RENDERED: JUNE 28, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002020-MR

WALTER L. WILKENING; SHIRLEY H. WILKENING;
DEWEY R. WOTRING; CHERYL L. WOTRING;
CARL L. SAYER; AND NADENE N. SAYER — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NOS. 04-CI-00857 & 07-CI-01889

BOARD OF EDUCTION OF OLDHAM COUNTY;
JOYCE FLETCHER IN HER OFFICIAL
CAPACITY AS CHAIR OF THE BOARD OF
EDUCATION; WILLIAM WELLS IN HIS OFFICIAL
CAPACITY AS SUPERINTEDENT OF OLDHAM
COUNTY SCHOOLS; AND KENTUCKY BOARD
OF EDUCATION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, TAYLOR, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Walter L. Wilkening, Shirley H. Wilkening, Dewey R. Wotring, Cheryl L. Wotring, Carl L. Sayer and Nadene N. Sayer (Taxpayers) appeal from a summary judgment entered in favor of the Board of Education of Oldham County, Kentucky, Joyce Fletcher in her official capacity as chair of the Board of Education, William Wells in his official capacity as superintendent of Oldham County Schools, and the Kentucky Board of Education (collectively the Board) on their claim that the imposition of taxes between the 2003-2004 school years and 2007-2008 school years was unlawfully excessive because these taxes were never approved by a prior vote. Having determined that a subsequent amendment of Kentucky Revised Statutes (KRS) 157.621 retroactively removed any requirement for a prior vote before these taxes could be levied, and that these changes do not violate Taxpayers right to vote or the separation of powers doctrine, we affirm.

After the Supreme Court of Kentucky held that the entire public school system was unconstitutional in *Rose v. Council for Better Education, Inc*., 790 S.W.2d 186 (Ky. 1989), the General Assembly enacted the Kentucky Education Reform Act (KERA). Under KERA, school districts must make a minimum tax effort, the equivalent tax rate, in order to qualify for state funding under the fund to Support Excellence in Education in Kentucky (SEEK). School districts may comprise their minimum equivalent tax rate of 30¢ through any combination of property taxes, motor vehicle taxes, and permissive taxes. KRS 160.470.

School boards are authorized to levy ad valorem taxes to fund education subject to certain statutory limits that trigger elections. Under KRS 160.470(1), there is a general tax rate (known as the subsection one tax rate) which is not to exceed the previous year's rate based upon the previous year's assessment. The subsection one tax rate does not require prior voter approval, but amounts collected above this rate or above the minimum equivalent tax rate generally require prior voter approval and certain excess amounts are subject to recall. KRS 157.440(2)(a); KRS 160.470.

In 1994, the General Assembly began to authorize school districts to increase taxes levied through a series of so called "nickel" taxes including the Facilities Support Program of Kentucky Nickel, the Growth Nickel, the Equalized Growth Nickel and the Recallable Growth Nickel. The only nickel taxes we are concerned with here are the Growth Nickel and the Equalized Growth Nickel.

The Growth Nickel was authorized under KRS 157.621(1), which exempted it from recall. The Growth Nickel was not eligible under the statute for extra matching state funds known as state equalization funds. Therefore, under KRS 157.440(2)(a), Growth Nickel taxes that exceeded the subsection one rate or the minimum equivalent tax rate were subject to a prior vote. Thus, at the time that the Board levied taxes for the 2003-2008 school years under the statutes in effect during this period, a prior vote was required.

However, in 2003 the General Assembly enacted House Bill (HB) 269, which was a belated budget bill covering the 2002-2004 period. HB 269

suspended certain limitations of the Growth Nickel provisions contained in KRS 157.621; under part IX, section 14(g) allowing districts meeting certain growth criteria, including levying a new Equalized Growth Nickel tax, to receive state equalization funds for the original Growth Nickel tax; and under part IX, section 19(c) it kept a sunset clause from taking effect. These changes were not codified in KRS 157.621 because they were suspensions and were continued in subsequent budget bills covering the levies at issue.

