

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

STEPHANIE L. ROWITZ
5730 W. Longridge Drive
Seven Hills, OH 44131,
and
JAMIE N. WEISBARTH, MADISON R.
WEISBARTH and McKENNA L. WEISBARTH
1200 Firwood Drive
Broadview Hts., Ohio 44147,
on behalf of themselves and all persons
similarly situated,

2016-00197

2016 MAR 14 PM 1:07

FILED
COURT OF CLAIMS
OF OHIO

Plaintiffs,

CLASS ACTION COMPLAINT

vs.

THE OHIO DEPARTMENT OF TAXATION
and
JOSEPH W. TESTA
30 East Broad Street
Columbus, Ohio 43215,
in his individual capacity and in his official
capacity as the Tax Commissioner of the
Ohio Department of Taxation,

Defendants.

Plaintiffs Stephanie L. Rowitz, Jamie N. Weisbarth, Madison R. Weisbarth and
McKenna L. Weisbarth (collectively "Plaintiffs"), on behalf of themselves and all others similarly
situated ("the Class"), by their attorneys Ray, Robinson, Carle & Davies Co., L.P.A., and
Underberg & Kessler LLP, as and for their Class Action Complaint allege as follows:

TIME TO END THE ILLEGAL TAMPON TAX

1. This is a class action to eliminate the "Tampon Tax" imposed by the Ohio
Department of Taxation (the "Department") on women in the State of Ohio. The tax imposed on

sales of menstrual sanitary products (hereafter “tampons and pads”) violates Ohio law. It violates the Equal Protection Clauses of the United States and Ohio constitutions. It is a vestige of another era, and now it is time to end it.

2. The State of Ohio does not tax most medical items. But the Department imposes a double standard when defining medical items for women and men. Medical products exclusively for women are taxed. Medical products also used by men are not taxed. Necessary medical products used by both men and women are not taxed.

3. But substances which are intended to affect the function only of the female body – tampons and pads – are taxed.

4. Tampons and pads are far more necessary to the preservation of health than other products the Department considers medically exempt. The Department’s double standard for men and women finds no support in the tax law and serves no purpose other than to discriminate and violate the Equal Protection clauses of the Ohio and U.S. Constitutions.

5. Justice Scalia once wrote for the Supreme Court that “A tax on wearing yarmulkes is a tax on Jews.”¹ A tax on tampons and pads is a tax on women. The “Tampon Tax” is irrational. It is discrimination. It is wrong. Defendants should be required to follow the law, and return the many millions of dollars they took illegally at the expense of women’s health.

PARTIES

6. Plaintiff Jamie N. Weisbart is a woman who resides in the County of Cuyahoga. Plaintiff has paid sales tax on her purchases of tampons and pads in the State of Ohio, including in the County of Cuyahoga, Ohio.

7. Plaintiff Madison R. Weisbart is a woman who resides in the County of Cuyahoga. Plaintiff has paid sales tax on her purchases of tampons and pads in the State of Ohio, including in

¹ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

the County of Cuyahoga, Ohio.

8. Plaintiff McKenna L. Weisbart is a woman who resides in the County of Cuyahoga. Plaintiff has paid sales tax on her purchases of tampons and pads in the State of Ohio, including in the County of Cuyahoga, Ohio.

9. Plaintiff Stephanie L. Rowitz is a woman who resides in the County of Cuyahoga. Plaintiff has paid sales tax on her purchases of tampons and pads in the State of Ohio, including in the County of Cuyahoga, Ohio.

10. All of the named Plaintiffs, as well as all members of the proposed Class, have paid sales tax on their purchases of feminine hygiene products in the State of Ohio in the past three years and before that time.

11. Defendant Ohio Department of Taxation is an agency of the State of Ohio organized under the laws of the State of Ohio. The Department maintains offices throughout the State of Ohio. The Department is responsible for administering and enforcing the tax laws of the State of Ohio, including the administration and collection of sales tax and the administration of sales tax exemptions at issue in this case.

