[Cite as *Zupancic v. Wilkins*, 2009-Ohio-3688.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Edward H. Zupancic, Lake County Auditor et al.,	:	
	:	
Plaintiffs-Appellants/ Cross-Appellees.	:	No. 08AP-472 (C.P.C. No. 05CVH03-3375)
v.	:	(REGULAR CALENDAR)
William W. Wilkins, Tax Commissioner of Ohio et al.,	:	
	:	
Defendants-Appellees/ Cross-Appellants.	:	

D E C I S I O N

Rendered on July 28, 2009

John R. Varanese, for appellants/cross-appellees Edward H. Zupancic, Benton-Carroll-Salem Local School District Board of Education, Jo Ellen Regel and The Lake County Board of County Commissioners.

Bricker & Eckler LLP, and *Mark A. Engel*, for appellant/cross-appellee Benton-Carroll-Salem Local School District Board of Education.

Richard Cordray, Attorney General, *Julie E. Brigner* and *Damion M. Clifford*, for appellees/cross-appellants William W. Wilkins, Tax Commissioner of Ohio, and Ohio Department of Taxation.

APPEALS from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Plaintiffs-appellants/cross-appellees, Edward H. Zupancic, Jo Ellen Regal, the Lake County Board of Commissioners, and the Board of Education of the Benton-Carroll-Salem Local School District (collectively "appellants"), appeal from a decision of

the Franklin County Court of Common Pleas, which granted summary judgment in favor of defendants-appellees/cross-appellants, Richard A. Levin, successor to William W. Wilkins, Tax Commissioner of Ohio ("Tax Commissioner"), and the Ohio Department of Taxation (collectively "appellees"). Additionally, appellees cross-appeal, asserting that the trial court erred in finding that it had jurisdiction over appellants' declaratory action.

{¶2} The instant matter involves the taxation of nuclear fuel rod assemblies. The Perry Nuclear Power Station and the Davis-Besse Nuclear Power Plant are located in Lake and Ottawa counties, respectively. The electric companies that own these power plants are public utilities and use nuclear fuel rod assemblies to generate electricity.

{¶3} The electric companies leased the nuclear fuel rod assemblies until their purchase in 2001. When the electric companies leased the nuclear fuel rod assemblies, they were taxed as general personal property pursuant to R.C. Chapter 5711; however, when the electric companies purchased the nuclear fuel rod assemblies, their tax liability was determined by the application of the Ohio public utility property tax contained in R.C. Chapter 5727. This change in methodology, which was effective for the tax year 2003, resulted in a loss of tax revenue to appellants.

{¶4} On March 25, 2005, appellants filed a declaratory judgment action, coupled with requests for both mandatory and prohibitory injunctions, seeking a determination of the term "cost" as used in R.C. 5727.15(C)(2)(b). Appellants claim that the construction of the term for the 2003 tax year had represented a change from prior tax years, although there had been no judicial determination, change in law, or change to an administrative rule to necessitate a different construction. According to appellants, nuclear fuel rod assemblies were (and are) depreciable capital assets, and, as such, the term "cost" as used in R.C. 5727.15(C)(2)(b) was required to be construed as " 'cost as capitalized on

the books and records of the public utility' or 'acquisition cost.' " (Complaint ¶30.) Instead, however, beginning with the 2003 tax year, the Tax Commissioner construed the term "cost" as used in R.C. 5727.15(C)(2)(b) as meaning " 'cost less amortization' and that the nuclear fuel rod assemblies received such treatment because [appellees] viewed them as depletable assets and determined their cost by including an adjustment for what they believed was accumulated depletion (amortization) of the nuclear fuel rod assemblies." (Complaint ¶29.) Appellants alleged that the change in methodology used by the Department of Taxation to determine the apportioned taxable value of the nuclear fuel rod assemblies was "calculated from an unlawful or otherwise arbitrary and capricious construction of the term 'cost' as used in R.C. 5727.15(C)(2)(b)." (Complaint ¶33.)

