RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
OCTOBER 24, 2007

(2006-SC-0416-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001566-MR

JOHNSON CONTROLS, INC.;
SECURITY GROUP, INC. AND SUBSIDIARIES,
INCLUDING SARGENT & GREENLEAF, INC.,
WILLIS NORTH AMERICA, INC. (F/K/A WILLIS
CORROON CORPORATION) AND AFFILIATES;
BUNZL USA, INC. AND SUBSIDIARIES,
INCLUDING MAK-PAK, INC.,
TREDEGAR CORPORATION AND SUBSIDIARIES,
PREDECESSOR IN INTEREST TO
TREDEGAR INDUSTRIES, INC. AND SUBSIDIARIES;
AND COSMOS BROADCASTING CORPORATION
AND AFFILIATES — APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE WILLIAM L. GRAHAM, JUDGE
CIVIL ACTION NOS. 00-CI-00523 AND 00-CI-00661

ROBBIE RUDOLPH, THE CURRENT SECRETARY OF
THE FINANCE AND ADMINISTRATION CABINET,
REVENUE DEPARTMENT; AND
COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET,
REVENUE DEPARTMENT — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TACKETT, JUDGES.

MINTON, JUDGE:

I. INTRODUCTION.

While the Appellants' administrative claims for income tax overpayment languished in the Kentucky Revenue Cabinet, the 2000 session of the Kentucky General Assembly enacted H.B. 541, which nullified these claims. Appellants then filed declaratory judgment actions in circuit court seeking to have the subsection of Kentucky Revised Statutes Chapter (KRS) 141.200 that codified H.B. 541 declared unconstitutional. Before us is the appeal from the unsuccessful declaratory judgment actions. We hold that the retroactivity period created by H.B. 541 exceeds the constitutional limits and violates Appellants' due process rights. Therefore, we reverse the circuit court.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

Beginning in 1972, the Cabinet allowed unitary businesses to file combined or unitary tax returns.[1] For reasons unnecessary to the resolution of this appeal, in 1988, the

[1] *See* GTE v. Revenue Cabinet, 889 S.W.2d 788, 790 (Ky. 1994). A "unitary business" is defined as "[a] business that has subsidiaries in other states or countries and that calculates its state income tax by determining what portion of a subsidiary's income is attributable to activities within the state, and paying taxes on that percentage." BLACK'S LAW DICTIONARY (8th ed. 2004). Similarly, a "unitary tax" is "[a] tax of income earned locally by a business that transacts business through an affiliated company outside the state or country." *Id.*

Cabinet issued a policy statement that "effectively halted the filing of combined [unitary] returns."[2] GTE challenged the Cabinet's policy shift in a case that reached the Kentucky Supreme Court in 1994.

On December 22, 1994, the Kentucky Supreme Court decided in GTE's favor, permitting unitary businesses to resume the practice of filing unitary tax returns in Kentucky. In response to that decision, Appellants, twenty-six businesses that claim to be legally entitled to file unitary tax returns, each filed amended tax returns with the Cabinet seeking reimbursement for taxes they claimed to have overpaid during the period that the Cabinet's policy prevented them from filing unitary tax returns.[3] Although the Cabinet purportedly acted on the overpayment requests of other similarly situated businesses, it took no immediate action on Appellants' claims.

At its next regular session following the GTE decision, 1996, the General Assembly enacted H.B. 599, which abolished unitary returns for the tax years after December 31, 1995. But that legislation had no effect on Appellants' pending claims for repayment. These claims were still pending before the Cabinet when the General Assembly convened its 1998 regular

---

[2] GTE, 889 S.W.2d at 790.

[3] *See* KRS 134.580, which authorizes refunds to any taxpaying entity for tax overpayments, provided that the refund application was made within four years from the date the payment was made.

session. In that session, the General Assembly enacted H.B. 321. That bill did not retroactively nullify Appellants' pending claims. Rather, the statute only provided that no post-GTE repayment claims would be paid during the biennial budget period. In court action challenging H.B. 321, the Franklin Circuit Court declared it unconstitutional, a decision the Cabinet appealed to this Court. But before this Court could decide the appeal, H.B. 321 expired by its own terms; and we dismissed the appeal as moot.[4]

