RENDERED: OCTOBER 26, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001379-MR
AND
NO. 2006-CA-001462-MR

DEPARTMENT OF REVENUE, FINANCE AND ADMINISTRATION CABINET, COMMONWEALTH OF KENTUCKY; MARIAN DAVIS IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF REVENUE — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00754

BILLY CURTSINGER, FREDA CURTSINGER, CHARLES M. POLIN, AND TRAVIS BUSH INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS OF SIMILARLY SITUATED PERSONS; PHILLIP J. SHEPHERD; AND H. EDWARD O'DANIEL, JR. — APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: The Department of Revenue (Revenue) and Curtsinger Cross-Appellants (taxpayers) appeal from a judgment of the Franklin Circuit Court awarding refunds of certain motor vehicle *ad valorem* taxes to a class certified by the circuit court. The judgment of the trial court is reversed and remanded.

From 1995 to 2002, the conflicting wording of three statutes created a loophole in Kentucky's *ad valorem* tax on motor vehicles. KRS 134.810(4) and KRS 186.021(2) stated that the "owner of record on January 1 of any year shall be liable for taxes" on a motor vehicle while KRS 186A.095 allowed a vehicle owner a "fifteen (15) day grace period from the date on which he purchased a vehicle" to obtain "a certificate of registration or title in his name." The effect of the interaction of these two statutes was that persons who purchased vehicles in late December but did not register them until after January 1 of the following year were not initially assessed the *ad valorem* motor vehicle tax because they were not considered the *owners of record* on January 1, the assessment date. In 1995, Revenue instituted a compliance program through which it identified and billed vehicle owners who fell within this loophole.

H. E. and Lucy O'Daniel were owners who received one such notice. On December 26, 1994, the O'Daniels purchased a vehicle from a dealership in Kentucky. The vehicle was registered on January 19, 1995, at which time a usage tax was assessed and collected, however, an *ad valorem* tax for 1995 was not collected. As part of

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

Revenue's compliance program, the O'Daniels received a delinquent tax notice in October of 1996 for the 1995 *ad valorem* tax.

The O'Daniels filed a letter of protest with Revenue, which was denied. Next, the O'Daniels filed a complaint with the Kentucky Board of Tax Appeals appealing the decision of Revenue. The Kentucky Board of Tax Appeals ruled in favor of Revenue. The O'Daniels then filed a petition of appeal in Marion Circuit Court. On May 1, 2000, the circuit court issued an order reversing the decision of the Board of Tax Appeals. Revenue appealed and the Kentucky Court of Appeals upheld the circuit court's decision.

This case was filed on June 27, 2000, on behalf of taxpayers who fell within the same loophole as the O'Daniels, purchasing vehicles in late December of 1994 through 2002 and lawfully registering them after January 1 of the year immediately following the date of purchase. Franklin Circuit Court granted summary judgment in favor of Revenue on February 7, 2002. The taxpayers appealed and Revenue moved to have the case transferred directly to the Supreme Court of Kentucky. Additionally, Revenue moved to consolidate this case with the *O'Daniel* case. The Supreme Court granted Revenue's motions and consolidated this class action case with the *O'Daniel* case. The Supreme Court affirmed the Court of Appeals' holding in favor of the O'Daniels, reversed the circuit court's judgment against the taxpayers, and remanded this case for further proceedings pursuant to its holding.[2]

On remand, the circuit court entered an order certifying the case as a class action. In its final judgment, the circuit court ordered Revenue to make refunds to the

[2] *Revenue Cabinet v. O'Daniel,* 153 S.W.3d 815 (Ky. 2005).

taxpayers excluding those funds that had been distributed to local governments. Additionally, counsel for the taxpayers was awarded a contingency fee of 33% of the gross recovery.

