2018 IL App (1st) 171015-U

THIRD DIVISION
March 21, 2018

No. 1-17-1015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAGICJACK VOCALTEC, LTD. and YMAX COMMUNICATIONS CORPORATION,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 15 L 50159
CITY OF CHICAGO DEPARTMENT OF FINANCE,	)	Honorable Carl Anthony Walker,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's order granting defendant's motion to dismiss the complaint; a plaintiff who contests whether a tax is authorized fits within the exception to the common law requirement of exhausting administrative remedies before seeking relief in a court of equity; however, because plaintiffs elected to pursue a remedy before the Department of Administrative Hearings prior to seeking relief from the court they will not be allowed to abandon this avenue and must exhaust administrative remedies before going into court.

¶ 2 Plaintiffs, magicJack VocalTec, Ltd. (VocalTec) and Ymax Communications Corporation (YMCC) sought declaratory and injunctive relief from the city of Chicago's

attempts to audit and assess the Chicago Simplified Telecommunications Tax and Emergency Telephone System Surcharge. Plaintiffs argue the city is not within its constitutional authority to tax them because they lack physical nexus to Chicago. The trial court found plaintiffs failed to exhaust available administrative remedies and that it therefore lacked jurisdiction to review the matter due to the Administrative Review Law (735 ILCS 5/3-101 (West 2016)). For the reasons that follow we affirm the trial court's order granting defendant's motion to dismiss plaintiffs' complaint and denying plaintiffs' motion for preliminary injunction.

¶ 3 BACKGROUND

¶ 4 This appeal stems from defendant, city of Chicago, initiating an audit and sending tax notices to plaintiffs, VocalTec and YMCC. VocalTec is an Israeli company that owns patents for technology related to voice over internet protocol, which allows customers to place calls over the internet by using a device plugged into their computer. The device, called a "magicJack" is produced and sold by magicJack LP, a Delaware limited partnership with its principle place of business in Florida. VocalTec owns holdings of YMCC, a Delaware corporation with its principle place of business in Florida. magicJack is a subsidiary of VocalTec and an affiliate of YMCC. Neither VocalTec nor YMCC have any employees assigned to Chicago and do not have employees visit Chicago. Neither plaintiff owns or leases any real or personal property in Chicago, although YMCC owns a computer server and other equipment in Oak Brook, Illinois.

¶ 5 The city of Chicago imposes a tax on the "act or privilege of originating in the city or receiving in the city intrastate [and interstate] telecommunications by a person at a rate of seven percent of the gross charge for such telecommunications purchased at retail." Municipal Code of Chicago §§ 3-73-030(A)(1) & (A)(2) (Added June 19, 2002) (Chicago Simplified Telecommunications Tax (Telecommunications tax)). To prevent multistate taxation on

interstate telecommunications, "any taxpayer, upon proof that the taxpayer has paid a tax in another state on the same event, shall be allowed a credit against the tax authorized by subsection (A)(2) to the extent of the amount of such tax properly due and paid in such other state." *Id.* § 3-73-030(B) (Added June 19, 2002). "The tax imposed by this chapter is not imposed on any act or privilege to the extent that such act or privilege may not, under the Constitution or Statutes of the United States, be made the subject of taxation by the city." *Id.* § 3-73-030(C) (Added June 19, 2002).

¶ 6 The city also imposes an emergency telephone system surcharge (911 Surcharge) "upon billed subscribers of telecommunications services within the corporate limits of the city other than 'wireless communications service.' " *Id.* § 3-64-030(A) (As Amended July 30, 2014). The tax pays for a "voice grade communications channel between a subscriber's premises and the public switched network capable of providing access to the 9-1-1 emergency telephone system." *Id.*

¶ 7 The Illinois Simplified Municipal Telecommunications Tax Act, 35 ILCS 636/5-1 *et seq.* (West 2016), and the Emergency Telephone System Act, 50 ILCS 750/1 *et seq.* (West 2016), require providers of telecommunications services and equipment to collect and remit the city's Telecommunications tax and 911 Surcharge.