Appellants' claims for overpayment were actively pending with the Cabinet when the General Assembly convened for its 2000 session. The General Assembly, apparently alarmed that the appellants' pending claims could significantly drain the state's treasury, enacted H.B. 541, which substantially amended KRS 141.200. Specifically, after enactment of H.B. 541, KRS 141.200(9)[5] provided that

> [n]o claim for refund or credit of a tax overpayment for any taxable year ending on or before December 31, 1995, made by an amended return or any other method after

[4] The facts regarding bills passed by the General Assembly in 1996 and 1998 is largely drawn from Appellants' motion for summary judgment before the trial court. To the extent that any factual recitations are disputed, they are presented in the light most favorable to Appellants, the party against whom summary judgment was granted. *See* Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

[5] Although it was not substantively amended, KRS 141.200(9) was recodified as KRS 141.200(17) after the filing of this action.

> December 22, 1994, and based on a change from any initially filed separate return or returns to a combined return under the unitary business concept or to a consolidated return, shall be effective or recognized for any purpose.

Similarly, after the enactment of H.B. 541, KRS 141.200(10)[6] provided that

> [n]o corporation or group of corporations shall be allowed to file a combined return under the unitary business concept or a consolidated return for any taxable year ending before December 31, 1995, unless on or before December 22, 1994, the corporation or group of corporations filed an initial or amended return under the unitary business concept or consolidated return for a taxable year ending before December 22, 1994.

The effect of H.B. 541 was to extinguish retroactively Appellants' pending claims for tax overpayment.

Arguing H.B. 541 to be unconstitutional, Appellants filed two separate declaratory judgment actions in the Franklin Circuit Court to have the retroactive portions of that law declared unconstitutional. Those two cases were consolidated; and the circuit court granted summary judgment to the Cabinet, expressly finding that H.B. 541 was not unconstitutional. The Appellants have appealed that ruling to this Court.

[6] Although it was not substantively amended, KRS 141.200(10) was recodified as KRS 141.200(18) subsequent to the filing of this action.

III. DISCUSSION AND ANALYSIS.

A. Propriety of Dual Administrative and Declaratory Judgment Proceedings.

Initially, we were concerned about whether this appeal was properly before us because the Appellants filed their declaratory judgment actions while their administrative claims for tax overpayment were pending. Normally, such parallel actions regarding the same subject matter and parties are potentially problematic because, generally speaking, a party seeking to have a statute declared unconstitutional must show that the application of the statute has caused injury.[7] At the time these declaratory judgment actions were filed in circuit court, the Appellants had suffered no harm from the application of KRS 141.200 because neither the Cabinet nor the Kentucky Board of Tax Appeals had relied upon that statute to deny Appellants' overpayment claims. And it appeared to us that the Appellants should have exhausted their administrative remedies[8]

---

[7] Commonwealth v. DLX, Inc., 42 S.W.3d 624, 626 (Ky. 2001) ("[i]n other words, until a statute has been applied, there can be no unconstitutional application. This is the basis for the rule that one must first show injury as the result of a statutory application, before that application may be attacked as unconstitutional.").

[8] *See, e.g.,* Board of Regents of Murray State Univ. v. Curris, 620 S.W.2d 322, 323 (Ky.App. 1981) ("[s]ubject to limited exceptions, none of which are present in this case, exhaustion of administrative remedies must precede judicial review of an administrative agency's action. Thus, even though the court had subject-matter jurisdiction, proper judicial administration mandates judicial deference until after exhaustion of all viable remedies before the agency vested with primary jurisdiction over the matter."); DLX, 42 S.W.3d at 625 ("[a]s a general rule, exhaustion

by finishing the proceedings before the Cabinet and Board of Tax Appeals before proceeding in circuit court.[9] So in order to allay our concerns and to broaden our understanding of the parties' positions, we asked for supplemental briefs. And after having examined those briefs and considering oral arguments, we have decided that exhaustion of administrative remedies is not required under these unique facts.

It is well settled that administrative bodies, such as the Cabinet and the Board of Tax Appeals, lack the power to declare a statute unconstitutional.[10] Thus, exhaustion of administrative remedies is not required when a statute is challenged as being unconstitutional on its face.[11] As the parties' supplemental briefs make clear, Appellants raise a facial challenge to KRS 141.200's constitutionality. So the exhaustion of administrative remedies doctrine is inapplicable, meaning that the Appellants were free to file their declaratory judgment actions in circuit court before the termination of

---

of administrative remedies is a jurisdictional prerequisite to seeking judicial relief.").

