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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002549-MR
AND
NO. 2008-CA-000023-MR

REVENUE CABINET (N/K/A FINANCE
AND ADMINISTRATION CABINET,
DEPARTMENT OF REVENUE),
COMMONWEALTH OF KENTUCKY APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00288

ASWORTH CORPORATION (N/K/A
ASWORTH, LLC), HT-FORUM, INC.
(N/K/A HTF, LLC); AND D AVIATION
SERVICES, INC. (N/K/A D AVIATION
SERVICES, LLC APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: The Revenue Cabinet, Commonwealth of Kentucky (n/k/a Finance and Administration Cabinet, Department of Revenue) (the Cabinet) appeals from the Franklin Circuit Court's order reversing the order of the Kentucky Board of Tax Appeals (Board). Asworth Corporation (n/k/a Asworth, LLC), D Aviation Services, Inc. (n/k/a D Aviation Services, LLC), and HT-Forum, Inc. (n/k/a HTF, LLC), (collectively the Corporations) cross-appeal from the same order. For the following reasons, we affirm the circuit court's order to the extent that it held that the Corporations have a tax nexus with Kentucky. We reverse insofar as it applied the three-factor apportionment method and ordered an immediate refund.

While this matter was pending before the Board, the parties stipulated to, *inter alia*, the following facts.[1] The Corporations were created under the laws of either Nevada or Delaware, all with their principal places of business in Chicago, Illinois. The Corporations "manage investments in various legal entities." None of the Corporations had any property, employees, or payroll in Kentucky during the tax years at issue. Nor have the Corporations ever been domiciled in Kentucky. Their sole connection with Kentucky was their "receipt of a distributive share of partnership income received from the profits of variously named and organized partnerships doing business in Kentucky." Board Order at 2.

1993-1996

[1] We quote at times from the parties' stipulations.

For the taxable periods ending on January 31 of 1993, 1994, 1995, and 1996, "Asworth filed Kentucky corporation income tax returns . . . and paid Kentucky corporate income tax calculated by using the standard three-factor apportionment formula (property, payroll, and receipts) under KRS[2] 141.120 to apportion its multistate income to Kentucky, and included the property, payroll and receipts of" both Asworth and Conwood Company, LP, a Delaware limited partnership of which Asworth owned a 99% limited partnership interest. Conwood is a Delaware limited partnership which has its principal place of business in Tennessee, and which also conducts business in Kentucky. "Asworth also filed Kentucky corporation license tax returns and paid the Kentucky corporate license tax of KRS 136.070 using the same methodology it utilized for corporate income tax for" these tax years.

Based on its audit of Asworth for these tax years, the Cabinet concluded that although Asworth was not required to file a corporation license tax return, it owed additional taxes, plus applicable interest and penalties. The Cabinet excluded Asworth's receipts and all of its affiliated entities in assessing the additional taxes, including "only Conwood receipts in Kentucky [presented in the formula] over Conwood receipts everywhere in the calculation(s)." That is, the Cabinet utilized a single-factor apportionment formula.

Asworth paid the taxes as assessed by the Cabinet, and then filed amended returns requesting a refund for the taxes it paid in relation to its original

[2] Kentucky Revised Statutes.

returns, as well as the increased amount it paid in relation to the Cabinet's audit assessment, plus the applicable interest and penalties. Asworth argued "that it had no nexus with Kentucky under KRS Chapter 141, and therefore was not subject to corporate income tax." The Cabinet denied Asworth's request for a refund, and Asworth appealed to the Board.

1997-1999

For the taxable periods ending January 31, 1997, and December 31 of 1997, 1998, and 1999, the Corporations each filed Kentucky corporation income tax returns and paid Kentucky corporation income tax. Through various corporate structure changes and transfers not pertinent here, at some point D Aviation Services and HT-Forum acquired ownership interests in Conwood.

Thereafter, the Corporations filed amended returns requesting refunds for the sums they paid for these taxable periods, plus interest. The Corporations argued that they did not have any tax liability in Kentucky. The Cabinet denied the requests for refunds,[3] and the matters were eventually appealed to the Board.