From this circuit court judgment, Revenue has appealed, arguing that: 1) this action should have been decertified as a class action and dismissed because of lack of standing on the part of Curtsinger and Polin; 2) Bush's claim should have been dismissed because it was not revived; 3) a party seeking a refund of taxes must comply with the terms of the applicable refund statute; 4) the circuit court erred as a matter of law in ordering tax refunds that were not in compliance with the applicable refund statute; 5) the circuit court erred in granting refunds to persons who had not exhausted their administrative remedies; and 6) the circuit court erred in certifying this action as a class action. The taxpayers respond, arguing that: 1) the named class members all have standing; 2) a previously undisclosed exoneration program by Revenue provides relief; 3) the taxpayers' claims are not barred by any statute of limitations on refunds; 4) Revenue's notice of tax violates Kentucky law; and 5) exhaustion of administrative remedies does not apply. The taxpayers also cross-appealed, arguing: 1) all taxpayers in this class are entitled to refunds with interest; 2) taxpayers who purchased vehicles in late December 2002 are not subject to the *ad valorem* motor vehicle tax for 2003 if their vehicles were registered after January 1, 2003; and 3) Revenue should be required to pay part or all of the attorney's fees incurred by the taxpayers under the Equal Access to Justice Act.

STANDARD OF REVIEW

Our standard of review is set forth in *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790-91 (Ky.App. 2001):

> When the outcome of a case turns on an issue of law, as in the instant matter, appellate review is *de novo.* There is no requirement that we grant any deference to the trial court where factual findings are not at issue. [*Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996) (citations omitted).] A determination of an issue of law is also presented where the question is one of statutory construction [*Interim Office v. Jewish Hosp. Healthcare,* 932 S.W.2d 388, 390 (Ky.App. 1996),] or where the relevant facts are undisputed and the dispositive issue thereby becomes the legal effect of those facts. [*See Mill Street Church of Christ v. Hogan,* 785 S.W.2d 263, 266-267 (Ky.App. 1990).]

ANALYSIS

The Department of Revenue contends that no recovery should be granted to taxpayers who did not follow the requisite refund process set forth in KRS 134.590 titled "Refund of *ad valorem* taxes or taxes held constitutional." As an initial matter in determining whether or not this statute applies to the case at bar, we must address procedural issues raised by the taxpayers. The taxpayers argue that Revenue should be barred from raising KRS 134.590 in this appeal because Revenue failed to initiate a timely cross-appeal challenging the Franklin Circuit Court's initial ruling on the applicability of the statute. Revenue argues that no cross-appeal was necessary because the Franklin Circuit Court's final judgment was in its favor, leaving Revenue with no need to cross-appeal. For the reasons set forth below, we agree with Revenue.

While this case was before the Franklin Circuit Court prior to the taxpayer's initial appeal, Revenue filed a motion to dismiss for lack of jurisdiction based on its argument that Curtsinger, Polin, and Bush had not sought the administrative remedies required by KRS 134.590. That motion was denied by the circuit court in an order entered September 7, 2001. On February 7, 2002, the Franklin Circuit Court entered an opinion and order granting summary judgment in favor of Revenue. The taxpayers appealed that judgment and Revenue moved to consolidate that appeal with its *O'Daniel* appeal and have both heard by the Supreme Court of Kentucky, which granted this request.

Since this case and the *O'Daniel* case involved similar factual circumstances and the same legal issue and in order to avoid "unnecessary repetition" in its opinion, the Supreme Court focused primarily on the *O'Daniel* case. In holding in favor of the O'Daniels and taxpayers, the Supreme Court of Kentucky did not have the occasion to address whether exhaustion of administrative remedies was necessary, as the O'Daniels had exhausted their administrative remedies prior to filing suit. Therefore, while the Franklin Circuit Court's judgment was reversed and remanded, no further proceedings had occurred regarding the administrative remedies issue.

Revenue argues that the circuit court erred as a matter of law in ordering tax refunds to plaintiffs who had not exhausted their administrative remedies under KRS 134.590. Revenue contends that this argument was properly preserved for review through numerous filings. These include Revenue's responses to the Plaintiff's renewed

motion for class certification and motion for summary judgment, Revenue's own motion for summary judgment, its sur-reply brief, as well as its motion to alter, amend, or vacate, and its plan for payment and distribution of tax refunds. The taxpayers disagree with Revenue, arguing instead that Revenue lost the opportunity to raise this issue when it failed to cross-appeal the circuit court's initial judgment.