[9] KRS 131.370(1) provides, in relevant part, that "[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."

[10] DLX, 42 S.W.3d at 626.

[11] *Id.*

their administrative claims with the Cabinet.[12] Likewise, since the administrative bodies lacked the power to declare KRS 141.200 unconstitutional, it would have been futile for the Appellants to seek that type of relief from those bodies. So this case also fits within the futility exception to the exhaustion of administrative remedies requirement.[13] Satisfied that no procedural impediment exists, we may examine this appeal on its merits.

B. Standard of Review.

In assessing the propriety of the trial court's grant of summary judgment to the Cabinet, we recognize that summary judgment was appropriate only if the Cabinet showed that Appellants "could not prevail under any circumstances."[14] In ruling on a motion for summary judgment, the trial court must view the evidence in the light most favorable to the party opposed to the motion.[15] And when we review a trial court's decision to grant summary judgment, we must determine whether the trial court correctly found that there were no genuine

---

[12] Kentucky Retirement Systems v. Lewis, 163 S.W.3d 1, 3 (Ky. 2005) ("a party is not required to exhaust all administrative remedies when the statute is alleged to be void on its face.").

[13] *Id.* ("[e]xhaustion of remedies is likewise not required when continuation of an administrative process would amount to an exercise in futility.").

[14] Steelvest, 807 S.W.2d at 480.

[15] *Id.*

issues of material fact.[16] Since findings of fact are not at issue here, the trial court's decision is entitled to no deference.[17]

Since Appellants are challenging the constitutionality of a statute, we must bear in mind that "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . ."[18] In Kentucky, "[t]he test of the constitutionality of a statute is whether it is unreasonable or arbitrary."[19] Finally, a statute is constitutionally valid "if a reasonable, legitimate public purpose for it exists, whether or not we agree with its 'wisdom or expediency.'"[20]

C. Is H.B. 541 Special Legislation?

Appellants' first main argument is that H.B. 541 is special legislation that violates Section 59 of the Kentucky Constitution. That section prohibits the General Assembly from

---

[16] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

[17] *Id.*

[18] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Accord Buford v. Commonwealth, 942 S.W.2d 909, 911 (Ky.App. 1997) ("[a] strong presumption exists in favor of the constitutionality of a statute.").

[19] Buford, 942 S.W.2d at 911.

[20] *Id.* (quoting Walters v. Bindner, 435 S.W.2d 464, 467 (Ky. 1968)).

passing any "local or special acts" regarding, among other things, "the assessment or the collection of taxes . . . ."

According to Appellants, once H.B. 541 was enacted in 2000, the four-year time limit of KRS 134.580 for filing tax overpayment requests for 1995 and any preceding years had already elapsed. So no other entities could have legally sought relief for any alleged overpayment occurring before December 31, 1995. And since they were the only entities with pending and unresolved overpayment claims for years preceding 1995, Appellants contend that H.B. 541's sole purpose was to destroy their pending overpayment claims through retroactive legislation.

Generally, "the term 'special law' is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others."[21] But legislation is not "special legislation" simply because it does not directly apply to every person in the Commonwealth.[22] Rather, in order to be special legislation, the law must apply disparately within the class of people to whom it was directed. In other words,

> [l]aws which apply to and operate uniformly upon all members of any class of persons, places, or things, requiring legislation

---

[21] City of Louisville v. Klusmeyer, 324 S.W.2d 831, 834 (Ky. 1959).

[22] Commonwealth v. Moyers, 272 S.W.2d 670, 673 (Ky. 1954) ("[a] law is not local or special merely because it does not relate to the whole state or to the general public.").

> peculiar to themselves in the matters covered by the laws in question, are general and not special. Laws which are framed in general terms and are not restricted in locality, but operate equally upon all groups of objects, which having regard to the purpose of the legislation or distinguished by characteristics sufficiently marked and important to make them a class by themselves, are declared . . . to be general.[23]

So "in order for a law to be general in its constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification."[24] This describes the two-pronged Schoo test that is used as the benchmark for determining whether legislation is special or general.

As for the first Schoo prong, the portions of KRS 141.200 at issue are, on their face, applicable to any business or corporate entity desiring to file an amended return based on the switch to the unitary filing method, provided that this switch occurred after December 22, 1994. Thus, H.B. 541 is not special legislation because it "uniformly operates on and applies to all persons and claims within its scope and range."[25] The fact that only a small group of taxpayers is potentially

---

[23] King v. Commonwealth, 194 Ky. 143, 238 S.W. 373, 376 (1922).

