[Cite as *Brown v. Ohio Tax Commr.*, 2012-Ohio-5768.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James Brown [Individually and as Class Representative],	:	
Plaintiff-Appellant/ [Cross-Appellee],	:	
v.	:	No. 11AP-349 (C.P.C. No. 10CVH-02-1753)
Richard A. Levin, Tax Commissioner of Ohio,	:	(REGULAR CALENDAR)
Defendant-Appellee/ [Cross-Appellant].	:	

D E C I S I O N

Rendered on December 6, 2012

Goldenberg Schneider, L.P.A., *Jeffrey S. Goldenberg* and *Todd B. Naylor*; *Taft Stettinius & Hollister, LLP*, and *Charles R. Saxbe*, for appellant.

Michael DeWine, Attorney General, *Sophia Hussain* and *Julie E. Brigner*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiff-appellant/cross-appellee, James Brown ("Brown"), appeals from a judgment of the Franklin County Court of Common Pleas denying the motion to dismiss for lack of subject-matter jurisdiction filed by defendant-appellee/cross-appellant, Joseph W. Testa, Tax Commissioner of the State of Ohio ("Tax Commissioner"), but granting the Tax Commissioner's motion to dismiss on the merits. Because the trial court erred in proceeding to the merits when Brown failed to exhaust the administrative

remedies in R.C. 5739.07 before pursuing an action in the court of common pleas, we reverse.

I. Facts and Procedural Background

{¶ 2} Brown commenced this action on February 4, 2010, by filing a class action complaint against the Tax Commissioner and on behalf of a class of similarly situated Ohio consumers seeking the equitable remedy of restitution for funds he asserts were wrongfully taken by the Tax Commissioner. Brown's complaint alleges the Tax Commissioner improperly collected sales tax on the value of vehicles traded-in as part of the "Cash for Clunkers" program established when President Barack Obama signed the Consumer Assistance to Recycle and Save Act of 2009 ("CARS").

{¶ 3} Under the "Cash for Clunkers" program, consumers could trade-in an eligible trade-in vehicle and purchase a new fuel efficient vehicle and receive a trade-in credit of $3,500 or $4,500 towards the purchase or lease of that new vehicle from a participating car dealer. Participating car dealers could then seek reimbursement from the federal government for the credits given to the consumers.

{¶ 4} Brown's complaint alleges he purchased a new motor vehicle from Columbia Hyundai in Cincinnati, Ohio, on August 5, 2009. In executing the transaction, Brown traded in an eligible vehicle and purchased a new fuel efficient vehicle and received $3,500 toward the purchase of his new vehicle, pursuant to the terms of the "Cash for Clunkers" program. Brown alleges he paid Ohio sales tax on the total purchase price of the vehicle, which included the $3,500 value of his trade-in vehicle. Brown asserts his trade-in should have reduced the purchase price of the vehicle for sales tax purposes. Brown's complaint further alleges the dealership from which he purchased the vehicle charged said sales tax in conformity with Information Release ST 2009-02—Sales and Use Tax: Car Allowance Rebate System ("Information Release ST 2009-02"), issued by the Tax Commissioner in July 2009.

{¶ 5} Information Release ST 2009-02 addressed the issue of whether the $3,500 or $4,500 allowance "is part of the sales price for computing Ohio sales and use tax, or [whether it] can be deducted from the price as a 'trade-in.' " Information Release ST 2009-02 declared that the allowance under the "Cash for Clunkers" program was not a trade-in and did not reduce the price of the purchased vehicle for tax purposes. Instead, it

stated the credit was to be included in the taxable price of the new vehicle and, as a result, consumers must pay sales tax on the full value of the vehicle purchased. The Tax Commissioner cited to R.C. 5739.01(H)(1)(b)(iii) as authority for its position.

