UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:12-CV-00030-DLB

CHARLIE COLEMAN, *et al.* **PLAINTIFFS**

vs.

CAMPBELL COUNTY LIBRARY
BOARD OF TRUSTEES **DEFENDANT**

AND

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON
CASE NO. 2:12-CV-0035-DLB

GARTH KUHNHEIN, *et al.* **PLAINTIFF**

v.

KENTON COUNTY LIBRARY
BOARD OF TRUSTEES **DEFENDANTS**

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' COMPLAINT

The Defendant, Kenton County Public Library Board of Trustees, by and through counsel, for its Reply in Support of its Motion to Dismiss, states as follows:

I. INTRODUCTION

The survival of Plaintiffs' claims hinges on their contention that KRS 134.590 does not apply to the present matter. Indeed, Plaintiffs do not dispute that if KRS 134.590 applies to their claims, then under Kentucky law: none of them have exhausted the requisite administrative remedies; they cannot maintain a class action lawsuit; their refund claims are subject to a two-year statute of limitations; and, they would be prohibited from seeking declaratory relief in the form of tax refunds.

In an effort to avoid the dismissal of their lawsuit, Plaintiffs offer numerous rationalizations and excuses as to why KRS 134.590 should not apply. As demonstrated below, however, none of these rationales are supported by the law. In fact, they are inconsistent with the allegations in the Complaint. Accordingly, KRS 134.590 applies to Plaintiffs' claims, and compels dismissal of the Complaint with prejudice.

II. ARGUMENT

A. Plaintiffs Must Exhaust the Administrative Remedies Set Forth in KRS 134.590.

Before filing a lawsuit seeking a refund for excess payment of ad valorem taxes, a taxpayer must first exhaust administrative remedies, as mandated by KRS 134.590. *Cromwell Louisville Assoc. v. Kentucky*, 323 S.W.3d 1, 7 (Ky. 2010); *Bischoff v. City of Newport*, 733 S.W.2d 762 (Ky. App. 1987). KRS 134.590 mandates that anyone seeking a refund of an ad valorem tax must apply for a refund with the levying authority within two (2) years. If a plaintiff fails to exhaust administrative remedies prior to filing a lawsuit for a tax refund, the complaint should be dismissed. *Bischoff*, 733 S.W.2d at 764. Plaintiffs argue that they are not required to exhaust the administrative remedies set forth in KRS 134.590 by manufacturing false and illusory exceptions to the statutory requirements. However, an examination of Kentucky law shows that no such exceptions exist and that Plaintiffs are required to exhaust the administrative remedies set forth in the statute.

1. KRS 134.590 applies to all ad valorem taxes.

KRS 134.590 is entitled "Refund of ad valorem taxes or taxes held unconstitutional." As its title indicates, there is no qualifier or limitation to the term 'ad valorem tax.' Similarly, the language of KRS 134.590 refers to ad valorem taxes without qualification. For example, Section (4) states:

> Refunds of **ad valorem taxes** shall be authorized by the mayor or chief finance officer of any city, consolidated local government, or urban-county government for the city, consolidated local government, or urban-county government or for any special district for which the city, consolidated local government, or urban-county government is the levying authority, by the county judge/executive of any county for the county or special district for which the fiscal court is the levying authority, or by the chairman or finance officer of any district board of education. (Emphasis Added)

Section (6) states, in part:

> No refund for **ad valorem taxes**, except those held unconstitutional, shall be made unless the taxpayer has properly followed the administrative remedy procedures established through the protest provisions of KRS 131.110, the appeal provisions of KRS 133.120, the correction provisions of KRS 133.110 and 133.130, or other administrative remedy procedures. (Emphasis Added)

Plaintiffs argue that KRS 134.590 does not apply in this action because they contend that the Library levies a 'special' ad valorem tax as stated under KRS Chapter 173. Plaintiffs' Response, p. 4. They argue that Kentucky law distinguishes 'special' ad valorem taxes from regular ad valorem taxes and that KRS 134.590 only applies to the latter.

The truth is Kentucky courts have never recognized a distinction between 'special' and regular ad valorem taxes with respect to KRS 134.590. The only distinctions recognized by the Courts regarding KRS 134.590 dealt with taxes not deemed ad valorem at all. *See City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004) (holding that a flat rate life squad fee was not an ad valorem tax and therefore not subject to KRS 134.590); *Maximum Mach. Co. v. City of Shepherdsville*, 17 S.W.3d 890 (Ky. 2000) (holding that KRS 134.590 was expressly limited to ad valorem taxes and did not apply to occupational license taxes).