12. Defendant Joseph W. Testa is the Tax Commissioner of the Ohio Department of Taxation. He is sued in his personal and official capacities. As the principal officer of the Department, Commissioner Testa is responsible for administering and enforcing the tax laws, regulations, and policies of the State of Ohio, including the sales tax and sales tax exemptions at issue in this case, including but not limited to the collection of state and county sales taxes.

JURISDICTION AND VENUE

13. The Court has jurisdiction over this combined action pursuant to its general jurisdiction under O.R.C. § 2305.01 and § 2743.03(A) (2), as well as under 42 U.S.C. § 1983 and the fourteenth Amendment of the United States Constitution and of the Bill of Rights, Article I, § 2,

of the Ohio Constitution.

14. Venue is proper in this court because the claims are brought against a commission of the State of Ohio which gave rise to the claims for relief.

FACTS

15. Ohio collects a sales tax of 5.4% on “every sale of tangible personal property” unless the product being sold fits within a statutory exemption. Ohio Sales Tax Law Chapter 5739. It also appears that the counties then add upwards of 3.35% to the state amount which is likewise discriminatory and illegal.

16. A long list of products is exempt from the sales tax. Ohio Sales Tax Law Chapter 5739.

17. Products necessary to human health are exempt from the sales tax, including “drugs,” “prescriptions,” “durable medical equipment,” and substances “intended to affect the structure or any function of the body.” Ohio Sales Tax Law § 5739.01.

18. The Department generally specifies which products qualify for this health exemption.

19. The Ohio sales tax law defines “drug” to include “. . . substance that is intended to affect the structure or any function of the body.” O.R.C. § 5739.01(FFF)

20. The Ohio sales tax law defines “durable medical equipment” as equipment that can withstand repeated use.” O.R.C. §5739.01(HHH).

The Department Chooses to Tax Feminine Hygiene Products

21. Notwithstanding the broad group of health products that qualify for exemption from the sales tax, the Department and its Commissioner have deliberately chosen to tax tampons and pads.

22. It is undisputable that tampons and pads serve multiple medical purposes. They are

not luxury items, but a necessity for women's health.

23. Tampons, sanitary pads, and other feminine hygiene products are used to staunch the flow of menstrual blood and prevent encrustation and detritus. It prevents the transmission of blood and byproducts of bodily fluids to others.

24. Without access to tampons and pads, women are forced to use unsanitary and dirty rags – which can lead to bacterial infections and an increased risk of diseases such as cervical cancer – or have nothing at all to staunch the blood, which poses a risk to the health of women and the public.²

25. In addition to these obvious sanitary and health benefits, tampons and pads help prevent other illness and disease in women.

26. For example, a study at the Yale University School of Medicine found that the regular use of tampons decreased the risk of endometriosis, a disease in which endometrial tissue grows outside the uterus instead of inside it, causing severe abdominal pain, impaired fertility, and an increased risk of ovarian cancer.³

27. For these reasons, the federal Food and Drug Administration (“FDA”) classifies tampons and pads as “medical devices.” 21 C.F.R. §§ 884.5425, 884.5435, 884.5460, 884.5470.

28. The Supreme Court of Illinois agreed, holding that tampons and sanitary napkins are “medical appliances” and therefore had to be exempt from the local sales tax.⁴

29. Under Ohio law, tampons and pads do not qualify as health care products exempted from the Ohio sales tax. Taxing tampons and pads is not substantially related to an important state interest.

² Jennifer Weiss-Wolf, *Helping Women and Girls. Period.*, N.Y. Times, Jan. 28, 2015, available at http://kristof.blogs.nytimes.com/2015/01/28/helping-women-and-girls-period/?_r=1 (last visited Mar. 2, 2016).

³ Erika L. Meaddough, David L. Olive, Peggy Gallup, Michael Perlin & Harvey Kliman, *Sexual Activity, Orgasm and Tampon Use Are Associated with a Decreased Risk for Endometriosis*, 53 *Gynecologic and Obstetric Investigation* 163 (2002), available at <http://www.karger.com/Article/Abstract/58368> (last visited Feb. 25, 2016).

⁴ *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 411 (1989).

30. This disparate treatment between health care products used exclusively by women is discriminatory on its fact and violates equal protection clauses of the Ohio and U. S. Constitution.