{¶ 6} Brown's complaint alleges Information Release ST 2009-02 conflicts with R.C. 5739.01(H)(2), because under the statute, Brown's trade-in should have reduced the price of the vehicle he purchased for sales tax purposes. Brown alleges he and the other members of the class wrongfully paid Ohio sales tax.

{¶ 7} On March 11, 2010, the Tax Commissioner filed a motion to dismiss Brown's complaint pursuant to Civ.R. 12(B)(1), arguing the trial court lacked subject-matter jurisdiction, and pursuant to Civ.R. 12(B)(6), arguing Brown failed to state a claim upon which relief could be granted. On March 25, 2010, Brown filed a memorandum contra to the Tax Commissioner's motion to dismiss, arguing (inter alia): the trial court had jurisdiction over this equitable action; the administrative remedy under R.C. 5739.07 was not adequate; there was no adequate legal remedy available; and R.C. 5739.01(H)(2) exempts the value of trade-ins from sales tax.

{¶ 8} On March 1, 2011, the trial court issued a decision overruling the motion to dismiss as to subject-matter jurisdiction, but granting the Tax Commissioner's motion to dismiss on the merits as a matter of law.

{¶ 9} First, the trial court determined it had subject-matter jurisdiction, finding that because the complaint sought the return of specific funds wrongfully collected or held, it was an action in equity properly before the court of common pleas. The trial court further found equitable relief was available because R.C. 5739.07 and R.C. Chapter 2723 did not provide an adequate legal remedy. Specifically, the trial court held the administrative remedy in R.C. 5739.07 was inefficient and burdensome, given the likelihood of numerous individual lawsuits being filed for small amounts of money. Furthermore, the trial court found the legal remedy in R.C. Chapter 2723 to be inadequate because its requirements were impracticable and overly burdensome as applied to consumer sales transactions.

{¶ 10} Nevertheless, the trial court found the Tax Commissioner was entitled to dismissal on the merits. First, the trial court stated the Tax Commissioner's interpretation of the taxation statutes was entitled to deference, and therefore, its

determination that the "Cash for Clunkers" payments were more like a rebate under R.C. 5739.01(H)(1)(b)(iii) than a traditional trade-in allowance under R.C. 5739.01(H)(2), should be given deference. Second, the trial court found the statutory language of the statute supported the Tax Commissioner's interpretation. Because a participating dealer in the program is not receiving the used vehicle itself as consideration toward the purchase of the new vehicle, but is instead receiving federal funds used to reduce the cost of the new vehicle for the purchaser, the trial court determined the credit was more like a third-party rebate, and thus the allowance should not be subtracted from the purchase price subject to Ohio sales tax. Accordingly, the trial court concluded dismissal was proper. A final judgment entry was journalized on March 1, 2011.

II. Assignments of Error

{¶ 11} Brown has filed a timely appeal in which he asserts the following assignment of error:

> ASSIGNMENT OF ERROR: The Trial Court Erred As A Matter Of Law In Granting the Tax Commissioner's Motion to Dismiss.[1]

{¶ 12} The Tax Commissioner has filed a timely cross-appeal in which he assigns the following errors:

> 1. The trial court erred in not holding that Mr. Brown's action was barred because he did not follow the exclusive statutory scheme for sales tax refunds in R.C. 5739.07.
>
> 2. The trial court erred in not holding that Mr. Brown's action was barred because he failed to exhaust R.C. 5739.07's administrative remedies.
>
> 3. The trial court erred in not holding that Mr. Brown's action in equity was barred because he had an adequate statutory remedy at law under R.C. 5739.07.

[1] Brown's stated assignment of error is very general in its assertion of error. In exploring the issues and arguments presented in his brief, it is apparent that Brown is challenging the trial court's decision granting the Tax Commissioner's motion to dismiss on the merits on the grounds that the Tax Commissioner's interpretation of R.C. 5739.01(H) and its application to the "Cash for Clunkers" program, which resulted in a determination that the program was a third-party rebate that did not reduce the sale price of the vehicle for tax purposes, was erroneous.

