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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001983-MR

MARK TREESH, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE; FRANKFORT INDEPENDENT SCHOOL DISTRICT — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS WINGATE, JUDGE
ACTION NO. 05-CI-01623

DIRECTV, INC.; ECHOSTAR SATELLITE, L.L.C. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

WINE, JUDGE: Mark Treesh, in his official capacity as Commissioner of the Department of Revenue, and the Frankfort Independent School District appeal an order of the Franklin Circuit Court granting motions for summary judgment filed by DIRECTV,

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Inc., and EchoStar Satellite, L.L.C. At issue is whether the gross receipts of providers of direct satellite broadcast and wireless cable service ("DBS") are subject to taxation by local school districts pursuant to KRS 160.614(3). The trial court held § 602 of the Telecommunications Act of 1996[2] preempts KRS 160.614(3) as it applies to DBS providers. After our review of the record and briefs of each of the parties (including an *amicus curiae* brief filed by Time Warner Cable, Inc.), as well as oral arguments, we reverse and remand with directions.

The facts are not in dispute. In 2005, KRS 160.614 was amended to include the gross receipts derived from the furnishing of DBS and wireless cable service. The amendment provides:

> (3) A utility gross receipts license tax initially levied by a school district board of education on or about July 1, 2005, shall include the gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in addition to the gross receipts derived from the furnishing of utility services defined in KRS 160.6131 and cable service.

Each board of education of a school district decides whether to "opt out" or to impose the utility tax according to the procedure set out in KRS 160.614(5). The Kentucky legislature transferred the collection and administration of the tax from the school districts to the Kentucky Department of Revenue. KRS 160.6145.

All providers of cable, utility and DBS services are required to register with the Department of Revenue and may utilize a website to file monthly tax returns. The

[2] Pub. L. 104, Title VI, § 602 of the Federal Telecommunications Act of 1996. 47 U.S.C.A. § 152.

website also identifies the school districts, geographic boundaries and tax rate information which can be utilized by the service providers. The site also acknowledges that the Department of Revenue collects the tax based on the rate established by the local authority. Finally, the superintendent of each school district is to provide the Department of Revenue and each utility provider the boundaries of the district where the utility service is provided. KRS 160.6152.

The Appellees, DIRECTV, Inc., and EchoStar Satellite, L.L.C., which are DBS service providers, have failed to register because they believe they are exempt from paying the utility tax, relying on § 602 of the Federal Telecommunications Act of 1996, which states in part:

> (a) Preemption-- A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.
>
> (b) Definitions--
>
> . . . .
>
> (3) Local taxing jurisdiction. -- The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.
>
> . . . .
>
> (c) Preservation of State Authority-- This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to

> prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

The parties filed cross-summary judgment motions, with the Appellants seeking imposition of the tax on providers and the Appellees seeking injunctive relief, as well as a declaration that § 602 preempted enforcement of KRS 160.614(3).

The Franklin Circuit Court held that the utility tax is preempted by § 602 of the Telecommunications Act insofar as it applies to DBS service providers. The Appellants now appeal the court's August 22, 2006, order granting summary judgment and permanently enjoining the Department of Revenue from requiring the Appellees to comply with KRS 160.614(3) as it applies to DBS service providers.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996), *citing* Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001), *citing Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the

trial court's decision and will review the issue *de novo*." *Lewis, supra*. A reviewing court is not bound by the trial court's decision on questions of law. In the present case, the questions to be answered dealt with the interpretation of statutes. "The construction and application of statutes is a matter of law and may be reviewed *de novo*." *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

In 1990, the Kentucky General Assembly, in response to the Supreme Court's directive in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), enacted an Education Reform Act which revised both state and local school taxing structures. KRS 160.470, which is among the statutes the Act amended, establishes a minimum base funding level, a portion of which is to be raised by local school districts with the levy of a minimum equivalent tax of thirty cents per $100.00 of assessed valuation. KRS 160.470(9)(a). The local effort may be composed of an *ad valorem* property tax, or the special taxes – occupational license tax, utility gross receipts license tax or excise tax – authorized by KRS 160.593 *et seq.*, or a combination of these taxes.

The Kentucky Supreme Court held in *Williams v. Kentucky Department of Education*, 113 S.W.3d 145, 152 (Ky. 2003):

> As we have previously emphasized, the *sole responsibility* for providing the system of common schools lies with the General Assembly. If they choose to delegate any of this duty to institutions such as the local boards of education, the General Assembly must provide a mechanism to assure that the ultimate control remains with the General Assembly, and assure that those local school districts also exercise the delegated duties in an efficient manner. [*Rose, supra*, at 216.]

This, of course, as *Williams* noted, was not a novel notion. "[P]ublic education has long been recognized as a function of State government . . . ." *Board of Education of Louisville v. Society of Alumni of Louisville Male High School, Inc.*, 239 S.W.2d 931, 933 (Ky. 1951), and "every common school in the state . . . is a state institution . . . ." *City of Louisville v. Board of Education of City of Louisville*, 154 Ky. 316, 157 S.W. 379, 380 (1913).

