IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

CFRE, LLC, and Sherry T. Ray, individually and on behalf of others similarly situated, Plaintiffs, v. Debbie H. Adkins, individually and in her official capacity as Greenville County Assessor; Real Property Services: Jill Kintigh, in her official capacity as Greenville County Treasurer; Joseph Kernell, in his official capacity as Greenville County Administrator; and John/JaneDoe, individually and in his/her/their official capacities, Defendants.	C/A No. 8:14-3825-TMC **ORDER**

In this putative class action, Plaintiffs CFRE, LLC, ("CFRE") and Sherry T. Ray ("Ray") (collectively "Plaintiffs") allege nine causes of action: 1) violations of 28 U.S.C. § 2201 and 42 U.S.C. § 1983; 2) accounting; 3) disgorgement; 4) violation of the 14th Amendment - 42 U.S.C. § 1983; 5) violation of the 14th Amendment - 42 U.S.C. § 1983; 6) violation of the 14th Amendment - 42 U.S.C. § 1983; 7) violation of 42 U.S.C. §1985; 8) violation of 42 U.S.C. §1986; and 9) prospective relief. (ECF No. 20 - Am. Compl.). This matter is before the court on Defendants' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) based on lack of subject matter jurisdiction. (ECF No. 35). Plaintiffs filed a response opposing the motion (ECF No. 37) and Defendants filed a Reply (ECF No. 41).

I. Background/Procedural History

Plaintiffs own, or at one time owned, a parcel of real property located within Greenville County.[1] The primary basis of Plaintiffs' claims is that Defendant the Greenville County Tax Assessor incorrectly valued and assessed their property in the 2010 countywide reassessment. In 2007, during a countywide reassessment, Plaintiffs' property in Greenville County was determined to have a fair market value of $353,644.00. (Am. Compl. ¶¶ 36-37). In 2010, Plaintiffs' property was reassessed again in a countywide assessment and the fair market value was determined to be $588,640.00. (Am. Compl. ¶¶ 41-42). Plaintiffs filed a protest with the county tax assessor, and the fair market value was reduced to $498,460.00. (Am. Compl. ¶¶ 44-45). Eventually, Defendants conceded to a reduction to $450,000.00. (Am. Compl. ¶ 48). Plaintiffs appealed to the County Board of Assessment Appeals ("Board") and a hearing was held before the Board. (Am. Compl. ¶ 50-51). At the hearing, Defendants asserted that the property had a fair market value of $557,950.00. (Am. Compl. ¶52). In November 20112, the Board adopted and approved the reassessment scheme and on November 30, 2012, Plaintiffs appealed the Board's decision by filing a contested case hearing request with the South Carolina Administrative Law Court ("ALC"). (Am. Compl. ¶¶ 50 and 57). Following discovery, on April 25, 2013, Plaintiffs filed a summary judgment motion in their action before the ALC. (Am. Compl. ¶¶ 59-60). That motion is currently pending before the ALC. (Pls.' Mem. Opp. Mot. to Dismiss at 17-18; ECF No. 37 at 17-18).

In their Complaint, Plaintiffs seek a declaration that the reassessment scheme of 2010 is

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[1]The property has been owned by Ray since 1991 and in December 2006, ownership of the property was transferred to CFRE. CFRE "is a single member, single asset, limited liability company whose single asset is fee simple ownership of a parcel of residential real property in Greenville County, South Carolina." (ECF No. 37, Pls.' Mem. Opp. Mot. to Dismiss at 4; See also Am. Compl. ¶¶ 5-7). Ray is the sole member of the LLC and she retains a life estate in and lives on the residential property. *Id.* .

void and invalid, and that the windfall pecuniary benefit to Defendants is subject to disgorgement.

II. Applicable Law

A motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction raises the fundamental question of whether a court has jurisdiction to adjudicate the matter before it. Fed.R.Civ.P. 12(b)(1). "Federal courts are courts of limited subject matter jurisdiction, and as such there is no presumption that the court has jurisdiction." *Pinkley, Inc. v. City of Fredrick*, 191 F.3d 394, 399 (4th Cir.1999).

