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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000773-MR

GTE SOUTH, INC., N/K/A
VERIZON SOUTH, INC. APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 01-CI-01363

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET; AND
KENTUCKY BOARD OF TAX APPEALS APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

JOHNSON, JUDGE: GTE South Incorporated, n/k/a Verizon South, Inc., has appealed from an order entered by the Franklin Circuit Court on March 10, 2003, which vacated a decision of the Kentucky Board of Tax Appeals that had set aside a sales and use tax assessment against GTE[1] for the taxable period of February 1,

[1] In their briefs to this Court, the parties refer to Verizon South, Inc. by its predecessor GTE South, Inc. We will do the same.

1991, through September 30, 1993. Having concluded that the circuit court erred in its determination that the Revenue Cabinet substantially complied with the notice requirements contained in KRS[2] 131.081(8), KRS 131.110(1) and KRS 139.620(1), and having further concluded that the trial court failed to make findings concerning the amount of the setoff the Revenue Cabinet is entitled to claim against a refund due GTE for the same time period, we reverse and remand for further proceedings consistent with this Opinion.

During the time period relevant to this appeal, GTE was in the business of providing local telephone service in a number of states, including Kentucky. In November 1996 the Revenue Cabinet decided to audit GTE's sales and use tax records for the period of February 1, 1991, through September 30, 1996. The audit, which was completed in October 1997, resulted in a sales and use tax assessment against GTE in the amount of $11,344,190.16.[3] Sometime in October 1997, the Revenue Cabinet mailed GTE an assessment letter dated October 16, 1997,[4] which

[2] Kentucky Revised Statutes.

[3] The Revenue Cabinet also audited GTE for the taxable period of February 1, 1987, through January 31, 1991, which resulted in an assessment against GTE in the amount of $28,275,861.80. The Revenue Cabinet later reduced its assessment against GTE for this period to $969,618.40, which GTE paid in full. GTE currently has a refund claim pending before the Board concerning the taxes it paid during this period.

[4] While the date of the letter is undisputed, the date the letter was mailed and the date it was received are very much in dispute and are at the center of this case.

set forth the basis and amount of the assessment.[5] The assessment letter stated that formal notices of tax due, including the interest and any penalties assessed against GTE, would be mailed separately and "may be expected within five (5) days." The assessment letter further provided that any protest "must be filed with the Cabinet within forty-five (45) days from the notice date on the computerized tax statements." On October 24, 1997, GTE received formal notices of tax due for the period of February 1, 1991, through September 30, 1996, in an envelope postmarked October 21, 1997.[6]

GTE protested the assessment, arguing, inter alia, that the Revenue Cabinet had failed to perform its assessment for the taxable period of February 1, 1991, through September 30, 1993,[7] within the four-year statute of limitations period prescribed in KRS 139.620(1).[8] GTE maintained that the Revenue

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[5] The assessment letter contained a narrative report along with supporting schedules setting forth the basis of the assessment. The majority of the tax deficiency assessed against GTE for this period was related to the revenue it received from certain carrier access charges.

[6] The notices of tax due included interest assessed against GTE for this period, which amounted to $3,852,517.82. The Revenue Cabinet did not assess any penalties against GTE for this period. The "notice date" listed on each notice of tax due is October 17, 1997.

[7] GTE paid the taxes assessed against it for the taxable period of October 1, 1993, through September 30, 1996.

[8] KRS 139.620(1) provides, in relevant part, as follows:

> As soon as practicable after each return is received, the cabinet shall examine and audit it. If the amount of tax computed by the cabinet is greater than the amount returned by the taxpayer, the excess shall be assessed by the cabinet within four (4)

Cabinet had until October 20, 1997, to assess any taxes against it for the period of February 1, 1991, through September 30, 1993.[9] GTE argued that the assessment against it for this period was void due to the fact the Revenue Cabinet failed to provide the statutory required notice of assessment prior to the October 20, 1997, deadline.[10]

The Revenue Cabinet issued a final ruling in the matter on December 3, 1998. The Revenue Cabinet maintained that GTE was responsible for the $370,313.33 assessment against it for the period of February 1, 1991, through September 30, 1993.[11] The Revenue Cabinet took the position that the assessment letter "complie[d] with the notice requirements of KRS 131.110." GTE

> years from the date the return was filed[.] . . . A notice of such assessment shall be mailed to the taxpayer. The time herein provided may be extended by agreement between the taxpayer and the cabinet.