The Court further held:

> We have several times written, in substance and effect, that every common school in the state, whether it be located in a populous city or in a sparsely settled rural district, is a state institution, protected, controlled, and regulated by the state, and that the fact that the state has appointed agencies such as fiscal courts, school trustees, and municipal bodies to aid it in the collection of taxes for the maintenance of these schools does not deprive them of their state character. . . . Therefore, when a municipal body, or a county, or a school district, levies taxes for school purposes, the tax so levied is a state, and not a municipal, county, or district, tax, although it be levied and collected by municipal or county or district officers.

City of Louisville v. Board of Education of City of Louisville, supra (internal citations omitted).

In *Board of Education of Louisville v. Board of Education of Jefferson County*, 458 S.W.2d 6, 8 (Ky. 1970), the former Court of Appeals declared that boards of education were not municipal corporations. Specifically, the Court held:

> [T]hough a school district possesses some of the attributes of a municipal corporation for some legal purposes as was recognized in *Sims v. Board of Education of Jefferson*

> *County*, Ky., 290 S.W.2d 491 [(1956], and though a school district is regarded as a political subdivision for some legal considerations as pointed out in *Board of Education of City of Corbin v. City of Corbin*, 301 Ky. 686, 192 S.W.2d 951 [(1946)], a school district is, nevertheless, an agency of the state subject to the will of the legislature and existing for one public purpose only—to locally administer the common schools within a particular area subject to the paramount interest of the state.

"Thus viewed, the statutory relationship between the DOE and the local board was more akin to that of principal-agent than to that of co-agents." *Williams v. Department of Education, supra*, at 154.

In *Rose, supra*, at 201, the Court acknowledged that local school districts were creatures of the state and that "our General Assembly has given local districts a perpetual, corporate existence, and has in two statutes [KRS 160.160 and 160.290], specifically given local boards virtual unlimited authority to carry out their duty of promoting local education."

Again and again Kentucky's Courts have ruled that the local district boards of education and the taxes they assessed were a state concern.

In *Cullinan v. Jefferson County*, 418 S.W.2d 407 (Ky. 1967), the Court held, "A board of education in Kentucky is performing a function of the state in operating the public schools as state institutions." *Commonwealth v. Louisville National Bank*, 220 Ky. 89, 294 S.W. 815 (1927)(School taxes are classified as state and not local taxes); *Middleton v. Middleton*, 239 Ky. 759, 40 S.W.2d 311 (1931)(Members of county boards of education are state and not municipal officers); *Board of Education of Louisville v.*

Society of Alumni of Louisville Male High School, 239 S.W.2d 931 (Ky. 1951)(Local school boards fulfill a governmental function of state government by providing public education within a particular geographical area) .

As pointed out in *Board of Education of Louisville v. Board of Education of Jefferson County*, *supra*, at 9:

> The tax is used only for school purposes within the county; the subject is one which is local in application but of statewide concern; the tax is one the county is authorized by the Constitution to levy; the legislature, which has the constitutional power to consolidate the entire state as one school district, determined a manner of distributing the proceeds of the tax to the school systems located in that county on a basis it deemed appropriate[.] . . .

In *Board of Trustees, Newport Public Library v. City of Newport*, 300 Ky. 125, 187 S.W.2d 806 (1945), the Court considered an act of the General Assembly which required a city to levy a property tax for the purpose of maintaining a public library in the city. The act was attacked as being in violation of the provisions of § 181 of the Kentucky Constitution. The Court held that the act imposed a local tax but that it was for state purposes.

KRS 160.614(3) mandates that any school district which levies a gross receipt license tax "*shall* include the gross receipts . . . of direct satellite broadcast and wireless cable service . . . ." (Emphasis added). Further, the district shall:

> include gross receipts derived from the furnishing of direct satellite broadcast and wireless cable service in the base of its utility gross receipts tax at the same rate as applied to cable service, unless the school district board of education chooses

> to opt out of this requirement by following the procedures set forth in subsection (5) of this section.

KRS 160.614(4).

Thus, the Commonwealth of Kentucky mandates the imposition of the utilities fee on DBS providers if any utilities tax is imposed. Only under the prescribed statutory guidelines may a local school district "opt out." This statutory provision is consistent with the previously cited Kentucky case law finding school taxes are state taxes.

Any federal statute must be interpreted in accordance with federal law. *Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003). The Appellees argue that the preemption provision of the Telecommunications Act prohibits enforcement of the utilities tax.

Historically, the police powers of the state are not preempted in the absence of "the clear and manifest purpose of Congress" to do so. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). If the statute contains an express preemption clause, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993); *Niehoff v. Surgidev Corp.*, 950 S.W.2d 816, 820 (Ky. 1997).