{¶5} The procedural history germane to this appeal is as follows. Appellees filed a motion to dismiss and a motion for judgment on the pleadings, both of which were denied by the trial court. Thereafter, the parties filed cross-motions for summary judgment; the bases of appellees' motion were that the trial court lacked subject-matter jurisdiction and that the Tax Commissioner's apportionment of the nuclear fuel rod assemblies was correct. The trial court granted appellees' motion but subsequently vacated its decision and reconsidered the parties' cross-motions for summary judgment. The trial court granted both cross-motions in part and denied them in part. The court found that appellants could maintain their action for declaratory relief but that the Tax Commissioner's apportionment methodology was not contrary to law. It is from that decision the parties have appealed.

{¶6} Appellants assert the following assignment of error:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE CROSS-APPELLANT TAX COMMISSIONER AND SHOULD

> HAVE GRANTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS-APPELLANTS CROSS-APPELLEES EDWARD H. ZUPANCIC, JO ELLEN REGAL, THE LAKE COUNTY BOARD OF COMMISSIONERS AND THE BENTON-CARROLL-SALEM LOCAL SCHOOL DISTRICT.

Appellees' cross-appeal asserts the following assignment of error:

> THE TRIAL COURT ERRED IN FINDING THAT IT HAD SUBJECT MATTER JURISDICTION OVER APPELLANTS' DECLARATORY JUDGMENT ACTION.

The threshold issue before this court is whether the trial court had jurisdiction over appellants' declaratory action, the resolution of which depends upon whether a declaratory judgment action is the appropriate mechanism by which to contest a determination made by the Tax Commissioner. A motion to dismiss for lack of subject-matter jurisdiction inherently raises questions of law, and our review is de novo. *Groza-Vance v. Vance,* 162 Ohio App.3d 510, 2005-Ohio-3815, ¶13. Making that determination necessarily requires consideration of the methodology employed by the Tax Commissioner.

Statutory Framework

{¶7} We begin our analysis with the statutory framework involved, as relative to the tax years at issue,[1] in order to put the parties' arguments in context. R.C. 5727.06 sets forth what constitutes the taxable property of a public utility. By the first day of March each year, each public utility is required to file a report with the Tax Commissioner containing sufficient information so as to allow the Tax Commissioner "to make any assessment or apportionment required under [R.C. Chapter 5727]." R.C. 5727.08. Pursuant to R.C. 5727.10, the Tax Commissioner is then required to determine, in

[1] Although R.C. Chapter 5727 has been amended since the tax years at issue, we have used the present tense when referring to pre-amended subsections in that chapter.

accordance with the valuation methods set forth in R.C. 5727.11, the "true value in money of all taxable property required by" R.C. 5727.06 to be assessed.

{¶8} R.C. 5727.11 provides in pertinent part:

> (A) Except as otherwise provided in this section, the true value of all taxable property required by division (A)(2) or (3) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation.
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> * * *
>
> (D)(1) Except as provided in division (D)(2) of this section, the true value of the production equipment of an electric company and the true value of all taxable property of a rural electric company is the equipment's or property's cost as capitalized on the company's books and records less fifty per cent of that cost as an allowance for depreciation and obsolescence.
>
> (2) The true value of the production equipment of an electric company or rural electric company purchased, transferred, or placed into service after the effective date of this amendment is the purchase price of the equipment as capitalized on the company's books and records less composite annual allowances as prescribed by the tax commissioner.
>
> * * *
>
> (G) The cost of property subject to a sale and leaseback transaction is the cost of the property as capitalized on the books and records of the public utility owning the property immediately prior to the sale and leaseback transaction.

The taxable property is then assessed at various percentages of true value. R.C. 5727.111. Once the Tax Commissioner determines the taxable value of the tangible personal property owned by the public utility, it is then apportioned among the various taxing districts in which the public utility's property is located. R.C. 5727.15.

