

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002241-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0014

BULLITT COUNTY TRANSMISSION

APPELLEE

AND

NO. 1997-CA-002242-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0009

DR. B. C. MOSER, d/b/a
Moser Chiropractic Office

APPELLEE

AND

NO. 1997-CA-002243-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0010

CHARLIE WRIGHT, d/b/a
Wright Electronics

APPELLEE

AND

NO. 1997-CA-002247-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0013

KENTUCKY TANK, INC.

APPELLEE

AND

NO. 1997-CA-002248-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0008

CATHY CURTSINGER, d/b/a
The Clip Joint

APPELLEE

AND

NO. 1997-CA-002249-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0011

BULLITT COUNTY FEEDERS
SUPPLY COMPANY, INC.

APPELLEE

AND

NO. 1997-CA-002250-DG

CITY OF SHEPHERDSVILLE,
KENTUCKY

APPELLANT

v. DISCRETIONARY REVIEW FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 97-XX-0012

MAXIMUM MACHINE COMPANY, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

* * *

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Discretionary review was granted in seven cases involving the refund of business license fees paid pursuant to an ordinance that this Court held void in an earlier action. The seven cases were consolidated and discretionary review was limited to two issues: the statute of limitations applicable to a refund of said business license fees; and whether the Bullitt Circuit Court erred in not applying the prior holdings of Griggs v. Dolan, Ky., 759 S.W.2d 593 (1988); Board of Education of Fayette County v. Taulbee, Ky., 706 S.W.2d 827 (1986); and St. Ledger v. Commonwealth, Revenue Cabinet, Ky., 942 S.W.2d 893 (1997), cert. denied, _____ U.S. _____, 118 S. Ct. 27, 138 L. Ed. 2d 1057 (1997).

The City of Shepherdsville, located in Bullitt County, enacted a business license fee ordinance (990-212) on May 7,

1990. Said ordinance imposed a license fee on businesses which was due July 1 of each year, beginning in 1990. A number of businesses/individuals (not a class action) filed suit to test the legality of said ordinance. On May 5, 1995, this Court (93-CA-2829-MR) affirmed the judgment of the special judge, which judgment held ordinance no. 990-212 void. On June 27, 1994, the City of Shepherdsville repealed ordinance no. 990-212 and enacted a replacement ordinance, 994-317, effective July 1, 1994. On June 12, 1995, that unchallenged ordinance was superseded by ordinance no. 995-345, effective July 1, 1995. The refunds in question are for the years 1990, 1991, 1992, and 1993.

The appellees seeking refunds were not parties to the original law suit nor did they endorse their payments as "paid under protest." The earlier action was not a class action. An application for a refund was not made before filing suit for a refund in the district court. Six suits were filed for a refund in district court on September 25, 1996, and one was filed on December 12, 1996.

KRS 92.280(2) is the enabling legislation for cities of the second through sixth classes for levying and collecting a license fee on franchises, trades, occupations, and professions. See also Section 181 of the Kentucky Constitution and KRS 92.281. Usually such ordinances also provide remedies for appealing said assessments and applications for refunds. However, "[T]he right to a refund of illegally or improperly collected taxes does not derive from the common law, but is a matter of legislative

grace.'" Commonwealth, Revenue Cabinet v. Gossum, Ky., 887 S.W.2d 329, 334 (1994) (quoting unspecified source). In order to argue entitlement to a refund, a taxpayer must bring himself/herself within the terms of a statute (or municipal ordinance) authorizing a refund. Id. (citing Department of Conservation v. Co-De Coal Co., Ky., 388 S.W.2d 614 (1964)). "A curative statute which provides a remedy must be strictly followed in all respects." Gossum, 887 S.W.2d at 334 (citing Norfolk and W. Ry. Co. v. McCoy, 288 Ky. 458, 156 S.W.2d 493 (1941)).

The appellees were successful in convincing the lower courts that either the five-year statute of limitations of KRS 413.120(5) (an action for withholding personal property) or KRS 413.120(6) (an action for injury to the rights not arising on contract and not otherwise enumerated) applied to the refunds of occupational taxes. We believe that KRS 134.590 is more on point (refund of ad valorem taxes or taxes held unconstitutional). KRS 134.590(3) provides:

(3) When it has been determined that city, urban-county, county, school district, or special district ad valorem taxes have been paid to a city, urban-county, county, school district, or special district when no taxes were due or the amount paid was in excess of the amount finally determined to be due, the taxes shall be refunded to the person who paid the tax.

This section, which was less than artfully drafted, could be clearer. However, we opine that it covers overpayments and numerous taxes paid to a municipality or local government when

not due. No one has suggested other curative legislation, and we are reluctant to find the general assembly would want refunds of ad valorem taxes but not occupational license taxes and the like. Griggs, 759 S.W.2d at 595 infers that refunds of taxes in general are covered.