> 4. The trial court erred in not holding that Mr. Brown's action was barred because he did not challenge the constitutionality of R.C. 5739.07.
>
> 5. The trial court erred in holding that the administrative remedy in R.C. 5739.07 was an inadequate legal remedy.

{¶ 13} Because the assignments of error raised in the Tax Commissioner's cross-appeal are dispositive, we shall address them first. Additionally, because the first, second, third, and fifth cross-assignments of error are interrelated, we shall address them together.

III. Standard of Review

{¶ 14} In ruling on a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction, the trial court determines whether the claim raises any action cognizable in that court. *Robinson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-550, 2011-Ohio-713, ¶ 5. Subject-matter jurisdiction involves " 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties.' " *Id.*, quoting *Vedder v. Warrensville Hts.*, 8th Dist. No. 81005, 2002-Ohio-5567, ¶ 14. An appellate court reviews de novo a trial court's order granting or denying a Civ.R. 12(B)(1) motion to dismiss. *Robinson* at ¶ 5, citing *Hudson v. Petrosurance*, 10th Dist. No. 08AP-1030, 2009-Ohio-4307, ¶ 12. In deciding a motion to dismiss for lack of subject-matter jurisdiction, the trial court may consider evidence outside of the complaint. *Cerrone v. Univ. of Toledo*, 10th Dist. No. 11AP-573, 2012-Ohio-953, ¶ 5, citing *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus.

{¶ 15} A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6) tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgt.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11. The movant may not rely on allegations or evidence outside the complaint. Id. In reviewing whether a motion to dismiss should be granted, we must accept all factual allegations in the complaint as true. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. A judgment

granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

IV. Tax Commissioner's Cross-Appeal—First, Second, Third, and Fifth Cross-Assignments of Error Addressing the Trial Court's Decision to Deny Dismissal Pursuant to Civ.R. 12(B)(1)

{¶ 16} The Tax Commissioner's first, second, third, and fifth cross-assignments of error collectively address the issue of whether the trial court could properly hear the merits of the case when Brown failed to pursue the administrative remedies set forth under R.C. 5739.07, which establishes a special statutory scheme for pursuing sales tax refunds.

A. Tax Commissioner's Argument

{¶ 17} The Tax Commissioner contends a taxpayer seeking a refund of Ohio sales tax must submit to the special statutory remedy set forth in R.C. 5739.07 before seeking relief in the court of common pleas. Under the exclusivity doctrine, the Tax Commissioner argues a party cannot bypass this special statutory procedure by pursuing an action for equitable restitution in the court of common pleas, as Brown has attempted to do here. The Tax Commissioner argues Brown improperly sought judicial review without requesting a decision from the Tax Commissioner and without appealing its determination through the established administrative process, thereby depriving the Tax Commissioner and/or the Board of Tax Appeals ("BTA") of the opportunity to make a factual record and to exercise its discretion or apply its expertise.

{¶ 18} The Tax Commissioner submits R.C. 5739.07 constitutes the exclusive remedy applicable here. However, even if it does not constitute the exclusive remedy, the Tax Commissioner contends it is, at minimum, an adequate remedy that must be exhausted before seeking relief in the court of common pleas, pursuant to the exhaustion doctrine. The Tax Commissioner further disputes the trial court's determination that the administrative remedy in R.C. 5739.07 is an inadequate legal remedy. The Tax Commissioner submits the refund application process is relatively simple, does not require the assistance of an attorney, would not create numerous lawsuits over small amounts of disputed tax, and would provide for a cost-effective resolution of all refund claims with similar factual and legal issues. To support his overall position, the Tax

Commissioner relies upon a recent decision from our court, *Telsat, Inc., v. Micro Center, Inc.*, 10th Dist. No. 10AP-229, 2010-Ohio-5628.[2]

B. Brown's Argument in Response

{¶ 19} Brown argues the trial court did not err in denying the Tax Commissioner's Civ.R. 12(B)(1) motion to dismiss because R.C. 5739.07 is neither exclusive nor adequate, and as a result, Brown was not limited to this specific remedy or required to exhaust his administrative remedies prior to filing suit in the court of common pleas.