Plaintiffs note that several Kentucky cases refer to 'special' ad valorem taxes, but none of these cases establish that 'special' ad valorem taxes are different from regular ad valorem taxes in any meaningful way, much less for the purpose of KRS 134.590. *See Hardin County Fiscal Court v. Hardin County Board of Health*, 899 S.W.2d 859 (Ky. App. 1995) (requiring the Fiscal

Court to set the Health Board's special ad valorem tax rate pursuant to the rate approved by the Board of Health); *Crafton v. Board of Trustees of the Henderson County Public Library*, 554 S.W.2d 82 (Ky. 1977) (holding that a ballot question establishing a library was moot once Fiscal Court approved library district via petition method.). To the contrary, recent Kentucky decisions following the enactment of KRS Chapter 132 simply refer to taxes imposed by libraries as regular ad valorem taxes and make no distinction with taxes levied by other taxing districts. *See Daviess County Pub. Library Taxing Dist. v. Boswell*, 185 S.W.3d 651 (Ky. App. 2005) *Lexington-Fayette Urban County Government v. Hayse*, 684 S.W.2d 301 (Ky. App. 1984).

Most importantly, there is nothing in the language of KRS 134.590 to suggest that its provisions would not apply to a 'special' ad valorem tax. In short, Plaintiffs cannot point to a single authority which supports its position that they are exempt from KRS 134.590 only because the Library levies a 'special' ad valorem tax.

2. KRS 134.590 applies to the Library because it is a local taxing district.

KRS 134.590 applies to ad valorem taxes levied by all local taxing districts. *St. Ledger v. Revenue Cabinet*, 942 S.W.2d 893, 900 (Ky. 1997). There are no local taxing districts which are exempt from these requirements. In their Response, Plaintiffs again try to concoct a faux distinction to exempt them from the refund requirements of KRS 134.590 by claiming that the statute only apply to 'special districts.' Plaintiffs' Response, pp. 4-6. Plaintiffs argue that because the Library is defined as a 'taxing district' under Kentucky law, and not a 'special taxing district,' KRS 134.590 does not apply.

Once again, Plaintiffs are trying to make a distinction that does not make a difference. Kentucky courts have consistently held that KRS 134.590 applies to local taxing districts and makes no distinctions between 'special' and regular taxing districts. *See Board of Education of*

Fayette County v. Taulbee, 706 S.W.2d. 827, 829 (Ky. 1986) ("KRS 134.590(3) provides that a **local taxing district** may make refunds where the amount of tax paid was in excess of the amount finally determined to be due.); *St. Ledger v. Revenue Cabinet*, 942 S.W.2d 893, 900 (Ky. 1997) ("[T]he Department of Revenue must provide refunds for the state under KRS 134.590(2), while KRS 134.590(6) strictly applies to refunds from **local tax districts**."); *Revenue Cabinet v. Gossum*, 887 S.W.2d 329, 334 (Ky. 1994) ("[T]he Department of Revenue shall refund under KRS 134.590(1), and that sections (3), (4), (5), and (6) apply to the refund of **all other taxing districts**.) (Emphasis Added).

Plaintiffs acknowledge that the Library is a taxing district as defined under KRS 65.180 – 65.192. Consequently, refunds for ad valorem taxes levied by these taxing districts are governed under KRS 134.590. There is absolutely no authority to suggest that taxing districts such as the Library are exempt from these requirements merely because they are not 'special' districts.

3. The refund procedure is set forth in KRS 134.590(3) through (6).

Plaintiffs argue that they are not required to exhaust the administrative requirements of KRS 134.590 because the Library has not instructed Plaintiffs on how to apply for a refund. Plaintiff's Response, pp. 6-7. However, the procedure for applying for a refund of an ad valorem tax levied by a local taxing district, such as the Library, is set forth in KRS 134.590(3) through (6). Because the relevant process is statutorily proscribed, Plaintiffs have adequate notice as to the procedure.

4. Plaintiffs' allegations of an unconstitutional taking do no relieve them of their obligation to exhaust administrative remedies.

Plaintiffs' assert that they are not required to exhaust the administrative remedies of KRS 134.590 because they are asserting that Chapter 132 is unconstitutional as applied. Plaintiffs are simply wrong. The Kentucky Supreme Court has held consistently that when a plaintiff argues a

tax statute or regulation is unconstitutional as applied because it results in an unlawful taking, the plaintiff must first exhaust administrative remedies prior to seeking a declaratory judgment. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 472 (Ky. 2004) ("In *Commonwealth v. DLX, Inc.*, after remarking that a party need not exhaust administrative remedies when attacking the constitutionality of a statute or a regulation as void on its face, this Court held that a party must exhaust administrative remedies prior to seeking judicial review of an as-applied constitutional challenge."); *Commonwealth v. DLX, Inc.*, 42 S.W. 3d 624, 625 (Ky. 2001) ("Exhaustion of administrative remedies is not necessary when attacking the constitutionality of a statute or regulation as void on its face . . . This exception does not apply in the case at bar, however, because DLX has not challenged the facial validity of the surface mining statutes and regulations. Rather, as its complaint shows, DLX's argument is that the Cabinet's application of the statutes and regulations resulted in an unconstitutional taking of its property.").

