

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mercury Trucking, Inc.,	:
Petitioner	:
	:
v.	: No. 248 M.D. 2007
	: Submitted: October 16, 2009
Pennsylvania Public Utility	:
Commission,	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge  
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: November 16, 2009

Before this Court is a petition for review filed in our original jurisdiction by Mercury Trucking, Inc. (Mercury) requesting this Court to order the Pennsylvania Public Utility Commission (Commission) to refund the overpayment it made on its tax assessment. Because there is no dispute that Mercury overpaid its assessment, we will so order.

The origins of this case arose out of our decision in *Mercury Trucking, Inc. v. Pennsylvania Public Utility Commission*, 923 A.2d 1244 (Pa. Cmwlt. 2007) (*Mercury I*). In that case, Mercury, a Pennsylvania trucking company, filed an appeal from an order of the Commission reversing the decision

of the Administrative Law Judge (ALJ) sustaining its objection to its revenue assessment for the 2004 operating period and granting its petition for a refund. Revenue assessments are made to fund the operation of the Commission. In *Mercury I*, Mercury failed to timely file its statement of its operating revenues for January 1, 2004, to December 31, 2004, due to shrinking operations in 2005, reduced staff and because the employee responsible for filing the report had suffered an illness and had not filed the report. When the Commission failed to receive the report, it issued a notice of assessment and a general assessment invoice for \$32,310 based not on actual revenues, but on Mercury's 2003 revenues plus a 12% increase. Mercury paid the invoice but filed an objection to the assessment and petition for a refund for \$12,242.98. The Law Bureau Prosecutory Staff, counsel for the Commission's Fiscal Office, filed a motion to dismiss Mercury's objection and petition for review, arguing that the Commission based its assessment on the estimate set forth by Section 510(b) of the Public Utility Code (Code), 66 Pa. C.S. §510(b),<sup>1</sup> and the estimate was binding on Mercury.

An ALJ determined that the Commission's estimate was excessive and granted Mercury a refund of \$12,242.98. The ALJ concluded that reliance on

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<sup>1</sup> 66 Pa. C.S. §510(b) provides:

(b) Allocation of assessment. On or before March 31 of each year, every public utility shall file with the commission a statement under oath showing its gross intrastate operating revenues for the preceding calendar year. If any public utility shall fail to file such statement on or before March 31, the commission shall estimate such revenues, which estimate shall be binding upon the public utility for the purposes of this section.

Section 510(b) by the Commission created an inconsistency between Sections 510(b) and 510(c) of the Code, 66 Pa. C.S §510(c), because Section 510(b) mandated that the Commission’s revenue estimates were binding while Section 510(c) allowed a utility to challenge the assessments that had been generated by the Commission, an unreasonable result not intended by the General Assembly. By opinion and order dated May 22, 2006, the Commission reversed the ALJ’s decision finding no inconsistencies between the two Code sections, and that Section 510(b) expressly stated that the failure of a utility to file its annual revenue report was a bar to it seeking to overturn its assessment.

On appeal, we found that we did not have jurisdiction over the appeal because pursuant to Section 510(d) of the Code, 66 Pa. C.S. §510(d),<sup>2</sup> a challenge

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<sup>2</sup> 66 Pa. C.S. §510(d) provides:

No suit or proceeding shall be maintained in any court for the purpose of restraining or in any way delaying the collection or payment of any assessment made under subsections (a), (b) and (c), but every public utility against which an assessment is made shall pay the same as provided in subsection (c). **Any public utility making any such payment may, at any time within two years from the date of payment, sue the Commonwealth in an action at law to recover the amount paid, or any part thereof, upon the ground that the assessment was excessive, erroneous, unlawful, or invalid, in whole or in part, provided objections, as hereinbefore provided, were filed with the commission, and payment of the assessment was made under protest either as to all or part thereof.** In any action for recovery of any payments made under this section, the claimant shall be entitled to raise every relevant issue of law, but the findings of fact made by the commission, pursuant to this section, shall be prima facie evidence of the facts therein stated. Any records, books, data, documents, and memoranda relating to the expenses of the commission shall be admissible in evidence in a court and shall be prima facie

**(Footnote continued on next page...)**

to the Commission's assessment had to be brought as an action at law. We then issued an order vacating the Commission's order and transferring the matter to our original jurisdiction.<sup>3</sup> Mercury then ultimately filed a petition for review requesting that we order the Commission to refund its overpayment on its assessment.

