

**In The  
Supreme Court of Ohio**

<b>State ex rel. JAMES PALM, et al.</b>	:	
	:	
<i>Relators,</i>	:	Case No. 2021-0960
	:	
v.	:	Original Action in Mandamus
	:	
	:	
<b>JEFF McCLAIN, et al.</b>	:	
	:	
<i>Respondents.</i>	:	

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**MOTION TO DISMISS OF RESPONDENT  
TAX COMMISSIONER JEFF McCLAIN**

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Now comes Respondent Ohio Tax Commissioner Jeff McClain and moves this Court to dismiss Relators’ Complaint for failure to state a claim under Civ.R. 12(B)(6). A memorandum in support of Respondent’s motion is attached.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### INTRODUCTION

Relators bring this action in mandamus seeking an order to compel Respondents, Treasurer of State Robert Sprague and Tax Commissioner Jeff McClain, to “jointly adopt policies and procedures for the processing of payment of taxes . . . such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt,” as prescribed by R.C. 5703.058. Relators believe that compliance with the provisions of R.C. 5703.058 would result in the processing of tax payments made by or on behalf of individual taxpayers and allege that the Tax Commissioner’s failure to comply with R.C. 5703.058 has resulted in their being denied credit for withholding tax that their employers allegedly made on their behalf. But Relators are wrong on both counts: the Tax Commissioner has complied with R.C. 5703.058, and his compliance did not affect Relators’ ability to determine the amount of withholding that their employees may have made on their behalf.

Not only are Relators wrong in their belief about the meaning and effect of R.C. 5703.058, they are wrong in their choice of action. Relators’ mandamus action fails for several reasons. First, mandamus is inappropriate where it is an attempt to bypass the exclusive special statutory tribunal for the adjudication of certain disputes. *State, ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 250-251, 257; 855 N.E.2d 1188, 1193-1194, 1198-1199 (2006). The General Assembly has created the Board of Tax Appeals and designated that it is the appointed tribunal for litigation of tax disputes with the Tax Commissioner, such as disagreements over the correct amount of income tax that is due. *See* R.C. 5717.02. Moreover, the General Assembly has prohibited any common pleas court from issuing any order which has the effect of suspending or staying any order, determination, or direction of the Department

of Taxation. R.C. 5703.38; *Hakim v. Kosydar*, 49 Ohio St.2d 161 (1977). This gives further effect to the legislature's intention that tax disputes be heard and decided by the specialized tribunal that is knowledgeable and experienced in the interpretation and application of tax law.

Second, in a similar vein, Relators have not exhausted this administrative remedy for the resolution of tax disputes. The "failure to exhaust [their] available administrative remedies bars the issuance of a writ of mandamus." *State ex rel. Bailey v. Indus. Comm'n. of Ohio*, 62 Ohio St. 3d 191, 192-93, 580 N.E.2d 1081, 1082 (1991). The Complaint does not allege that Relators filed a petition for reassessment of tax assessed or that they pursued a refund of any alleged overpayment with the Tax Commissioner. And they admit that they have not appealed any final determination of the Tax Commissioner to the Board of Tax Appeals, which has jurisdiction over such matters. Relators contend that because they would not prevail in such appeals, they are relieved of the requirement to exhaust their administrative remedies. It is unknown whether they would have prevailed in an administrative appeal. They may have been able to convince the Board of Tax Appeals that their employers withheld tax, and the Board may have ordered that they be credited with an amount in line with their wages. But whether Relators would *prevail* does not mean that the administrative remedies are not *available*. Relators' failure to take advantage of the available administrative remedies is cause for dismissal of their mandamus action.

But even if Relators could avoid dismissal on the two bases above, their mandamus claims against the Tax Commissioner fail because they cannot establish a clear legal right to their requested relief. Relators' entire action is based on an erroneous reading of law. R.C. 5703.058 pertains only to policies and procedures for processing payments received by the Treasurer of State from *state* entities. It has no application to individual taxpayers.

Finally, mandamus fails because Relators cannot establish the lack of an adequate remedy in the ordinary course of the law. Relators could have pursued administrative relief through a petition for reassessment or sought a refund of the alleged withholding and appealed any denial to the Board of Tax Appeals and then to this Court. Relators chose to forego that prescribed remedy at law in the belief that they would not have obtained relief. They cannot now seek this extraordinary writ as a substitute for the prescribed remedy.

For all of these reasons, Relators' Complaint against the Tax Commissioner should be dismissed.

