SECOND DIVISION
September 30, 2016

No. 1-15-2834

AIRRIS AVIATION AND MARINE, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	
	)	No. 2014 CH 16761
CONSTANCE BEARD, in her capacity as	)	
Director, Illinois Department of Revenue; and the	)	
ILLINOIS DEPARMENT OF REVENUE	)	Honorable
	)	Robert Lopez Cepero
Defendants-Appellants.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment is reversed and its entry of a permanent injunction and stay of the administrative proceedings are vacated.

¶ 2 The primary question raised in this appeal is whether a nonresident corporation may seek a judicial determination that the corporation does not have a sufficient nexus with Illinois to be subject to the State's sales or use tax, without first exhausting administrative remedies, where a system of administrative hearings is available and the final decision of the Department is reviewable under the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2012); 35 ILCS 120/12 (West 2012).

¶ 3 BACKGROUND

¶ 4 On July 17, 2012, plaintiff Airris Aviation and Marine, Inc., a Delaware corporation headquartered in Florida, purchased a 2013 Ford Flex from Napleton Libertyville Ford in Libertyville, Illinois. The purchase was made on behalf of Airris by Jennifer Davis, an Illinois resident and plaintiff's attorney. At the time of the transaction, Napleton filed a Sales Tax Return with the Illinois Department of Revenue indicating Airris was a "Nonresident buyer," and for that reason Napleton did not collect the sales tax.[1]

¶ 5 In May 2013, the Department initiated an audit and requested information and documentation from Napleton dealing with the sale. In response, Napleton provided the Department: (1) a state of Delaware application for title; (2) a special 30-Day Drive-Away Permit for the car; and (3) a letter from Airris addressed to "DMV Titles" in Delaware asking that a Delaware license be issued and mailed to Davis in Illinois. The Department generated a CARFAX history report for the vehicle that indicated the vehicle was serviced for "recommended maintenance" in Libertyville two months and four months after the vehicle's purchase. On May 31, 2013, the Department initiated a sales and use tax audit of Airris' claimed tax exemption.

¶ 6 As part of the audit, the Department sent an "Audit Records Request" to Airris. Airris

[1] Section 120/2-5 (25) of the Retailers' Occupation Tax Act exempts certain motor vehicles from sales and use taxes and provides: "[e]xcept as provided in item (25-5) of this Section, a motor vehicle sold in this State to a nonresident even though the motor vehicle is delivered to the nonresident in this State, if the motor vehicle is not to be titled in this State, and if a drive-away permit is issued to the motor vehicle as provided in Section 3-603 of the Illinois Vehicle Code or if the nonresident purchaser has vehicle registration plates to transfer to the motor vehicle upon returning to his or her home state. The issuance of the drive-away permit or having the out-of-state registration plates to be transferred is prima facie evidence that the motor vehicle will not be titled in this State." 35 ILCS 120/2-5 (West 2012).

responded with "paperwork covering the purchase, title and registration" of the vehicle, which included a Delaware vehicle registration card. However, Airris objected to the Department's other requests for information contending that it had no agents or offices in Illinois, was not domiciled in Illinois and that the vehicle purchase was the only "piece of business" Airris transacted in Illinois, and therefore, the information requests were "beyond the scope of reasonable."

¶ 7 Thereafter, the Department sent Airris a notice demanding copies of its books and records. Airris responded arguing that its vehicle purchase fell within an Illinois tax exemption afforded to nonresidents when a "motor vehicle is not to be titled in this State, and *** a drive-away permit [has been] issued." Airris also argued that it had "no nexus with Illinois [sufficient] to subject [it] to Illinois tax laws," and therefore, the Department was "exceeding its statutory authority and jurisdiction" by inquiring into the transaction.

¶ 8 On December 13, 2013, Joseph Llamas, president of Airris, sent a letter to the Department explaining that because Airris "does not sell or lease any tangible personal property in the state of Illinois or to any Illinois consumers," "does not accept any purchase orders in Illinois or maintain an inventory in Illinois," "does not maintain a place of business in Illinois" and does not have any officers or employees in Illinois, the sale or use tax cannot be assessed on the vehicle.

¶ 9 The Department responded explaining that "[t]ax is due on a vehicle in the state [if] it is being used not in the state it is registered." [2]

[2] A"[u]se tax is imposed 'upon the privilege of using in this State tangible personal property purchased at retail from a retailer.' " *Performance Marketing Ass'n, Inc., v. Hamer*, 2013 IL 114496, ¶ 3 (citing 35 ILCS 105/3 (West 2010)).