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**(continued...)**

evidence of the truth of their contents. If it is finally determined in any such action that all or any part of the assessment for which payment was made under protest was excessive, erroneous, unlawful, or invalid, the commission shall make a refund to the claimant out of the appropriation specified in section 511 as directed by the court.

<sup>3</sup> When Mercury initially filed its petition for review, it was not in our original jurisdiction and oral argument was held on February 5, 2007. This Court raised the issue of jurisdiction, *sua sponte*, and issued an order transferring the matter to our original jurisdiction and vacating the Commission's order and directing the Commission to file a responsive pleading. The Commission filed an application for re-argument and an extension of time to file a responsive pleading. We granted the application for the extension of time by order dated June 4, 2007, but denied the application for reargument by order dated June 25, 2007. On July 2, 2007, the Commission filed an answer and new matter and also filed preliminary objections. On July 5, 2007, we issued an order to strike the Commission's answer and new matter as premature. On July 25, 2007, the Commission filed an appeal with our Supreme Court. On August 6, 2007, Mercury filed an answer to the preliminary objections. We issued an order on August 9, 2007, listing the preliminary objections and the response thereto for argument. The Commission then filed an application for stay of the August 9, 2007 order pending appeal and the stay was granted by order of the Court dated October 5, 2007. On October 4, 2007, the Supreme Court issued an order quashing the Commission's appeal. We subsequently issued an order lifting the stay and directed scheduling of briefs and oral argument on the preliminary objections. By order dated March 7, 2008, the preliminary objections were overruled. On March 27, 2008, the Commission filed an answer and new matter with this Court. It also filed a notice of appeal to the Pennsylvania Supreme Court which was quashed by the Court. The case remained dormant until March 5, 2009, when this Court issued a rule to show cause why the action should not be dismissed for want of prosecution against Mercury. On April 7, 2009, Mercury answered the rule to show cause and we ordered the rule discharged and directed the parties to file a stipulation of facts which they did on July 8, 2009.

Because this matter is now in our original jurisdiction, we are hearing the matter *de novo*. If we find that the assessment was excessive, erroneous, unlawful or invalid under Section 510(d) of the Code, we shall order a refund. The Commission does not dispute that the overpayment was made and, in fact, admits that Mercury paid too much. It only argues that once it made the assessment that the late filing was “binding” as it did in its dismissed preliminary objections, that Mercury was forever barred from claiming a refund. In our decision denying the preliminary objections dated March 7, 2008 (No. 248 M.D. 2007, filed March 7, 2008), we held that:

Section 510(d) of the code provides a public utility the right to challenge its revenue assessment. 66 Pa. C.S. §510(d) provides, in pertinent part, that “[a]ny public utility making a payment may, at any time *within two years from the date of payment, sue the commonwealth in an action at law to recover the amount paid, or any part thereof, upon the ground that the assessment was excessive, erroneous, unlawful or invalid, in whole or in part, **provided objections, as hereinbefore provided, were filed with the commission, and payment of the assessment was made under protest as to either all or part thereof.***” (Emphasis added.) Section 510(c) of the code does not preclude or prohibit a public utility from filing an action until the Commission issues a notice to the public utility. Under that section, all that the public utility must do is file its objections to the assessment and pay the Commission the assessed amount. Consequently, under the plain language of Section 510 of the code, Mercury was authorized to file an action in our original jurisdiction within two years of being assessed by the Commission because it met the requirements under Section 510(c) of the Code.

(Emphasis in original.)

Because Mercury met the requirements and the Commission stipulates that Mercury overpaid its assessment, we order that Mercury be reimbursed \$12,242.98 for the tax overpayment it made to the Commission for tax year 2004.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mercury Trucking, Inc.,	:
Petitioner	:
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v.	: No. 248 M.D. 2007
	:
Pennsylvania Public Utility	:
Commission,	:
Respondent	:

**ORDER**

AND NOW, this 16<sup>th</sup> day of November, the Pennsylvania Public Utility Commission is ordered to reimburse Mercury Trucking, Inc. \$12,242.98 as overpayment of its assessment for tax year 2004.

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DAN PELLEGRINI, JUDGE