{¶9} On or before the first Monday in October, the Tax Commissioner assesses the taxable personal property of each public utility and issues "a preliminary assessment that reflects the taxable value apportioned to each county and each taxing district in the county." R.C. 5727.23. The preliminary assessment is certified to the public utility, as well as the auditor of the county to which there has been an apportionment. Id. The statute also mandates that the county auditor "place the apportioned taxable value on the general tax list." Id. A preliminary assessment becomes final after 90 days, unless a petition for reassessment is filed pursuant to R.C. 5727.47 by the public utility. Id. If the public utility files such a petition, then the affected county auditor(s) can appeal the Tax Commissioner's determination regarding the petition. If the public utility does not file a petition for reassessment, the preliminary assessment becomes final, but it does not constitute a final determination of the Tax Commissioner under R.C. 5717.02, and, thus, an appeal does not lie from its issuance. In other words, under that scenario, there is no administrative appellate process available to the county auditors who disagree with the Tax Commissioner. County auditors previously had the same standing as taxpayers to challenge a preliminary assessment, but the legislature's amendments to R.C. 5727.23, effective December 31, 1989, eliminated their right to do so.

Parties' Merit Arguments

{¶10} Appellants' argument rests upon the premise that the Tax Commissioner misconstrued the term "cost" in R.C. 5727.15(C)(2)(b), which provides:

> The value of taxable personal property, other than production equipment, shall be apportioned to each taxing district in the proportion that the cost of such other taxable personal property physically located in each taxing district is of the total cost of such other taxable personal property physically located in this state.

Appellants assert that the term "cost," when applied to nuclear fuel rod assemblies, means cost as capitalized on the public utility's books and records, i.e., acquisition cost, and not acquisition cost less depreciation. In support of their argument, appellants point to R.C. 5727.11(A), which requires the Tax Commissioner to use a "method of valuation using cost as capitalized on the public utility's books and records." (Appellant's brief at 14.) They further contend that their definition of "cost" comports with the accounting regulations of the Federal Energy Regulatory Commission ("FERC"), which, according to appellants, requires electric companies to "account for the cost of nuclear fuel rod assemblies by capitalizing the original or acquisition cost of the assemblies and amortizing the capitalized cost of the asset over the service or useful life of the asset." (Appellants' brief at 8.) Appellants maintain the fiction underlying the Tax Commissioner's treatment of the nuclear fuel rod assemblies is that they are not depletable assets, which disappear during use like other consumable commodities, but, rather, such are depreciable capital assets that retain value even after the fissile material is consumed because the rod itself does not disappear. Appellants also take the position that appellees' counter argument confuses two distinct concepts in taxation, i.e., value and cost, but only the latter of which is at issue here in relation to apportionment under R.C. 5727.15(C)(2)(b).

{¶11} Naturally, appellees disagree. The Department of Taxation reconsidered its tax treatment of the nuclear fuel rod assemblies after learning that the electric companies had purchased the same. It conducted "extensive research," and, after consulting with the electric companies, "concluded that nuclear fuel is a commodity that is expended/consumed in its use." (Appellees' responsive brief at 7.) Thus, the Tax Commissioner "determined that the 'cost' of the nuclear fuel rod assemblies pursuant to

R.C. 5727.15(C)(2)(b) was the original cost of the nuclear fuel rod assemblies as capitalized on the books and records of the Electric Companies less the cost attributable to the fuel that had been expended/consumed." Id. The Tax Commissioner "determined it was improper to tax nuclear fuel that no longer existed, which thereby reduced the 'cost' in the apportionment calculation by the cost associated with that no-longer-in-existence fuel." Id.