### **STATEMENT OF FACTS**

Relators allege that the Tax Commissioner and the Treasurer are jointly failing to comply with R.C. 5703.058, a statute that pertains to the processing of tax payments. *Id.* at ¶ 22. They claim that Respondents' failure "to adopt and issue policies and procedures in conformity with R.C. 5703.058" results in duplicate collection of personal income taxes from taxpayers who do not possess a W-2 form from their employers when filing their tax returns, because they do not receive credit for the withholding that their employers allegedly made and remitted. *Id.* at ¶ 22-24. Relators also allege that because the Respondents have not complied with R.C. 5703.058, the Tax Commissioner is failing to notify taxpayers of any credit account balance for which a refund is due, pursuant to R.C. 5703.77. *Id.* at ¶ 24.

Relators Palm and Pearson are two taxpayers who were unable to obtain a copy of their W-2 forms to file their taxes for certain years. *See id.* at ¶ 25-55. Relator Palm did not file Ohio personal income tax returns for tax years 2016 through 2018. *Id.* at ¶ 25. He wished to come into compliance in 2020, but he did not have the W-2's issued by his employers for those years, showing his wage and withholding information necessary for completion of his tax returns. *Id.*

Palm was unable to contact the company he worked for in 2017 to obtain duplicate W-2's because it was no longer in business. *Id.* at ¶ 26. Although Palm was able to obtain his wage and income statements from the IRS for 2016-2018, these statements did not show the amounts of Ohio income taxes that were withheld by Palm's employers. *Id.* at ¶¶ 28-29.

Palm filed his Ohio tax returns for 2016 through 2018 in December 2020, and listed "unknown" for the amount withheld by his employer for state taxes on those returns. *Id.* at ¶ 33. The Department processed Palm's returns giving Palm "zero credit" for the amount withheld and paid to the State of Ohio by his employers. *Id.* at ¶ 35. For the 2016 tax year, the Department sent a notice indicating that Palm had a balance due of \$49.12. *Id.* at ¶ 36; Ex. G. For the 2018 tax year, the Department sent a notice for a balance due of \$253.11. *See* Ex. H. Palm believes that he does not owe these taxes, and believes that he is instead owed a refund. *Compl.* at ¶ 37, 39. Palm, however, did not respond to the billing notice to challenge the amount contained on the notice, nor did he file a petition for reassessment seeking review of any assessment that was issued to him.

Relator Pearson is a taxpayer who likewise did not timely file her tax returns for tax years 2017 through 2019. *Comp.* at ¶ 43. Pearson, too, wished to become compliant with her filing responsibilities and obtained her wage and income statements for 2017-2019 from the IRS. These did not show her Ohio withholding, and she wrote "unknown" in the margin of her Ohio tax returns for those years. Ohio processed those returns as if no withholding had been made, but also calculated that no tax was due. *Id.* at ¶¶ 50-52. She did not seek a refund of the alleged withholding administratively. Pearson believes that withholding was made and remitted by her employer, and that this withholding should have been refunded to her. *Id.* at ¶ 53.

Relators Palm and Pearson now seek a writ of mandamus “directing Respondents Commissioner McClain and Treasurer Sprague to ‘jointly adopt policies and procedures for the processing of payment of taxes . . . such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt,’ as required by R.C. 5703.058, and to timely notify taxpayers of any credit account balance for which a refund is due, as required by R.C. 5703.77.” Compl. at p. 16. Relators also seek “proper adjustments to the amount of state tax owed” and any refunds to be issued to Relator Palm and Relator Pearson, accordingly. *Id.* at pp. 16-17. In addition, Relators ask “[t]hat the policies and procedures adopted by Commissioner McClain and Treasurer Sprague include the availability of account transcripts that list the amount of state withholding paid by the employer to the State of Ohio on the employee’s behalf, such that individual taxpayers can avail themselves of legal avenues by the Ohio Board of Tax Appeals and/or legal avenues under R.C. Chapter 2723.” *Id.* at p. 17.

### STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which a court may grant relief challenges the sufficiency of the complaint, itself. *Volbers-Klarich v. Middletown Mgt. Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11-12. A court must consider and accept all factual allegations of the complaint as true and afford all reasonable inferences in the non-moving party’s favor. *Id.* However, “unsupported conclusions are not considered admitted and are not sufficient to withstand a motion to dismiss.” (Citations omitted.) *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). Further, courts are not required to accept unsupported legal conclusions as true when reviewing motions to dismiss under Civ.R. 12(B)(6). *See Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988). Dismissal under Civ.R. 12(B)(6) is warranted if “it appears beyond doubt that the



plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

*O'Brien v. Univ. of Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

## ARGUMENT

### **I. Relators' Mandamus Action Is Barred Because It Is An Attempt To Bypass The Special Statutory Proceedings Prescribed For Challenging The Tax Commissioner's Final Determinations Of Tax Liabilities Or Credits.**