Similar to *Popplewell* and *DLX*, Plaintiffs are challenging the Library's application of a statute. Specifically, Plaintiffs are arguing the Library improperly applied KRS Chapter 132 to increase the ad valorem tax rate, which resulted in an unlawful taking in violation of the Constitution. Complaint, ¶¶ 38-42; Plaintiffs' Response, pp. 7-8. Thus, Plaintiffs are required to exhaust the administrative remedies set forth in KRS 134.590, and their failure to do so is grounds for dismissal of their claims. *Popplewell's Alligator*, 133 S.W.3d at 459 (reversing the court of appeals and dismissing the plaintiff's declaratory judgment action).[1]

[1] Later in their Response (pp. 10-11) Plaintiffs again reference the constitutionality of the ad valorem tax, and cite *Kling*, 654 S.W.2d 606 for the contention that "Defendants have unilaterally exceeded their authority and adopted an additional 'ad valorem' tax, [thus] said tax is unconstitutional and properly brought before this Court ." Response, p. 10. *Kling* offers no support Plaintiffs' position. In *Kling*, the Commission sued the Campbell County Clerk because the Clerk refused to list new tax levies on state and county tax bills. *Kling* has nothing to do with a taxpayer's right to challenge the constitutionality of a statute or their need to exhaust administrative remedies prior to doing so.

5. Application of KRS 134.590 does not violate the jural rights doctrine.

Any contention by Plaintiffs that application of KRS 134.590 violates Kentucky's jural rights doctrine is wholly unsupported by the law. Plaintiffs do not cite any authority to support their position that KRS 134.590 somehow precludes a right of action in negligence that was recognized at common law prior to the adoption of the 1891 Constitution—because there is none. In fact, "[i]t is to be recognized 'that the right to a refund of illegally or improperly collected taxes does not derive from the common law, but is a matter of legislative grace.'" *Revenue Cabinet v. Gossum*, 887 S.W.2d 329, 334 (Ky. 1994) quoting *Department of Conservation v. Co-De Coal Co.*, 388 S.W.2d 614, 615 (Ky. Ct. App. 1964). The jural rights doctrine is completely irrelevant to this matter.

6. Plaintiffs do not have a common law right to a refund.

There is no common law right to a refund where statutory authority for a refund exists. And where statutory authority exists, a plaintiff "must bring themselves within the terms of the statute authorizing a refund." *Gossum*, 887 S.W.2d at 334 (requiring plaintiffs to comply with the requirements of KRS 134.590 for recovery of a tax paid under a statute held unconstitutional) citing *Co-De Coal Co.*, 388 S.W.2d at 615 (requiring plaintiff to comply with KRS 134.580 for refund where it was determined that plaintiff was not subject to the taxes paid). KRS 134.590 authorizes a refund, and Plaintiffs cannot exercise a common law right to recovery independent from it. Thus, Plaintiffs' attempts to establish the "invalidity and involuntariness" elements for a common law tax refund claim (Plaintiffs' Response, pp. 9-10) are irrelevant.[2] Plaintiffs do not

[2] Plaintiffs' reliance on *In Inland Container Corporation v. Mason County*, 6 S.W.3d 374 (Ky. 1999) in support of their common law tax refund claim is misplaced. In that case, the Court turned to common law relief because there was no refund statute on point for a refund of the occupational taxes in question. Conversely, "in the present case, there is a statute on point for the refund of ad valorem taxes and that statute is KRS 134.590." *Dep't of Revenue v. Curtsinger*, Nos. 2006-CA-001379, 2006-CA-001462, 2007 Ky. App. Unpub. LEXIS 699, at *12 (Ky. Ct. App. Oct. 26, 2007) (requiring the plaintiffs comply with the refund statute and exhaust administrative remedies).

have a common law right to a tax refund, and they failed to bring themselves within the terms of KRS 134.590. Therefore, the Library's motion to dismiss should be granted.

B. Plaintiffs Have Conceded Application of KRS 134.590 Eliminates or Limits Their Claims Substantially.

While Plaintiffs attempt to dispute the applicability of KRS 134.590, they refute very little, if any, of the Library's argument that applying KRS 134.590 either eliminates entirely or severely limits their claims in this case. In fact, Plaintiffs have essentially conceded that applying KRS 134.590 is devastating to their case.