We hold that Revenue had no need to cross-appeal the Franklin Circuit Court's order granting summary judgment because that judgment was *favorable* to Revenue. "[A]ppeals are taken from judgments, not from unfavorable rulings. . . . A party must be aggrieved by a judgment in order to appeal from it." *Brown v. Barkley,* 628 S.W.2d 616, 618 (Ky. 1982). (Emphasis omitted). While the September 7, 2001, ruling was unfavorable to Revenue's position that KRS 134.590 is applicable to this case, the judgment entered February 7, 2002, was *favorable* to Revenue. "A cross-appeal is appropriate only when the judgment fails to give the cross-appellant all the relief he has demanded or subjects him to some degree of relief he seeks to avoid." *Id.* at 618. Again, Revenue was, in the February 7, 2002, order granting summary judgment, given all the relief it demanded as summary judgment was granted in its favor. Having no obligation nor opportunity to cross-appeal and having appropriately preserved the KRS 134.590 argument, Revenue can properly raise the issues of the statute of limitations and administrative remedies requirement.

We shall next consider whether KRS 134.590 is controlling in this case, as this question is central to the determination of all other issues presented in this appeal.

Revenue argues that the availability of a refund in this case is governed by KRS 134.590. We agree.

KRS 134.590(1) provides:

> When it appears to the appropriate agency of state government that money has been paid into the State Treasury *for ad valorem taxes when no taxes were in fact due or for taxes of any kind paid under a statute held unconstitutional*, the agency of state government which administers the tax shall refund the money, or cause it to be refunded, to the person who paid the tax. . . . (Emphasis added.)

The taxpayers argue that this statute applies only to lawful assessments made by Revenue in compliance with statutory requirements or taxes paid under a constitutional statute. This argument, however, is without merit. A reading of the plain language of KRS 134.590 clearly indicates that this statute applies to situations where an ad valorem tax was paid when no tax was due or where a statute is held unconstitutional.

Next, the taxpayers attempt to argue that Revenue was not the "appropriate agency of state government" to levy the tax under the language of the statute. Instead, they argue the appropriate state agency would be the county clerks of the counties in which taxes were assessed. There is, however, an important distinction to be made in the wording of this statute. The first part of the statute states that a finding that no tax was due or that a statute was unconstitutional must be determined by an "appropriate agency of the state government." KRS 134.590. The latter part of the statute then instructs that the "agency of state government which administers the tax" shall refund the money. *Id.* These two agencies do not have to be the same entity. For instance, the Board of Tax

Appeals could be the appropriate agency of state government determining that a tax is invalid, while a county clerk would be the agency of state government which administered the tax and would therefore be responsible for the refund. In this case, however, the Supreme Court of Kentucky was the appropriate entity to ultimately determine the validity of the tax and the Department of Revenue, as the agency that administered the tax, is the state agency charged with refunding the money or causing refunds to be made.

Any refunds, however, must also be in compliance with KRS 134.590(2) which states:

> No refund shall be made unless an application for refund is made within two (2) years from the time payment was made. No refund for ad valorem taxes, except those held unconstitutional, shall be made unless the taxpayer has properly followed the administrative remedy procedures . . . .

In refuting the assertion that the two-year statute of limitations should apply, the taxpayers cite to *Maximum Machine Co., Inc. v. City of Shepherdsville*, 17 S.W.3d 890 (Ky. 2000). The taxpayers essentially suggest that *Maximum* stands for the principle that it would be inequitable to deny a refund based solely on a statute of limitations, and that, where a statute of limitations prevents a refund, a refund should be granted under common law. This, however, is an improper representation of *Maximum*. In *Maximum*, the Supreme Court turned to common law relief because there was no refund statute on point for a refund of the occupational taxes in question. In the present

case, there is a statute on point for the refund of *ad valorem* taxes and that statute is KRS 134.590.

While the results of applying KRS 134.590 may be harsh to many of the taxpayers in this case, such an application has been upheld in a similar case by the Supreme Court of Kentucky. In *Revenue Cabinet v. Gossum*, 887 S.W.2d 329 (Ky. 1994), the Supreme Court upheld the two-year statute of limitations provision of KRS 134.590, citing the government's interest in fiscal security. The Court reasoned that the statute of limitations protected the state's fiscal security, shielding the state from having to repay to taxpayers millions of dollars, which had presumably been allocated to various requirements of the state's budget, years after a tax was collected.