Procedural Posture

On appeal to the Board, the Corporations' appeals were consolidated pursuant to a motion which indicated that the appeals concerned the same issues, related to the same tax, and involved related entities. Ultimately, the Board held that "KRS 141.040 did not reach the distributive share paid to [the Corporations] by partnerships doing business in the Commonwealth" since they did not own

[3] While the Cabinet never ruled on Asworth's claim regarding any refund for the taxable period ending January 31, 1997, the parties agree that the outcome here will also apply to that claim.

property, lease property, or have any employees receiving compensation in Kentucky. Thus, the Corporations did not have a "physical presence" in Kentucky and were not subject to Kentucky corporation income tax.

On appeal, the circuit court reversed, holding that the Corporations were "subject to tax on their distributive share income from partnerships doing business both within and without Kentucky pursuant to KRS 141.206." The circuit court calculated the amount owed based upon the ratio of sales, property, and payroll in Kentucky to total sales, property, and payroll everywhere in the United States (the three-factor method). This appeal and cross-appeal followed.

Following oral argument on the merits of the case, the Corporations moved for leave to correct a mathematical error in the circuit court's order and to allow the parties to brief issues concerning 2008 Regular Session House Bill (H.B.) 704 or to remand the case to the circuit court for review of H.B. 704. The Cabinet, in response, stated that it did not oppose the motion. Thereafter, this court granted the Corporations' motion, ordering a mathematical revision of the circuit court's order entered December 4, 2007, taking judicial notice of the enactment of 2008 Ky. Acts, c. 132 § 8 (*repealed and reenacted* by H.B. 216, 2009 Gen. Assem., Reg. Sess. (Ky. 2009) (enacted)), (collectively the Bills), and granting leave for the parties to brief issues concerning the Bills. These issues will be addressed following our discussion of the circuit court's order reversing the order of the Board.

Whether Statutes Require Taxation

First, the Corporations argue on cross-appeal that the circuit court erred by finding that the Corporations are subject to taxation pursuant to KRS 141.206(5). We disagree.

KRS 141.040(1) provides[4] that with certain exceptions, the following shall pay for each taxable year a tax on taxable net income: "every foreign corporation owning or leasing property located in this state or having one (1) or more individuals receiving compensation as defined in KRS 141.120(8)(b) in this state[.]" The Corporations argue that since the parties stipulated that the Corporations did not own property, lease property, or have individuals receiving compensation in Kentucky, they are not subject to Kentucky corporate income tax. The Cabinet argues that the circuit court correctly held that regardless of KRS 141.040(1), the Corporations are subject to taxation pursuant to KRS 141.206(5), which provides:

> Nonresident individuals and corporations which are partners in a partnership or shareholders in an S corporation which does business within and without Kentucky are taxable on their proportionate share of the distribute income passed through the partnership or S corporation attributable to business done in Kentucky.

Simply put, we agree with the Cabinet and the circuit court that the plain language of KRS 141.206(5) subjects the Corporations to taxation. A different result is not compelled, as the Corporations suggest, by the fact that KRS 141.206(5) does not contain the words "shall pay." We hold that the words "are taxable" are sufficient

[4] Unless otherwise noted, we quote from the statutes as in effect July 15, 1996.

to impose tax liability in this situation. Further, a different result is not compelled by any subsequent amendments to these statutes.

Void for Vagueness

The Corporations assert that KRS 141.206 is void for vagueness. In *Bd. of Trs. of the Judicial Form Ret. Sys. v. Attorney Gen.*, 132 S.W.3d 770 (Ky. 2003), the Kentucky Supreme Court held that unintelligible legislation was a nullity. Specifically, the court stated:

> The void-for-vagueness doctrine is most often applied in the context of the First Amendment, the criminal law, and punitive civil laws. *See, e.g. Martin v. Commonwealth*, Ky., 96 S.W.3d 38, 59-60 (2003) (First Amendment); *Jones v. Commonwealth*, Ky., 830 S.W.2d 877, 880 (1992) (criminal law); *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 499-500, 102 S.Ct. 1186, 1193-94, 71 L.Ed.2d 362 (1982) (civil penalties). However, while statutes affecting those areas should receive the most *rigorous* review and are most *commonly* held void for vagueness, non-punitive civil, regulatory, or spending statutes are also invalid if they are so unintelligible as to be incapable of judicial interpretation. In that circumstance, the statute often is declared void for "unintelligibility" or "uncertainty" as opposed to "vagueness."
>
> The most oft-cited expression of this doctrine in Kentucky is *Folks v. Barren County*, 313 Ky. 515, 232 S.W.2d 1010 (1950), in which our predecessor court was asked to interpret a statute allowing boards of education to finance new school buildings through direct appeals to voters. The Court noted the following proposition of law:
>
> It is not for us to say the Legislature does not have the right to be indirect where it could be direct, or to be obscure and confusing where it could be clear and simple. But where the law-making body, in framing the

> law, has not expressed its intent intelligibly, or *in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will*, the statute will be declared to be inoperative and void.

Id. at 778. We hold that this principle has no applicability to the instant statute.

The legislative will expressed in KRS 141.206(5) is intelligible. It expresses the policy that nonresident corporations, such as the Corporations herein, which are partners in a partnership doing business within and without Kentucky are taxable on their proportionate share of distributive income passed through the partnership attributable to business done in Kentucky. The Corporations' allegations of deficiencies—absence of tax rate, "imposition" language, lack of clarity—are without merit. The applicable tax rate is supplied by KRS 141.040. As noted above, the statute contains imposition language. And, the statute is sufficiently clear. This conclusion is supported in part by the fact that Asworth filed a corporate income tax return in the first place. The statute is not void for vagueness, *i.e.*, unintelligibility.

Commerce Clause

Next, the Corporations argue that subjecting them to tax under KRS 141.206(5) violates the Commerce Clause. We disagree.

To withstand an attack on Commerce Clause grounds, a tax must be: (1) nondiscriminatory toward interstate commerce; (2) applied to one or more activities with a substantial nexus with the taxing state; (3) fairly apportioned; and (4) fairly related to services provided by the state. *Revenue Cabinet v. Ashland*

Oil, Inc., 888 S.W.2d 701, 704 (Ky.App. 1994) (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)).

While the Corporations assert in their brief that taxing them under KRS 141.206(5) violates each of the *Complete Auto Transits* prongs, they seriously argue only with regard to the second prong. The Corporations cite *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), in arguing that the "substantial nexus" requirement can only be satisfied through a physical presence with the taxing state, which is a status the Corporations do not have with Kentucky. In addressing the sales and use taxes at issue in *Quill*, the Supreme Court reaffirmed its previous bright-line rule that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311, 112 S.Ct. at 1912. However, the Supreme Court recognized that it had not articulated the same physical-presence requirement in reviewing other types of taxes. 504 U.S. at 314, 112 S.Ct. at 1914. Thus, the applicability of *Quill*'s physical presence requirement to income tax cases, such as the matter before us, is unclear. Nevertheless, even if a substantial nexus requires a physical presence in Kentucky, for the reasons stated hereafter we hold that the Corporations in fact have such a nexus.

Again, while the Corporations do no business in Kentucky, at various times they have owned up to a 99% limited and/or general partnership interest in, and have received distributive shares of partnership income from the profits of, a partnership which does business in Kentucky. Such a partnership unquestionably

has received protection and benefits from Kentucky, thereby enabling the distribution of income to the Corporations. We hold that this connection gives rise to a substantial nexus with, and/or a physical presence within, Kentucky. *Accord Borden Chemicals & Plastics, L.P. v. Zehnder*, 726 N.E.2d 73, 79-82 (Ill.App. 2000) (commerce clause does not prohibit Illinois from assessing replacement tax on a limited partner which has no connection with the State of Illinois other than investing in a partnership). The cases from other jurisdictions cited by the Corporations and/or the tax expert's testimony below regarding the physical presence standard do not compel a different result.

Due Process Clause

Next, the Corporations argue that subjecting them to tax under KRS 141.206(5) violates the Due Process Clause of the Fourteenth Amendment. We disagree.