The Ohio Supreme Court has explained that “courts that have general constitutional jurisdiction in mandamus \* \* \* patently and unambiguously lack jurisdiction over mandamus claims concerning matters that are vested in the exclusive original jurisdiction of another tribunal.” *See, State ex rel. Geauga Cty. Budget Comm. v. Court of Appeals for Geauga Cty.*, 1 Ohio St.3d 110, 438 N.E.2d 428 (1982) (court of appeals may not exercise original jurisdiction over mandamus action because Board of Tax Appeals had exclusive jurisdiction to determine whether a budget commission had improperly refused to certify a levy). Thus, “where statutory relief is afforded and clearly applies to the circumstances giving rise to the action, the statute constitutes the exclusive avenue for seeking redress.” *Westbrook v. Prudential Ins. Co.*, 37 Ohio St.3d 166, 170 (1988).

These precepts with respect to tax issues were cogently illustrated in *State ex rel. Iris Sales v. Voinovich* (8th Dist. 1975), 43 Ohio App.2d 18. There, a taxpayer filed a complaint alleging that certain property suffered from a discriminatory tax classification. The complaint sought declaratory relief as well as a writ of mandamus. The court rejected the taxpayer's suit, explaining that “[b]ecause Chapters 5715 and 5717 of the Ohio Revised Code establish special statutory procedures for testing the valuation and assessment of real property for tax purposes, declaratory judgment is an inappropriate remedy which should not be granted as an alternative to these statutory procedures.” *Id.* at syllabus, ¶ 3. Moreover, the court remarked that “[t]he circumvention of these special statutory procedures would nullify the legislative intent to have specialized tax questions initially determined by boards and agencies specifically designed and created for that purpose.” *Id.* at 23.

Other Ohio appellate courts have similarly refused to exercise jurisdiction over mandamus and declaratory judgment actions involving issues where the Board of Tax Appeals is the statutorily designated tribunal for litigation. *Zupancic v. Wilkins* (Jul. 8, 2009), 10<sup>th</sup> Dist. App. No. 08AP-472, 2009-Ohio-3688, ¶ 25 (finding that an “action for declaratory judgment is not the proper vehicle by which to challenge the Tax Commissioner’s decision.”); *Withintime, Inc. v. Cuyahoga Cnty. Fiscal Officer* (May 12, 2016), 8<sup>th</sup> Dist. App. No. 103482, 2016-Ohio-2944, ¶ 15 (“Declaratory, injunctive, and mandamus actions are inappropriate to obtain a reduction of taxable value of real property.”).

The special statutory proceedings that govern state income tax disputes are set forth in Revised Code Chapters 5747, 5703, and 5717. If the Tax Commissioner finds that a taxpayer has failed to timely file an income tax return, files an incorrect return, or fails to pay the full amount of the taxes due, he may make an assessment against the taxpayer for any deficiency based upon any information in the Commissioner’s possession. R.C. 5747.13(A). The taxpayer to whom the assessment is issued may file with the Commissioner a written petition for reassessment setting forth his objections to the assessment. R.C. 5747.13(B). The petition must be filed within sixty days after service of the notice of assessment. *Id.*

If a petition is properly filed, and the taxpayer requests a hearing, the Commissioner will review the assessment and anything submitted by the taxpayer in support of his objections and issue his final determination that reduces, affirms, or increases the assessment. R.C. 5703.60(A). The final determination is served on the taxpayer, and it is subject to appeal to the Board of Tax Appeals under the provisions of R.C. 5717.02.

An evidentiary hearing is held by the Board of Tax Appeals, if requested by the taxpayer, where documentary and testamentary evidence can be presented in support of the appeal. The Board will review the evidence and issue its decision and order that can affirm, reverse, vacate, modify or remand the final determination of the Tax Commissioner. R.C. 5717.03(F). The decision and order of the Board of Tax Appeals may be appealed directly to this Court or the court of appeals of the county in which the taxpayer resides, as provided by R.C. 5717.04.

In addition to the right to petition and review an assessment of tax, the General Assembly provided an administrative process for obtaining overpayments of tax by filing an application for refund. R.C. 5747.11. If the refund application is denied, the taxpayer may appeal that denial to the Board of Tax Appeals in the same manner as the appeal of a final determination of an assessment.