¶ 8 YMCC has been a registered telecommunications carrier with the Illinois Commerce Commission since 2006. In 2013, YMCC registered to collect and remit Chicago's 911 Surcharge. On February 28, 2014, the city of Chicago Department of Finance (the Department) sent VocalTec an Initial Notice stating that VocalTec was being investigated for possible noncompliance with Chicago tax laws. The Department requested VocalTec complete a taxpayer information form for itself and each of its affiliates. VocalTec responded to the notice

on April 4, 2014. VocalTec wrote to the Department that it should not be subject to any tax in Chicago because neither VocalTec nor its affiliates have any physical presence in Chicago. The Department replied by issuing a formal notice of audit initiation.

¶ 9 In November 2014, the Department requested plaintiffs waive the statute of limitations for assessing a tax against them for the period July 1, 2007 through June 30, 2008. Plaintiffs refused to agree to an extension of the limitations period. The Department then issued estimated assessments of two taxes – the Telecommunications tax and the 911 Surcharge – against VocalTec and YMCC for the period July 1, 2007 through June 30, 2008. Each defendant was sent a tax estimate of $40,040.92 for the Telecommunications tax (including penalty and interest charges) and $31,023.14 for the 911 Surcharge (including penalty and interest charges).

¶ 10 On January 21, 2015, plaintiffs filed their protest of the tax assessment and petition for hearing with the Department of Administrative Hearings. On March 3, 2015, plaintiffs filed their complaint in the circuit court of Cook County. On March 12, 2015, the trial court issued an order granting plaintiffs a stay of the administrative proceedings and audit and assessment of taxes pending the court's review of plaintiffs' motion for preliminary injunction.

¶ 11 On December 17, 2015, the city sent plaintiffs an estimated tax assessment for the period July 1, 2008 through June 30, 2009. Each plaintiff was assessed $81,866.98 for the Telecommunications tax (including penalty and interest charges), and $114,587.20 for the 911 Surcharge (including penalty and interest charges). On January 12, 2016, plaintiffs filed their protest of this tax assessment and petition for hearing with the Department of Administrative Hearings.

¶ 12 Plaintiffs filed an amended complaint with the trial court on March 23, 2016 to include a claim against the most recent tax assessments issued by the city. Count I of plaintiffs' amended

complaint requested the court "find and declare that the Department lacks the authority under the Illinois Constitution or the United States Constitution to audit plaintiffs." Count II of plaintiffs' amended complaint argued "the Department's attempt to audit and assess plaintiffs is exactly the type of conduct for which the Illinois and United States Constitutions provide protection." The prayer for relief requested the court enjoin administrative proceedings and "enjoin the Department from auditing or assessing plaintiffs or their affiliates." Plaintiffs argued "the Department's effort to audit and assess VocalTec and YMCC under these circumstances violates the Due Process Clause of the Illinois and United States Constitutions ***. It also violates the Commerce clause of the United States Constitution."

¶ 13 Defendant filed a motion to dismiss plaintiffs' amended complaint, claiming the trial court lacked jurisdiction to review the matter because there was no final administrative decision for the court to review. Defendant argued plaintiffs failed to exhaust available administrative remedies, and therefore could not seek equitable relief. Defendant also contested plaintiffs' motion for preliminary injunction, claiming plaintiffs had not established a *prima facie* case for granting a preliminary injunction. After the trial court heard from both parties on the matters, the court issued an order on March 22, 2017 denying plaintiffs' motion for preliminary injunction and granting defendant's motion to dismiss. The court found defendant was entitled to dismissal as a matter of law because "plaintiffs filed protests and petitions for hearing with the [Department of Administrative Hearings] instead of paying pursuant to the Protest Monies Act and having the circuit court rule." The trial court found that because plaintiffs initiated protests with the Department of Administrative Hearings, they had to pursue that avenue of recourse until they received a final administrative decision from which they could seek judicial review. The court denied plaintiffs' motion for preliminary injunction because it found plaintiffs did not face

irreparable harm. Plaintiffs timely filed their appeal of the trial court's order. After plaintiffs filed their notice of appeal, they filed a motion before this court to continue the stay of administrative proceedings and audit and assessment of taxes, pending our review of the matter. On June 2, 2017, we entered an order granting plaintiffs' motion for continued stay.