The *Quill* court explained that "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax[.]'" 504 U.S. at 306, 112 S.Ct. at 1909 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954)). The Court has "framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Quill*, 504 U.S. at 307, 112 S.Ct. at 1910 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)).

The Corporations argue that they have no "definite link" or "minimum connection" with Kentucky. However, as with our Commerce Clause analysis, we hold that the Corporations' ownership interest in, and receipt of income from, a partnership doing business in Kentucky provides the requisite link for taxation under the Due Process Clause. *Accord Borden Chemicals & Plastics, L.P.*, 726 N.E.2d at 78-79.

Apportionment

The Cabinet argues that since the circuit court concluded that the Corporations were subject to taxation pursuant to KRS 141.206(5), it should have used the single-factor formula found therein to calculate the amount owed. Instead, the circuit court applied the three-factor formula found in KRS 141.120(8). We agree that KRS 141.206(5) contains the proper apportionment formula.

The circuit court held that the three-factor formula found in KRS 141.120(8) provided the correct method for calculating the taxes the Corporations owed, as that method "seems to be logical from a legal standpoint. To prevent the [Corporations] from applying this method, would possibly infringe on the [Corporations'] constitutional rights." Thus, the circuit court concluded not that the legislature intended for taxpayers to use the three-factor formula in situations such as these, but instead that prohibiting taxpayers from using the three-factor formula would subject the formula to possible constitutional problems. We disagree with the circuit court's reasoning.

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Ky. Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000). As set forth above, KRS 141.206(5) provides that nonresident corporations "are taxable on their proportionate share of the distributive income passed through the partnership . . . attributable to business done in Kentucky" if they are partners in a partnership "which does business within and without Kentucky[.]" Further, KRS 141.206(5)(a) provides: "Business done in Kentucky is determined by the ratio of gross receipts from sales to purchasers or customers in Kentucky or services performed in Kentucky to the total gross receipts from sales or service everywhere." The plain language of these provisions compels a finding that the legislature intended for the amount of tax owed under this section to be calculated using the formula found therein. Accordingly, the circuit court erred by applying instead the formula found in KRS 141.120(8).

The question then becomes whether the application of this formula to the matter *sub judice* is constitutional. The Supreme Court explained in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164, 103 S.Ct. 2933, 2939-40, 77 L.Ed.2d 545 (1983):

> Under both the Due Process and the Commerce Clauses of the Constitution, a state may not, when imposing an income-based tax, "tax value earned outside its borders." In the case of a more-or-less integrated business enterprise operating in more than one State, however, arriving at precise territorial allocations of "value" is often an elusive goal, both in theory and in practice. For this reason and others, we have long held that the Constitution imposes no single formula on the

> States, and that the taxpayer has the "distinct burden of showing by 'clear and cogent evidence' that [the state tax] results in extraterritorial values being taxed . . . ."

(Internal citations omitted.) Here, the application of the formula found in KRS 141.206(5) will not result in extraterritorial values being taxed, as the provision requires taxation of the "proportionate share of the distributive income passed through the partnership . . . attributable to business done in Kentucky." Again, "[b]usiness done in Kentucky is determined by the ratio of gross receipts from sales to purchasers or customers in Kentucky or services performed in Kentucky to the total gross receipts from sales or service everywhere." KRS 141.206(5)(a). This necessarily excludes extraterritorial values.

The Corporations argue that we should remand, directing the Board to admit into evidence and consider a tax expert's opinion regarding which formula to apply. However, we believe that the Board's error, if any, in failing to admit this evidence was harmless. First, the Board never reached the issue of which formula should apply since it held that the Corporations did not have the appropriate nexus with Kentucky. Second, the tax expert essentially opined that the three-factor formula is preferable from a policy perspective because it accounts for two key business inputs that the single-factor formula does not. Nevertheless, this court's role is not to decide policy. Rather, it is to "ascertain and give effect to the intent of the legislature." *Ky. Ins. Guar. Ass'n*, 13 S.W.3d at 610.

