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Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001128-MR

FINANCE AND ADMINISTRATION
CABINET, THE KENTUCKY DEPARTMENT
OF REVENUE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-00029

MARK F. SOMMER, and
TAX ANALYSTS

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, J. LAMBERT AND VANMETER,¹ JUDGES.

COMBS, JUDGE: The Finance and Administration Cabinet, Kentucky

Department of Revenue, appeals from a final judgment of the Franklin Circuit

¹ Judge Laurence B. VanMeter dissented in this opinion prior to being elected to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

Court that conflicted with and overrode an opinion issued by the Office of the Attorney General. The court held that the Department of Revenue was required by the provisions of our Open Records Act to produce for inspection suitably redacted copies of its final rulings in tax administration cases. After our review, we affirm.

KRS² 131.110 provides that after a notice of tax assessment has been provided to a taxpayer, the taxpayer may elect to file a protest with the Department of Revenue. The taxpayer's protest "shall be accompanied by a supporting statement setting forth the grounds upon which the protest is made." After a timely protest has been filed, the taxpayer "may request a conference with the department." KRS 131.110(2). "After considering the taxpayer's protest, including any matters presented at the final conference, the department shall issue a final ruling" KRS 131.110(3). The ruling must contain "a general statement of the issues in controversy and the department's position with respect to them." *Id.* The taxpayer may appeal that ruling to the Kentucky Board of Tax Appeals. KRS 131.110(5). By statute, proceedings before the Board (with limited exception not relevant here) are a matter of public record and are – without question – wholly exempt from any right to privacy on the part of the taxpayer. KRS 131.355(1); KRS 131.190(b)(2). Orders issued by the Board may be appealed by either party to Franklin Circuit Court. KRS 131.340.

On February 23, 2012, Mark F. Sommer, a tax attorney, invoked the Kentucky Open Records Act, KRS 61.870 *et seq.* He filed an open records request

² Kentucky Revised Statutes.

with the Finance and Administration Cabinet and the Department of Revenue. He requested “[a] copy of each so-called “Final Ruling” issued by either the Department or the Cabinet with a date shown thereon of January 1, 2004 through the current date” He conceded that information identifying each individual taxpayer would necessarily be redacted.

On March 2, 2012, the Cabinet’s general counsel responded to the request. Sommer was advised that once the documents had been gathered and reviewed, copies would be made available. The Cabinet estimated that Sommer’s request would be met by March 16, 2012.

However, by mid-March, the Cabinet reconsidered its position and decided to *deny* Sommer’s request. It explained that “final ruling letters that have not been appealed to the Board of Tax Appeals . . . are exempt from disclosure under the Open Records Act” The Cabinet claimed that it was impossible to redact final ruling letters that had not been appealed without the danger of disclosing taxpayer information that the Department of Revenue was specifically charged with protecting under the provisions of KRS 131.190 and KRS 131.081(15). The Cabinet further contended that “review [of] all 700 plus documents . . . to determine what redactions are needed, particularly where the result based on [a] sample appears to be that only boiler plate language would remain (which the Department assumes is not the part of the final ruling the Request is interested in), is unduly burdensome pursuant to KRS 61.872(6).” Although the Cabinet conceded that final rulings appealed to the Board of Tax

Appeals are public records, it declined to produce them as well. Sommer appealed the denial to the Office of the Attorney General.

The Office of the Attorney General undertook its review pursuant to the provisions of KRS 61.880. On October 30, 2012, the Attorney General's office requested that the administrative agencies submit for an *in camera* inspection "the sample final rulings and arguments supporting nondisclosure relative to each ruling."

The Office of the Attorney General issued a decision holding that the administrative agency's decision not to provide even redacted copies of the final rulings was supported by the provisions of KRS 131.190(1)(a) and KRS 131.081(15), which prohibit or restrict disclosure of certain taxpayer information. In addition, the provisions of KRS 131.990(2) contain severe penalties for the unauthorized disclosure of taxpayer information. In considering the three statutes together, the Attorney General concluded that Kentucky's legislative scheme, unlike that of other jurisdictions, does not permit the publication of final rulings issued by the Department of Revenue.

On January 11, 2013, Sommer petitioned the Franklin Circuit Court for review of the Attorney General's decision. On July 13, 2013, Tax Analysts, a non-profit news organization, filed a motion to intervene in the action pursuant to the provisions of CR³ 24.01. That motion was granted.

³ Kentucky Rules of Civil Procedure.

In the course of its review, the circuit court conducted an *in camera* analysis of the sample of final rulings that had been submitted to the Office of the Attorney General. The court concluded that the Department of Revenue was required by the provisions of the Open Records Act to produce the requested documents. The court observed first that final rulings of the Department of Revenue that had been appealed to the Board of Tax Appeals were public records and that the denial of access to these rulings was entirely without basis.

Next, the court concluded that even those final rulings that had not been appealed to the Board of Tax Appeals were subject to disclosure once they had been properly redacted. The court observed that its *in camera* review of the sample final rulings indicated that there was no legitimate basis upon which to keep confidential the vast majority of information included in the agency's rulings. The court concluded that the Department of Revenue could comply with its obligations under the Open Records Act to disclose to the public the substance of its final administrative rulings in cases in which taxpayers had challenged the Department's assessment "without unduly infringing on the privacy rights of taxpayers, or violating the general confidentiality statute that prohibits tax authorities from disclosing information it has compelled the taxpayer to produce." The court denied the agency's motion to reconsider and awarded costs, including reasonable attorney's fees. This appeal followed.