{¶12} Appellees contend that the fundamental flaw with appellants' argument is that it "ignores the unique characteristics of the assemblies whose value is determined by the amount of nuclear fuel contained within it." (Appellants' responsive brief at 9.)[2] In that regard, appellees assert that the Supreme Court of Ohio recognized in *CC Leasing Corp. v. Limbach* (1989), 23 Ohio St.3d 204, 208, that it was reasonable to assign the full cost of the nuclear fuel rod assemblies to the nuclear fuel. With respect to appellants' argument that the term "cost" used in R.C. 5727.15(C)(2)(b) means "cost as capitalized on the public utility's books and records" found in R.C. 5727.11(A), appellees argue that such violates the admonition that a court cannot add words or delete them from a statute, and the fact the legislature chose not to use the same language in both subsections evidences its intent to distinguish the term in the aforementioned statutes.

Parties' Jurisdictional Arguments

{¶13} Appellees advance a multifaceted argument that the trial court lacked subject-matter jurisdiction to consider the complaint. Appellees first argue that the instant action is, in reality, a direct appeal of the Tax Commissioner's preliminary assessment, which appellants have no statutory right to contest. Appellees also contend that

[2] The parties have stipulated that the "low grade nuclear fuel" that remains in the nuclear fuel rod assemblies after their use in the reactor has been completed has a de minimis or zero salvage value.

appellants' declaratory judgment action is an inappropriate method for challenging the Tax Commissioner's assessment and apportionment of the electric utilities' personal property (the nuclear fuel rod assemblies) because it bypasses the special statutory proceeding established by the legislature, to wit, the Board of Tax Appeals ("BTA"), and supportively cite the maxim that where the legislature has enacted a "complete and comprehensive statutory scheme" governing review by an administrative agency, that agency is vested with exclusive jurisdiction over those matters. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 153. Appellees explain the significance of the foregoing as it relates to this case in that the issues presented "are of a specialized nature that require the expertise of a tribunal with expertise in this area of law and the unseen ramifications of rulings in this area. They also are of a nature that requires adjudication within a framework of statewide application. This need for uniform application of law is precisely why the General Assembly has seen fit to create the special statutory framework for the administrative adjudication and appeal of tax determinations." (Appellees' brief at 15.) Appellees further argue that the Tax Commissioner's action was discretionary, and, as such, cite to *Ohio Academy of Nursing Homes v. Ohio Dept. of Job and Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, for the proposition that a declaratory judgment action is not the proper vehicle to review the Tax Commissioner's decision.

{¶14} Appellants readily concede that they cannot maintain a direct appeal of the Tax Commissioner's preliminary assessment determination but argue that they are not foreclosed from obtaining a judicial construction of the term "cost" by means of a declaratory judgment action. Appellants posit that, although the legislature may have amended R.C. 5727.23 to foreclose the right of appeal by county auditors to the BTA, the

legislature did not amend R.C. 2721.03 to preclude appellants' right to obtain a declaratory judgment. In fact, appellants argue that the contrary is true, that "[d]eclaratory judgment has always been an available remedy where a statutory administrative remedy is unavailable" and cite to several cases in support. (Appellants' responsive brief at 8.) To the extent the Tax Commissioner's act of construing the term "cost" was not ministerial, but involved some degree of discretion, appellants assert that *Raceway Park v. Ohio State Racing Comm.*, 150 Ohio App.3d 702, 2002-Ohio-6838, dictates that they be allowed to maintain the instant action. Appellants also posit that *State ex rel. Ryland v. Tracy* (1992), 78 Ohio App.3d 631 ("*Ryland I*") and *Ryland v. Tracy* (1994), 96 Ohio App.3d 392 ("*Ryland II*"), establish that a declaratory judgment action is a proper method by which to seek review of the Tax Commissioner's action, and they distinguish *Ohio Academy of Nursing Homes* from the case herein.