Payment Motion

Finally, the Cabinet argues that the circuit court erred by granting the Corporations' motion seeking immediate payment of their refunds. We agree.

Under KRS 131.365 and KRS 134.580, a refund payment is not due immediately. KRS 131.365(4) directs that payment shall be ordered on appeal. This section provides: "In the case of any appeal, any taxes, interest, or penalty paid but found by the board to be in excess of that legally due shall be ordered refunded to the taxpayer." The Cabinet argues that this statute is silent regarding the timing of any payment; however, we hold that the plain language directs that any payment shall be ordered upon appeal.

KRS 134.580(2) provides:

> When money has been paid into the State Treasury in payment of any state taxes, except ad valorem taxes, whether payment was made voluntarily or involuntarily, the appropriate agency shall authorize refunds to the person who paid the tax, or to his heirs, personal representatives or assigns, of any overpayment of tax and any payment where no tax was due. When a bona fide controversy exists between the agency and the taxpayer as to the liability of the taxpayer for the payment of tax claimed to be due by the agency, the taxpayer may pay the amount claimed by the agency to be due, and if an appeal is taken by the taxpayer from the ruling of the agency within the time provided by KRS 131.340 and it is finally adjudged that the taxpayer was not liable for the payment of the tax or any part thereof, the agency shall authorize the refund or credit as the Kentucky Board of Tax Appeals or courts may direct.

A refund payment under this statute is not due until the matter is "finally adjudged" by either the Board or a court. Thus, pursuant to these two statutes, the Corporations are not entitled to immediate payment of any refund.

The Bills

The Corporations assert that the Bills are invalid because they unconstitutionally and retroactively deprive the Corporations of interest on their tax refunds and/or claims. We disagree.

The Bills amended KRS 131.183, 141.044, 141.235 and 134.580 to provide, in part, that for tax refunds issued after a certain date, interest may begin to accrue as late as the date of filing an amended return, and at a rate of "prime minus 2%." The Bills also provide that these changes apply "retroactively on all outstanding refund claims for taxable years ending before December 31, 1995, and shall apply to all claims for such taxable years pending in any judicial or administrative forum." For numerous reasons, discussed below, the Corporations challenge the Bills' validity, including, but not limited to their contention that the Bills deprive them of interest on their overpayment for the interim period between the payment of the tax, or the due date of the return, and the date of filing the amended return, and that the retroactive effect of the Bills is unconstitutional.

First, the Corporations argue that the Bills are unconstitutional under due process provisions of federal and state law. In particular, the Corporations argue that they are constitutionally entitled to refunds on any overpayments of tax, and that interest constitutes part of the overpayment which must also be refunded. They claim not only that the Bills improperly deprive them of interest on their overpayments for up to four years, but also that the retroactively payable interest rate was improperly reduced to prime rate minus 2%.

Regardless of whether interest is considered part of an overpayment of tax, "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *United States v. Carlton*, 512 U.S. 26, 33, 114 S.Ct. 2018, 2023, 129 L.Ed.2d 22 (1994). Neither is there a vested right in Title XI[5] of KRS, relating to Revenue and Taxation. Justice Stone explained in *Welch v. Henry*, 305 U.S. 134, 146-47, 59 S.Ct. 121, 125, 83 L.Ed. 87 (1938):

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process[.]

The Supreme Court "repeatedly has upheld retroactive tax legislation against a due process challenge." 512 U.S. at 30, 114 S.Ct. at 2021. As long as retroactive application of the Bills to the statutes is "rationally related to a legitimate legislative purpose," due process is not violated. *Id.* at 35, 114 S.Ct. at 2024. Retroactive application of tax legislation has been held to be rationally related to the legitimate governmental purpose of raising revenue, in order to prevent a "significant and unanticipated revenue loss." *Id.* at 32, 114 S.Ct. at 2023.

The issue then is whether retroactive application of the Bills rationally furthers the legitimate governmental purpose of raising revenue, to prevent a significant and unanticipated revenue loss. The Corporations argue that the fiscal notes to both Bills indicate that the Bills are to have no fiscal impact on the

[5] KRS Chapters 131 to 144.