¶ 10 On January 14, 2014, the Department issued a "Notice of Proposed Audit Findings," concluding that a use tax is due on the vehicle. The Department found that "[b]ased on the best available information" it determined that Airris was an Illinois resident both at the time of purchase and at the time Airris claimed the nonresident exemption, therefore, as a resident, Airris did not qualify for the nonresident exemption. The notice expressly stated that if Airris did not agree "with the tax amount as shown, you may request a review of this proposed liability by the Informal Conference Board (20 ILCS 2505-510)." On the same day the Department issued a "Notice of Proposed Audit Liability" in the amount of $3,280.

¶ 11 On October 16, 2014, Airris filed this declaratory action in the circuit court of Cook County and requested a permanent injunction against the Department and its Director. The complaint alleged that plaintiff does not have a sufficient nexus with Illinois "to be required to submit to Illinois tax laws." Plaintiff is a nonresident of Illinois, the vehicle is titled outside Illinois and it had been issued a drive-away permit for the vehicle. There is an exemption from the payment of taxes for vehicles sold in Illinois to nonresidents, even though the vehicle is delivered to the nonresident in Illinois, if the vehicle is not to be titled in Illinois and if a drive-away permit is issued. Accordingly, the purchase satisfied the Illinois sales tax exemption (35 ILCS 120/2-5(25) (2014)) as well as the use tax exemption (35 ILCS 105/3-55(h) (2014)).

¶ 12 On January 7, 2015, the Department sent Airris notice that it completed its audit and "as a result, we have assessed" a tax liability of $3,503.84. The notice informed Airris that if it did not agree with the amount of tax liability, it may contest the notice by: (1) filing a petition with the Illinois Independent Tax Tribunal; or (2) file a petition with the Department requesting an administrative hearing; or (3) pay the total liability under protest and "file a complaint with the

circuit court for review of our determination."

¶ 13 On March 3, 2015, Airris sent the Department a notice of "Protest and Request for Administrative Hearing."

¶ 14 Thereafter, defendants responded to the complaint with a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)) arguing that plaintiff was prohibited from bringing an equitable action because a challenge to the imposition of the tax is available under the Protest Act (30 ILCS 230/1 (2014)). In the alternative, because plaintiff filed a "Protest and Request for Administrative Hearing" during the pendency of the Chancery action, there are two pending matters between the same parties for the same cause, the complaint should be dismissed under section 2-619(a)(3). 735 ILCS 5/2-619(a)(3) (West 2012).

¶ 15 The circuit court denied the motion to dismiss and stayed all other proceedings pending further order of court explaining that the case involved "a matter of constitutional proportions." In a subsequent written opinion, the court addressed defendants' section 2-619(a)(3) argument, finding that the administrative proceeding and the pending action did not involve the "same cause" because the administrative proceeding addressed a "liability for use tax" whereas this action addressed "the Department's jurisdiction" to assess a use tax.

¶ 16 On July 1, 2015, Airris moved for summary judgment arguing that it did not have a substantial nexus with Illinois sufficient to subject it to the Department's jurisdiction and that the use tax only applies to persons residing in or entities engaged in business in Illinois.

¶ 17 Defendants responded arguing that: (1) the Department had the authority to audit plaintiff; (2) Airris had a sufficiently substantial nexus with Illinois to impose the use tax; and (3)

genuine issues of material fact preclude summary judgment. Defendants asserted that the vehicle was delivered to Davis, an Illinois resident, officer, and agent of plaintiff. Davis negotiated and registered the vehicle and its purchase, signed on plaintiff's behalf and procured auto liability insurance naming Davis as an additional insured. Davis requested title and registration from the Delaware Secretary of State and asked that the documents be sent to her Illinois address.

¶ 18 On September 2, 2015, the circuit court granted summary judgment in favor of Airris. The circuit court enjoined the Department from "collecting tax, penalty or interest under the Act with respect to the purchase of this vehicle, and from bringing any action against Plaintiff under the act for failure to comply with the act." The court issued a declaratory judgment that "the tax and act are not applicable to plaintiff" and dismissed the Department's "notice of tax liability" concluding that no tax was due. Defendants timely filed this appeal.

¶ 19 ANALYSIS

¶ 20 On appeal defendants move to vacate the summary judgment entered in favor of plaintiff, vacate the injunction against the Department from imposing or collecting any tax due under the Act with respect to the purchase and to reverse the order denying defendant's motion to dismiss.[3] The purpose of a section 2-619 motion is to dispose of issues of law and issues of fact that can be easily proved early in the litigation. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). A section 2-619 motion to dismiss, admits the legal sufficiency of the complaint, but asserts affirmative matter that allows for an involuntary dismissal of the claim based on certain defects or defenses.

[3] Defendants ask this court to not address the circuit court's summary judgment decision because the claims involving Airris' tax liability are fact specific and can be best considered in an administrative proceeding, after development of an appropriate record. Defendants cite to *Irwin Industrial Tool Co. v. Department of Revenue*, 238 Ill. 2d 332 (2010) to illustrate the highly fact specific nature of this case.