GTE also contested the Revenue Cabinet's assertion that it was required to pay taxes on the revenue it received from carrier access charges. The Revenue Cabinet subsequently withdrew the portion of the assessment related to the carrier access charges, which reduced GTE's overall tax liability for the period of February 1, 1991, through September 30, 1993, to $370,313.33.

[9] On August 14, 1996, GTE and the Revenue Cabinet entered into a written agreement extending the deadline for any assessment covering the taxable period of February 1, 1987, through August 31, 1993, to October 20, 1997. GTE and the Revenue Cabinet both agree that the assessment for the taxable period relevant to this appeal, February 1, 1991, through September 30, 1993, had to be completed by October 20, 1997.

[10] GTE contended that the assessment letter, which was dated October 16, 1997, failed to provide the notice required by KRS 139.620(1).

[11] The Revenue Cabinet acknowledged that GTE was entitled to a refund in the amount of $274,489.07 concerning an overpayment with respect to certain sales and use taxes it paid for the period of April 1991 through March 1993. The Revenue Cabinet offset this amount against the $370,313.33 GTE owed for the period of February 1, 1991, through September 30, 1993, which resulted in a net tax liability of $95,824.26.

appealed the Revenue Cabinet's ruling to the Board of Tax Appeals.[12]

GTE argued before the Board that the assessment letter failed to satisfy the notice requirements contained in KRS 131.081(8),[13] KRS 131.110(1),[14] and KRS 139.620(1). In sum, GTE claimed the assessment letter was insufficient notice since it did not contain any information concerning the amount of interest or penalties assessed against it by the Revenue Cabinet. GTE maintained that pursuant to KRS 131.081(8), the Revenue Cabinet was required to provide this information prior to the expiration of the four-year statute of limitations period prescribed in KRS 139.620(1).[15] In addition, GTE contended that even if the assessment letter was deemed to satisfy the notice

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[12] See KRS 131.110(5).

[13] KRS 131.081(8) provides, in relevant part, as follows:

> The cabinet shall include with each notice of tax due a clear and concise description of the basis and amount of any tax, penalty, and interest assessed against the taxpayer, and copies of the agent's audit workpapers and the agent's written narrative setting forth the grounds upon which the assessment is made.

[14] KRS 131.110(1) provides that "[t]he Revenue Cabinet shall mail to the taxpayer a notice of any tax assessed by it[,]" and that "[t]he assessment shall be due and payable if not protested in writing to the cabinet within forty-five (45) days from the date of notice."

[15] As previously discussed, the interest assessed against GTE for the period of February 1, 1991, through September 30, 1993, was set forth in the notices of tax due, which were postmarked October 21, 1997. GTE insisted that these notices were untimely since they were mailed after the October 20, 1997, deadline.

requirement, it was mailed after the October 20, 1997, deadline.[16]

On October 10, 2000, a hearing was held before the Board concerning the issues raised by GTE in its appeal. Several witnesses testified at the hearing, including GTE's staff auditor, Richard Ehle. Ehle explained that he was involved in the audit that concerned the period of February 1, 1991, through September 30, 1996. Ehle testified that he received an assessment letter addressed to him concerning this period on October 27, 1997. Ehle explained that he was initially unsure of the date he received the assessment letter, but that he later became aware of the date when he was presented with a handwritten Post-it note that was attached to the letter.[17] Ehle testified that the Post-it note indicated that he received the letter on October 27, 1997.[18] Ehle testified that he recognized the handwriting on the note as his own. Ehle stated that he received the notices of tax due for the period of February 1, 1991, through September 30, 1996, on October 24, 1997. On cross-examination, Ehle acknowledged that it was not

[16] GTE raised this issue for the first time before the Board. Interestingly, GTE failed to retain the envelope in which the letter was sent, which likely would have contained a postmark date indicating when it was mailed.

[17] Ehle testified that he first became aware of the Post-it note approximately two weeks prior to the hearing.

[18] The Post-it note, which was signed by Ehle, stated that he received the letter at approximately 2:30 p.m. on October 27, 1997.

unusual for his secretary or supervisor to open his mail before it reached his desk.[19] Several employees from the Revenue Cabinet also testified at the hearing concerning the mailing system employed by the Revenue Cabinet. The Revenue Cabinet was unable, however, to produce any witness who could verify the date the assessment letter was mailed.