Trial Court's Decision

{¶15} The parties advanced the same merit and jurisdictional arguments set forth above before the trial court. The court rejected appellees' jurisdictional argument, concluding that the Tax Commissioner's interpretation of the term "cost" was "adequately ministerial," as opposed to discretionary, and, as such, it had jurisdiction. (Trial Court's Decision, Nov. 27, 2007, at 4.) In reaching that conclusion, the trial court relied upon *Raceway Park*, *Ryland I*, and *Ryland II*. The court also relied upon the tenet that R.C. Chapter 2721 is to be liberally construed, and, as applied to this case, explained that "liberal construction requires that an administrative decision be regarded as ministerial enough to permit the court to exercise jurisdiction over a declaratory judgment action when that decision is not otherwise appealable and the administrative decision did not result from a process in which the plaintiff was given a hearing." (Decision at 6.)

{¶16} Having found it had jurisdiction over appellants' declaratory judgment action, the trial court considered the parties' competing merit arguments, resolving the matter in favor of appellees. The court found that nuclear fuel was similar to coal in that both are consumed in the process of generating electricity, and granted summary judgment to appellees "on the issue of whether it was appropriate for the Commissioner to reduce the assessed value of the fuel rods as the fissile material within them is depleted." (Decision at 11.) The trial court explained that "[s]ince the fuel rods have the special characteristic that the fissile material within them is used up over time, it was reasonable for the Tax Commissioner to treat fuel rods differently than other capital assets." (Decision at 11-12.)

Analysis

{¶17} In *French v. Limbach* (1991), 59 Ohio St.3d 153, the Supreme Court of Ohio answered the specific question of whether a county auditor can appeal to the BTA from a preliminary assessment certificate issued by the Tax Commissioner, noting that it was not deciding "the more fundamental questions of whether a county auditor has a right to appeal from any determination of the Tax Commissioner regarding intercounty personal property tax returns, or from any such assessment when it has become final by operation of law." Id. at 154. It would appear then that this case, in essence, begins where *French* left off.

{¶18} There is no dispute that the legislature's amendment of R.C. 5727.23, effective December 31, 1989, eliminated the right of a county auditor to appeal the Tax Commissioner's apportionment of the value of property owned by a public utility to the BTA. Appellants freely concede that they cannot maintain a direct appeal of the Tax Commissioner's construction of the term "cost" as used in R.C. 5727.15, but argue that

they have a right to a declaratory judgment "to obtain review of the Tax Commissioner's construction of the apportionment statute's term 'cost' and his tax value apportionment based on this construction." (Appellants' responsive brief at 3.) Although crafted as a declaratory judgment action, appellants' complaint, distilled to its essence, alleges no more than that they disagree with the Tax Commissioner's construction of the term "cost," which they assert is contrary to Ohio law and resulted in a loss of tax revenue to appellants — styling the complaint as a declaratory judgment action does not conceal the fact that appellants' action is, in reality, an attempt to appeal the decision issued by the Tax Commissioner. Indeed, if appellants were statutorily permitted to appeal the Tax Commissioner's decision to the BTA, it is hard to conceptualize the qualitative difference between that which they would assert in their appeal and that which they have asserted herein.

{¶19} Actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed. *State ex rel. Albright v. Court of Common Pleas* (1991), 60 Ohio St.3d 40, 42 (citations omitted). One of the cases cited by the court in *Albright* was *State ex rel. Iris Sales Co.* v. *Voinovich* (1975), 43 Ohio App.2d 18, in which the Eighth District Court of Appeals dismissed a declaratory judgment action that concerned an issue of taxation. That court stated:

> Although Rule 57 of the Ohio Rules of Civil Procedure permits declaratory relief where appropriate, even when another adequate remedy exists, declaratory relief should not be granted in those situations where a special statutory proceeding has been provided for that purpose. Declaratory relief pursuant to Rule 57 of the Ohio Rules of Civil Procedure is inappropriate where it would result in the by-pass of a special statutory proceeding. The 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 28.