The General Assembly has provided a complete statutory process for the review and appeal of tax assessments and claims for refund, providing an exclusive, specialized tribunal for the litigation of tax disputes along with a direct right of appeal from that tribunal to this Court. Having failed to avail themselves of this statutory process dedicated to tax matters, Relators cannot now use mandamus to, in effect, obtain a review of the Commissioner's determinations of their tax liability, bypassing the process provided by Ohio law.

**II. Mandamus Is Not Available Because Relators Have Failed to Exhaust Their Administrative Remedies.**

As discussed above, an administrative remedy is provided for the appeal of determinations of the Tax Commissioner. “[I]t [is] necessary to exhaust administrative remedies before asserting the extraordinary remedy of mandamus.” *Burt Realty Corp. v. Columbus*, 21 Ohio St. 2d 265, 268, 257 N.E.2d 355, 357 (1970), citing *State ex rel. Lieux v.*

*Westlake*, 154 Ohio St. 412, 412, 96 N.E.2d 414, 415 (1951); *State ex rel. Foreman v. City Council of Bellefontaine*, 1 Ohio St. 2d 132, 132, 205 N.E.2d 398, 399 (1965).

The statutory administrative process for seeking a review of the Tax Commissioner's assessment and final determination of a taxpayer's income tax liability is described above. Relators have not alleged that they or their representatives initiated this process by filing a petition for reassessment for any of the tax years at issue. Nor have they alleged that they filed applications for refund of any alleged overpayments. Their failure to avail themselves of and exhaust their available administrative remedies disqualifies them from obtaining mandamus relief. *State ex rel. Bailey*, 62 Ohio St. 3d at 192-93.

Relators conclude that these administrative remedies are not available because they do not think they could "prevail" without their W-2 information. Compl. ¶ 67; *see also id.* ¶¶ 59, 71. This is an example of circular reasoning. There is an available remedy, but we can't meet the burden of proof to obtain the remedy; therefore, there is no available remedy. Under Relators' reasoning, every taxpayer who does not have the documentation to support his appeal can claim that there is no available remedy at law because they could not prevail without the documentation. It is enough that an appeal is available to preclude a writ of mandamus. *State ex rel. Peoples v. Johnson*, 2017-Ohio-9140, ¶ 11, 152 Ohio St. 3d 418, 420, 97 N.E.3d 426, 428, quoting *State ex rel. Luoma v. Russo*, 141 Ohio St.3d 53, 2014-Ohio-4532, 21 N.E.3d 305, ¶ 8. "And the fact that a prior appeal was unsuccessful or even wrongly decided does not mean that it was not an *adequate* remedy." *State ex rel. Peoples v. Johnson*, 2017-Ohio-9140, ¶ 11, 152 Ohio St. 3d 418, 420, 97 N.E.3d 426, 428, citing *State ex rel. Walker v. State*, 142 Ohio St.3d 365, 2015-Ohio-1481, 30 N.E.3d 947, ¶ 14; *State ex rel. Barr v. Pittman*, 127 Ohio St.3d 32, 2010-Ohio-4989, 936 N.E.2d 43, ¶ 1.

And Relators do not *know* that they would not prevail through an appeal to the Board of Tax Appeals. The Board has a small claims division where the standards of proof are not as stringent, and the taxpayer does not need to incur the expense of hiring an attorney. They might have been successful in convincing the Board that they should receive credit for an appropriate amount of withholding. But even if they were not successful in a BTA appeal, that does not mean that it was not an adequate remedy. *State ex rel. Peoples*, 152 Ohio St. 3d 418, at ¶ 11. Not having the evidence that is needed to win an appeal does not mean that the statutory remedy does not exist. And the existence of the administrative remedy that Relators utterly failed to utilize removes mandamus from consideration.

### **III. Relators Do Not Meet The Three Requirements For Mandamus**

To be entitled to a writ of mandamus, the relator must establish by clear and convincing evidence three elements: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the respondent; and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Richard v. Mohr*, 135 Ohio St.3d 373, 2013-Ohio-1471, 987 N.E.2d 650, ¶ 4; *State ex rel. Luonuansuu v. King*, 2020-Ohio-4286, 161 Ohio St. 3d 178, 161 N.E.3d 619, ¶ 15, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13.

#### **A. Relators have failed to establish a clear legal right to the requested relief from the Tax Commissioner. The premise of their mandamus action is based on a misreading of the plain language of R.C. 5703.058**

Relators' entire suit is premised on an incorrect reading of the statute. They claim that R.C. 5703.058 requires the Tax Commissioner and the Treasurer to jointly adopt policies and procedures for processing tax payments from individual taxpayers, see, e.g., Compl. at ¶ 21. It does not. A plain reading of the statute shows that R.C. 5703.058 provides for the adoption of

policies and procedures that govern payments to the Treasurer made by state entities, not individual citizens.