On September 7, 2001, the Board entered an order setting aside the assessment against GTE for the period of February 1, 1991, through September 30, 1993. The Board concluded that the assessment against GTE for this period was untimely and therefore void. The Board's order stated, in relevant part, as follows:

> In accordance with the statute of limitations as described in KRS 139.110(1), the Cabinet had to provide GTE with notice of any assessment against it for the taxable period September 1993 on or before October 20, 1997.
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> Sections 131.081(8), 131.110(1) and KRS 139.620(1) of the Kentucky Revised Statutes must be construed to harmonize the statutes so as to give effect to all of them, and in such a way that they do not become meaningless or ineffectual. Commonwealth v. Phon, Ky., 17 S.W.3d 106, 107-108 (2000).
>
> The proper construction of KRS §§ 131.081(8), 131.110(1) and KRS 139.620(1) requires that five elements of information must be timely provided to a taxpayer in

[19] It is important to note that Ehle never stated that he opened the envelope in which the letter was sent; he simply testified as to the date that he received the letter. As previously discussed, GTE failed to retain the envelope in which the letter was sent.

order for the taxpayer to have received notice of an assessment. The five elements are: (1) a clear and concise description of the basis and amount of tax, (2) a clear and concise description of the basis and amount of penalty, (3) a clear and concise description of the basis and amount of interest, (4) copies of the agent's audit work papers; and (5) the agent's written narrative setting forth the grounds upon which the assessment is made.

The October 16, 1997[, assessment] letter did not contain elements (2) and (3); that is, it did not inform GTE of the interest and penalty assessed. Therefore, under KRS 131.081(8) the October 16, 1997[, assessment] letter did not constitute notice of the assessment against GTE for the February 1, 1991[,] through September 30, 1993[,] taxable periods.[20]

In order for GTE to have received timely notice under the statutes, both the October 17, 1997[,] Notices of Tax Due and the October 16, 1997[, assessment] letter would had to have been mailed to GTE, as evidenced by the postmark, on or before October 20, 1997.[21]

. . .

GTE did not receive timely notice of the assessment against it in the amount of $370,313.33 for the taxable periods February 1, 1991[,] through September 30, 1993, and therefore, such assessment is null and void.

. . .

[20] The Board also found that the assessment letter was mailed after the October 20, 1997, deadline. In addition, the Board found that the Revenue Cabinet had failed to establish that it "has a regular system or scheme for mailing that ensures timely mailing of tax assessments[.]"

[21] As previously discussed, the envelope in which the notices of tax due were sent had an October 21, 1997, postmark date.

> The Board orders the Revenue Cabinet's final ruling reversed, and the assessment against GTE in the amount of $370,313.33 is set aside.
>
> As there is no valid and binding assessment or liability against which the Cabinet may offset this refund, the Cabinet is ordered to authorize payment of the refund to GTE in the amount of $274,489.07, plus interest.

The Revenue Cabinet appealed the Board's decision to the Franklin Circuit Court.[22] In its appeal to the circuit court, the Revenue Cabinet argued, inter alia, that the Board's finding that the assessment letter was untimely was "without support of substantial evidence."[23] On December 19, 2002, the circuit court entered an opinion and order affirming the Board's decision, which stated, in relevant part, as follows:

> The Board determined that the assessment letter dated October 16, 1997[,] was mailed untimely (after October 20, 1997). This finding of fact is supported by substantial evidence in the record. Mysteriously, this letter did not receive a postmark en route to [GTE]. Thus, the Board was forced to rely upon circumstantial evidence to determine whether the letter was

[22] Pursuant to KRS 131.370(1), "[a]ny party aggrieved by any final order of the Kentucky Board of Tax Appeals . . . may appeal to the Franklin Circuit Court or to the Circuit Court of the county in which the party aggrieved resides or conducts his place of business in accordance with KRS Chapter 13B." Any decision rendered pursuant to this provision is subject to direct review by the Court of Appeals. See KRS 13B.160.

[23] The Revenue Cabinet also took issue with the Board's conclusion that it had to provide GTE with notice of any assessment against it for the taxable period of February 1, 1991, through September 30, 1993, by October 20, 1997. In sum, the Revenue Cabinet maintained that it was only required to perform the "act of assessment" within the four-year statute of limitations period prescribed in KRS 139.620(1).