{¶20} Here, there is no special statutory proceeding that appellants could avail themselves of, but that is because the legislature amended R.C. 5727.23 and specifically eliminated the statutory proceeding that they once had, which was an appeal to the BTA. By amending the statute in the way that it did, "the General Assembly has shut the county auditors out" of seeking a review of preliminary assessments issued by the Tax Commissioner. *DeWeese v. Zaino*, 100 Ohio St.3d 324, 326, 2003-Ohio-6502, ¶23. Given that legislative intent is paramount, it follows that if a declaratory judgment action is inappropriate because a special statutory proceeding would be bypassed, such action would also be inappropriate where the legislature purposefully chose to take away a party's right to a proceeding by amending a statute to preclude the same. Accordingly, we find that appellants' action for declaratory relief constituted an improper attempt to bypass the legislature's intent that only the taxpayer can challenge preliminary assessments issued by the Tax Commissioner.

{¶21} There is legal authority that supports the above finding. An instructive case not cited by either party is *Carney v. School Employees Retirement System Bd.*(1987), 39 Ohio App.3d 71, in which this court held that a declaratory judgment action was not the proper vehicle by which to challenge the determination of an agency where the legislature had foreclosed the avenue of a direct appeal. In that case, the plaintiff filed a declaratory judgment action seeking to have a decision of the School Employees Retirement System reviewed. In affirming the trial court's dismissal of plaintiff's complaint, this court explained:

> R.C. 3309.39 states that the determination by SERS of whether a person is entitled to disability retirement benefits is final. Therefore, there is no statutory procedure by which the decision of SERS may be appealed.
>
> Appellant filed an action for declaratory judgment in order to have the SERS decision reviewed. An action for declaratory judgment was not the proper vehicle to use to have the SERS determination reviewed since an action for declaratory judgment cannot be used as a substitute for an appeal and, pursuant to R.C. 3309.39, there is no right to appeal a SERS determination.
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> * * *
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> Since R.C. 3309.39 denied appellant an adequate remedy at law, a cause of action in mandamus is available to her since she has exhausted all administrative remedies from which she has no right to appeal. In addition, mandamus is available in that it may be utilized to correct any abuse of discretion in the administrative proceedings. A cause of action in mandamus will lie to permit a private individual to compel a public officer to perform an official act where such officer is under a clear legal duty to do so, and where relator has an interest or is being denied a right or benefit by reason of the public officer's failure to perform the act which he is under the clear legal duty to perform.

Id. at 72 (citations omitted). Accord *State ex rel. Swartzlander v. State Teachers Retirement Bd.* (1996), 117 Ohio App.3d 131 (declaratory judgment could not be used as a substitute appeal where statute did not give the plaintiff a right to appeal the board's determination); *State ex rel. Shumway v. State Teachers Retirement Bd*. (1996), 114 Ohio App.3d 280; cf. *Perez v. Cleveland*, 78 Ohio St.3d 376, 377, 1997-Ohio-33 (because statute "delimits the procedure for challenging a coroner's verdict, use of declaratory judgment to resolve those same issues is inappropriate."); *Heartland Jockey Club, Ltd. v. Ohio State Racing Comm.* (Aug. 3, 1999), 10th Dist. No. 98AP-1465; *Providence Hosp. v. McBee* (Mar. 17, 1983), 10th Dist. No. 82AP-383.

{¶22} In concluding that appellants cannot maintain the instant action, we must reconcile our decision herein with this court's decision in *Ryland I.* In that case, county auditors filed a writ of mandamus ordering the Tax Commissioner to apportion the values of the situsable personal property of Columbia Gas Transmission Corporation in compliance with R.C. 5727.15(D) for purposes of tax years 1988, 1989, 1990, and 1991. The matter was referred to a magistrate, who recommended that this court deny the county auditors' writ on the grounds that they had an adequate remedy at law by way of declaratory judgment. No party filed objections to the report. After quoting language contained in R.C. 2721.02 and 2721.03, the *Ryland I* court found that a declaratory judgment proceeding would afford the county auditors the opportunity to have their rights declared under R.C. 5727.15 and proceeded to adopt the magistrate's decision as its own. Pursuant to *Ryland I*, the county auditors filed an action for declaratory judgment, and *Ryland II* involves an appeal filed by the Tax Commissioner and the Ohio Department of Taxation from the trial court's decision. The *Ryland II* court found that the doctrine of res judicata precluded any question as to whether the county auditors had a right to bring a declaratory judgment action, as there was no appeal of this court's decision in *Ryland I*.