31. Tampons and pads also qualify as a “drug” because they are “substances to be intended to affect . . . a function of the body.” O.R.C. § 5739.01(FFF). Taxing tampons and pads is not substantially related to an important state interest although tampons and pads, used to stop the flow of blood from the uterus, hence “affect a function of the body,”

32. There can be only one explanation for the Department’s decision to tax tampons and pads but not other less medically necessary products also used by men like products after a vasectomy to prevent infection and keep site clean and dry: feminine hygiene products like tampons and pads are used by women only, to treat women’s health issues only. As the Supreme Court has held, when a government action targets a protected class – in this case, women, and is thus irrational, the intent to discriminate can readily be presumed.

Taxing Tampons and Pads Harms Women

33. On information and belief, the average women spends at least \$70 or more per year on tampons and pads.

34. On information and belief, menstruating women make up at least 25 percent of Ohio’s population of 12 million.⁵

35. On information and belief, by imposing a 5.4% sales tax on 3 million women paying \$70 per year for tampons and pads, Ohio collects approximately \$11 million each year by taxing women.

36. On information and belief, this represents less than one hundredth of one percent of the total annual budget of the State of Ohio, which was approximately \$64 billion for the fiscal year

⁵ U.S. Census Bureau,2014

2015.⁶

37. But this tax is burdensome for the women who have to pay it, particularly for women living in poverty or with a low income. For some, paying a 5.4% tax or more with the county portion counted, on a product that women *must* have (or risk infection, disease, loss of work, or worse) is a financial hardship.⁷

CLASS ACTION ALLEGATIONS

38. This action is brought as and may properly be maintained as a class action under the provisions of Rule 23 of the Ohio Rules of Civil Procedure.

39. The putative class is defined as women who reside in the State of Ohio and who has purchased tampons and/or sanitary pads, and paid sales tax on those purchases, in the State of Ohio within the statute of limitations period.

40. The members of this putative class are so numerous that separate actions or joinder of parties, whether required or permitted, is impracticable.

41. There are questions of law and fact common to the Class that predominate over any questions affecting only individual members of each class.

42. The principal common questions of law for the Class is whether Defendants violated the tax law of the State of Ohio, the Fourteenth Amendment of the United States Constitution, and the Equal Protection Clause of the Ohio Constitution by charging sales tax on tampons and pads.

43. The principal common question of fact for the Class is that the members of the Class were all charged the same sales tax by Defendants on their purchases of tampons and pads.

44. Plaintiffs have no interests antagonistic to the interests of the other members of the

⁶ Ohio Office of Budget and Management, "Budget History Since FY 1999 (All Funds)," available at <http://obm.ohio.gov/budget/operating/doc/fy-16-17/BudgetHistorySinceFY-1999.pdf>

⁷ Women also often have to pay a local sales tax, imposed by the county they reside in, on top of the 5.4% charged by the State. *See* ORC 5740 et seq.

Class. There is no conflict between Plaintiffs and any other members of the Class with respect to this action or the claims for relief herein.

45. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent legal counsel experienced in constitutional law and class action litigation matters for that purpose.

46. Plaintiffs are adequate representatives of the Class and, together with their attorneys, are able to, and will fairly and adequately, protect the interests of the Class and its members.

47. In addition, a class action is superior to other available methods for the fair, just, and efficient adjudication of the claims asserted herein. Joinder of all members of the Class is impracticable and, for financial and other reasons, it would be impractical for individual members of the Class to pursue separate claims. Moreover, prosecution of separate actions by individual members of the Class would create the risk of varying and inconsistent adjudications, and would unduly burden the courts.

48. Plaintiffs and their counsel anticipate no difficulty in the management of this litigation as a class action.

FIRST CAUSE OF ACTION
Declaratory Judgment Against All Defendants

49. Plaintiffs hereby repeat and reallege the foregoing paragraphs as if the same were fully set forth at length herein.

50. Pursuant to O.R.C. § 2721, *et seq.*, Plaintiffs seek a declaration from this Court that Defendants' decision to charge sales tax on tampons and sanitary napkins is unlawful, invalid, and unenforceable.