> mailed on or before October 20, 1997. The postmark and arrival dates for other correspondence between the Cabinet and [GTE] provide ample evidence to support the Board's decision. All other letters sent by the Cabinet that were postmarked on or before October 20, 1997[,] were received by [GTE] on or before October 24, 1997. However, the assessment letter in question did not arrive at [GTE] until October 27, 1997. It is more than reasonable to conclude that the assessment letter was not mailed until after October 20, 1997, and therefore was untimely [citation to record omitted].[24]
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> . . .
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> [GTE] has a tax refund claim pending in the amount of $274,489.07. The Cabinet argues that refund claims are governed by equitable principles, citing Shannon v. Hughes, 270 Ky. 530, [109 S.W.2d 1174] (1937). Federal courts allow the government to make an equitable set-off for an underpayment against any refund claimed by a taxpayer, even if that underpayment could not be assessed due to the applicable statute of limitations. Lewis v. Reynolds, 284 U.S. 281[, 52 S.Ct. 145, 76 L.Ed. 293] (1932). The United States Court of Claims supported this reasoning by pointing out that federal taxpayers have been granted equitable recoupment despite failure to file a timely claim for a refund. Dysart v. United States, [169 Ct.Cl. 276,] 340 F.2d 624 ([Ct.Cl.] 1965). In other words, if the taxpayer can offset a tax assessment for one period with an untimely refund claim for the

[24] The circuit court agreed with the Board's construction of KRS 131.081(8), KRS 131.110(1) and KRS 139.620(1). That is to say, the circuit court concluded that the Revenue Cabinet was required to provide GTE with both the assessment letter and the notices of tax due concerning the taxable period of February 1, 1991, through September 30, 1993, by the October 20, 1997, deadline. Nevertheless, the circuit court reasoned that the assessment letter would have been sufficient to achieve the purpose for which the notice statutes were intended if it had been timely mailed.

> same period, then the government should be given the reciprocal privilege.
>
> Equitable considerations do not support the Cabinet's desire to offset [GTE's] refund in this case. In its brief, [GTE] pointed out that the Cabinet has always prohibited taxpayers from using the doctrine of equitable recoupment. The Cabinet did not contradict that statement, nor could this Court find any published Kentucky appellate court opinions applying equitable recoupment. Unlike the federal tax cases cited by the Cabinet, Kentucky taxpayers have not been allowed to offset tax assessment with untimely refund claims. Thus, as a matter of equity, the Cabinet should not be allowed to offset a valid refund claim by the amount of an untimely assessment otherwise uncollectible.

On December 30, 2002, the Revenue Cabinet filed a motion to alter, amend or vacate the circuit court's opinion and order. The Revenue Cabinet argued that the Board's finding that the assessment letter was untimely was unsupported by the evidence. On March 10, 2003, the circuit court entered an order granting the Revenue Cabinet's motion to alter, amend or vacate. The order stated, in relevant part, as follows:

> The Court, in its Order of December 19, 2002, made a critical factual error in reaching its conclusions on the timeliness of the mailing of the assessment letter. In its Order, the Court cited as a relevant fact that the October 16, 1997, assessment letter did not have a postmark date stamped upon the envelope at the time of delivery. This factual finding was incorrect and led the Court to circumstantial conclusions which were prejudicial to the Cabinet.

In actual fact, the postmark date of the October 16, 1997[,] assessment letter could not be determined because GTE, the Respondent herein, could not produce the envelope in which the letter had arrived. This was despite the fact that GTE could produce the envelopes for all other assessment and notice of tax due letters sent to GTE concerning this audit and a related audit. In light of this correction, the Court must re-examine its holding that the Board of Tax Appeals' conclusion that the Revenue Cabinet's notice of assessment was not timely mailed was supported by substantial evidence in the record.

. . .

Reference to the evidence cited by the Board in its Order reveals that the Board's conclusion that the October 16, 1997[, assessment] letter was mailed untimely, could only be based upon the evidence of the post-it-note attached to the letter by Rick Ehle of GTE.[ ] Ehle, at the hearing before the Board, testified that he had discovered a post-it-note attached to the October 16th letter indicating that he had received the letter on October 27th. Ehle also testified, however, that he was not the first person at GTE who would have received this letter. This post-it-note, which was not discovered until well after Ehle's deposition, was not furnished to the Revenue Cabinet until shortly before the Board's hearing. Ehle had no specific memory of making the post-it-note, but identified it as his handwriting.

. . .

Again, we repeat, the postmarked envelope in which the letter arrived at GTE was never found or produced.

. . .