[24] Schoo v. Rose, 270 S.W.2d 940, 941 (Ky. 1954).

[25] Commonwealth v. McCoun, 313 S.W.2d 585, 588 (Ky. 1958).

affected by the legislation does not mean that the legislation is special legislation.[26]

The second prong of the Schoo test is also satisfied. The clear reason underlying the General Assembly's passage of H.B. 541 was to forestall a loss of funds from the state treasury. Raising or preserving state revenues is a legitimate legislative goal.[27] Choosing December 22, 1994, as the cutoff date for switching to a unitary tax return enabled the General Assembly, in its collective wisdom, a way to avoid depleting the state treasury. Thus, H.B. 541 was rationally related to effectuating its permissible purpose. Overall, therefore, we find that H.B. 541 is not special legislation.

D. Does H.B. 541 Violate the Due Process Clause?

Appellants' second main argument is that H.B. 541's retroactive effect deprives them of due process. Because of the

---

[26] Kentucky Milk Marketing and Anti-Monopoly Commission v. The Borden Co., 456 S.W.2d 831, 835 (Ky. 1969) ("[i]n any event the fact that a legislative act deals with a special subject does not make it special legislation. All acts must deal with a special subject, such as alcoholic beverages, game and fish, conduct of elections, etc.").

[27] *See, e.g.,* United States v. Carlton, 512 U.S. 26, 40 (Scalia, J., concurring) ("[r]evenue raising is certainly a legitimate legislative purpose . . . .") *See also, e.g.,* Wilson v. Gipson, 753 P.2d 1349, 1351-1352 (Okla. 1988) ("[i]t is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry.").

excessive period of retroactivity contained in that law, we agree.

Retroactive periods in legislation are nothing new. In fact, the United States Supreme Court "repeatedly has upheld retroactive tax legislation against a due process challenge."[28] So the fact that H.B. 541 acts retroactively does not, in and of itself, make it unconstitutional.

According to United States v. Carlton, the seminal case in this area, "[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation[.]"[29] Thus, the overarching test used to analyze such legislation is the familiar rational basis test.[30]

In order to determine if a retroactive tax statute passes the rational basis test, however, the Carlton court set forth a two-part test. First, it looked at the statute to find

---

[28] Carlton, 512 U.S. at 30. *See also* Usery, 428 U.S. at 16 ("[b]ut our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").

[29] Carlton at 512 U.S. at 30.

[30] *Id.* at 30-31 (quoting Pension Benefit Guaranty Corporation v. R.A. Gray & Co., 467 U.S. 717, 729-730 (1984) (internal quotation marks omitted) ("[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.").

if it was arbitrary or was enacted for a legitimate purpose.[31] Second, it focused on whether the act was promptly enacted and "established only a modest period of retroactivity."[32]

As noted in our discussion of whether H.B. 541 was special legislation, the General Assembly's purported purpose in enacting the statute was to avoid the potential loss of revenue caused by filing amended returns on a unitary basis for years before 1995. The statute is rationally related to accomplishing that legitimate purpose, and whether we believe the statute was the wisest or the best method of accomplishing that purpose is irrelevant to our inquiry.

But we are constrained to find that the period of retroactivity contained in H.B. 541 is so lengthy as to constitute a due process violation. We are well aware that because H.B. 541 scuttled what Appellants considered to be their right under formerly established law to receive reimbursement

---

[31] *Id.* at 32 ("[w]e conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary.").

[32] *Id.* The Cabinet argues in vain that there is no "modesty" requirement under Carlton. However, many courts interpreting Carlton have found such a requirement, including one case explicitly relied upon by the Cabinet. *See* Tate & Lyle, Inc. v. C.I.R., 87 F.3d 99, 107 (3d Cir. 1996) ("[t]here [in Carlton], the Supreme Court set forth a two-part test for determining whether the retroactive application of a tax statute violates due process. First, for retroactivity to be upheld, it must be shown that the statute has a rational legislative purpose and is not arbitrary; and second, that the period of retroactivity is moderate, not excessive.").

for overpayment is, in and of itself, of no consequence as "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."[33] But, at some point, the rights of a taxpayer to proceed under particular provisions of a taxation code become settled enough so that a taxpayer must be permitted to order his financial affairs in regards to those laws.[34] Thus, the Supreme Court opined in Carlton that the period of retroactivity must be "modest."