Commonwealth and thus, raising revenue could not have been the purpose of the Bills. However, while the Bills may not expressly state their expected fiscal impact, such an omission is not dispositive to the determination of whether the Bills rationally further the purpose of raising revenue.

"Revenue raising is certainly a legitimate legislative purpose, and any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers that goal." *Id.* at 40, 114 S.Ct. at 2027. (Scalia, J., concurring) (internal citations omitted). The Bills at issue herein have the effect of potentially shortening the time period for which a taxpayer may accrue interest on an overpayment of tax, and decreasing the rate at which said interest accrues---effects clearly intended to increase revenue for the Commonwealth. Since the Bills rationally further the legitimate governmental purpose of raising revenue, we hold that they satisfy the "rational basis" test articulated in *Carlton*.

The Corporations also contend that the four-year period of retroactivity in this case fails to meet the "modesty requirement" of retroactive tax legislation under *Carlton*. However, contrary to the Corporations' assertion, the holding in *Carlton* did not establish such a "modesty requirement;" rather, the majority simply noted with favor that "Congress acted promptly and established only a modest period of retroactivity." *Id.* at 32, 114 S.Ct. at 2023. This suggests to us that the period of retroactivity is to be considered in determining whether the legislation rationally furthers a legitimate governmental purpose. Here, the Bills retroactively applied to all outstanding refund claims for taxable years ending prior

to the Bills'effective dates, and to all claims for those taxable years pending in any judicial or administrative forum. We hold that the retroactive period extending to outstanding claims as of the Bills' effective dates does not violate the due process clause.

Second, the Corporations claim that the Bills violate equal protection provisions of federal and state law because their effective dates treat similarly situated taxpayers differently.[6] In other words, the Corporations assert that taxpayers who receive refunds after the effective dates will receive interest for a shorter period of time, and calculated at a lower rate, than taxpayers who received refunds prior to these dates.

Germane to the Corporations' claim is the well-established power of the government to tax and to enact legislation which controls the revenue system. "The broad discretion as to classification which a legislature possesses in the field of taxation has long been recognized." *Commonwealth, Revenue Cabinet v. Smith*, 875 S.W.2d 873, 875 (Ky. 1994). "Further, in a taxation case, unless a rational basis for such law can be completely refuted, then the law may stand as constitutional." *Id.*

"Statutes are presumed to be valid and those concerning social or economic matters generally comply with federal equal protection requirements if the classifications that they create are rationally related to a legitimate state

[6] The Fourteenth Amendment to the United States Constitution requires persons who are similarly situated to be treated alike. *Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 195 (Ky. 2008) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985)).

interest." *Durham v. Peabody Coal Co.*, 272 S.W.3d 192, 195 (Ky. 2008) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985)). "A statute complies with Kentucky equal protection requirements if a 'reasonable basis' or 'substantial and justifiable reason' supports the classifications that it creates." *Durham*, 272 S.W.3d at 195 (quoting *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005)); *Waggoner v. Waggoner*, 846 S.W.2d 704 (Ky. 1992). This "rational basis" test is the same for due process, as discussed above, and again, the Bills satisfy its requirements. Consequently, the Corporations' equal protection claim is without merit.

Third, the Corporations argue that application of the Bills constitutes an unconstitutional "taking" of the Corporations' interest in their refund claims and tax overpayments under the Fifth Amendment to the United States Constitution, the takings clause, and Ky. Const. § 13.[7]

> [I]t is . . . well settled that [the due process] clause [of the 5th Amendment] is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise

[7] The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." Ky. Const. § 13 provides: "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

> of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

Brushaber v. Union Pac. R.R., 240 U.S. 1, 24-25, 36 S.Ct. 236, 244, 60 L.Ed. 493 (1916) (holding, in part, that the retroactive effect of certain income tax provisions, fixing an earlier date as the time from which the income was to be computed, did not violate the due process clause of Fifth Amendment.); *see A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 601, 78 L.Ed. 1109 (1934) (The due process clause "is applicable to a taxing statute . . . only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."). Here, the adjustment of the interest rate on tax refunds is not such an exertion of the legislative taxing power so as to constitute a "taking" of property for public use. Thus, the Corporations argument in this respect fails.