1. Plaintiffs concede KRS 134.590 bars Plaintiffs from seeking declaratory relief for tax refunds already paid.

Plaintiffs concede application of KRS 134.590 would bar them from pursing a declaratory judgment requiring a refund of taxes already paid because Plaintiffs have not exhausted their administrative remedies. Plaintiffs' Response, pp. 12-13 ("As set forth above, KRS 134.590 is inapplicable to the case at hand, but should the Court determine otherwise, Plaintiff has presented a claim for a declaratory judgment to avoid the continued imposition of a tax based on an illegal rate."). As explained above, KRS 134.590 applies to Plaintiffs' claims, and Plaintiffs are required to exhaust their administrative remedies prior to seeking declaratory relief for tax refunds. Plaintiffs' own concessions compel the dismissal of Plaintiffs' injunctive relief for return of their tax refunds.

2. Plaintiffs do not refute application of KRS 134.590 results in a two-year statute of limitations for their tax refund claims.

Pursuant to KRS 134.590(6), "No refund shall be made unless each taxpayer individually applies within two (2) years from the date payment was made." Accordingly, Plaintiffs, as well as each class member individually, is required to seek a refund within two years from the date they allegedly made the excessive tax payment. Thus, even if Plaintiffs win on the merits,

applicability of KRS 134.590 imposes a two-year statute of limitations for their tax refunds. Plaintiffs do not contest this result.[3] Because KRS 134.590 applies to Plaintiffs' claims, Plaintiffs' request for compensatory damages in the form of tax refunds prior to 2010 must be dismissed.

3. Plaintiffs concede class actions are not permitted under KRS 134.590.

In its Motion to Dismiss (pp. 5-8), the Library demonstrated a class action lawsuit is not permitted under KRS 134.590. Since Plaintiffs have said absolutely nothing to refute this point, they concede applying KRS 124.590 results in the dismissal of their classwide claims.

C. The Library is Entitled to Sovereign Immunity for Plaintiffs' Conversion Claim.

Plaintiffs do not dispute that sovereign immunity extends to protect a library from tort claims. Nor do Plaintiffs refute that "[T]he sovereign state cannot be held liable in a court of law for either intentional or unintentional torts committed by its agents." *Calvert Investments, Inc. v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 805 S.W.2d 133, 139 (Ky. 1991). Plaintiffs instead assert simply that a taxpayer can seek a refund of unlawful taxes from the state. Plaintiffs' Response, p. 13. The Library does not argue that Plaintiffs cannot seek a refund of taxes in court, assuming Plaintiffs follow the proper procedures necessary to vest the court with jurisdiction. Instead, the Library moves to dismiss Plaintiffs' conversion claim because a cause of action for conversion against the Library is barred by the doctrine of sovereign immunity.

[3] Instead, Plaintiffs merely proclaim KRS 134.590 inapplicable, and assert they are entitled to a common law statute of limitations of five years. However, as discussed above, Plaintiffs are not entitled to assert a common law right to a tax refund. In *Maximum Machine Co., Inc. v. City of Shepherdsville*, 17 S.W.3d 890 (Ky. 2000), a case relied upon by Plaintiffs, the Court found the statute of limitations in KRS 134.590 inapplicable because the challenged ordinance was an occupational license tax, not an ad valorem tax. The issues in the present case involve an ad valorem tax, and thus, *Maximum* does not apply.

Plaintiffs do not contradict this contention, and thus, their conversion claim should be dismissed for failure to state a claim upon which relief can be granted.

III. CONCLUSION

For the foregoing reasons, the Library's Motion to Dismiss should be granted, and the Plaintiffs' Complaint should be dismissed, with prejudice at Plaintiffs' cost.

Respectfully submitted,

/s/ *Michael W. Hawkins*
Michael W. Hawkins, Esq. (82949)
Cori R. Stirling (*admitted pro hac vice*)
Dinsmore & Shohl LLP
255 East Fifth Street, Suite 1900
Cincinnati, Ohio 45202
Phone: (513) 977-8200
Fax: (513) 977-8141

Mary Ann Stewart
ADAMS, STEPNER,
WOLTERMANN & DUSING, PLLC
40 W. Pike Street
P.O. Box 861
Covington, KY 41012
Phone: (859) 394-6200
Fax: (859) 392 7364
Email: mstewart@aswdlaw.com

Attorneys for Defendant Kenton County Public Library Board of Trustees

CERTIFICATION

This is to certify that on the 4th day of May, 2012, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to: Brandon N. Voelker.

/s/ *Michael W. Hawkins*
Michael W. Hawkins, Esq.
Dinsmore & Shohl LLP
255 East Fifth Street, Suite 1900
Cincinnati, Ohio 45202
Phone: (513) 977-8200
Fax: (513) 977-8141

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