¶ 14 ANALYSIS

¶ 15 Defendant maintains the trial court lacked jurisdiction to review the matter because plaintiffs failed to exhaust all administrative remedies before seeking equitable relief. Plaintiffs contend they were not required to exhaust administrative remedies because their claim fell into one of the recognized exceptions to the exhaustion of remedies doctrine: plaintiffs claim the tax imposed on them is unauthorized by law. They argue defendant's motion to dismiss their amended complaint should be denied.

¶ 16 "A section 2–619 motion admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Because the trial court's grant of a 2-619 motion to dismiss involves a pure issue of law, we review the dismissal of plaintiffs' amended complaint *de novo*. "It is well settled that our review of a section 2–619 dismissal is *de novo*." *Id.* In ruling on a section 2-619 motion to dismiss, we "interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Id.*

¶ 17 Exhaustion of Remedies - Motion to Dismiss

¶ 18 The trial court granted defendant's 2-619 motion to dismiss because it found it lacked jurisdiction to hear the matter due to plaintiffs' failure to exhaust available administrative remedies. Defendant argues it is entitled to judgment as a matter of law because the trial court lacked jurisdiction over the matter due to the lack of a final decision issued by the Department of

Administrative Hearings. "Trial courts have original jurisdiction of all justiciable matters except those exclusively within the jurisdiction of the Illinois Supreme Court and may review administrative actions 'as provided by law.' [Citation.] Trial courts may be divested of their original jurisdiction by the legislature where it places original jurisdiction in an administrative agency." *City of Kankakee v. Department of Revenue*, 2013 IL App (3d) 120599, ¶ 11. Under the Administrative Review Law, "[j]urisdiction to review *final* administrative decisions is vested in the Circuit Courts." (Emphasis added.) 735 ILCS 5/3-104 (West 2016).

¶ 19 Plaintiffs here filed their challenge to the taxes in the Department of Administrative Hearings and subsequently filed a complaint for relief in the circuit court without receiving a final administrative decision for the court to review. Plaintiffs contend the circuit court erred granting defendant's motion to dismiss because they met the exception to the common law rule that they must exhaust administrative remedies because they challenged the authority of Chicago to impose the taxes on them.

¶ 20 Under the exhaustion of remedies doctrine, "the general rule is that a taxpayer is limited to first exhausting administrative remedies provided by statute beginning with the Board of Review—the remedy at law for an incorrect assessment—before seeking relief in the circuit court." *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 295 (2010). There are two notable exceptions to the general rule that a taxpayer must exhaust available administrative remedies before seeking judicial review: "a taxpayer need not look to the remedy at law but may seek injunctive or declaratory relief in circuit court where the tax or assessment is unauthorized by law or where it is levied upon property exempt from taxation." *Id.* at 296. Here plaintiffs claim the tax assessments levied against them are unauthorized by law because they are outside the city's taxing jurisdiction and they may seek relief from the court without a final

administrative decision.

> "We note that public officials have no taxing power except that which is delegated to them by the legislature. [Citations.] The obligation of citizens to pay taxes is purely a statutory creation, and taxes can be levied, assessed and collected only in the manner expressly spelled out by statute. [Citation.] A tax is therefore 'unauthorized' when the taxing body has no statutory power to tax. [Citation.] It has also been held that the actions of an assessor are unauthorized by law where the assessor acts with respect to property over which he has not been given any jurisdiction by statute." *Id.* at 295.

¶ 21 We agree with plaintiffs that the common law provides an exception to the exhaustion of remedies doctrine for plaintiffs contesting an unauthorized tax. However, the common law is also clear that a party may not utilize this exception if the party has already filed a protest with the Department of Administrative Hearings. Our supreme court has repeatedly affirmed this longstanding common law rule.

