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IN THE INDIANA TAX COURT

HIMCO WASTE-AWAY SERVICE, INC., *et al.,*	)	
Petitioners,	)	
v.	)	Cause No. 49T10-0006-TA-76
INDIANA DEPARTMENT OF STATE REVENUE and KENNETH L. MILLER, in his capacity as Commissioner of the Indiana Department of State Revenue,	)	
Respondents.	)	

ORDER ON RESPONDENTS' MOTION TO DISMISS

NOT FOR PUBLICATION
September 7, 2005

FISHER, J.

The Petitioners, Borden Waste-Away Service, Inc., Circle City Recycling, F.W. Richards, Inc., and Usher Transport, Inc., appeal the final determinations of the Indiana Department of State Revenue (Department) denying them a proportional use credit against their motor carrier fuel and surcharge tax (MCFT) liabilities for the second, third and fourth quarters of 1998 and the first and second quarters of 1999 (the periods at issue). The matter is currently before the Court on the Department's motion to dismiss.

The issue for the Court to decide is whether it has jurisdiction to hear the Petitioners' appeal. For the following reasons, the Court GRANTS the Department's motion.

FACTS AND PROCEDURAL HISTORY

During the periods at issue, the Petitioners operated commercial motor vehicles on Indiana's highways and were therefore subject to the MCFT. *See* IND. CODE ANN. §§ 6-6-4.1-4, -4.5 (West 1998-1999). After initially paying their MCFT liabilities, each of the Petitioners filed a claim for refund with the Department seeking a credit against their MCFT liabilities. *See id.* Between January and June of 2000, the Department issued final determinations denying each of the Petitioner's claims.

On February 10, 2000, thirty-nine other motor carriers initiated a class action suit in the Tax Court, appealing similar final determinations of the Department. *See Jack Gray Transp., Inc. v. Indiana Dep't of State Revenue,* 744 N.E.2d 1071 (Ind. Tax Ct. 2001), *review denied*. On June 8, 2000, HIMCO Waste-Away Services, Inc. (HIMCO) and several other motor carriers initiated an original tax appeal challenging similar final determinations. The Court stayed the proceedings in HIMCO's appeal pending the outcome of the class certification in *Jack Gray*.

On February 20, 2001, the Court handed down its decision in *Jack Gray*, in which it denied class certification, because Jack Gray had not met the numerosity requirement of Indiana Trial Rule 23(A)(1). *Id*. at 1075; *see also* Ind. Trial Rule 23(A). Consequently, on March 16, 2001, the Petitioners sought to join HIMCO's appeal (i.e., they were foreclosed from challenging their final determinations as members of the

class in *Jack Gray*).[1] On November 27, 2002, the Department filed a motion to dismiss, claiming that the Court lacked subject matter jurisdiction to hear the Petitioners' appeal. The Court granted joinder on December 6, 2002, effective as of March 16, 2001. The Court held a hearing on the Department's motion on January 24, 2003. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

Standard of Review

This Court hears appeals from denials of claims for refunds by the Department *de novo*. IND. CODE ANN. § 6-8.1-9-1(d) (West Supp. 2004-2005). Therefore, the Court is not bound by the evidence or the issues presented at the administrative level. *Chrysler Fin. Co. v. Indiana Dep't of State Revenue*, 761 N.E.2d 909, 911 (Ind. Tax Ct. 2002), *review denied*.

Discussion

In its motion to dismiss, the Department argues that because the Petitioners failed to file their petitions with this Court within 90 days from the date of the final determinations denying their claims for refund, this Court lacks subject matter jurisdiction over their appeal. *See* A.I.C. § 6-8.1-9-1(c) (stating that the Tax Court does not have jurisdiction to hear refund appeal suits filed more than ninety days after the date the Department mailed the decision of denial to the person filing suit). In response, the Petitioners argue that the filing of the original tax appeal by Jack Gray Transport,

[1] HIMCO and the other original appellants have since disposed of their claims; therefore, the Petitioners are the only remaining petitioners before the Court.

Inc., requesting class certification, tolled the time limits prescribed by the statute.[2] Thus, the Petitioners allege that they were still within their ninety days when they sought to join HIMCO's appeal on March 16, 2001.

To support their claim, the Petitioners rely on two United States Supreme Court cases. In *American Pipe and Construction Co. v. State of Utah*, 414 U.S. 538 (1974), the United States Supreme Court held that where class action status is denied, solely for a failure to meet the numerosity requirement, "the commencement of the original class suit tolls the running of the statute [of limitations period] for all purported members of the class who make timely motions to intervene after the court [denies the class certification].[3] *American Pipe*, 414 U.S. at 553-54 (footnote added). Later in *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended its holding in *American Pipe*, explaining that the "filing of a class action tolls the statute of limitations period 'as to all asserted members of the class,' not just as to intervenors." *Crown, Cork & Seal Company v. Parker*, 462 at 350 (citation omitted).

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[2] The Petitioners also argue that the Department's motion does not really concern the Court's subject matter jurisdiction, but rather its jurisdiction over the particular case. (*See* Pet'rs Resp. to Resp't Mot. to Dismiss (hereinafter, Pet'rs Resp. Br.) at 2.) The Court disagrees. This Court has previously determined that compliance with Indiana Code § 6-8.1-9-1(c) affects its subject matter jurisdiction, and will continue to do so now. *See*, *e.g.*, *Hyatt Corp. v. Indiana Dep't of State Revenue*, 695 N.E.2d 1051, 1053 (Ind. Tax Ct. 1998), *review denied*.