Fourth, the Corporations assert that the Bills violate Ky. Const. § 51, which provides, in pertinent part: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title[.]" Specifically, the Corporations contend that the Bills' title "An act relating to fiscal

matters and declaring an emergency" contains more than one subject and insufficiently expresses the subject matter contained therein.

In *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 443 (Ky. 1986), the Kentucky Supreme Court confirmed that the portion of § 51 cited above permits a legislative act to pertain to only a single subject, which must be described in the act's title. Nevertheless, this section of the Constitution "has always been liberally construed, with all doubts being resolved in favor of the validity of the legislative action." *Id.* "The purpose of the section is said to be to prevent the enactment of 'surreptitious' legislation." *Id.* (citing *Bowman v. Hamlett*, 159 Ky. 184, 188, 166 S.W. 1008, 1009 (1914); *Dawson v. Commonwealth, Dep't of Transp.,* 622 S.W.2d 212 (Ky. 1981)).

In *E. Ky. Coal Lands Corp. v. Commonwealth*, 127 Ky. 667, 702-03, 106 S.W. 260, 271 (1907), the court held that the title "A act relating to revenue and taxation" did not violate § 51, reasoning that "'[n]one of the provisions of a statute should be regarded as unconstitutional, where they all relate directly or indirectly to the same subject, have an natural connection, and not foreign to the subject expressed in its title.'" *Id.* (quoting *Phillips v. Cin. & Cov. Bridge Co.*, 59 Ky. (2 Met.) 219 (1859)). "In *L. & O. Turnpike Co. v. Ballard*, 59 Ky. (2 Met.) 165 (1859), it was said: 'A more liberal construction of this clause of the Constitution will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation.'" *E. Ky. Coal*, 127 Ky. at 703-04, 106 S.W. at 271.

Here, the Corporations do not contend that the Bills contain surreptitious legislation; rather, they take issue with the title itself. However, under a liberal construction historically afforded to § 51, we hold that the portions of the Bills at issue herein, relating to tax refunds, properly fall within the category of "fiscal matters" and thus, the title of the Bills sufficiently express the subject matter contained therein.

Lastly, the Corporations aver that the Bills are impermissible special legislation in violation of Ky. Const. § 59, which prohibits the General Assembly from passing local or special acts concerning various subjects, including "To regulate the rate of interest." The Corporations argue that the Bills arbitrarily treat taxpayers who received refunds prior to the effective dates differently from those who will receive refunds after those dates, and disproportionately classify interest rates for refunds and assessments, for no distinct or natural reason.

"Classification is a necessary feature and power of legislation, as it is impossible for any extensive code of laws to apply to every person or subject in the state." *City of Louisville v. Commonwealth*, 134 Ky. 488, 496, 121 S.W. 411, 413 (1909). In *Ravitz v. Steurele*, 257 Ky. 108, 120, 77 S.W.2d 360, 366 (1934), the court held constitutional an act which "provides an extensive, efficient system for the control, regulation, and the general supervision of the class of money lenders embraced by it." In so ruling, the court reasoned that the act's "intendment and purpose is to control, regulate, and supervise the business of the money lenders classified by it, and, in so far as it deals with the subject of interest, it does so

incidentally and as a part of the system of regulation and control therein provided." *Id*. Thus, "[a]s its provisions relate to interest, it is not a local or special law[.]" *Id.*

By the same token, insofar as the Bills at issue herein deal with the subject of interest, they do so incidentally and as part of a system of controlling, regulating, and supervising tax refunds. The effective dates, after which taxpayers are susceptible to different interest rates, are neither arbitrary nor unreasonable, and do not undertake in any way to fix or regulate the rate of interest. Thus, the challenged portions of the Bills herein are not impermissible special legislation in violation of Ky. Const. § 59 with respect to regulating the rate of interest.

The Franklin Circuit Court's order is affirmed in part, reversed in part, and remanded for further proceedings.

ALL CONCUR.

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