> "The same rule is applicable in a case of this kind as where a party is assessed and taxed for property that is exempt from taxation, or where he is taxed and assessed by parties having no power or authority to assess the property, or where the assessing and taxing officers assess and tax property that is not in their territory or jurisdiction. In all such cases the aggrieved party has his remedy by injunction to enjoin the assessment and collection of such taxes, although he also has an adequate remedy to be relieved from such assessment before the board of review. The two remedies are cumulative, and the party so aggrieved may pursue either remedy-the one by injunction, or the one by applying to the board of review. The

> only limitation in such cases is that, where he elects to pursue the remedy before the board of review, he will not be allowed to abandon it and then go into equity; but he may go into equity in the first instance and have relief." *Young*, 285 Ill. at 370 (citing *Illinois Central R. Co. v. Hodges*, 113 Ill. 323 (1885); *School Directors of Union School District No. 4 v. School Directors of New Union School District No. 2*, 135 Ill. 464 (1891); *Searing v. Heavysides*, 106 Ill. 85 (1883); *First National Bank of Urbana v. Holmes*, 246 Ill. 362 (1910); *Moline Water Power Co. v. Cox*, 252 Ill. 348 (1911)).

See also *Hodges*, 113 Ill. at 326 ("If the party elect the remedy provided by this section, he will not be allowed to abandon it and then go into equity, but he may go into equity in the first instance, and have relief."); *Millennium Park Joint Venture, LLC*, 241 Ill. 2d at 301 ("[W]hen a taxpayer elects to pursue the remedy before the Board of Review, he will not be allowed to abandon it and then go into equity, but he may go into equity in the first instance and have relief."). In this case, because plaintiffs first filed their protest and request for hearing with the Department of Administrative Hearings before filing their complaint in the trial court, plaintiffs cannot now invoke the exception to the exhaustion of remedies doctrine and abandon their administrative review.

¶ 22 In their brief plaintiffs claim they presented a facial challenge to the taxing ordinances. They argue presenting a facial challenge in an administrative proceeding would be futile and they could not get relief because an administrative agency is not authorized to declare legislation unconstitutional. See Municipal Code of Chicago § 3-4-340(A)(2) ("the administrative law officer shall not hear or decide any claim that any ordinance is unconstitutional on its face or that the city council did not have authority to enact the ordinance."). They assert their facial

challenge to the ordinance may still be brought in the trial court prior to a final administrative decision even though they have filed a protest with the Department of Administrative Hearings, because the department lacks the authority to declare an ordinance unconstitutional.

> "A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully [citations], because an enactment is facially invalid only if no set of circumstances exists under which it would be valid. [Citation.] The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008).

Plaintiffs' claim that their complaint raised a facial constitutional challenge is clearly refuted by the record. Instead, plaintiffs in their complaint alleged the tax could not be assessed on them because of facts particular to them. Plaintiffs did not request the trial court to declare the 911 Surcharge or the Telecommunications tax unconstitutional. "If a plaintiff prevails in an as-applied claim, he may enjoin the objectionable enforcement of the enactment only against himself, while a successful facial attack voids the enactment in its entirety and in all applications." *Id.* at 306. Plaintiffs sought to enjoin the objectionable enforcement against themselves, not to have the taxes voided entirely.

¶ 23 Count I of plaintiffs' amended complaint requests the court to "find and declare that the Department lacks the authority under the Illinois Constitution or the United States Constitution to audit plaintiffs." Count II of plaintiffs' amended complaint argues "the Department's attempt to audit and assess plaintiffs is exactly the type of conduct for which the Illinois and United States Constitutions provide protection." The prayer for relief requested the court enjoin administrative proceedings and "enjoin the Department from auditing or assessing plaintiffs or

their affiliates." Nowhere in the amended complaint do plaintiffs make the argument that the Telecommunications tax or the 911 Surcharge are unconstitutional. Rather than taking issue with the law, plaintiffs complain of the Department's conduct. Plaintiffs' complaint simply does not make the argument the taxes are unconstitutional. It instead argues "the Department's effort to audit and assess VocalTec and YMCC under these circumstances violates the Due Process Clause of the Illinois and United States Constitutions ***. It also violates the Commerce clause of the United States Constitution." Critically, the complaint does not state the law as written violates the Illinois and United States Constitutions. The constitutional infirmity plaintiffs complain of arises from "the Department's effort to audit and assess" plaintiffs.