The Board interpreted the HB 269 suspensions of KRS 157.621 to authorize it to levy the original Growth Nickel and the new Equalized Growth Nickel taxes without the need to seek prior voter approval of these taxes. The Board based its interpretation on the interaction between the HB 269 suspensions of KRS 157.621 and the requirements of KRS 157.440(2)(a), which explains the mechanism by which a school district may have an election to seek voter approval of a levy that will exceed the subsection one rate, but states "[r]evenue produced by this levy shall not be equalized with state funds." Therefore, the Board interpreted the HB 269 suspension that made the Growth Nickel and Equalized Growth Nickel taxes levied eligible for state equalization funds, to prohibit a prior election, even though the statutory language of KRS 157.621 did not exempt the Growth Nickel from a prior election. This interpretation is the cause of this litigation.

While this litigation and similar litigation against other school districts was pending, in 2008, the General Assembly enacted HB 704.[1] HB 704 made several

[1] We do not discuss HB 734 (which became 2008 Ky. Acts Ch. 80) separately, because it was passed prior to HB 704 (which became 2008 Ky. Acts Ch. 132) in the same legislative session.

important amendments to KRS 157.621. HB 704 finally codified the Equalized Growth Nickel tax. Prior to that period, it only existed in the HB 269 suspension and subsequent budget bill suspensions of KRS 157.621. HB 704 amended KRS 157.621 to retroactively exempt the Growth Nickel and Equalized Growth Nickel taxes from voter approval if levied prior to April 24, 2008. 2008 Ky. Acts Ch. 132.[2] By making these changes, HB 704 retroactively established the validity of the Board's determination that it did not need to submit its levies for prior voter approval.

For the 2002-2003 school year, the Board levied an ad valorem tax rate of 56.3¢ per $100 of assessed property, which Taxpayers have not contested. For the 2003-2004 school year, the Board levied a tax rate of 67¢, but did not submit this rate for prior voter approval. In the years that followed through the 2007-2008 school year, the Board continued to levy a tax rate based upon the 2003-2004 rate.

Taxpayers agree that the Oldham County Schools met the growth requirements necessary to make the district eligible for the Board to levy the Growth Nickel and Equalized Growth Nickel taxes. They argue that the Board

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Additionally, these two bills contain almost identical language and have been codified together. The only purpose behind HB 734 was to amend KRS 157.621 and explain the General Assembly's intent in doing so. It contains a non-codified intent section, section two, that explains it was being enacted to affirm language contained in previous budgets starting with the HB 269 budget and to affirm that the levies passed pursuant to those budgets were not subject to notice, hearing, recall or prior vote. HB 704 was a more general bill that amended several fiscally related statutes; it does not contain a similar intent section. HB 704 controls because it was enacted later, therefore, we cite it.

[2] In 2009, KRS 157.621 was repealed and reenacted using the same language used in 2008 Ky. Acts Ch. 132 (HB 704). This was done in order for the General Assembly to affirm the validity of 2008 Ky. Acts Ch. 132, and this change applied retroactively to April 24, 2008. 2009 Ky. Acts Ch. 86 (HB 216) §§ 12, 17.

was required to hold an election before these amounts could be levied. Accordingly, Taxpayers filed actions for tax refunds in 2004 and 2007, claiming that because the 2003-2004 proposed tax rate should have been submitted for prior voter approval, the tax for that fiscal year and the years that followed through the 2007-2008 fiscal year were invalid. The 2004 action was certified as a class action and in 2008 the two actions were consolidated.

Taxpayers originally claimed that either the Board's interpretation of HB 269 which eliminated the prior vote requirement for the Growth Nickel and Equalized Growth Nickel taxes was incorrect or that HB 269 violated section fifty-one of the Kentucky Constitution by failing to satisfy its republication, title and subject-matter requirements. After HB 704 amended KRS 157.621, taxpayers additionally challenged the constitutionality of HB 704 claiming that it violated their right to a prior vote and the separation of powers. Both parties filed motions for summary judgment. The circuit court granted the Board's motion for summary judgment.

Whether a prior election was required depends upon whether HB 704 validly amended KRS 157.621 to retroactively eliminate the Growth Nickel and Equalized Growth Nickel taxes from the requirement of a prior vote. If HB 704 is valid, the 67¢ levy was valid because it was formed from the subsection one tax rate of 56.8¢, which did not trigger the voter approval requirement, and 10.2¢ from the Growth Nickel and Equalized Growth Nickel taxes would not require prior voter approval. Accordingly, the 67¢ levy rate would be valid without prior approval.