Clearly, § 602 prevents certain local entities from taxing DBS service providers. "When Congress has considered the issue of pre-emption and has included in

the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority, . . . there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517, 112 S. Ct. 2608, 2618, 120 L. Ed. 407 (1992), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 505, 98 S. Ct. 1185, 1190, 55 L. Ed. 2d 443 (1973) and *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 690, 93 L. Ed. 2d 613 (1987).

However, the "savings clause" in subsection (c) in § 602 contemplates a school tax scenario as prescribed in KRS 160.614(3). The Commonwealth mandates the local school district levy an *ad valorem* tax to obtain the amount of money needed as shown in the general school budget. KRS 160.455. The maximum rate of 3% is prescribed by statute. KRS 160.613. Gross receipts license tax returns and related payments shall be transmitted electronically to the Department of Revenue. KRS 160.6145. The Department of Revenue then distributes the taxes collected to each school district imposing the tax. KRS 160.6154. Finally, the Department of Revenue makes amortized refunds to service providers. KRS 160.6156.

While not explicitly stated in the preemption section, the reason for prohibiting the local jurisdictions from taxing DBS providers revolved around the burden of calculating and paying multiple tax bills with various due dates in any given state.

The current taxing scheme is not overly burdensome to DBS service providers. The district school superintendent must provide the necessary information to the service provider and Department of Revenue to help determine the geographic location of the subscriber. KRS 160.6152. Any DBS or wireless cable service provider required to pay the utility tax may increase its rates up to 3% to cover the cost of the tax. KRS 160.617. Most importantly, the DBS providers are required to only pay one assessment each quarter.

For the foregoing reasons, it is readily apparent that the tax authorized by the legislation here being attacked (KRS 160.614(3)) is for state purpose. Therefore, the provision of the Telecommunications Act which preserves the right of a state to tax the services of a DBS provider allows for the taxation scheme outlined in KRS 160.614(3).

We therefore reverse and remand with direction that the trial court deny the motions for summary judgment and injunctive relief sought by DIRECTV, Inc., and EchoStar Satellite, L.L.C., and, further, enter an order granting the Department of Revenue's motion for summary judgment, directing that the Appellees register with the Department of Revenue and remit the utility tax, interest and penalties.

HENRY, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I agree with the majority's interpretation of Kentucky law that a tax imposed by a local school district is a state tax. Such has long been the law in this Commonwealth. *Lamar v. Board of Education of*

Hancock Co. School District, 467 S.W.2d 143 (Ky. 1971). However, I believe that the preemption provision of the Federal Telecommunications Act of 1996 is precisely applicable to this legislation and prohibits the enforcement of the tax.

Initially, I differ with the majority that the characterization of the tax as a state tax resolves the issue in this case. Instead, the issue is whether the school districts are local taxing jurisdictions as defined in §602 of the Federal Telecommunications Act which includes in its definition any "municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction...with the authority to impose a tax or fee...." The Act prohibits any tax from being imposed by a local taxing jurisdiction. Thus, I believe the issue is not the nature of the tax but is whether a school district is a local taxing jurisdiction which imposes the tax.

Common sense dictates that a school district be considered a local taxing jurisdiction. Their authority is limited to the area within its district, and pursuant to this legislation, they have the authority to impose taxes within their geographical boundaries. It is in fact the potential for varying tax rates imposed upon DBS service providers that prompted the enactment of the preemption provision.

As noted by the majority, the reason for prohibiting local taxing jurisdictions from taxing DBS providers is to relieve the providers of the burden of calculating and paying multiple tax bills with various dues dates within a single state. In this Commonwealth there are 175 school districts each of which have chosen to impose the tax at varying rates or to not impose the tax. The boundaries of the various school

districts are often difficult to identify since they are not necessarily consistent with traditional political boundaries of cities or counties, thereby imposing upon the provider the onerous task of calculating and paying its tax liability.

The majority suggests that the website provided by the Department of Revenue lifts the burden sought to be prevented by §602 of the Act. Regardless of the success of the Department's efforts, it remains that the Act explicitly prohibits a school district from imposing the tax.

I conclude with an observation concerning the enactment of KRS 160.014. This litigation will undoubtedly be appealed to our Supreme Court and thereafter proceed within the federal judicial system. As a result, the local school districts will be unable to rely on the receipt of the money generated from this tax. Why the legislature chose this more legally dubious route to tax the providers is, except to the politically wise, unknown.

It is clear that the state has the authority to impose a uniform tax on the DBS providers which could then be distributed to the local school districts. To avoid the loss of needed income to our school districts, during its next session the legislature should enact new legislation imposing a statewide uniform tax on DBS providers in Kentucky with the proceeds to be distributed to the local districts per capita.

I would affirm the trial court's findings that the local school districts are local taxing jurisdictions and that §602(a) of the Federal Telecommunications Act of 1996 preempts KRS 160.014.

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