No hard and fast rule exists for what is or is not a permissibly modest period of retroactivity. But our research has shown that nearly all of the post-Carlton reported cases[35] involve challenges to statutes containing retroactive periods of less than one year.[36] In the case at hand, the period of

---

[33] Carlton, 512 U.S. at 33. Similarly, under Kentucky law "[i]t is generally recognized that the right to a refund of illegally or improperly collected taxes does not derive from the common law, but is a matter of legislative grace." Dept. of Conservation v. Co-De Coal Co., 388 S.W.2d 614, 615 (Ky. 1965). And it is clear that matters of legislative grace may be "granted, withdrawn or restricted at the will of the legislature." Univ. of Kentucky v. Guynn, 372 S.W.2d 414, 416 (Ky. 1963).

[34] *See* Carlton, 512 U.S. at 37-38 (O'Connor, J., concurring) ("[t]he governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose.").

[35] Unfortunately, no Kentucky appellate court has had occasion to cite Carlton. Thus, we must turn to the decisions of the federal courts and our sister state courts for guidance.

[36] Indeed, although the majority did not expressly adopt her rationale, Justice O'Connor's concurring opinion in Carlton sets forth a bright line one-year limitation on the permissible period of retroactivity for a taxation statute. Carlton, 512 U.S. at 38 (O'Connor, J., concurring) ("[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional

retroactivity is over five years because H.B. 541 was enacted in 2000 and purports to take away tax returns filed as of December 1994.[37]

We have examined the cases relied upon by both the trial court and the Cabinet in favor of H.B. 541. Of those cases, only three were decided after Carlton enunciated the modesty doctrine for retroactive tax legislation.[38] So those three are most relevant to the issue at hand.

Of those three cases, two involve challenges to retroactive administrative regulations promulgated by the United States Treasury Department and Internal Revenue Service.[39] Thus, as those cases do not involve statutes, they are easily

---

questions."). In fact, even though Carlton first explicitly set forth the modesty requirement, the federal courts have previously expressed concern regarding tax statutes with periods of retroactivity longer than one year. *See, e.g.*, U.S. v. Darusmont, 449 U.S. 292, 296-297 (1981) (holding that the permissible period of retroactivity for federal taxation statutes "has been confined to short and limited periods required by the practicalities of producing national legislation."). Surprisingly, the estimable judge Learned Hand expressed concern about periods of retroactivity exceeding twelve months as far back as 1930. Cohan v. Commissioner of Internal Revenue, 39 F.2d 540, 545 (2d Cir. 1930). ("Nobody has a vested right in the rate of taxation, which may be retroactively changed at the will of Congress at least for periods of less than twelve months; Congress has done so from the outset.")

[37] As Appellants filed for refund of overpayments for the four years preceding the GTE decision, H.B. 541's period of retroactivity is actually from about five to about nine years.

[38] *See* Montana Rail Link, Inc. v. U.S., 76 F.3d 991 (9th Cir. 1996); Tate & Lyle, Inc., 87 F.3d 99; A. Tarricone, Inc. v. U.S., 4 F.Supp.2d 323 (S.D.N.Y. 1998).

[39] Tate & Lyle, Inc., 87 F.3d 99; A. Tarricone, Inc., 4 F.Supp.2d 323.

distinguishable from the case at hand. That distinction is further highlighted by the fact that the administrative agencies involved in those two cases apparently had the discretionary power to determine the retroactive effects of tax regulations.[40] So the only relevant authority relied upon by the Cabinet is Montana Rail Link, Inc.