Next, we shall address KRS 134.590(2). Under KRS 134.590(2), if the Supreme Court had held the tax statute to be unconstitutional, the taxpayers would only need to meet the two-year statute of limitations requirement. If, however, the Supreme Court had held that the *ad valorem* tax was paid where no tax was due, the taxpayers would have to comply with the two-year statute of limitations as well as the exhaustion of administrative remedy requirements. As set forth below, the Supreme Court did not hold the *ad valorem* tax statute to be unconstitutional; therefore, the taxpayers must comply with the statute of limitations and administrative remedies requirements.

The *O'Daniel* case did not hinge on the constitutionality of the *ad valorem* tax statute. Rather, it was decided on the basis of Revenue's interpretation of the "owner of record" wording of the tax statute. "[B]ecause, statutorily, only the *owner of record* on

January 1, 1995, was liable for the taxes, we hold that the vehicle owners are not liable for the 1995 *ad valorem* taxes." *Revenue Cabinet v. O'Daniel,* 153 S.W.3d 815, 817 (Ky. 2005). Since this decision held that there was no liability for the *ad valorem* tax, or stated differently, that tax was paid where no tax was due, the administrative remedies portion of KRS 134.590 is implicated.

Finally, the taxpayers claim that the notice of taxes mailed to them by Revenue was insufficient under KRS 131.081(2) and (8). There was no finding on the issue of insufficiency of notice at any point in this litigation. The taxpayers have not previously raised this issue in their case and the issue was not addressed by the Supreme Court in the first appeal. Two issues thus arise; first, whether the taxpayers may present the notice issue for the first time in this appeal and, if so, what is the result. Determining the impact of the notice argument, should it be allowed, involves determining whether proper notice was given and, if not, what remedies are available to the taxpayers.

A thorough review of the record reveals that the notice issue was not raised by the taxpayers at any point prior to their cross-appeal. It is firmly established in Kentucky law that, "any basis for relief that is neither pleaded nor proven in the lower court cannot be considered for the first time by [the Court of Appeals]." *Bibbs v. Kentucky & Indiana Terminal R.R.*, 300 S.W.2d 229, 231 (Ky. 1957). Since the taxpayers made no mention as to the insufficiency of notice during the trial and, as a result, the circuit court made no findings on that issue, it may not be raised in this appeal.

In so holding, we note that there is no case law or statutory law in Kentucky exempting claims under the taxpayers bill of rights from this basic rule of appellate practice.

However, even if we were to consider the notice issue, a favorable decision would not benefit the taxpayers herein. As noted above, the taxpayers assert that the notice provided by Revenue was decided under KRS 131.081(2) and (8). However, a complete reading of KRS 131.081 reveals only one remedy available to the taxpayers in the event their rights under KRS 131.081 are violated:

> *Taxpayers shall have the right to bring an action for damages against the Commonwealth to the Board of Claims* for actual and direct monetary damages sustained by the taxpayer as a result of willful, reckless, and intentional disregard by department employees of the rights of taxpayers as set out in KRS 131.041 to 131.081 or in the tax laws administered by the department. In the awarding of damages pursuant to this subsection, the board shall take into consideration the negligence or omissions, if any, on the part of the taxpayer which contributed to the damages . . . . (Emphasis added).

KRS 131.081(14).

Therefore, even if the taxpayers could prove willful, reckless, or intentional conduct on the part of Revenue in allegedly failing to provide complete notice under KRS 131.081, the proper forum for that action is the Board of Claims, not the circuit court. It is important to note, however, that KRS 131.081, unlike KRS 134.590, has no statute of limitations for bringing a claim. Thus, if the notice provided by Revenue was insufficient, the taxpayers may still be able to seek relief by filing an action with the Board of Claims.

Since we have held that the provisions of KRS 134.590(1) and (2) are applicable to this case, a factual determination must be made as to whether the taxpayers: (1) applied for relief under those statutory provisions within the two-year statute of limitations, and (2) exhausted their administrative remedies prior to filing suit. As noted above, the taxpayers may have a viable claim with regard to deficiency of notice; however, that claim must properly be pursued in the Board of Claims, not the circuit court.

Having determined that KRS 134.590 is applicable to the refund granted in this case, we reverse the order of the Franklin Circuit Court and remand this case for further proceedings in accordance with this opinion, including a determination as to whether the taxpayers exhausted their administrative remedies.

ALL CONCUR.

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