, the Missouri Supreme Court was presented the question of "whether a taxpayer may bring an action in Missouri courts under 42 U.S.C. § 1983 to redress an allegedly unconstitutional imposition of a tax on real estate." 691 S.W.2d 271, 272 (Mo. banc 1985). The Supreme Court held that because the Refund Statute provides a "plain, adequate, and complete remedy for the redress of [taxpayers'] grievances[,]" they could not proceed under constitutional claims and were required to pursue their statutory remedy. *Id*.

The same is true here. Plaintiffs have an adequate remedy under the Refund Statute to seek a refund of taxes paid. Of course, whether Plaintiffs are successful in their refund claim is not the issue. Importantly, in *Stufflebaum* the determination was not that under the specific facts and circumstances of that case, the Refund Statute provided a "plain, adequate, and complete remedy[,]" but that the Refund State provides such a remedy for a taxpayer to seek redress of his grievances. *Id.* That Plaintiffs have a procedural avenue to challenge the tax is the issue. *Id.*; *Burris v. City of Little Rock*, 941 F.2d 717, 720 (8th Cir. 1991) ("The adequacy of the state remedy if measured according to procedural rather than substantive criteria."). Therefore, Plaintiffs' constitutional claims set out in Counts IV through VIII fail to state a claim upon which relief can be granted and dismissal is proper.

III. Plaintiffs' Cannot Maintain a Class Action Refund Claim as a Matter of Law.

The only mechanism by which Plaintiffs can receive a refund of taxes paid, whether they were paid erroneously, paid under duress, or where illegally assessed, is through the Refund

Statute. *Lett*, 948 S.W.2d at 620. The Refund Statute allows any taxpayer to protest all or any part of any current taxes assessed against the taxpayer, except taxes collected by the director of revenue. R.S.Mo. §139.031.1. To invoke the statute, the taxpayer is required to: (1) make a full payment of the current tax bill before the delinquency date; (2) file with the collector a written statement setting forth the grounds on which the protest is based, including the true value in money claimed by the taxpayer; and (3) commence an action in the circuit court based on the protest within ninety (90) days. *Id.* "Section 139.031 must be meticulously followed." *Blankenship v. Franklin County Collector*, 619 S.W.3d 491, 512 (Mo.App. E.D. 2021) (*citing Adcor Realty v. State Tax Comm'n*, 627 S.W.2d 604, 606 (Mo. banc 1982)).

Plaintiffs continue to seek in Count III to certify a class of taxpayers seeking a refund, despite binding precedent stating they cannot. In their Second Amended Petition, Plaintiffs seek to distinguish the precedent on this point by arguing that the case law disallowing class actions under the Refund Statute are "dicta." *Second Amended Petition* at ¶ 29. Plaintiffs further try to distinguish *Blankenship* by stating that "the court in *Blankenship* did not rule out the possibility of a class action suit in a tax refund case." *Id.* at ¶ 30.

Plaintiffs' argument cannot be squared with the actual language used by the court in *Blankenship*: "Section 139.031, construed strictly, does not authorize class refunds but only refunds for individual taxpayers who follow its procedures." *Blankenship*, 619 S.W.3d at 512. Missouri Supreme Court precedent stands for the same point of law. *Lane v. Lensmeyer*, 158 S.W.3d 218, 222 n. 7 (Mo. banc 2005) ("[N]othing in section 139.031 authorizes class refunds.").

Moreover, this proposition of law is not *dicta*. "Obiter dicta is by definition a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it." *Calvert v. Plenge*, 351 S.W.3d 851, 857 (Mo.App. E.D. 2011). The issue before the

Court in *Blankenship* was whether "refunds may issue under section 139.031.1 on a class-wide basis so long as the class representative complied with its requirements." 619 S.W.3d at 512. Therefore, the Court's statement in *Blankenship* that the Refund Statute does not allow class-wide relief is not dicta.

Here, Plaintiffs, as a matter of law, cannot certify a class for a refund of taxes paid and their continued attempts to do so should be dismissed with prejudice.