The Department of Revenue has already complied with the circuit court's order to reimburse Sommer and Tax Analysts as well as to produce those

final rulings that were eventually appealed to the Kentucky Board of Tax Appeals. It does not contest those portions of the circuit court's decision. However, it contends that the circuit court erred by concluding that final rulings **not subsequently appealed** are also subject to inspection upon an open records request. It argues that those final rulings are exempt from inspection under the provisions of the Act since they contain private taxpayer information that is not otherwise a matter of public record and that cannot easily be segregated from non-exempt information.

The facts of this case are undisputed. This is purely a question of law. And matters of law are reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717 (Ky.2000). Thus, we may not defer to the conclusions of the circuit court.

Kentucky's Open Records Act declares that "free and open examination of public records is in the public interest." KRS 61.871. It provides that public records "shall be open for inspection by any person, except as otherwise provided by KRS 61.870 to 62.884." KRS 61.872. "Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly" are expressly exempt from inspection. KRS 61.878(1)(l). Exceptions to the disclosure of public records are to be strictly construed, however. *Id.* And where a public record contains a combination of both exempt and non-exempt information, government agencies are required to

separate the material and make the non-exempt material available for inspection.

KRS 61.878.

On appeal, the Department of Revenue argues that provisions of the Kentucky Taxpayers' Bill of Rights (specifically KRS 131.081 and KRS 131.190) exempt from public examination its final rulings that are not appealed. We disagree.

The Kentucky Taxpayers' Bill of Rights guarantees that taxpayers "shall have the right to privacy with regard to the information provided on their Kentucky tax returns and reports, including any attached information or documents." KRS 131.081(15). And it prohibits the disclosure of any "information pertaining to the returns, reports, or the affairs of a person's business" to any other person. *Id.*

The provisions of KRS 131.190 also specifically prohibit the release of certain information acquired in the process of tax administration. KRS 131.190(1)(a) directs that no employee of the Department of Revenue or any other person:

shall intentionally and without authorization inspect or divulge any information acquired by him of the affairs of any person, or information regarding the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by a hearing or investigation, insofar as the information may have to do with the affairs of the person's business.

Under the penalty provisions of KRS 131.990, those who violate taxpayer privacy laws are subject to reprimand, termination, fines, and imprisonment. Anyone who unlawfully divulges confidential tax information is also subject to civil damages. *See Maysville Transit Co. v. Ort*, 177 S.W.2d 369 (Ky. 1943). The Department of Revenue argues that when read together, these statutes protect from disclosure essentially all of the information sought by Sommer and Tax Analysts.

Sommer and Tax Analysts argue that by making the substance of its final rulings available for public inspection, the Department of Revenue would provide needed guidance to taxpayers, the legislature, and the media about how our tax laws are construed and administered. They claim that the Department of Revenue can meet its obligation to maintain the privacy of taxpayers as well as its obligation to make available its final rulings under the Open Records Act by simply redacting personal identifiers.

We agree with the circuit court that the Department of Revenue has taken an unreasonably and overly broad view of KRS 131.190(1)(a) and KRS 131.081(15) as to how those provisions relate to the nature of material sought by Sommer and Tax Analysts. As noted above, final rulings of the Department of Revenue must contain a general statement of the issues in controversy and the department's position with respect to them. KRS 131.110(3). Consequently, the substantive portions of final rulings contain a wealth of information relative to the implementation of our tax laws. This is the very material that Sommer and Tax Analysts have sought to inspect. They have not sought to inspect supporting

statements filed by any taxpayer to initiate a protest of the tax assessment nor information provided by any taxpayer at a conference with the Department of Revenue. There is no doubt that such material would be protected by the provisions ensuring taxpayer privacy.

The evidence presented to the trial court indicates that the Department of Revenue itself has used redacted copies of its final rulings to support its position in litigation concerning other taxpayers. The Department's use of its final rulings in this fashion clearly undermines and contradicts the position that it has taken throughout these proceedings.

A number of these final rulings – suitably redacted by the Department of Revenue to protect taxpayer privacy – have been included in the record before us. Our review of these rulings indicates that they contain great bodies of information related to the reasoning and analysis of the Department of Revenue with respect to its task in administration of our tax laws. We are persuaded that that information can indeed be made available without jeopardizing the privacy interests of individual taxpayers protected by the provisions of KRS 131.190(1)(a) and KRS 131.081(15). Based upon our review of these final rulings, we conclude that the circuit court did not err by construing the pertinent statutes to give maximum effect both to the privacy protections of taxpayers and to the public's interest in knowing how our tax laws are being administered.

In summary, we conclude that the production of material sought by

Sommer and Tax Analysts for inspection is not prohibited by any provision of law.

Quite the contrary; it is required by our Open Records Act.

We affirm the decision of the Franklin Circuit Court and hold that the Department of Revenue must produce for inspection the final rulings requested by Sommer and Tax Analysts.

J. LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS BY SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING. I respectfully dissent. I agree wholeheartedly that the records sought by the Sommer and Tax Analysts should be made public to advise taxpayers and their advisers/counsel as to how our state taxing authorities have addressed similar tax issues in the past. That said, my view is that the legislature has made a policy determination that these records are not subject to disclosure. KRS 61.878(1)(l); KRS 131.081(15); KRS 131.190(1)(a). Consequently, I believe the Attorney General's interpretation was correct. Ky. OAG 12-ORD-225, 2012 WL 6623748 (2012). I would reverse the Franklin Circuit Court's Opinion and Order.

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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