The evidence before the Board clearly demonstrates that the Revenue Cabinet proved conclusively and convincingly a regular system for the mailing of assessment letters, including particular attention to those involving an impending statute of limitations deadline. The substantial weight of the evidence from the hearing only supports the conclusion that this presumption applies to support the Cabinet's position that the October 16th letter was mailed on or before the October 20th deadline. The johnny-come-lately post-it-note is insufficient evidence as a matter of law to support the Board's finding that the assessment letter was mailed after the October 20th deadline. As a consequence, the Board's finding to the contrary is arbitrary and must be set aside [emphasis omitted].

The Court reaffirms the portions of its Order holding that the assessment letter constitutes sufficient notice under the statute.

The Court, however, does not reaffirm the portions of its Order holding that there is no offset against another pending tax refund claim by GTE. In light of the above holding, this issue is no longer central to the Court's decision in this case. But the tax refund statutes (KRS 139.770 and KRS 134.580) only allow refunds for an "overpayment of tax." Our review of additional authorities cited by the Cabinet has convinced us that the Court's initial analysis of this issue in its December 19, 2002[,] Order[ ] is also incorrect. The principles of equitable recoupment previously cited by the Court do not apply to the issue of whether GTE South made an over-payment of taxes in a separate transaction.

WHEREFORE, the Revenue Cabinet's Motion to Alter, Amend or Vacate the Court's

> December 19, 2002, Judgment is GRANTED. The Board's Order, that the Cabinet's assessment letter of October 16, 1997, IS HEREBY SET ASIDE AND VACATED. The Cabinet's Tax Assessment under the October 16, 1997[,] letter, IS HEREBY ORDERED REINSTATED.

This appeal followed.

GTE raises three issues on appeal. First, GTE asserts that the circuit court erroneously substituted its judgment on the weight of the evidence for that of the Board when it held that the evidence was insufficient as a matter of law to support the Board's finding that the assessment letter was mailed after the October 20, 1997, deadline. Second, GTE contends that the circuit court erred by concluding that the assessment letter constituted sufficient notice under the relevant statutes.[25] Third, GTE claims that it is entitled to a refund for the time period that is in dispute and that the Revenue Cabinet is not entitled to a setoff of the alleged liability against this refund.

We begin our analysis by setting forth the proper standard of review. When a circuit court is charged with the task of reviewing the final decision of an administrative agency, such as the Board of Tax Appeals, its review is limited

[25] GTE also takes issue with the circuit court's conclusion that the evidence before the Board demonstrated that the Revenue Cabinet "proved conclusively and convincingly a regular system for the mailing of assessment letters[.]" As previously discussed, the Board found that the Revenue Cabinet failed to establish that it "has a regular system or scheme for mailing that ensures timely mailing of tax assessments[.]" We need not address this issue, however, as its resolution is not central to our disposition of this appeal.

by KRS 13B.150(2) to a determination of whether the agency's decision is:

> (a) In violation of constitutional or statutory provisions;
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> (b) In excess of the statutory authority of the agency;
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> (c) Without support of substantial evidence on the whole record;
>
> (d) Arbitrary, capricious, or characterized by abuse of discretion;
>
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
>
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
>
> (g) Deficient as otherwise provided by law.

Whether the Revenue Cabinet provided GTE with due and timely notice of the tax assessment levied against it for the period of February 1, 1991, through September 30, 1993, presents a mixed question of fact and law.[26] "When considering questions of law or mixed questions of fact and law, the reviewing Court has greater latitude in determining whether the findings were supported by evidence of probative value than when only a

[26] See, e.g., Kentland Elkhorn Coal Corp. v. Yates, Ky.App., 743 S.W.2d 47, 49 (1988); and Harry M. Stevens Co., Inc. v. Workmen's Compensation Board, Ky.App., 553 S.W.2d 852 (1977).

question of fact is at issue."[27] As previously discussed, GTE first takes issue with the circuit court's determination that "[t]he johnny-come-lately post-it-note [was] insufficient as a matter of law to support the Board's finding that the assessment letter was mailed after the October 20th deadline." When the party with the burden of proof on a factual issue is successful before an administrative tribunal, as in the case sub judice,[28] the issue on appeal is whether substantial evidence supports the agency's conclusions.[29] "Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people."[30] Moreover, it is well-settled that a reviewing court may not substitute its judgment for that of an administrative tribunal "as to the weight of the evidence on questions of fact."[31] Findings of fact shall not be set aside unless clearly

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[27] Purchase Transportation Services v. Estate of Wilson, Ky., 39 S.W.3d 816, 817-18 (2001).