Montana Rail Link, Inc. is distinguishable from the case at hand for two main reasons. First, Montana Rail Link, Inc. contains no discussion of whether the retroactivity period in its challenged statute is modest, as is required by Carlton. Second, the statute at issue in Montana Rail Link, Inc. was

---

[40] A. Tarricone, Inc, 4 F.Supp.2d at 326 ("[w]hile retroactive application of a statute is disfavored, a federal agency will have the power to promulgate retroactive rules if 'that power is conveyed by Congress in express terms.' Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). At the time in question, Congress had expressly conveyed that power to the Secretary of the Treasury: The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect. 26 U.S.C. § 7805(b) (West 1989)"); Tate & Lyle, Inc., 87 F.3d at 107 ("[b]ased on the Supreme Court's holding in *Carlton*, the Tax Court found the six year period in this case excessive, and thus, violative of the Due Process Clause. We find, however, that *Carlton* is distinguishable: *Carlton* involved the retroactive application of a *statute*, and here we are dealing with the retroactive application of a *regulation*. The retroactivity of treasury regulations is governed by I.R.C. § 7805(b), which states:

> The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.
>
> Clearly Congress has determined that treasury regulations are presumed to apply retroactively. The extent to which newly promulgated regulations shall not apply retroactively is a matter of discretion left to the Secretary.") (Footnote omitted.) (Emphasis in original.).

primarily focused on protecting the rights of retired railroad workers, whereas, the General Assembly in our case was solely concerned with protecting state funds. Thus, we find that Montana Rail Link, Inc. is an insufficient basis to support H.B. 541's retroactivity period.

The five- to nine-year retroactivity period enacted in H.B. 541 appears to be greater than that approved for any similar statute by a court in the post-Carlton era. Although we recognize that enactments of the General Assembly are entitled to deference, that deference is not so unlimited as to permit the General Assembly to delay five to nine years to settle claims of Kentucky taxpayers. Had the General Assembly enacted H.B. 541 in 1996, at its first session following the GTE decision, the outcome of this appeal may well have been different. But as it stands, the Cabinet is asking us to approve a statute with a potential period of retroactivity far in excess of any approved since Carlton.

We agree with the Supreme Court of South Carolina's learned opinion that "[a]t some point . . . the government's interest in meeting its revenue requirements must yield to taxpayers' interest in finality regarding tax liabilities and credits. That point has been reached in this case; under the facts and circumstances here, the retroactivity period is simply

excessive."[41] In short, we find that the portions of H.B. 541 currently codified at KRS 141.200(17)-(18) are an unconstitutional infringement upon Appellants' due process rights.

In reaching our decision, we reject the Cabinet's sovereign immunity defense. It is settled law that a taxing entity must provide a post-deprivation remedy for a taxpayer aggrieved by an unconstitutional statute. In McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, the United States Supreme Court held that

> [i]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.[42]

---

[41] Rivers v. State, 490 S.E.2d 261, 265 (S.C. 1997) (striking down tax legislation with two to three year period of retroactivity on due process grounds). *See also* City of Modesto v. National Med, Inc., 27 Cal.Rptr.3d 215, 222 (Cal.Ct.App. 2005) (striking down a municipal business license tax because "the period of retroactivity sought by the City is not 'modest.' The 2004 guidelines would be applied to the 1996 through 2000 tax years, up to eight years before those guidelines were adopted. Generally in California, courts have upheld the retroactive application of tax laws only where such retroactivity was limited to the current tax year. As noted by Justice O'Connor, concurring in United States v. Carlton, a period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise serious constitutional issues.") (Internal citation omitted.).

[42] 496 U.S. 18, 31 (1990) (internal footnote omitted) (emphasis in original).

And in Revenue Cabinet v. Gossum, our Supreme Court held that

> Kentucky's system is structured so that a taxpayer is coerced into paying the tax in advance to avoid financial sanctions. The Supreme Court has held [in McKesson Corp.] that in such cases the due process clause of the Fourteenth Amendment obligates the state to provide *meaningful* backward-looking relief to rectify any unconstitutional deprivation.[43]

Thus, Kentucky must provide a method for Appellants to receive any funds they improperly paid under the unconstitutional portions of H.B. 541, which it has done under the tax refund statutes codified at KRS 134.580 and 134.590. Nevertheless, the Cabinet contends that H.B. 541 contains a withdrawal of the Commonwealth's waiver of sovereign immunity contained in those tax refund statutes. Upholding the Cabinet's sovereign immunity claim would, therefore, improperly extinguish Appellants' clear right to seek a post-deprivation remedy.

E. Other Constitutional Issues.

Because we have found that the challenged portions of H.B. 541 violate Appellants' due process rights, we will not belabor this opinion by engaging in a detailed analysis of the remainder of Appellants' supplemental arguments. But we will briefly address them because of the importance of this case.