¶ 24 We believe the legislation that created the agency empowered it to determine the questions raised by plaintiffs when they filed their protest and request for hearing because the agency is authorized to impose a tax only as long as it does not violate the statutes and constitution of the United States. The agency is required to determine whether imposition of a tax violates the constitution and statutes of the United States. "The tax imposed by this chapter is not imposed on any act or privilege to the extent that such act or privilege may not, under the Constitution or Statutes of the United States, be made the subject of taxation by the city." Municipal Code of Chicago § 3-73-030(C) (Added June 19, 2002). The agency therefore can determine the question raised by plaintiffs - whether imposing a tax on plaintiffs violates the constitution and statutes of the United States.

¶ 25 Plaintiffs argue in their appellate briefs that they raised a facial constitutional challenge by claiming the 911 Surcharge and the Telecommunications tax are overbroad and vague because the laws allow the city to reach parties it has no jurisdiction over. However, plaintiffs failed to make this argument anywhere in their complaint or amended complaint. Instead, as

noted above, plaintiffs requested the trial court find the city's act of auditing and assessing plaintiffs unconstitutional. We construe plaintiffs' claims as plainly an as-applied challenge.

¶ 26 Finally, we note the trial court found plaintiffs failed to exhaust available administrative remedies on the basis that "plaintiffs filed protests and petitions for hearing with the [Department of Administrative Hearings] instead of paying pursuant to the Protest Monies Act and having the circuit court rule." Plaintiffs argue the trial court erred by dismissing the complaint on this basis because the Protest Monies Act only applies to certain payments made to the State of Illinois, and not to taxes imposed by municipalities. 30 ILCS 230/1 (West 2016). They claim the trial court mistakenly found plaintiffs had another avenue of recourse outside of administrative proceedings. However, we review the judgment of trial court, not its reasoning, and may affirm the judgment for any reason supported by the record. *Bruel and Kjaer v. Village of Bensenville*, 2012 IL App (2d) 110500, ¶ 22. Here the record shows plaintiffs first filed a protest in the Department of Administrative Hearings, and then filed their complaint in court two months later. Our common law is clear that once a party initiates administrative proceedings, they may no longer invoke the unauthorized by law exception to the exhaustion of remedies doctrine and may not abandon their administrative action. *Millennium Park Joint Venture, LLC*, 241 Ill. 2d at 301; *Young*, 285 Ill. at 370; *Hodges*, 113 Ill. at 326. Therefore, we affirm the judgment of the trial court dismissing plaintiffs' complaint.

¶ 27 Plaintiffs sought a preliminary injunction to halt the administrative proceedings and the audit and assessment of taxes, pending the disposition of this case. Because we affirm the trial court's order granting defendant's motion to dismiss, the resolution of whether the motion for preliminary injunction should be granted pending review by the court is moot. Thus, we do not reach the merits of plaintiffs' motion for preliminary injunction. The June 2, 2017 order entered

by this court granting a continued stay is hereby vacated.

¶ 28 We affirm the trial court's order granting defendant's motion to dismiss. Although plaintiffs' argument that a tax was unauthorized by law was within the common law exception to the exhaustion of remedies doctrine, plaintiffs forfeited their right to invoke the exception because they first filed for relief with the Department of Administrative Hearings. Therefore, plaintiffs' protest and as-applied challenge to the ordinance is properly within the jurisdiction of the Department of Administrative Hearings, and we affirm the trial court's decision to defer to the Department of Administrative Hearings and its dismissal of the complaint. *Millennium Park Joint Venture, LLC*, 241 Ill. 2d at 301; *Young*, 285 Ill. at 370; *Hodges*, 113 Ill. at 326.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.