The burden of proving subject matter jurisdiction in response to a Rule 12(b)(1) motion to dismiss is on the plaintiff, the party asserting jurisdiction. *See Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). When the Rule 12(b)(1) motion challenge is raised not as to the sufficiency of the jurisdictional allegations in the plaintiff's complaint but to the underlying facts supporting those allegations, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.* (*citing Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982)). A court should grant a Rule 12(b)(1) motion to dismiss if the material jurisdictional facts are known and the moving party is entitled to prevail as a matter of law. *Id.*

III. Discussion

Defendants move to dismiss due to lack of subject matter jurisdiction based upon the Tax Injunction Act ("Act"), 28 U.S.C. ¶ 1341, and the principles of comity.[2] Plaintiffs contend that

[2]As an initial matter, the court notes that Plaintiffs argue that Defendants did not raise the Act or comity until they filed this motion to dismiss. (Pls.' Mem. Opp. Mot. to Dismiss at 16, ECF No. 37 at 3,16; and generally Pls.' Mem. Opp. Mot. to Amend, ECF No.46). However,

neither the Act or comity divest this court of jurisdiction.

The Act provides that federal district courts "shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. ¶ 1341. The Act codifies the principles of comity regarding federal non-intervention in the fiscal matters of a state and reflects Congress' regard for and understanding of the importance of independent taxing power to state revenue collections and consequently to effective state operation and management. *See Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522. The Act creates a non-waivable jurisdictional bar and prohibits declaratory as well as injunctive relief. *See California v. Grace Brethren Church*, 457 U.S. 393, 408-11 (1982). To come within the statutory ban, the remedy available in the state courts must provide the taxpayer with a " 'full hearing and judicial determination' at which [the taxpayer] may raise any and all constitutional objections to the tax.' " *Rosewell*, 450 U.S. at 515 n.19. In sum, the Act precludes actions in federal court for declaratory or injunctive relief against any state tax, as long as the taxpayer has an adequate remedy in state court.

In their motion to dismiss, Defendants contend that *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000), and *Reed v. Dorchester Cty.*, C/A No. 2:14-76-RMG, 2014 WL 3799502 (D.S.C. filed July 31, 2014) (adopting the Report of the U.S. Magistrate

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even if not raised earlier, the court finds that Defendants are not barred from raising these issues as they involve the court's subject matter jurisdiction. *See Folio v. City of Clarksburg,* 134 F.3d 1211, 1214 (4th Cir. 1997)(holding that the Act is a jurisdictional bar and as such cannot be waived and should be addressed even if parties do not raise it). *See also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("First, 'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.' Moreover, courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." (citations omitted)); *In re Kirkland*, 600 F.3d 310, 315 (4th Cir.2010) ("Subject matter jurisdiction cannot be forfeited or waived, and can be raised by a party, or by the court sua sponte, at any time prior to final judgment.").

Judge, 2014 WL 3799433 (D.S.C. filed July 8, 2014))(as modified so the dismissal was without prejudice), are on point and hold that a federal court cannot entertain an action challenging a state or local tax if a "plain, speedy, and efficient" remedy is available in state court. Additionally, Defendants rely on *Rosewell*, *Fair Assessment*, 454 U.S. 100 (1981), and *Grace Bethren*.[3] In response, Plaintiffs argue the more recent opinions in *Hibbs v. Winn,* 542 U.S. 88 (2004), and *Direct Mktg. Ass'n v. Brohl*, ____ U.S. ___, 135 S.Ct. 1124 (2015), are fatal to the Defendants' argument that the Act bars this action.[4] The court disagrees and finds both of these case are distinguishable.

First, Plaintiffs argue that under the Act, "assessment" refers to the demand for or the official enrollment of unpaid taxes which is the first stage in the "levy or collection" process. (Pls.' Mem. Opp. Mot. to Dismiss at 11). Specifically, Plaintiffs argue that here, just as in *Hibbs*, the avoidance of a tax payment is not before the court. *Id.* at 14. However, *Hibbs* is factually distinguishable and its holding has been severely limited.