{¶ 20} In support of this conclusion, Brown argues the exclusivity and exhaustion doctrines do not require dismissal here because: (1) it is unnecessary to allow the agency to further develop additional factual background, as there are no facts to be determined, no evidence to be weighed, and the issue involved is strictly one of statutory interpretation; (2) it would be futile to pursue this action with the Tax Commissioner because the Tax Commissioner has already released a formal interpretation of the relevant statutory provisions (i.e., Information Release ST 2009-02) and its interpretation is adverse to applicants requesting refunds; (3) it would be futile and onerous to require thousands of individual consumers to file separate refund applications involving only small amounts of money with the Tax Commissioner when the costs and attorneys' fees involved in pursuing this matter before the BTA (and possibly the Supreme Court of Ohio) far outweigh the refund amount Brown could recover; instead, a single class action could be brought to maximize efficiency; (4) there is no authority finding R.C. 5739.07 to be an exclusive remedy for taxpayers subjected to illegal taxation, but there is a long line of cases permitting taxpayers to seek resolution of tax disputes via the court system; and (5) the process set forth in the statute is not a complete and comprehensive scheme and the statute does not set forth an adequate remedy.

{¶ 21} Finally, Brown attempts to distinguish this case from *Telsat*, arguing the factual circumstances in the two cases are distinguishable. He further argues he has adequately alleged an unjust enrichment claim seeking equitable restitution, which can be pursued in a court of common pleas.

---

[2] Our decision in *Telsat* was released on November 18, 2010. At the time the parties filed their motions to dismiss and memorandum contra, we had not yet issued our decision.

C. Analysis

{¶ 22} Pursuant to R.C. 5739.07, a consumer who believes sales tax was illegally or erroneously collected may file an application for a refund. *See* R.C. 5739.07(A) and (D). In turn, the Tax Commissioner must determine the amount of refund to which the applicant is entitled, if any. R.C. 5739.07(E). If the Tax Commissioner determines the amount of the refund is less than the amount claimed in the application, the commissioner must give the applicant written notice. R.C. 5703.70(A). The applicant can then provide additional information to the Tax Commissioner, request a hearing, or both. R.C. 5703.70(A). Subsequently, the Tax Commissioner must issue a final determination, which the applicant can appeal to the BTA if he or she is dissatisfied with that determination. R.C. 5717.02. The "BTA is the only statutorily recognized forum for review of a tax determination." *Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation*, 63 Ohio St.3d 648, 653 (1992). Finally, the process allows for an appeal of the BTA's determination to a court of appeals or the Supreme Court of Ohio. *See* R.C. 5717.04; *Telsat* at ¶ 10; *Herrick v. Kosydar*, 10th Dist. No. 74AP-218 (Oct. 1, 1974).

{¶ 23} The Tax Commissioner contends this statutory procedure presents an exclusive remedy for seeking a refund of illegally or erroneously paid sales tax. *See Franklin Cty. Law Enforcement Assoc. v. Fraternal Order of Police, Capital City Lodge No. 9*, 59 Ohio St.3d 167, 169 (1991), and *Zanesville v. Fannan*, 53 Ohio St. 605 (1895), paragraph two of the syllabus. ("Where a statute which creates a new right prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option."). *See also Telsat* at ¶ 10, quoting *Avon Lake School Dist. v. Limbach*, 35 Ohio St.3d 118, 119 (1988) (" 'A litigant has no inherent right to appeal a tax determination, only a statutory right.' ").

{¶ 24} However, to the extent it is not an exclusive remedy, the Tax Commissioner submits that it is an adequate statutory remedy which Brown must first exhaust, rather than initiating an action for equitable relief in the court of common pleas.

