

ARIZONA TAX COURT

TX 2005-050091

01/05/2006

HONORABLE MARK W. ARMSTRONG

CLERK OF THE COURT  
L. Slaughter  
Deputy

FILED: \_\_\_\_\_

MICHAEL DEVINE, et al.

RICHARD G HIMELRICK

v.

ARIZONA STATE DEPARTMENT OF  
REVENUE, et al.

ELIZABETH S HILL

SHAWN K AIKEN  
JOHN M O'NEAL  
PAUL J MOONEY  
DONALD A WALL  
GREGORY D HANLEY

**UNDER ADVISEMENT RULING ON DEFENDANTS' MOTIONS TO DISMISS**

This matter was taken under advisement after oral argument on December 13, 2005.

**STATEMENT OF THE DISPUTE**

Pursuant to Rule 12(b), Arizona Rules of Civil Procedure, Defendants, Arizona Department of Revenue ("Department") and Arizona Sports and Tourism Authority ("AZ-STA") move to dismiss the Amended Notice of Appeal and Complaint For Declaratory and Injunctive Relief and For Refund of Taxes Imposed Under A.R.S. § 5-839 and § 5-840 ("Amended Complaint") filed by Plaintiff, Steven Karbal ("Karbal"). Plaintiff argues the taxes are unconstitutional. The Defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted because Karbal has failed to exhaust his administrative remedies and as an individual customer, Karbal lacks standing to make the claim because he is not the proper party.

**STATEMENT OF FACTS**

In April 2000, the AZ-STA was officially established to promote tourism in Maricopa County, develop a multipurpose sports facility, develop and renovate the Cactus League baseball

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spring training facilities and develop and improve youth and amateur sports, recreational and other community facilities. To fund the AZ-STA programs and facilities, in November 2000, the majority of voters in Maricopa County approved Proposition 302, which authorized a local car rental surcharge and hotel tax that would be used to partially fund the AZ-STA. The car rental tax and hotel tax went into effect on March 1, 2001.

Following a visit to Maricopa County, where he was assessed the car rental tax and hotel tax, the original plaintiff herein, Michael Devine (“Devine”), filed an administrative appeal and claim for refund with the Arizona Department of Revenue (“Department”), challenging the validity of the taxes he paid to the Arizona Biltmore Resort (“Biltmore”) and Enterprise Leasing Company of Phoenix (“Enterprise”). According to both the Complaint and the Amended Complaint, on April 22, 2005, the Department issued an order denying Devine’s claims that the rental car taxes and hotel taxes implemented by the passage of Proposition 302 were unconstitutional. Following receipt of that order and within the 60 days required by statute, on June 20, 2005, Devine filed a “Notice of Appeal And Complaint For Declaratory Relief And For Refund Of Taxes Imposed Under A.R.S. § 5-839 and A.R.S. § 5-840” (“Complaint”). In the original complaint, Devine named the Department, Biltmore, Enterprise and AZ-STA as defendants, claiming to act on behalf of himself and a “class” of unnamed taxpayers.

On July 15, 2005, before any responsive pleadings were filed herein, the Complaint was amended to substitute a new plaintiff, Steven Karbal (“Karbal”), as the representative of a potential class of plaintiffs and Devine was designated as only pursuing his “individual” claims. The Amended Complaint added Vanguard Car Rental USA, Inc. (“Vanguard”) and Four Seasons Hotels Limited (“Four Seasons”) as defendants, and simultaneously removed AZ-STA as a defendant. On the next business day, July 18<sup>th</sup>, plaintiffs gave notice of the voluntarily dismissal of Devine from the lawsuit, stating in pertinent part: “Plaintiff Michael Devine, by his attorneys, hereby gives notice of the dismissal of his individual claims against the Arizona Department of Revenue, Enterprise Leasing Company of Phoenix and KSL Biltmore Resort, Inc. . . .” The notice of dismissal then goes on to state that: “This notice does not affect the individual or representative claims of Plaintiff Steven Karbal.” As a result of the plaintiffs’ filing of the Notice of Dismissal, Karbal is now the sole named plaintiff in this suit.

On August 1, 2005, the plaintiffs stipulated to allow AZ-STA to intervene as a matter of right in this action, because AZ-STA has a direct interest in the outcome of this action. This Court signed the Order allowing AZ-STA to intervene on August 9, 2005. Accordingly, AZ-STA is a proper party in bringing this motion to dismiss.

**THE COURT’S DECISION**

The Court finds that this matter should be dismissed because Plaintiff failed to exhaust required administrative remedies and the original Plaintiff Devine is no longer a member of the putative class. On this issue, Plaintiff relies primarily on *Arizona Department of Revenue v. Dougherty*, 200 Ariz. 515, 29 P.3d 862 (2001). The Court finds that *Dougherty* is

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distinguishable, however, since the plaintiff there actually saw her case through. That did not happen here. In this case, Devine aborted his claim and Karbal has not exhausted his administrative remedies.

Plaintiff also alleges that it would be futile to exhaust administrative remedies and therefore he was not separately required to do so, relying on the outcome of Mr. Devine's unsuccessful refund claim before the Administrative Law Judge ("ALJ"). The Court disagrees. The decision of the ALJ in Mr. Devine's case is irrelevant because Devine is no longer a party to this action. Further, as noted by the Department in its reply, neither Devine nor Karbal have complied with the requirements set forth in A.R.S. § 42-1118(E), which requires refund claims to set forth the amount of the refund(s) requested and the specific tax period(s) involved. Devine did not even do so for his own claim. Because Devine has been dismissed, and Karbal has never filed a refund claim with the Department, no potential class representative meets the statutory requirements in A.R.S. § 42-1118(E).

In light of the above findings, the Court finds it unnecessary to address Defendants' subject matter jurisdiction and standing arguments, except the Court does find that the subject taxes are tantamount to transaction privilege taxes.

**IT IS THEREFORE ORDERED** granting Defendants' Motions to Dismiss based on Plaintiff's failure to exhaust administrative remedies.