In *Hibbs*, a third party challenged the constitutionality of an Arizona statute which provided state tax credits to taxpayers who contributed money to "school tuition organizations" which awarded tuition grants. The Court noted at the outset that "Plaintiffs-respondents do not

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[3]In *Rosewell*, a taxpayer challenged Illinois' real estate tax refund procedure, which required taxpayers to pay the tax first and then attempt to contest the assessment and obtain a refund. 450 U.S. 503. The Court found at the outset that the Tax Injunction Act "generally prohibits federal district courts from enjoining state tax administration," and focused more on the question of whether Illinois provided an adequate state remedy. Id. at 512. In *Fair Assessment*, the plaintiffs challenged a county's disparate assessment of property valuations for property tax purposes and sought damages under §1983. 454 U.S. at 106. The Court held the Act prohibited an award of damages under § 1983. In *Grace Brethren*, churches and religious schools sought a declaratory judgment and to enjoin the collection of state unemployment tax which they alleged was a violation of their First Amendment rights. 457 U.S. at 396. The Court held that the Act deprived the court of jurisdiction. Id.

[4]Further, Plaintiffs attempt to distinguish *Reed* and *Lawyer* by arguing that the defendants in those cases were seeking to collect delinquent taxes and the appellants sought a refund of state taxes.

contest their own tax liability. Nor do they seek to impede Arizona's receipt of tax revenues." *Id.* Based on these facts, the Court held that the Tax Injunction Act did not bar the plaintiffs' claims. *Id*. 111-12. The Court specifically stated that there are certain cases which undisputably fall within the Act's compass: "All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes). Federal-court relief, therefore would have operated to reduce the flow of state tax revenue." 124 S.Ct. 106. The Court thus concluded held that the Act did not preclude a federal action filed by a third party who does not challenge his own tax liability, but rather challenges a tax credit received by others under a revenue-raising tax provision. The Court in *Hibbs* clearly recognized that the Act squarely bars a federal suit such the one brought here by Plaintiffs. *See Hibbs,* 542 U.S. at 106, 124 S.Ct. at 2288 (characterizing a taxpayer's federal suit to avoid paying its own taxes as one that "fall[s] within § 1341's undisputed compass").

Moreover, in a later case, in discussing its holding in *Hibbs*, the Court noted that "No refund suit (or other taxpayer mechanism) was open to the plaintiffs in *Hibbs*, who were financially disinterested 'third parties'; they did not, therefore, improperly bypass any state procedure. Respondents here, however, could have asserted their federal rights by seeking a reduction in their tax bill in an Ohio refund suit." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 432 n.12 (2010). In *Hibbs,* the Court repeatedly emphasized that the primary purpose of the Act was to protect the flow of state tax revenue by preventing challenges in federal court by taxpayers seeking to avoid their own tax liability. *Hibbs*, 542 U.S. at 106-108. More recently in *Direct Mktg. Ass'n*, the Court referred to its holding in *Hibbs* as "narrow" and stated that "*Hibbs* held only 'that the [Act] did not preclude a federal challenge by a third party who objected to a tax credit received by others, but in no way objected to her own liability under any revenue-raising tax provision.'" 135 S.Ct. at 1133 n.2.

In *Direct Mktg. Ass'n*, the Supreme Court addressed the issue of whether the Act barred a federal action brought by a trade association of retailers challenging a Colorado law requiring retailers who do not collect Colorado's sales or use tax to notify Colorado customers of their use tax liability and to report the information to the Colorado Department of Revenue. The Court stated that "[t]he question before us is whether the relief sought here would 'enjoin, suspend or restrain the assessment, levy or collection of any tax under State law.'" *Id.* at 1129. The Court determined that, although the suit challenging the Colorado law may inhibit the assessment, levy, or collection of Colorado's sales and use tax, it did not restrain those activities, and thus the federal action was not barred by the Act. *Id.* at 1133. The Court held that the assessment, levy or collection of taxes did not include informational notices or private reports of information related to tax liability as these acts did not restrain or stop the assessment, levy, or collection of tax; rather those acts merely inhibited the assessment, levy, or collection of the tax.[5] *Id.* This case is simply inapplicable to the present one.