{¶ 25} The doctrine of exhaustion requires a person to exhaust administrative remedies before seeking relief from the judicial system. *Derakhshan v. State Med. Bd. of*

Ohio, 10th Dist. No. 07AP-261, 2007-Ohio-5802, ¶ 23. The purpose behind the exhaustion doctrine "is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes." *Id.*, citing *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 111 (1990). While many courts have described the exhaustion doctrine as a jurisdictional concept, the Supreme Court of Ohio, as well as this court, have clarified that a party's failure to exhaust available administrative remedies is not a jurisdictional defect, but rather an affirmative defense that must be timely asserted or it will be considered waived. *Derakhshan* at ¶ 24, citing *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462 (1997); *Prairie Twp. Bd. of Trustees v. Hay*, 10th Dist. No. 01AP-1198, 2002-Ohio-4765, ¶ 26.

{¶ 26} Nevertheless, whether a party's failure to exhaust administrative remedies is considered a jurisdictional defect or an affirmative defense, it has been established that allowing " 'a claimant * * * to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process.' " *Derakhshan* at ¶ 24, quoting *Carmack v. Caltrider*, 164 Ohio App.3d 76, 2005-Ohio-5575, ¶ 6 (2d Dist.), quoting *Kaltenbach v. Mayfield*, 4th Dist. No. 89-CA-10 (Apr. 27, 1990).

{¶ 27} The procedure set forth under R.C. 5739.02 for collecting sales tax refunds was addressed in *Telsat*, a case which bears many similarities to the one before us now. Therefore, we turn to our analysis in *Telsat* for guidance.

{¶ 28} In *Telsat*, the plaintiff (Telsat, Inc.) filed a complaint in court of common pleas alleging it had been wrongfully charged sales tax on the full price of a television, rather than on the price as it was reduced by various rebates. Telsat Inc. also sought to certify a class of individuals who had been similarly charged. The complaint further alleged that it was not necessary to pursue the refund through the administrative scheme set forth in R.C. 5739.02. While rejecting the argument that it lacked subject-matter jurisdiction due to the plaintiff's failure to pursue administrative remedies, the trial court in *Telsat* granted summary judgment in favor of the Tax Commissioner after determining the post-sale mail-in rebate did not reduce the "price" for purposes of the amount of sales tax to be paid.

{¶ 29} Telsat, Inc. appealed, challenging, inter alia, the determination that post-sale rebates did not reduce the taxable price and the trial court's failure to declare that it was unnecessary to pursue the claims under the administrative procedure set forth in R.C. 5739.07. The Tax Commissioner filed a cross-appeal, assigning several of the same assignments of error raised in the instant case regarding exhaustion of administrative remedies, the exclusivity of the special statutory scheme set forth in R.C. 5739.07, and the adequacy of that statutory remedy.

{¶ 30} In addressing the appeal, we found:

> [W]hether we construe the procedure available in R.C. 5739.07 as an exclusive statutory proceeding or an administrative remedy to be exhausted before an action may be filed in the common pleas court, the issue resolves to whether the common pleas court should have reached the merits of plaintiff's complaint or should have determined plaintiff's action to be inappropriate because the procedure set forth in R.C. 5739.07 was available.

Telsat at ¶ 18.

{¶ 31} On appeal, Telsat, Inc. argued that even if its request for relief fell within R.C. 5739.07, the statute was not an adequate remedy because pursuit of that remedy was futile, onerous, and expensive. Specifically, Telsat, Inc. argued: pursuit of the refund under R.C. 5739.07 was not cost-effective, due to the small refund amount sought; the information needed to pursue the refund is burdensome; and the process is futile because the Tax Commissioner will deny any and all refund claims.