{¶23} For several reasons, however, we do not find *Ryland I*[3] to be of precedential value. First, upon reflection, it becomes apparent that the analysis in that case was incomplete; there is no citation to authority, save for quoting statutory language, and there is no analysis in support of the court's decision. For example, *Ryland I* does not explain how the county auditors satisfied the requirements for declaratory relief; specifically, the

[3] A Shepard's search reveals that no Ohio court has cited to either *Ryland I* or *Ryland II*.

"rights, status, or other legal relations" to be declared.[4] Second, we agree with appellees that *Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation* (1992), 63 Ohio St.3d 648, superseded *Ryland I* to a palpable extent. Although we do not find *Ryland I* or *Ryland II* to be of precedential value in resolving the matter before us, we do not explicitly overrule the same.

{¶24} Another basis exists for finding that appellants are not entitled to declaratory relief. In *Ohio Academy of Nursing Homes*, the Supreme Court of Ohio held that "[w]hen a state agency's decision is discretionary, and by statute, not subject to appeal, an action in mandamus is the sole avenue of relief available to a party challenging the agency's decision." Id. at syllabus. While the Tax Commissioner's duty to apportion taxes pursuant to R.C. 5727.15 is ministerial,[5] we find the method by which the Tax Commissioner carries out that duty involves the exercise of a high degree of official judgment or discretion, and, therefore, is discretionary. Cf. *Ashland Cty. Bd. of Commrs.*

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[4] This case presents the same question. It is not clear to this court what "rights" appellants have or whether a justiciable controversy exists. Although there is clearly a dispute, "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient to create an actual controversy if the parties to the action do not have adverse legal interests." *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 536, 1996-Ohio-286, paragraph one of the syllabus. The laws pertaining to the valuation and allocation of public utility personal property create no duty on the part of the Tax Commissioner toward the school districts. *Avon Lake*, supra, at 174. The duty of the Department of Taxation to assess, value and apportion property according to the dictates of R.C. Chapter 5727 is a general duty owed to the public and not to any one person or party. Id. And in *Ashland Cty. Bd. of Commrs.* at 655, the Supreme Court of Ohio held that the duty to "certify to county auditors the value of taxable property apportioned to each taxing district is only a public duty." Although appellants assert that they have a "right to a correct apportionment," the aforementioned cases appear to weaken appellants' argument.

[5] A ministerial act has been defined as an act " '* * * which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done.' " *Ohio Boys Town, Inc. v. Brown* (1981), 69 Ohio St.2d 1, 4-5 (citations omitted).

at 656. We also find that appellants' reliance upon *Raceway Park* is misplaced. As such, a declaratory judgment action under R.C. 2721.03 is not available to appellants.

{¶25} Based on the foregoing, we conclude that appellants' action for declaratory judgment is not the proper vehicle by which to challenge the Tax Commissioner's decision. As such, we sustain appellees' cross-assignment of error, and overrule appellants' assignment of error. Cross-appellees' motion to strike cross-appellants' reply brief appendix and portions of cross-appellants' reply brief relying on the appendix is granted as such was not part of the trial court record. The judgment of the Franklin County Court of Common Pleas is reversed, and the case is remanded to that court with instructions to dismiss the complaint.

Motion to strike granted; judgment reversed and cause remanded with instructions.

BROWN and SADLER, JJ., concur.

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