Evanston Insurance Co. v. Riseborough, 2014 IL 114271, ¶ 13. An "[a]ffirmative matter is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in, or inferred from the complaint." (Internal quotation marks omitted.) *Golden v. Mullen*, 295 Ill. App. 3d 865, 869 (1997). Section 2-619(a)(3) of the Code, permits involuntary dismissal of a complaint on the ground that "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2012). We review a circuit court's decision on a section 2-619(a)(9) motion to dismiss *de novo*. *Elderman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). However, because the decision to grant or deny a section 2-619(a)(3) motion to dismiss is discretionary, we review the circuit court's decision to deny defendants' section 2-619(a)(3) motion to dismiss for abuse of discretion. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447 (1986).

¶ 21 A tax is imposed on the use of tangible personal property in Illinois. 35 ILCS 120/3 (West 2012). A"[u]se tax is imposed 'upon the privilege of using in this State tangible personal property purchased at retail from a retailer.' " *Performance Marketing Ass'n, Inc., v. Hamer*, 2013 IL 114496, ¶ 3 (citing 35 ILCS 105/3 (West 2010)). " '*Use*' *means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property*. " (Emphases added.) 35 ILCS 105/2 (West 2008). " 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use, ***." *Id*. Although a use tax is paid by the seller of personal property, the tax is collected from the purchaser and held by the retailer until paid to the Department. *Brown v. Zehnder*, 295 Ill. App. 3d 1031 (1998).

¶ 22 Generally, the use of tangible personal property within Illinois is taxable unless the potential taxpayer produces evidence sufficient to establish the claim of nonliability, or an applicable exemption from the tax. *Mel-Park Drugs, Inc. v. Department of Revenue*, 218 Ill. App. 3d 203, (1991). For example, the use of a motor vehicle in Illinois is subject to taxation under the Act, unless the vehicle is not to be titled in Illinois and if a drive-away permit is issued to the vehicle, provided the nonresident purchaser executes a statement, signed under penalty of perjury, of their intent to title the vehicle in their resident state within 30-days after sale. 35 ILCS 105/3-55(h), (h-1) (West 2012). However, if the vehicle remains in Illinois for more than 30-days, its use may be subject to tax under the Act. See 35 ILCS 105/3-55(h) (West 2012); see also 86 Ill. Adm. Code 150.310(7).

¶ 23 The Legislature has empowered the Department to administer and enforce the collection of the use tax through various means. 35 ILCS 120/1, 8 (West 2012); see *Sweilem v. Department of Revenue*, 372 Ill. App. 3d 475 (2007). This authority includes the power to investigate, audit, assess, correct tax returns, and collect the tax when owed. 35 ILCS 120/1, 8 (West 2012); *People v. Floom*, 52 Ill. App. 3d 971 (1977). The Department "may hold investigations and hearings," "may examine any books, papers, records or memoranda bearing upon the sales of tangible personal property," and "may take testimony" of a person, officer or employee having knowledge" of the transaction at issue. 35 ILCS 120/8 (West 2012). After audit and imposition of a tax, to dispute the assessment of a tax, a taxpayer can seek review of the final decision in several different ways. *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 545–46 (1983).

¶ 24 In this case, plaintiff claimed an exemption at the time the vehicle was purchased. The Department sought additional information from the retailer, Napleton Ford. As a result of the

information provided, the Department launched a formal audit to determine whether plaintiff was entitled to the claimed exemption. The Department issued requests for books, records and documents to determine whether the vehicle was used in Illinois and whether that use was sufficient to impose the use tax. While the issue of use was under audit, and after the Department issued a notice of preliminary findings indicating plaintiff may be liable for payment of the tax, plaintiff filed this declaratory action to enjoin the Department from collecting the tax.

¶ 25 Defendants argue that plaintiff's action should have been dismissed by the circuit court because the issue of whether plaintiff was subject to a use tax under the Act was pending before the Department at the time the instant action was filed, there were other methods to seek review of the Department's audit findings and plaintiff failed to exhaust its administrative remedies.[4] Defendants contend that instead of filing the instant suit, plaintiff should have waited until the Department issued its final assessment and notice of tax liability and then sought administrative review of the Department's decision. See *GTE Automatic Electric, Inc. v. Allphin*, 38 Ill. App. 3d 910 (1976) (failure to submit to Department's audit and otherwise exhaust administrative remedies prior to bringing a declaratory action makes any judicial review of the cause premature).