Gossum, 887 S.W.2d 329, distinguishes refunds for overpayment of taxes from refunds in which the constitutionality of a tax scheme is at issue, and allows different statutes of limitation for each. However, KRS 413.120(3) deals with municipalities, special districts, and local governments, not state government. It is the only provision for refunds from these local entities. The title of this statute includes refunds of “. . . taxes held unconstitutional.” Therefore, realizing refunds are a matter of grace from the general assembly, we read KRS 413.120(3) as authorizing local refunds on both overpayments and where ordinances are found unconstitutional. See River Excursion Co. v. City of Louisville, 244 Ky. 811, 515 S.W.2d 470, 472 (1932); Ziedman & Pollie v. City of Ashland, 244 Ky. 279, 50 S.W.2d 557 (1932); Board of Education of Fayette County v. Taulbee, 706 S.W.2d at 829; Griggs v. Dolan, 759 S.W.2d 593; see also St. Ledger v. Commonwealth, Revenue Cabinet, 942 S.W.2d at 900.

KRS 134.590(6) sets a two-year statute of limitations, from the date the taxes were paid, or when in litigation, two years from the date of final decree:

(6) No refund shall be made unless an application is made within two (2) years from the date payment was made. If the amount of taxes due is in litigation, the application for refund shall be made within two (2) years from the date the amount due is finally determined. 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.

Application of the statute of limitations and tolling are subject to certain rules which are unique to taxing statutes and ordinances. For instance, "The filing of a lawsuit does not automatically entitle a plaintiff to a refund without further action." Board of Education of Fayette County v. Taulbee, 706 S.W.2d at 829; see also Griggs v. Dolan, 759 S.W.2d at 596. Even after a final determination of the litigation, the statute is not self-executing, and it does not trigger a refund. The individual taxpayer must make an application for a refund from the taxing authority. Taulbee, 706 S.W.2d at 829. Filing an administrative application for a refund is necessary before a separate judicial action can be filed for a refund. Bischoff v. City of Newport, Ky. App., 733 S.W.2d 762, 763 (1987). This rule applies to both state and local taxes. Id.; St. Ledger v. Commonwealth, Revenue Cabinet, 942 S.W.2d 893.

The requirement that the individual taxpayer make an application for a refund applies whether the suit is by individuals or by class action. Board of Education of Fayette

County v. Taulbee, 706 S.W.2d at 829; Griggs v. Dolan, 759 S.W.2d 593. Applications or actions for refunds cannot proceed as class actions. Bischoff v. City of Newport, 733 S.W.2d at 763 (citing Taulbee, 706 S.W.2d 827). After a successful class action contesting the tax is final, individual members of the class must make individual application for a refund within the two-year statute of limitation from the date of finality. Id. Under KRS 134.590(6), if the suit contests the amount due, assessments, and so forth, the statute of limitations begins from the date paid, or if a timely application is made, it is tolled until two years from the date of final judgment determining the amount. Taulbee, 706 S.W.2d at 829. If the suit contests the constitutionality of a statute or ordinance, the statute of limitations runs from the date of finality of the judgment holding the tax statute or ordinance unconstitutional. Bischoff, 733 S.W.2d at 764; Dolan, 759 S.W.2d at 594. Thus, Dolan distinguishes Taulbee to the extent that Taulbee would require an application for a refund to be filed two years from the date of payment and not toll the two-year period if the litigation involved the method of assessments, amounts due, and the like. Taulbee would toll the statute if the constitutionality were being litigated and would allow the application for a refund to be filed after a final judgment. Griggs recognizes the distinction between applications for refunds of taxes paid based on improper assessments, not due, from applications for refunds of unconstitutional taxes. However, as to local governments and refunds under KRS

134.590(6), the Court interpreted the statute to toll the need for filing an application for a refund in either case where litigation ensued. Griggs, 759 S.W.2d at 595-96. St. Ledger v. Commonwealth, Revenue Cabinet, 942 S.W.2d at 900, distinguished between a refund of local taxes and state taxes, recognizing a distinction on the state taxes between contesting the constitutionality of such and the amount thereof. Also, the Court recognized KRS 134.590(1) and (2) were different from section 6 of said statute in that sections 1 and 2 required “. . . the filing of a refund application within two years of payment, not two years from the date of the filing of the lawsuit.” Id.

In order to qualify under an application for a refund, the individual requesting a refund must have standing. Standing requires the applicant be a member of the class in a class action or a party to the suit contesting the constitutionality of the tax ordinance. If an applicant for a refund is not a party, the judgment is unenforceable. Board of Education of Fayette County v. Taulbee, 706 S.W.2d at 830; CR 19; Griggs v. Dolan, 759 S.W.2d at 596.

Applying the facts of our seven individual appeals to the rules and procedures discussed above, we note that the original action questioning the ordinance (which imposed a license fee) was not certified as a class action, nor were any of the parties, other than the City of Shepherdsville, a party to the earlier action which voided the occupational license fee

ordinance. Also, the parties in question did not request a refund from the City of Shepherdsville within two years from the time the last taxes were paid (July 1, 1995). Where an ordinance makes no provision or forms for refunds, a written request to the taxing authority would suffice. Under Griggs v. Dolan, 759 S.W.2d at 596, "if no litigation is filed in two years, the time for administrative application will expire after two years elapse from the date payment was made."

For the foregoing reasons, those parts of the judgments which ordered refunds, costs, and interest are reversed and the matters are remanded with directions to dismiss said actions.

GUIDUGLI, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, DISSENTS.

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BRIEF FOR APPELLEES:

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