SECOND CAUSE OF ACTION
**Article 78 – Inapplicable Tax and Arbitrary, Capricious, Legally Deficient
Determination Against All Defendants**

51. Plaintiffs hereby repeat and reallege the foregoing paragraphs as if the same were fully set forth at length herein.

52. The sales tax, O.R.C. § 5739.01, is inapplicable to tampons and pads as a matter of law.

53. Under O.R.C. § 5739.01, tampons and pads are exempt from the sales tax because: they are “substances” “intended to affect the . . . function of the body,” O.R.C. § 5739.01(FFF); and they are a “drug” within the meaning of O.R.C. § 5739.01.

54. Defendants’ decision to charge and collect sales tax on tampons and pads, but not on other products with a much less substantial medical purpose, is arbitrary, capricious, and irrational, and violates the Ohio tax law and Ohio Constitution.

55. Defendants’ decision to charge and collect sales tax on tampons and pads discriminates against women.

56. Women in Ohio who buy tampons and pads are harmed by Defendants’ decision to tax these products because they are forced to pay a sales tax on products necessary and vital to their health.

57. Pursuant to O.R.C. Chapter 2721, Plaintiffs request that the Court issue an order declaring that Defendants’ decision to charge and collect a sales tax on tampons and pads is unlawful, affected by an error of law, arbitrary and capricious, invalid, unenforceable, and in violation of Ohio law; enjoining Defendants from charging and collecting sales tax on tampons and pads; and ordering that Defendants refund to Plaintiffs and all members of the Class the illegal sales tax they have improperly paid on tampons and sanitary napkins over at least the past six years or more.

THIRD CAUSE OF ACTION
Ohio Constitution, Article I, Section 2, Against All Defendants

58. Plaintiffs hereby repeat and reallege the foregoing paragraphs as if the same were fully set forth at length herein.

59. The Bill of Rights, Article I, § 2, of the Ohio Constitution, provides that “All political power is inherent in the people. Government is instituted for their equal protection and benefit”

60. Defendant’s decision to charge and collect sales tax on tampons and pads violates the Equal Protection Clause, Article I, § 2, of the Ohio Constitution because it denies women equal protection and discriminates against women, because a tax on feminine hygiene products is on its face a tax on women, and because it results in the disparate treatment of women.

61. Defendants’ decision to charge and collect sales tax on women’s medical products – tampons and pads – but not medical products also used by men is not substantially related to an important state interest, is not rationally related to a legitimate state purpose, is not rational at all, directly discriminates against women, and directly results in the disparate treatment of women.

62. As a direct and proximate result of the above-mentioned acts, Plaintiffs have suffered injuries and damages. Women in Ohio who buy tampons and pads are harmed by Defendants’ decision to tax these products, because they are forced to pay a sales tax on products necessary to their health, while men who purchase products far less necessary to their health are not.

FOURTH CAUSE OF ACTION
U.S. Constitution Fourteenth Amendment / 42 U.S.C. § 1983,
Denial of Equal Protection on the Basis of Sex / Due Process
Against Defendant Joseph W. Testa

63. Plaintiffs hereby repeat and reallege the foregoing paragraphs as if the same were fully set forth at length herein.

64. Defendant Joseph W. Testa’s decision to charge and collect sales tax on tampons and

pads discriminates against women, because a tax on feminine hygiene products is on its face a tax on women, and because it results in the disparate treatment of women.

65. Defendant Testa's decision to charge and collect sales tax on women's medical products – tampons and pads – but not medical products also used by men is not substantially related to an important state interest, is not rationally related to a legitimate state purpose, is not rational at all, directly discriminates against women, and directly results in the disparate treatment of women.

66. Such discrimination violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, Section 1. (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”)

67. Defendant acted under color of Ohio law to deprive the Plaintiffs of their Fourteenth Amendment rights. A cause of action is created by 42 U.S.C. § 1983.