Here, Plaintiffs seeks an order declaring that the 2010 reassessment void and invalid and that the windfall which ensued is proper for disgorgement or restitution. (Am. Compl. ¶¶ 110, 115, 119; p. 21). Plaintiffs contend the taxes have been paid and "no refund is sought here." (Pls.' Mem. Opp. Mot. to Dismiss at 8). The court is hard-pressed to make a distinction between disgorgement and restitution from a refund of the taxes in this case. Plaintiffs seek relief that would have the effect of limiting their tax liability, *Laborde v. City of Gahanna*, 561 Fed.Appx. 476, 479 (6th Cir. 2014), and thwart tax collection The effect of Plaintiffs' argument is that, to avoid the bar of the Act, a plaintiff merely needs to pay the tax and seek disgorgement and

[5]The Court also specifically held that it took "no position on whether a suit such as this one might nevertheless be barred under the 'comity doctrine,' which 'counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction.' " *Direct Mktg*, 135 S.Ct. at 1134.

restitution, rather than a "refund." The relief is the same - a return of an overpayment of taxes, which would reduce the tax revenue. The idea that a federal court ordering a disgorgement of revenue is any less invasive of a state's fiscal affairs than a federal court ordering a refund of paid taxes is illogical. Plaintiffs are protesting the amount of taxes that they have paid and they seek, inter alia, a disgorgement of the sums paid and a declaratory judgment that the manner in which Defendants have assessed their property is unconstitutional. They are attempting to avoid state taxes and the relief sought in this action would clearly enjoin, suspend or restrain the assessment, levy or collection of state property taxes.

The court now turns to whether there is a plain, speedy, and efficient state remedy. Plaintiffs first contend that the ALC cannot "judge constitutional issues." (Pls.' Mem. Opp. Mot. to Dismiss at 12). This is not entirely accurate. An ALC may not rule upon a facial challenge to the constitutionality of a regulation or statute, but may rule upon an as-applied challenge. *See Travelscape, LLC v. S.C. Dep't of Rev.*, 705 S.E.2d 28, 38-39 (S.C. 2011). And, in any event, Plaintiffs are not raising a facial constitutional challenge. Plaintiffs specifically state that "[i]t bears reiterating that Plaintiffs do not allege or imply that the subject standards/restrictions set by state law are invalid or unconstitutional. To the contrary, it is Defendants' willful and retaliatory disregard of state law and their ensuing misconduct, callous indifference, and culpable ratification that engendered this action." (Pls.' Mem. Opp. Mot. to Dismiss at 5).

Plaintiffs then argue that the state remedy has not been speedy. Although Plaintiffs contend that they have undertaken multiple efforts in an attempt to acquire a resolution in the state action, which have been disregarded by the ALC, the court believes that there remain remedies in the state action. The court is hesitant to hold that simply because a summary judgment motion has been pending for a long period of time, Plaintiffs have not been afforded adequate protection in the state proceeding. *See Rosewell,* 450 U.S. at 520 (in finding Illinois'

legal remedy was a plain, speedy, and efficient remedy under the Act, the Court stated "respondent's 2-year wait, regrettably, is not unusual. Nowhere in the Tax Injunction Act did Congress suggest that the remedy just be the speediest."). *See also Lerch v. Cascade County Treasurer*, 12 F.3d 1107, *2 (9th Cir. 1993) (unpublished table decision) (holding three-year delay in state remedy for complex class action to be "speedy" under the Act); *Guertin v. City of Eastport*, 143 F.Supp.2d 67, 71 n.3 (D. Me. 2001) (finding that two and a half year wait on decision permissible under the Act). The court finds that Plaintiffs have a adequate state remedy and the Act bars the instant action.[6]

IV. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss (ECF No. 35) is **GRANTED.**

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

April 14, 2015
Anderson, South Carolina

[6]In light of the court's ruling that the Act bars this action, it is unnecessary to reach the issue of comity.