The Tax Commissioner receives tax payments with respect to many of the taxes that he administers, and must deposit those payments into the State bank account and report the deposits on OAKS, the State Accounting System. The OAKS approval is sent to the Treasurer who makes sure that the amount shown as deposited on OAKS balances with the bank account. R.C. 5703.058 relates to policies and procedures for these activities.

R.C. 5703.058 does not impose any duty on the Tax Commissioner and Treasurer to develop policies and procedures with respect to accounting for tax payments made by individuals. It simply requires policies and procedures that supplement R.C. 113.08:

Before January 1, 2008, the tax commissioner and the treasurer of state shall consult and jointly adopt policies and procedures for the processing of payments of taxes administered by the tax commissioner such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt by the commissioner or treasurer. The policies and procedures shall apply to all such payments received on or after January 1, 2008. *The policies and procedures are supplemental to rules adopted by the treasurer of state under section 113.08 of the Revised Code.*

(Emphasis added.) R.C. 5703.058. R.C. 113.08 addresses deposits made by state entities or agents thereof, and provides, in pertinent part:

“[E]very *state officer, employee, and agent shall*, at the times and in the manner prescribed by rule of the treasurer of state, pay to the treasurer of state all money, checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise. The rules shall include procedures for dealing with checks not accepted for deposit by a financial institution and procedures for making deposits into the custodial funds of the treasurer of state. The payer shall specify the amount being paid, the fund to which the amount is to be credited, and any other information required by the treasurer of state. The treasurer of state shall file and preserve the record of payment.”

(Emphasis added.)

A plain reading of these two provisions shows that they are concerned with the proper procedures for depositing and accounting for money collected by the agencies from taxes, licenses, premiums, and other activities. The General Assembly's express reference to R.C. 113.08 limited the scope of R.C. 5703.058 to developing policies related to tax payments. And, the Tax Commissioner and Treasurer fulfilled their duty to develop such policies, as is shown in Relators' Exhibit C. Thus, Relators' flawed reading of R.C. 5703.58 cannot support their mandamus action, because it fails to establish the existence of a clear legal right to mandamus

Nor can Relators establish by clear and convincing evidence that they are entitled to a writ crediting them with money allegedly withheld by their employers. Compl. at ¶ 17. Relators have not claimed to have any such evidence, but instead aver that the amount of tax that may have been withheld is unknown. Comp. at ¶¶ 40, 51. Because Relators cannot establish that an amount of tax was withheld from their pay for state withholding, they cannot meet the mandamus burden of clear and convincing evidence of their entitlement to the writ.

**B. Relators cannot establish that the Tax Commissioner has violated any “clear legal duty.”**

Relators have not shown that the Tax Commissioner has a clear legal duty to provide them with their requested relief as they have alleged in their Complaint. Relators' Complaint is premised on their contention that R.C. 5703.058 required the Tax Commissioner and Treasurer to adopt policies and procedures that would account for tax payments made by or on behalf of individuals. They repeatedly contend that the failure of the Commissioner and Treasurer to have developed these policies has resulted in their financial injury. But as shown above, this contention is based on a misreading of R.C. 5703.058, and no such duty *clearly* exists.



**C. Because Relators had adequate legal remedies through the administrative review and appeal process they may not seek mandamus.**

As discussed above, Relators had adequate legal remedies by way of (1) petitioning for reassessment; (2) appealing the final determination to the Board of Tax Appeals; and (3) appealing any adverse judgment of the Board of Tax Appeals to this Court or a lower court of appeals. These remedies existed, but Relators did not pursue them. “It is well settled that mandamus will not issue when an individual has a plain and adequate remedy in the ordinary course of law.” *State ex rel. Hodge v. Ryan*, 2012-Ohio-999, ¶ 6, 131 Ohio St. 3d 357, 358, 965 N.E.2d 280, 281-82; *see also State ex rel. Steele v. McClelland*, 2018-Ohio-4011, ¶ 9, 154 Ohio St. 3d 574, 576, 116 N.E.3d 1267, 1269; R.C. 2731.05. “Administrative remedies are plain and adequate remedies that preclude mandamus.” *State ex rel. Hodge*, 131 Ohio St. 3d 357, at ¶ 6.

**CONCLUSION**

For the foregoing reasons, Relators’ Complaint against the Tax Commissioner should be dismissed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on May 24, 2022, by electronic mail upon the following:

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