[3] The Indiana Court of Appeals adopted the logic of *American Pipe* in *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. Ct. App. 1979). In that case, the court held that the filing of a complaint, which sought to initiate a class action suit, constituted a filing by all persons who were later determined to be members of the certified class; and thus certain class members were not barred by the applicable statute of limitations. *Arnold*, 398 N.E.2d at 440. The court found *American Pipe* "particularly persuasive" and stated that the "reasoning [of *American Pipe*] applie[d] with equal force." *Id*.

The Department argues, however, that these cases are distinguishable from the case at bar because they concern statutes of limitation, whereas this case hinges on compliance with a jurisdictional prerequisite. (*See* Oral Argument Tr. at 8.) More specifically, the Department claims that jurisdictional prerequisites, unlike statutes of limitation, cannot be tolled. The Court agrees.

"A statute of limitations does not create or extinguish a right. It only places limitations upon a remedy which may be tolled or waived." *Marhoefer Packing Co. v. Indiana Dep't of State Revenue*, 301 N.E.2d 209, 216 (Ind. Ct. App. 1973). Nevertheless, "'where the right of action and the conditions for bringing the same are contained within the same statute, compliance with the conditions is a condition precedent and *must* be fulfilled to preserve the right.'" *Id*. (emphasis added) (citation omitted). In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the United States Supreme Court considered whether a provision of Title VII was a jurisdictional prerequisite or a statute of limitation. The Court held the provision was a statute of limitation, stating:

> [t]he provision granting district courts jurisdiction under Title VII. . . does not limit jurisdiction to those cases in which there has been a timely filing . . . [as i]t contains no reference to the timely filing requirement. The provision specifying the time for filing . . . appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Zipes, 455 U.S. at 393-94 (footnote omitted).

In the instant case, however, the legislature did include a specific limitation to the Court's jurisdiction within the same statute providing for the appeal process. Specifically, Indiana Code § 6-8.1-9-1(c) states, in relevant part:

> If [a] person disagrees with any part of the [D]epartment's decision [concerning a claim for refund], the person may appeal the decision[.] . . . The person must file the appeal with the tax court. *The tax court does not have jurisdiction to hear a refund appeal suit*, if . . . the appeal is filed more than ninety (90) days after the date the [D]epartment mails the decision of denial to the person[.]

A.I.C. § 6-8.1-9-1(c) (emphasis added). Furthermore, this Court has previously determined that compliance with the filing requirements of Indiana Code § 6-8.1-9-1 is jurisdictional. *See, e.g., Jack Gray Transp., Inc.*, 744 N.E.2d at 1073 n.4 (stating that the Court did not have subject matter jurisdiction because it was only authorized to hear refund appeals filed in compliance with Indiana Code § 6-8.1-9-1(c)); *Hyatt Corp. v. Indiana Dep't of State Revenue*, 695 N.E.2d 1051, 1053 (Ind. Tax Ct. 1998) (stating that the Court's subject matter jurisdiction depends on whether an appeal is timely filed in this Court based on Indiana Code § 6-8.1-9-1(c)), *review denied*; *City Sec. Corp. v. Indiana Dep't of State Revenue*, 704 N.E.2d 1122, 1125 (Ind. Tax Ct. 1998) (stating that, in that case, whether the Court had subject matter jurisdiction turned on a reading of Indiana Code 6-8.1-9-1).

Based on the language of the statute and case law, it follows that filing within the ninety day time period is a jurisdictional prerequisite, not subject to tolling or waiver. *See Zipes*, 455 U.S. at 397 (noting that jurisdictional prerequisites cannot be tolled); *see also Marhoefer*, 301 N.E.2d at 216 ("condition essential to the existence of the right . . . cannot be tolled or waived"). Accordingly, the Petitioners' deadline for filing their

petitions was not tolled; thus the petitions are untimely.[4] As such this Court lacks subject matter jurisdiction over the Petitioners' appeal.

CONCLUSION

For the foregoing reasons, the Court now GRANTS the Department's motion, and the case is now DISMISSED.

SO ORDERED this 7th day of September, 2005.

_____
Thomas G. Fisher, Judge
Indiana Tax Court

[4] The Petitioners also argue that by enacting Indiana Code § 6-8.1-9-7, "the General Assembly has structured a class action framework that does not require a qualified class member to adhere to the time constraints imposed in the tax appeal process established under I[ndiana] C[ode] § 6-8.1-9-1(c)." (*See* Pet'rs Resp. Br at 4-5.)

Indiana Code § 6-8.1-9-7 states that "[a] class action for the refund of a tax subject to this chapter may not be maintained in any court, including the Indiana [T]ax [C]ourt, on behalf of any person who has not complied with the requirements of section 1(a) of this chapter before the certification of the class." IND. CODE ANN. § 6-8.1-9-7 (West 1998); *see also* IND CODE ANN. § 6-8.1-9-1(a) (West 1999) (requiring a claim for refund to be filed with the Department within three years from the latter of the due date of the return or date of payment). This statute speaks only to the requirements for qualifying as a member of a class; it does not, as the Petitioners suggest, excuse compliance with Indiana Code § 6-8.1-9-1(c). *See Marhoefer*, 301 N.E.2d at 219 ("where the legislature has by statute created a right, afforded a remedy and prescribed a procedure to be followed in connection with the remedy, that procedure must be strictly followed").

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