{¶ 32} In addressing Telsat, Inc.'s arguments, we determined the process for seeking a refund was not overly burdensome, as the only information necessary to request the refund under R.C. 5739.07 was the applicant's name, contact information, refund amount, date of purchase, and proof of payment. We also relied upon an affidavit from the supervisor of the sales and use tax refund unit, who averred that she had processed 1,656 refund applications in the past ten years seeking a refund of $25 or less and that she had also processed almost 6,000 refunds for $100 or less during that same time frame, to find that thousands of people have been willing to pursue relief pursuant to R.C. 5739.07, despite the small amounts of the refunds.

{¶ 33} In *Telsat*, we rejected the assertion the statutory remedy in R.C. 5739.07 is inadequate simply based upon speculation that the Tax Commissioner would deny all refunds requested under the statute. We noted that if the Tax Commissioner denied a refund, the applicant could still appeal the decision to the BTA and eventually to the Supreme Court of Ohio. Thus, even if the Tax Commissioner denied the requested refund, the plaintiff still had additional avenues for relief pursuant to the administrative process.

{¶ 34} We also rejected Telsat, Inc.'s argument that the potential lack of cost-effectiveness made the remedy inadequate. Despite acknowledging that the costs of pursuing a small sales tax claim to the BTA and the Supreme Court of Ohio may substantially exceed the amount of the refund, we nevertheless found the administrative remedy to be adequate in *Telsat*. "The General Assembly * * * was aware that sales tax issues typically involve small amounts but nonetheless prescribed the process set forth in R.C. 5739.07, presumably because the initial cost of seeking a refund through the administrative process is less than if litigation were to be initiated to collect the illegal or erroneous tax." *Id.* at ¶ 27. We further found that, should the appeal of an adverse decision rendered by the Tax Commissioner result in a decision that is favorable to the applicant, that decision would likely resolve the claims of all of the remaining class members when the Tax Commissioner implemented the appellate court's determination.[3] *Id*. at ¶ 27. This provided further support for the adequacy of the statutory remedy.

{¶ 35} In the end, we held "even if the R.C. 5739.07 refund procedure is not an exclusive remedy that deprives the common pleas court of jurisdiction for plaintiff's failure to pursue it, the refund procedure under R.C. 5739.07 is an adequate remedy such that plaintiff and the proposed class first must exhaust their remedies under that scheme before seeking relief in the common pleas court." *Id.* at ¶ 28. We went on to find that the trial court erred in reaching the merits of the parties' arguments as to the definition of

[3] The Tax Commissioner has also argued in the case currently before us that it has an efficient policy for dealing with multiple refund applications containing similar factual and legal bases by holding all of them until one case proceeds through both the administrative and judicial systems in order to alleviate the costs associated with multiple applicants pursuing multiple appeals with the BTA and the Supreme Court of Ohio. However, the evidence produced by the Tax Commissioner in support of this assertion in this case was not introduced into the record at the trial court proceedings. Nevertheless, we do have our reasoning and analysis as set forth in *Telsat* to serve as guidance.

"price" and should have determined Telsat, Inc.'s action was improper for failure to pursue the refund procedure in R.C. 5739.07. *Id.*

{¶ 36} We reach the same conclusion here. We believe the principles and reasoning applied in *Telsat* are equally applicable to the instant case. Despite our holding in *Telsat*, Brown attempts to distinguish this case from *Telsat*. Upon review, however, we find any differences to be of little or no significance.

{¶ 37} Unlike in *Telsat*, Brown argues the Tax Commissioner in this case issued Information Release ST 2009-02, an "official statement" declaring the policy of the Tax Commissioner, which is adverse to Brown and any putative class. Because of this well-known, adverse position, Brown argues it is certain that any application filed under R.C. 5739.07 would be rejected, and therefore filing such an application would be futile. Brown further argues the filing of an R.C. 5739.07 application under these circumstances would undoubtedly result in an appeal to the BTA, which would substantially increase costs and attorneys' fees to the point that such costs and fees would exceed the amount of the refund he stands to recover ($192.50), and also make the refund application process less cost effective than if he had pursued litigation in the court system. Thus, Brown argues the remedy is not adequate under these circumstances.