Like their due process claim, Appellants' equal protection argument is also analyzed under the rational basis

[43] 887 S.W.2d 329, 332 (Ky. 1994) (emphasis in original).

test, albeit without any apparent requirement that the period of retroactivity be modest.[44] We have already determined that H.B. 541 is rationally related to the legitimate governmental interest of preserving previously collected revenue. Thus, Appellants' equal protection argument must fail.

Appellants next claim that H.B. 541 represents a violation of the separation of powers contained in sections 27 and 28 of the Kentucky Constitution because, in enacting that legislation, the General Assembly retroactively overruled GTE. We reject this argument. Clearly, the General Assembly possesses the exclusive power to write and amend Kentucky's tax code.[45] Furthermore, the General Assembly possesses the unquestioned right to take action in response to decisions of

---

[44] *See* Stephens v. State Farm Mutual Auto. Ins. Co., 894 S.W.2d 624, 627 (Ky. 1995) (holding that a statue does not "violate the equal protection clause merely because the classifications made by its laws are imperfect. The uniformity principle is not violated nor is the equal protection of laws violated if there is a reasonable basis or rational justification. When the objective is legitimate and the classification is rationally related to that objective, it is not constitutionally arbitrary."); Weiand v. Board of Trustees of Kentucky Retirement Systems, 25 S.W.3d 88, 92 (Ky. 2000) ("[a]s a general rule, a statute is presumed valid and will survive an equal protection challenge if it can be shown that the classification drawn by the statute is rationally related to a legitimate state interest.").

[45] Commonwealth, ex rel. Armstrong v. Collins, 709 S.W.2d 437, 448 (Ky. 1986) ("[t]he General Assembly has the basic constitutional power and responsibility to tax and to spend the public's money. This power, as we have seen in prior decisions, is exclusive to the General Assembly and includes the power to use a budget bill to repeal, amend, modify and suspend existing statutes.").

Kentucky courts.[46] Thus, the General Assembly did not violate the Kentucky Constitution's separation of powers doctrine when it enacted H.B. 541 in response to GTE.

We express no opinion on Appellants' arguments that H.B. 541 violates the "takings clauses" of the federal and Kentucky Constitutions which prohibit the taking of private property for public use. Appellants' brief clearly provides that they are advancing their takings argument only if H.B. 541 is found to be constitutionally sound, which it is not.[47]

Finally, we also express no opinion on Appellants' argument that H.B. 541 violates Section 51 of the Kentucky Constitution, which requires the republication of any previously enacted legislation amended by a new statute. Appellants did not raise this argument before the trial court. Thus, it is not cognizable on appeal.[48]

---

[46] Telamarketing Communications, Inc. v. Liberty Partners, 798 S.W.2d 462, 463 (Ky. 1990) ("[t]he General Assembly has a perfect right to change the common law and previous court decisions . . . .").

[47] *See* Appellants' Brief, p. 23 ("[a]lternatively, should this Court rule finds [sic] that H.B. 541 is constitutional, that provision works a taking of the Appellants[']s refund claim and associated monies.").

[48] Hutchings v. Louisville Trust Co., 276 S.W.2d 461, 466 (Ky. 1955) ("[i]n the first place, it is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time.").

IV. CONCLUSION.

Because the retroactivity period of H.B. 541 is so excessive as to violate due process, the trial court's order granting summary judgment to Appellees is reversed and this matter is remanded for further proceedings consistent with this opinion. Lest this opinion be misconstrued, we are not stating that Appellants are entitled to relief in their pending claims for tax overpayments. Rather, we only hold that they are entitled to receive a full, final, and prompt resolution of those claims on their merits.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

Bruce F. Clark
Margaret R. Grant
Erica L. Horn
Frankfort, Kentucky

Paul H. Frankel
Michael A. Pearl
New York, New York

AMICUS CURIAE BRIEFS FOR GANNETT SATELLITE INFORMATION NETWORK, INC.; COURIER JOURNAL AND LOUISVILLE TIMES CO.; GANNETT DIRECT MARKETING SERVICES, INC.; GANNETT RIVER STATES PUBLISHING CORP.; COURIER CELLULAR CORPORATION; COMPUTER EMPORIUM; AND COURIER BROADWAY CORP.:

Thomas J. Luber
Mitzi D. Wyrick
Jennifer Starr
Louisville, Kentucky

BRIEFS AND ORAL ARGUMENT FOR APPELLEES:

Laura M. Ferguson
Frankfort, Kentucky

C. Christopher Trower
Atlanta, Georgia