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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002409-MR

THE CITY OF BROMLEY; JAMES MILLER, INDIVIDUALLY AND AS MAYOR OF THE CITY OF BROMLEY; AND JANET GARDINER, INDIVIDUALLY AND AS CITY CLERK OF THE CITY OF BROMLEY — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 99-CI-01527

GAIL SMITH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

TAYLOR, JUDGE: The City of Bromley, James Miller, individually and as Mayor of the City of Bromley, and Janet Gardiner, individually and as City Clerk of the City of Bromley (collectively referred to as "appellants") bring this appeal from an October 18,

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

2006, Judgment of the Kenton Circuit Court ordering a refund of taxes paid pursuant to an unconstitutional ordinance. We affirm.

In 1999, the City of Bromley enacted Ordinance No. 5-3-99 (ordinance) levying a flat-rate tax upon each residential and business unit within the city for the provision of life-squad and other non fire-related emergency services. Gail Smith was a resident of the city, a taxpayer of the city, and a member of the Bromley City Council. In 1999, Smith filed a complaint in the Kenton Circuit Court challenging, *inter alios*, the constitutionality of Section IV of the ordinances which imposed a flat-rate tax in 1999 and 2000.[2] Smith also sought certification of a class of taxpayers who paid the flat-rate tax in 1999 and 2000 pursuant to the ordinance. Ky. R. Civ. P. (CR) 23.01.

By order entered October 12, 2000, the circuit court determined that the action may not be maintained as a class action and denied certification of the class. Relevant to this appeal, the circuit court entered summary judgment holding that the ordinances were unconstitutional and voiding the flat-rate tax levied thereunder.

Appeals were taken to the Court of Appeals. In Appeal Nos. 2001-CA-001440-MR and 2001-CA-001441-MR, this Court affirmed the circuit court's holding that the ordinances imposing the flat-rate tax in 1999 and 2000 were unconstitutional and that a refund was due. The Court of Appeals also held that Kentucky Revised Statutes (KRS) 134.590 was applicable to Smith's claim for a refund of taxes paid in 1999 and 2000. In so doing, the Court of Appeals "deemed" the flat-rate tax an *ad valorem* tax so that the provisions of KRS 134.590 would apply to Smith's refund claim. The Court then concluded that "[r]efunds under that statute [KRS 134.590] must be claimed and

[2] Gail Smith was permitted to amend her complaint to challenge the constitutionality of an identical flat-rate tax levied pursuant to Ordinance No. 6-1-00 for the year 2000.

processed individually." As such, the Court of Appeals ruled that Smith was not entitled to maintain a class action for refund purposes.

The Supreme Court of Kentucky granted discretionary review. In a November 18, 2004, opinion (*City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004)), the Supreme Court affirmed this Court's holding that the flat-rate tax for the years 1999 and 2000 was unconstitutional. However, the Supreme Court held that the Court of Appeals erroneously deemed the flat-rate tax an *ad valorem* tax and erroneously determined that KRS 134.590 was applicable to Smith's claim:

> The taxes in question here are specific or per unit taxes and not ad valorem taxes. They cannot be deemed ad valorem taxes by judicial action and thereby come within the purview of KRS 134.590(3). Thus, it was error for the Court of Appeals to apply KRS 134.590. It was also incorrect in determining that a request for class certification for refund purposes could not be established. Class action relief is available with respect to the common law remedy for aggrieved taxpayers.

City of Bromley, 149 S.W.3d at 406. As such, the Supreme Court held that Smith was entitled to maintain a class action for refund purposes under the common law.

Upon remand and following the mandate of the Supreme Court, the circuit court ordered certification of a class action for, *inter alios*, purposes of seeking a refund of taxes paid under the flat-rate tax. Thereafter, Smith filed a motion to amend her complaint. The circuit court granted the motion. In the amended complaint, Smith stated that the City of Bromley later enacted Ordinance No. 6-1-01 and Ordinance No. 6-2-02, and these ordinances imposed the unconstitutional flat-rate tax in the years 2001 and 2002, respectively. Smith sought an adjudication of the ordinances unconstitutionality

and a refund for taxes paid under the ordinances in 2001 and 2002. She again sought certification of a class for refund purposes.

Ultimately, the circuit court ordered that "the claims in regard to the Second Amended Complaint may be maintained . . . as a class action." By judgment entered October 18, 2006, the circuit court concluded that the flat-rate tax imposed by Ordinance Nos. 5-3-99, 6-1-00, 6-1-01, and 6-2-02 was unconstitutional "[f]or the reasons identified in the Opinion of the Supreme Court of Kentucky." The circuit court then stated that the City of Bromley "is obligated and liable to each member of the class of the taxpayers from or for whom any of . . . [the flat-rate tax was] paid, for the amount of their respective payments." The circuit court ordered the City of Bromley to issue a refund to each member of the class for taxes paid under the unconstitutional flat-rate tax for the years 1999, 2000, 2001, and 2002. This appeal follows.

Appellants concede that the flat-rate tax for the entire four-year period (1999, 2000, 2001, and 2002) is unconstitutional. Appellants further concede that as a result of the Supreme Court's opinion in *City of Bromley*, 149 S.W.3d 403 refunds are due to the entire class of individuals who paid the tax in 1999 and 2000. However, appellants argue, most curiously, that the circuit court erred by certifying a class action for refund of taxes paid in the years 2001 and 2002. Rather, appellants maintain that Smith, individually, may seek a refund for the years of 2001 and 2002. In support thereof, appellants are once again arguing that the provisions of KRS 134.590 are applicable to Smith's refund claim, and thereunder, a tax refund may only be pursued by individual taxpayers, as opposed to a class of taxpayers. Specifically, appellants maintain

that the flat-rate tax for the years 2001-2002 is an "unconstitutional" tax under KRS 134.580, thus bringing it under the provisions of KRS 134.590.

We begin by observing that the flat-rate tax imposed in the years 2001 and 2002 is virtually identical in both substance and legal import to the flat-rate tax imposed in the years 1999 and 2000. Our Supreme Court has previously held that the flat-rate tax imposed in 1999 and 2000 does not "come within the purview of KRS 134.590(3)" and that "[c]lass action relief is available with respect to the common law remedy for aggrieved taxpayers." *City of Bromley*, 149 S.W.3d at 406. We see no basis to distinguish this case from the mandate of the Supreme Court. Moreover, the interpretation of KRS 134.590 proposed by appellants is simply untenable. In short, we flatly reject appellants' arguments and further caution appellants that the instant appeal is dangerously close to being frivolous under CR 73.02(4). *See Peabody Coal Co. v. Goforth*, 857 S.W.2d 167 (Ky. 1993).

For the foregoing reasons, the Judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R. Kim Vocke
Covington, Kentucky

BRIEF FOR APPELLEE:

Frank A. Wichmann
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