{¶ 38} We reject Brown's argument that the issuance of Information Release ST 2009-02 makes this case distinguishable from *Telsat*. An information release is not a final determination of the Tax Commissioner, as it may be subject to revision or the application of new factual scenarios producing different results. Also, as noted in *Telsat*, the possibility that a refund claim will be denied does not render R.C. 5739.07 an inadequate remedy. *Id.* at ¶ 26. In addition, an information release is not a substitute for the requirement that the applicant establish the facts necessary to prove entitlement to the refund, and it fails to provide the reasoning or the basis for certain conclusions as applied to a specific situation.

{¶ 39} Brown also argues that this case lacks the statistical evidence provided in *Telsat* setting forth the number of consumers who have filed refund applications to recover small refund amounts, thereby demonstrating that the R.C. 5739.07 process provides an adequate remedy. Without such evidence, Brown submits we should not apply the reasoning of *Telsat*.

{¶ 40} Admittedly, no such statistics were presented as evidence in the case before us. Nevertheless, we still have our analysis in *Telsat* as authority upon which to rely and in which we determined, "[t]he General Assembly * * * was aware that sales tax issues typically involve small amounts but nonetheless prescribed the process set forth in R.C. 5739.07 * * * ." *Id.* at ¶ 27.

{¶ 41} Brown further notes that the *Telsat* court failed to consider the case of *Herrick v. Kosydar*, 44 Ohio St.2d 128 (1975), in conducting its analysis. Brown submits that *Herrick* supports his position that a taxpayer may bring a class action for equitable relief against the Tax Commissioner in a court of common pleas if it provides a superior remedy for the plaintiffs. However, we disagree.

{¶ 42} In *Herrick*, the Supreme Court of Ohio determined that the court of common pleas had jurisdiction to render a *declaratory judgment*, despite the existence of an administrative remedy under R.C. Title 57, because the plaintiffs' claim was based upon the *constitutionality* of two statutes, and as the court noted, an administrative agency is without jurisdiction to determine the constitutionality of a statute. This is very different from *Telsat* and from the case before us, as Brown has specifically argued that his action is not one seeking a declaratory judgment and he has not challenged the constitutionality of the statute. *See also Zupancic v. Wilkins*, 10th Dist. No. 08AP-472, 2009-Ohio-3688, ¶ 19 (actions for declaratory judgment are inappropriate where a special statutory proceeding would be bypassed; while Civ.R. 57 permits declaratory relief where appropriate, even when another adequate remedy exists, it should not be granted in situations where a special statutory proceeding has been provided for that purpose).

{¶ 43} Consequently, based upon our analysis as set forth above, we find Brown's attempts to distinguish this case from *Telsat* to be meritless. Furthermore, because we find the trial court erred in hearing this case on the merits, it now matters not whether the trial court's decision regarding the Tax Commissioner's use and application of Information Release ST 2009-02 is correct. Therefore, it is unnecessary for us to address the assignment of error raised in Brown's appeal in which he challenges the trial court's decision granting the Tax Commissioner's motion to dismiss on the merits or to address the Tax Commissioner's fourth cross-assignment of error.

V. Disposition

{¶ 44} Accordingly, we sustain the Tax Commissioner's first, second, third, and fifth cross-assignments of error, rendering moot the fourth cross-assignment of error as well as Brown's single assignment of error. We find the trial court erred in concluding Brown was not required to exhaust the administrative remedies set forth in R.C. 5739.07 prior to pursuing this action, and on that basis, we reverse the judgment of the Franklin County Court of Common Pleas and remand with instructions to dismiss Brown's complaint on those grounds.

Judgment reversed;
cause remanded.

TYACK and FRENCH, JJ., concur.

_____