[28] Clearly, the burden was on GTE to establish the facts necessary to support its statute of limitations defense. Cf., Wimmer v. City of Ft. Thomas, Ky.App., 733 S.W.2d 759, 761 (1987)(stating that pleading the statute of limitations is an affirmative defense and the burden lies with the party asserting the defense to show his entitlement to it). See also Woods v. Commissioner of Internal Revenue, 92 T.C. 776, 779 (U.S.Tax Ct. 1989).

[29] See, e.g., Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

[30] Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002)(citing Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971)).

[31] KRS 13B.150(2). See also Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419-20 (1985); and Revenue Cabinet v. Kentucky-American Water Co., Ky., 997 S.W.2d 2, 8 (1999).

erroneous and a factual finding is not clearly erroneous if it is supported by substantial evidence.[32]

Based on the lack of evidence to support the Board's finding on this issue, we agree with the circuit court's reversal of the Board's determination that the assessment letter was mailed untimely. The Board appears to have premised its finding on Ehle's testimony that he received the assessment letter on October 27, 1997.[33] Ehle, however, never stated that he opened the envelope in which the letter was sent; he simply testified as to the date that he received the letter.[34] In fact, Ehle testified that it was not unusual for his secretary or supervisor to open his mail before it reached his desk. As previously discussed, the burden was on GTE to establish the facts necessary to support its statute of limitations defense. "A party pleading the statute of limitations as a bar to assessment establishes a prima facie case by showing that the statutory notice was mailed beyond the normally applicable

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[32] See, e.g., Johnson v. Galen Health Care, Inc., Ky.App., 39 S.W.3d 828, 832 (2001); and Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991).

[33] The Board cited Ehle's testimony from the October 10, 2000, hearing and James Gaither's deposition testimony in support of its determination that the assessment letter was mailed untimely. Gaither was Ehle's supervisor during the time period relevant to this appeal. In his deposition, Gaither stated that he first came into contact with the assessment letter on October 27, 1997, when Ehle presented him with the letter and the attached Post-it note.

[34] Likewise, Gaither simply testified as to the date that he received the letter from Ehle.

period provided by the statute of limitations."[35] Like the circuit court, we conclude that the scant evidence before the Board concerning the alleged untimeliness of the assessment letter was insufficient "to induce conviction in the minds of reasonable people[;]"[36] and accordingly, GTE failed to satisfy its burden on this issue. Consequently, the circuit court correctly reversed the Board's determination that the assessment letter was mailed after the October 20, 1997, deadline.

GTE further contends that the circuit court erred by concluding that the assessment letter constituted sufficient notice under the relevant statutes. In sum, GTE maintains that "[s]trict compliance with the notice requirements of KRS §§ 131.110(1), 139.620(1) and 131.081(8) is required." GTE's argument is premised upon its interpretation of KRS 131.081(8), KRS 131.110(1) and KRS 139.620(1). GTE contends that before a taxpayer will be deemed to have received notice of an assessment, the aforementioned statutes, when read together, require that the notice of the assessment include the following: (1) a clear and concise description of the basis and amount of any tax assessed against the taxpayer; (2) a clear and concise description of the basis and amount of any penalty assessed against the taxpayer; (3) a clear and concise description of the

[35] Woods, 92 T.C. at 779.

[36] Burton, 72 S.W.3d at 929.

basis and amount of any interest assessed against the taxpayer; (4) copies of the agent's audit workpapers; and (5) the agent's written narrative setting forth the grounds upon which the assessment is made.[37] We agree with GTE's construction of KRS 131.081(8), KRS 131.110(1) and KRS 139.620(1).

It is well-established that doubtful language in statutes imposing taxes should be resolved in favor of the taxpayer.[38] As the former Court of Appeals stated in George v. Scent:[39]

> Taxing laws should be plain and precise, for they impose a burden upon the people. That imposition should be explicitly and distinctly revealed. If the Legislature fails so to express its intention and meaning, it is the function of the judiciary to construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers.[40]

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[37] See KRS 131.081(8).

[38] WDKY-TV, Inc. v. Revenue Cabinet, Commonwealth of Kentucky, Ky.App., 838 S.W.2d 431, 433 (1992).

[39] Ky., 346 S.W.2d 784, 789 (1961) (citing Frank Fehr Brewing Co. v. Commonwealth ex rel. Oates, 296 Ky. 667, 178 S.W.2d 197 (1944)).