IV. Plaintiffs' Hancock Amendment Claim Fails to Allege a Legislative Action Resulting in a New Tax or an Expansion to the Base of an Existing Tax, and therefore Fails to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' final count is under § 22(a) of the Hancock Amendment. To support their Hancock Amendment claim, Plaintiffs allege that "[b]y requiring nonresidents of the City to pay earnings tax for work or services performed or rendered outside the City, the City has imposed a new tax or expanded the tax base without a vote of the people." *Second Amended Petition*, at ¶ 324.

The fundamental problem with this claim is that, like the constitutional claims, it ignores the Refund Statute. If Defendants are correct and the earnings tax is applicable to remote work, no new tax has been created. A pre-existing statute and ordinance have simply been applied to a set of facts that is, to say the least, novel. And if the Courts find that the earnings tax statute and ordinance do not apply to remote work, Plaintiffs would be entitled to a refund (assuming they complied with the requirements of the Refund Statute) and no new tax has been created.

More particularly, the portion of Section 22(a) on which Plaintiffs rely prohibits a political subdivision from *increasing* a current tax levy without approval from the voters. To determine if a tax levy violates Section 22(a), the constitution's prohibition is measured against the tax levy. *Tax Increment Fin. Com'n v. J.E. Dunn Const.*, 781 S.W.2d 70, 74 (Mo. banc 1989). "Actions which do not increase the levy do not violate the Hancock Amendment even if a particular

taxpayer's liability is increased." *City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.*, 37 S.W.3d 867, 871 (Mo.App. E.D. 2001) (emphasis added).

The Hancock Amendment does not define the term "levy." However, "levy" has been defined by the Missouri Supreme Court as follows:

> "In its proper sense . . . it is the formal and official action of a legislative body invested with the power of taxation . . . whereby it determines and declares that a tax of a certain amount, or of a certain percentage on value, shall be imposed on persons and property subject thereto."

State v. County Com'n of Johnson County, 918 S.W.2d 252, 256 (Mo. banc 1996) (emphasis added).

In the present case, Plaintiffs do not allege that the levy – the 1% earnings tax – has been increased. Nor do Plaintiffs allege any "formal and official action of a *legislative* body" by which an increased levy has been imposed. *Id.* (emphasis added). Such a legislative action is necessary to properly allege a violation of the Hancock Amendment. *See, e.g., Blankenship*, 619 S.W.3d at 504.

In fact, Plaintiffs' Second Amended Petition refers entirely to Section 5.22.020 of the City Code, which Plaintiffs' do not allege has been changed, since the adoption of the Hancock Amendment or otherwise, in any respect to levy an increased tax. Plaintiffs' claim here is that City "exceeded its authority," not that it levied a new tax. *Second Amended Petition* at ¶ 325. Whether Plaintiffs are correct in this claim is an issue that should be decided under a properly pleaded Refund Statute claim.

Separately, Plaintiffs fail adequately to allege that Defendants have violated the Hancock Amendment's prohibition against expanding the "base of an existing tax." That term is also not defined within the Hancock Amendment but has been defined by the Missouri Supreme Court as "that property against which the law allows a government to levy a tax." *Tannenbaum v. City of*

Richmond Heights, 704 S.W.2d 227, 229 (Mo. banc 1986). But here, as Plaintiffs allege, the tax continues to be applied against earnings. The ordinance continues to state, as Plaintiffs allege, that a 1% earning tax is due "for work done or services performed or rendered in the City." *Second Amended Petition*, at ¶ 1. Again, whether serviced rendered in the City include remote or virtual work for a City employer is a question that can and should be answered in connection with a properly pleaded Refund Statute claim.

Because Plaintiffs have failed to allege a formal legislative action that imposed a new tax levy or that expanded the base of an existing tax, Plaintiffs' Hancock Amendment claim fails to state a claim upon which relief can be granted and should be dismissed.

Conclusion

For the foregoing reasons, Plaintiffs' Second Amended Petition should be dismissed, with prejudice, save for each individual Plaintiff's claim for a refund under the Refund Statute.

WHEREFORE, Defendants Gregory F.X. Daly, in his official capacity as the Collector of Revenue for the City of St. Louis, Missouri and the City of St. Louis, Missouri respectfully request that the Court grant their Joint Motion to Dismiss, dismiss Plaintiffs' Second Amended Petition, with prejudice, as described above, and for any other and further relief the Court deems just and proper under the circumstances.

Respectfully submitted:

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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 July 1, 2021.

/s/ David H. Luce