Therefore, we examine Taxpayers claim that HB 704 is unconstitutional because it impairs their fundamental right to vote and the separation of powers doctrine by repealing KRS 157.621 and amending it to retroactively remove the prior voter approval requirement in 2008, after the challenged taxes had been levied and Taxpayers filed suit.

We agree that the General Assembly's action retroactively altered KRS 157.621 because "the enactment make[s] it apparent that retroactivity was the intended result." *Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006). The language of HB 704 expresses a clear intent by the General Assembly to retroactively exempt the Growth Nickel and Equalized Growth Nickel taxes from prior voter approval for amounts collected starting with the 2003-2004 fiscal year.

Retroactive legislation is permissible so long as it does not arbitrarily, or without due process, terminate or impair the judicial rights of a litigant. *Louisville Shopping Center, Inc. v. City of St. Matthews*, 635 S.W.2d 307, 310 (Ky. 1982). Tax statutes can be applied retroactively because a taxpayer has no immunity from taxation. *Miller v. Johnson Controls, Inc*., 296 S.W.3d 392, 403 (Ky. 2009). So long as a retroactive change to the tax code is rationally related to a legitimate legislative purpose, it does not violate due process. *Id*.

The retroactive amendment of KRS 157.621 is rationally related to the legitimate legislative purpose of addressing shortfalls in public school financing for counties experiencing large increases in student populations. The right to vote on levying taxes for school purposes is not a fundamental right because such a

right has been delegated by the legislature and can also be taken away by the legislature. *Christopher v. Robinson*, 164 Ky. 262, 175 S.W. 387, 388 (1915). The General Assembly could properly decide that allowing taxpayers to vote upon the Growth Nickel and Equalized Growth Nickel taxes was an impediment to adequately funding schools and eliminate the right to vote on these taxes.

The retroactive application of KRS 157.621 to Taxpayers' pending case does not violate separation of powers as explained by *King v. Campbell County*, 217 S.W.3d 862 (Ky.App. 2006). In *King*, a taxpayer argued that separation of powers was violated when a retroactive legislative action overturned a Kentucky Supreme Court ruling which would have made him eligible for a tax refund. King had filed suit when the new legislation was adopted. *Id*. at 864-867. Our Court discussed whether the retroactive application of the bill amounted to a legislative encroachment upon judicial powers and determined that it did not because King had no vested right to a refund, explaining:

> The United States Supreme Court has held that the federal separation-of-powers requirement prohibits Congress from "retroactively commanding the federal courts to reopen final judgments," *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 219, 115 S.Ct. 1447, 1453, 131 L.Ed.2d 328 (1995), and from "adjudicating particular cases legislatively." *Ruiz v. United States,* 243 F.3d 941, 948 (5th Cir. 2001) (citing *United States v. Klein,* 80 U.S. (13 Wall.) 128, 147, 20 L.Ed. 519 (1871)). It does not, however, prevent Congress from affecting pending cases by retroactively "amend[ing] applicable law." *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. at 218, 115 S.Ct. at 1452 (internal quotation marks omitted; citing *Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992)). King has suggested no reason to

> construe Kentucky's separation-of-powers provisions differently. King's right to a tax refund had not vested through a final judgment and thus the General Assembly's retroactive amendment of a law applicable to his pending case did not encroach upon judicial power in violation of the Constitution's separation-of-powers provision.

King, 217 S.W.3d at 870-871. Because Taxpayers case had not become final, and they did not yet have a right to a tax refund,[3] the retroactive amendment of KRS 157.621 did not violate the separation of powers doctrine.

Having determined the validity of HB 704, we need not address whether HB 269 was interpreted correctly by the Board or valid. Accordingly, we affirm the Franklin Circuit Court's grant of summary judgment to the Board.

ALL CONCUR.

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[3] We note that if Taxpayers were entitled to a prior vote on the levies in excess of the subsection one tax rate, they would not necessarily be entitled to a refund. Instead, they would appear to be entitled to a vote. However, a vote under these circumstances would not be the same as a prior vote and would function more like a delayed recall, because the taxes were already levied, collected and spent. We do not decide whether Taxpayers should have sought an injunction before these taxes were collected or what the proper remedy would have been had the Taxpayers prevailed.