[40] Id. See also Matter of Protest of Strayer, 716 P.2d 588, 592 (Kan. 1986)(holding that "[t]ax statutes are penal, and thus must be strictly construed in favor of the taxpayer"); First National Bank of Springfield v. Dept. of Revenue, 421 N.E.2d 175, 177 (Ill. 1981)(holding that "[t]axing statutes are to be strictly construed, and their language is not to be extended or enlarged by implication beyond its clear import, but in cases of doubt such laws are construed most strongly against the government and in favor of the taxpayer"); and KTVO, Inc. v. Bair, 255 N.W.2d 111, 112-13 (Iowa 1977)(noting that "[i]n construing tax statutes doubt is resolved in favor of the taxpayer"). The historical underpinnings for the general rule that taxing statutes are to be strictly construed in favor of the taxpayer can be traced to Chief Justice Marshall's declaration in M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 431, 4 L.Ed. 579 (1819), that "[t]he power to tax involves the power to destroy[.]"

We conclude that KRS 131.081(8), KRS 131.110(1) and KRS 139.620(1) were intended to provide the taxpayer with notice of any tax, interest or penalties assessed against him, as well as the basis of such assessment within a timely fashion, so as to allow for a protest of the assessment if necessary. KRS 139.620(1) provides that "[i]f the amount of tax computed by the cabinet is greater than the amount returned by the taxpayer, the excess shall[41] be assessed by the cabinet within four (4) years from the date the return was filed" [emphasis added]. KRS 131.110(1) provides that "[t]he Revenue Cabinet shall mail to the taxpayer a notice of any tax assessed by it[,]" and that "[t]he assessment shall be due and payable if not protested in writing to the cabinet within forty-five (45) days from the date of notice" [emphases added]. KRS 131.110(1) further provides that any protest "shall be accompanied by a supporting statement setting forth the grounds upon which the protest is made" [emphasis added].

In order for the taxpayer to make an informed decision concerning its right to protest a tax assessment, the

[41] It is a fundamental rule of statutory construction that the word "shall" is to be treated as mandatory unless the context requires otherwise. See, e.g., Alexander v. S & M Motors, Inc., Ky., 28 S.W.3d 303, 305 (2000). See also KRS 446.010(29). Furthermore, our Supreme Court recently stated in Commonwealth v. Phon, Ky., 17 S.W.3d 106, 108 (2000), that "statutes should be construed in such a way that they do not become meaningless or ineffectual" [footnote omitted].

Legislature enacted KRS 131.081(8), which details the information that is to be provided to the taxpayer as follows:

> (8) The cabinet shall include with each notice of tax due a clear and concise description of the basis and amount of any tax, penalty, and interest assessed against the taxpayer, and copies of the agent's audit workpapers and the agent's written narrative setting forth the grounds upon which the assessment is made. Taxpayers shall be similarly notified regarding the denial or reduction of any refund or credit claim filed by a taxpayer [emphasis added].

Central to our holding in this case is a determination of the Legislature's intent as to the application of the four-year statute of limitations. The Revenue Cabinet takes the position that this four-year limitation applies only to the assessment of the tax. Thus, the Revenue Cabinet contends that it was not required to provide the taxpayer with the five elements of information within the four-year period. The Revenue Cabinet did send GTE an assessment letter in the four-year period which contained the basis and amount of the tax assessed against it for the period of February 1, 1991, through September 30, 1993, along with the audit workpapers and agent's written narrative for that period.[42] However, it was not until October 24, 1997, that GTE received formal notices of tax due

[42] As previously discussed, GTE failed to establish that the assessment letter was untimely mailed after the October 20, 1997, deadline.

which included the interest assessed against it for the period in question, in an envelope postmarked October 21, 1997.

When KRS 131.081(8) is read in conjunction with KRS 131.110(1) and KRS 139.620(1), we are persuaded that KRS 131.081(8) requires the Cabinet to include with each notice of tax due the five elements set forth in the statute within the four-year statute of limitations period contained in KRS 139.620(1). In the case sub judice, the timely assessment letter contained three of the required five elements, but the remaining two elements (interest and lack of penalty) were not provided until the untimely notice of tax due was sent. While the Revenue Cabinet contends that it substantially complied with the requirements of the statutes, we hold that the clear language of the statutes in question leaves no room for substantial compliance. Consequently, we are of the opinion that strict compliance with the notice requirements contained in KRS 131.081(8), KRS 131.110(1) and KRS 139.620(1) is mandated. To hold otherwise would, at a minimum, render KRS 131.081(8) meaningless or ineffectual.[43]