68. As a direct and proximate result of the above-mentioned acts, Plaintiffs have suffered discriminatory financial loss. Women in Ohio who buy tampons and pads are harmed by Defendants' decision to tax these products, because they are forced to pay a sales tax on products necessary and vital to their health, while men who purchase products far less necessary to their health are not.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor against Defendants, and issue an order containing the following relief:

A. A declaration that Defendants' decision to charge and collect a sales tax on tampons and pads is unlawful, invalid, unenforceable, in violation of Ohio tax law, and unconstitutional under the Fourteenth Amendment of the United States Constitution and Article I, § 2 of the Ohio Constitution;

- B. An order certifying the Plaintiff Class;
- C. An order permanently enjoining Defendants from charging and collecting a sales tax on tampons and sanitary napkins;
- D. An order awarding Plaintiffs and the other members of the Class refunds, as restitution of taxes improperly assessed by Defendants and paid by Plaintiffs, and damages of at least \$11,000,000 per year for the expected class of women entitled, but otherwise in an amount to be determined at trial;
- E. An order awarding Plaintiffs attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and
- F. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

RAY, ROBINSON, CARLE & DAVIES CO., L.P.A.

By 

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Attorneys for Plaintiffs

IN THE COURT OF CLAIMS OF OHIO

Claim Form

2016-00197

Case Number

for Court use only

CLAIMANT:

(1) Stephanie L. Rowitz, et al. (see Complaint)
claimant's first and last name

(2) July 11, 1992
date of birth

(3) 5730 W. Longridge Drive
street address

(4) Seven Hills, OH 44131
city state zip

(5) 216-236-2400
telephone area code

(6) rowitz.s@gmail.com
Email address

NOTE: if you move or change telephone numbers you must give the Court written notice of the new address or telephone number

STATE AGENCY OR DEPARTMENT:

(7) Ohio Dept. of Taxation and Tax Commissioner
defendant state department, board, commission, etc

(8) 30 E. Broad St.
street address

(9) Columbus, OH 43215
city state zip

(10) Location where injury, damage, or loss occurred.

Collection of state and county tax on tampons and sanitary napkins (see Complaint)

(11) Date and time when injury, damage, or loss occurred.

ongoing - collection of tax at least since 2003

(12) Describe in ordinary language the basis of the claim.

See Complaint attached. Millions of Ohio women have been

discriminated against in the collection of sales tax,

both on a state and county level, for menstruation sanitary

products.

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(16) I (circle the appropriate word or phrase) have do not have insurance coverage for the injury, damage or loss with the

(17) _____
fill in company name and address and policy number

The policy has a (18) \$ _____ deductible provision.

I (circle the appropriate word or phrase) have/have not/ received insurance payment(s) in the amount of

(19) \$ _____ as a result of the incident described above. (see instructions). I ask the Court to grant a judgment in the amount stated in blank (14).

(20) If you are a Medicare or Medicaid beneficiary, please list your Medicare or Medicaid number below

n/a

If the amount exceeds \$10,000.00 the Court may require that a civil rules complaint be filed. Under the penalties of perjury and falsification, I state that I have read or had read to me the above complaint and that it is true. Further, I expressly waive, on behalf of myself and of any person who shall have any interest in this claim, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me from disclosing any knowledge or information which they thereby acquired.

(21) [Signature]
signature of plaintiff (see instructions)

BE SURE TO INCLUDE FILING FEE AND TO GIVE THE COURT WRITTEN NOTICE OF ADDRESS CHANGES
(see instructions)

NOTE: Plaintiff need not have an attorney. If plaintiff files the complaint without an attorney, plaintiff completes Blank (21). If plaintiff files through an attorney, plaintiff signs Blank (21) and the attorney signs Blank (22) and completes Blanks (23) through (25).

Pursuant to Civil Rule 11, I state I have read the above complaint; that to the best of my knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

(22) [Signature]
signature of plaintiff's attorney

(23) 6480 Rockside Woods Blvd S 360
street address

(24) Cleveland OH 44131
city state zip

(26) 216 236 2400
telephone area code

SEND COMPLETED FORM & PAYMENT TO:

Ohio Court of Claims
Thomas J. Moyer Ohio Judicial Center
65 South Front Street, 3rd Floor
Columbus, Ohio 43215