¶ 26 Plaintiff argues it is a foreign corporation with an insufficient connection to Illinois to

[4] Defendants specifically argue that the circuit court erred in denying their motion to dismiss where: (1) this equitable action is not a permissible method for challenging the imposition of a sales or use tax pursuant to *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541 (1983); and (2) it is well-settled that equitable actions cannot be brought in this situation where there is an adequate remedy at law (Illinois State Officers and Employees Money Disposition Act (Protest Act) (30 ILCS 230/1 et seq. (West 2012)). Defendants also argue that the circuit court erred in denying their section 2-619(a)(3) motion to dismiss this action in favor of the administrative proceeding Airris begun where this action and the administrative proceeding involved the same parties, same cause and the administrative proceeding is one of the three permissible methods for review recognized in *Shell Oil*.

permit imposition of a use tax for its vehicle, purchased in Illinois but licensed and titled in a foreign state, and the Department has no "jurisdiction" to make any inquiry of plaintiff (and plaintiff has no obligation to respond to any inquiry) regarding the use of the vehicle in Illinois. We disagree and find that the Department has jurisdiction and a duty to inquire, investigate and impose a use tax under the circumstances presented in this appeal.

¶ 27 Taxation is a legislative function. *La Salle National Bank v. County of Cook*, 57 Ill. 2d 318, 323 (1974). "It is well established that, in cases which seek to avoid statutory procedures relating to the assessment and collection of taxes, relief by way of declaratory judgment should not be afforded in a tax case that did not merit relief in chancery by way of injunction." *People ex rel. Fahner v. American Telephone & Telegraph Co.*, 86 Ill. 2d 479, 485 (1981). In revenue cases, applying general equitable principles, it is the rule that a declaratory judgment is not available if the statute provides an adequate remedy at law. *Id.* The doctrine of exhaustion of administrative remedies "has long been a basic principle of administrative law–a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him." *Illinois Bell Telephone Co. v. Allphin*, 60 Ill. 2d 350, 357-58 (1975). This doctrine "prevents courts from entangling themselves in abstract disagreements over administrative policies and protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." (Internal quotation marks omitted.) *Poindexter v. State*, 229 Ill. 2d 194, 208-9 (2008). The doctrine of exhaustion "applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." *Fahner*, 86 Ill. 2d at 485–86.

¶ 28 The legislature, in the exercise of its power to levy taxes, has provided for the assessment and collection of the use tax by the Department. *Id*. at 487. Relevant to this appeal, objections to the imposition of the use tax are initiated by demanding an administrative hearing after receipt of a Notice of Tax Liability from the Department. 35 ILCS 105/12, 120/4, 120/5 (West 2012). The taxpayer can obtain relief from the tax if it establishes that an assessment was the result of "a mistake of fact or an error of law." 35 ILCS 120/5 (West 2012). Alternatively, the taxpayer can pay the tax, file for a refund and demand a hearing. 35 ILCS 105/19, 20 (West 2012). In either case, the final decision of the Department is subject to judicial review under the Administrative Review Law. 35 ILCS 105/12, 120/4 (West 2012). A third option is to pay the tax under protest, avoid an administrative hearing and file for relief pursuant to the Protest Act. 30 ILCS 230/1 (West 2014).

¶ 29 Here, while the Department's audit was pending, plaintiff filed this declaratory judgment action to dispute its liability for the potential assessment of the use tax. During the pendency of this declaratory judgment action, in January, 2015, the Department issued its final notice of audit findings and issued a notice of tax liability, plaintiff filed a notice of protest and requested an administrative hearing. Clearly the circuit court should not have interfered with these administrative proceedings. As stated in *Dubin v. Personnel Board of City of Chicago*, 128 Ill. 2d 490, 499 (1989) "where a final agency decision has been rendered and the circuit court may grant the relief which a party seeks within the context of reviewing that decision, a circuit court has no authority to entertain independent actions regarding the actions of an administrative agency." In order to dispute the Department's assessment of the use tax, plaintiff had three options: (1) "withhold payment of the tax and receive an administrative hearing following receipt

of a notice of tax liability from the Department of Revenue"; or (2) "pay the tax, file a claim for credit or refund, and have an administrative hearing after protesting the Department's notice of tentative determination of claim"; or (3) "pay the tax under protest pursuant to the Protest Monies Act and have the circuit court pass upon the protest." *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 545–46 (1983).

¶ 30 Based on the foregoing, we find that plaintiff failed to exhaust its administrative remedies and pursue an available a remedy at law. All the arguments against imposition of a use tax advanced by Airris are arguments that are appropriately made to the Department and, if unsuccessful, they can be presented to the special competence of an administrative body and, if necessary, thereafter on administrative review in the circuit court pursuant to the Act. The regulatory scheme established in the Act should be allowed to run its course free of judicial interference. The trial court erred in granting summary judgment in favor of the plaintiff, erred in entering an injunction against the Department enjoining further proceedings pursuant to the Act and erred in not dismissing the lawsuit for failure to exhaust administrative remedies under section 2-619(a)(9) of the Code.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we reverse the judgment of the circuit court and vacate the injunction and stay of the Department of Revenue's administrative proceedings.

¶ 33 Reversed in part; vacated in part.