While our holding on the notice issue favors GTE, we accept the Revenue Cabinet's alternative argument that GTE is not entitled to a refund concerning the sales and use taxes it

[43] To adopt the Revenue Cabinet's construction of the statutes in question would have the effect of extending the time period for providing the taxpayer with the elements listed in KRS 131.081(8) indefinitely.

paid for the period of April 1991 through March 1993, since it did not "overpay" its taxes for that period.[44] KRS 139.770, which governs claims for refunds or credits for taxes paid, provides that "[t]he taxes paid pursuant to the provisions of this chapter shall be refunded or credited in the manner provided in KRS 134.580."[45] KRS 134.580(2) authorizes the Revenue Cabinet to issue a refund or credit for "any overpayment of tax and any payment where no tax was due."[46] Thus, an "overpayment" or "payment where no tax was due" must occur before a refund is authorized.[47] Stated another way, the taxpayer is only entitled to a refund if he has overpaid his tax liability.

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[44] As previously discussed, GTE had claimed a refund of $274,489.07 for overpayment of its sales and use taxes during this period.

[45] See KRS 139.770(1).

[46] KRS 134.580(4) provides, in relevant part, as follows:

> Nothing in this section shall be construed to authorize the agency to make or cause to be made any refund except within four (4) years of the date prescribed by law for the filing of a return including any extension of time for filing the return . . . except in any case where the assessment period has been extended by written agreement between the taxpayer and the cabinet[.]

The Revenue Cabinet concedes that GTE's refund request for the period of April 1991 through March 1993 was timely filed.

[47] Pursuant to KRS 134.580(1)(b), "'[o]verpayment' or 'payment where no tax was due' means the tax liability under the terms of the applicable statute without reference to the constitutionality of the statute."

In Lewis v. Reynolds,[48] the United States Supreme Court noted long ago that this issue "'involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.'"[49] The Supreme Court went on to hold:

> An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the [government] to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded [emphasis added].[50]

The principles enunciated by the Supreme Court in Lewis have become ingrained in the jurisprudence of tax law.[51] Although this issue appears to be one of first impression in Kentucky, we see no reason to deviate from this majority rule. Consequently, we conclude that even though the assessment and collection of GTE's tax liability for the period of April 1991

[48] 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293, modified by, 284 U.S. 599, 52 S.Ct. 264, 76 L.Ed. 514 (1932).

[49] Id. 284 U.S. at 283 (quoting Lewis v. Reynolds, 48 F.2d 515, 516 (10th Cir. 1931)).

[50] Id. 284 U.S. at 283.

[51] See IES Industries, Inc. v. United States, 349 F.3d 574, 581 n.5 (8th Cir. 2003); Bachner v. Commissioner of Internal Revenue, 109 T.C. 125, 130-32 (U.S.Tax Ct. 1997); Allen v. United States, 51 F.3d 1012, 1014-15 (11th Cir. 1995); Angle v. United States, 996 F.2d 252, 256 (10th Cir. 1993); Bankers Trust Corp. v. New York City Department of Finance, 301 A.D.2d 321, 330 (N.Y.App.Div. 2002); and Sprint Communications Co. v. State Board of Equalization, 47 Cal.Rptr.2d 399, 402-03 (Cal.App. 1995).

through March 1993, is now barred by the statute of limitations, the Revenue Cabinet has the right to retain prior excess payments for that same time period to the extent that they do not exceed the amount "which might have been properly assessed and demanded."[52] Unfortunately, the circuit court failed to determine the amount of tax that had been assessed against GTE for the period of April 1991 through March 1993. As previously discussed, the Revenue Cabinet contends GTE underpaid its sales and use taxes in the amount of $370,313.33 for the period of February 1, 1991, through September 30, 1993. This period overlaps by eight months the period for which GTE has requested a refund. Consequently, this matter must be remanded to the circuit court for a factual determination of whether the refund amount requested by GTE for the period of April 1991 through March 1993 exceeds the amount assessed against it for that same time period. GTE will be entitled to a refund for any such excess; otherwise, the entire refund will be exhausted as an offset against the tax liability for that period which might have been properly assessed and demanded.

Based on the foregoing reasons, the order of the Franklin Circuit Court is reversed, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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[52] Lewis, 284 U.S. at 283.

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