

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-001054-MR

WAL-MART STORES EAST, LP;  
AND SAM'S EAST, INC.

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 14-CI-00870

DEPARTMENT OF REVENUE,  
FINANCE & ADMINISTRATION  
CABINET, COMMONWEALTH  
OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Wal-Mart Stores East, LP, and Sam's East, Inc.

(hereinafter "Retailers"), appeal from the Franklin Circuit Court's opinion and order holding that the General Assembly's 2009 Act repealing and reenacting KRS<sup>1</sup> 139.570, which applied a \$1,500 per taxpayer cap on compensation for

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<sup>1</sup> Kentucky Revised Statutes.

collecting and remitting sales tax retroactively, was constitutional under Section 180 of the Kentucky Constitution, and further holding that the 2003, 2005, and 2006 budget bills were constitutional under Section 51 of the Kentucky Constitution. For the following reasons, we affirm.

## **I. Factual and Procedural Background**

Retailers operate stores throughout Kentucky that sell a variety of merchandise. They collect and remit an approximate average of \$17,000,000 combined in sales tax each month to the Kentucky Department of Revenue (“Department”). From July 2003 through June 2008 (the “Refund Period”), KRS 139.570 provided, “[f]or reimbursement of the cost of collecting and remitting the tax, the seller shall deduct on each return . . . (1%) of the tax due in excess of (\$1,000)[.]” During the Refund Period, the Kentucky General Assembly enacted three separate Budget Bills, each of which contained the following clause:

“Notwithstanding KRS 139.570, . . . the total reimbursement allowed per taxpayer in any month shall not exceed \$1,500.” *See* 2003 Ky. Acts ch. 156, tit. & pt. III, § 41 (H.B. 269); 2005 Ky. Acts ch. 173, tit. & pt. III, § 25 (H.B. 267); 2006 Ky. Acts ch. 252, tit. & pt. III, § 23 (H.B. 380).<sup>2</sup>

In 2008, the General Assembly amended KRS 139.570 to limit the amount a seller may claim in reimbursement to no more than \$1,500 in any monthly reporting period, effective July 1, 2008. *See* KRS 139.570; 2008 Ky. Acts

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<sup>2</sup> The \$1,500 cap provisions in the Budget Bills expired at the end of each fiscal year. Thus, each budget bill applied from July 1<sup>st</sup> of the enacting year through June 30<sup>th</sup> of the following year.

ch. 39 § 284. In 2009, the General Assembly repealed and reenacted KRS 139.570 to include a \$1,500 per taxpayer limit on the monthly reimbursement amount. *See* 2009 Ky. Acts ch. 92 § 1. The 2009 Act stated that it applied retroactively for the period of July 1, 2003 to June 30, 2004, and for the period of July 1, 2005 to June 30, 2008.<sup>3</sup>

Retailers filed a claim with the Department for refunds pursuant to KRS 139.570 as written during the Refund Period for amounts in excess of \$1,500 for each month of the Refund Period, on September 2, 2008.<sup>4</sup> The Department denied Retailers' claims via correspondence dated December 17, 2008. The Retailers protested that denial and were again denied on August 27, 2012 due to the \$1,500 cap. Retailers then requested a final ruling from the Department, which the Department issued on June 14, 2013, denying Retailers' claims. The Retailers appealed to the Board of Tax Appeals, and the Board subsequently issued an order stating that it lacked jurisdiction to hear constitutional challenges. The Retailers appealed the final order to the Franklin Circuit Court, which entered an order on June 9, 2015, finding the \$1,500 cap constitutional. This appeal follows.

## **II. Standard of Review**

Retailers' arguments consist solely of challenges to the constitutionality of statutes enacted by the legislature. Since the issues in this case

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<sup>3</sup> The 2009 Act provided no \$1,500 cap from July 1, 2004 to June 30, 2005. The Refund Period, as referenced in this opinion, therefore excludes that fiscal year for purposes of Retailers' refund claims.

<sup>4</sup> Wal-Mart claims a total of \$8,414,926.90 plus applicable statutory interest; Sam's claims a total of \$455,090.04 plus applicable statutory interest.

involve constitutional interpretation and application, the questions are purely questions of law and thus subject to *de novo* review. *See, e.g., Louisville & Jefferson Cnty. Metro Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky. 2007); *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky. App. 2004); *Coca-Cola Bottling Co. v. Revenue Cabinet*, 80 S.W.3d 787, 790-91 (Ky. App. 2001).

### **III. Arguments**

The Retailers make two arguments: first, they claim that the Budget Bills enacted during the Refund Period violate Section 51 of the Kentucky Constitution; second, they argue that the 2009 Act violates Section 180 of the Kentucky Constitution.

#### **A. Statute of Limitations**

The parties' briefs each address the timeliness of the Retailers' refund claims, debating whether the two-year statute of limitations for refund applications filed pursuant to an allegedly unconstitutional statute contained in KRS 134.590 applies, or whether the more general four-year refund filing period of KRS 134.580 applies. However, the circuit court did not address this issue, since it found no merit in the Retailers' refund claims, and we will not address an issue on which the circuit court has not had the opportunity to rule. *See Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011).

#### **B. Constitutionality of the 2009 Act under Section 180**

As the Department indicates, we must first address the 2009 Act's constitutionality, since it retroactively repealed and reenacted KRS 139.570 to

apply the \$1,500 per taxpayer cap throughout the Refund Period. Retroactivity issues are threshold issues which have the “propensity to render the other issues moot.” *Beshear v. Haydon Bridge Co.*, 304 S.W.3d 682, 691 (Ky. 2010). If the trial court’s ruling that the 2009 Act was constitutional is upheld, then many of the Retailers’ challenges to the Budget Bills are rendered irrelevant.<sup>5</sup>

The Retailers assert that the 2009 Act, repealing and reenacting KRS 139.570 to retroactively add the \$1500 per taxpayer cap, violates Section 180 of the Kentucky Constitution because it repurposes their refund money, or private funds, into the general fund. Section 180 states:

Every act enacted by the General Assembly . . . levying a tax, shall specify distinctly the purpose for which said tax is levied, and **no tax levied and collected for one purpose shall ever be devoted to another purpose.**

(emphasis added). An act that violates Section 180 of the Constitution is void.

*See Unemployment Comp. Comm’n v. Savage*, 283 Ky. 301, 308, 140 S.W.2d 1073, 1077 (1940) (declaring an act of the legislature, which attempted to transfer railroad workers’ contributions to the Railroad Unemployment Insurance Account to the Unemployment Trust Fund, a violation of Section 180 and thus void).

In order to determine the purpose for which a tax was levied, “we must look to the act which levied the tax - not to the one receiving its benefit.”

*Haydon Bridge*, 304 S.W.3d at 706. The Retailers maintain that KRS 139.570 was

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<sup>5</sup> The trial court addressed the constitutionality of the 2009 Act’s attempt to repeal and reenact KRS 139.570 as a matter of due process, but the Retailers do not appear to contest the trial court’s holding that the retroactivity of the Act is constitutional on due process grounds, so we will only address the issue of the 2009 Act’s constitutionality as it pertains to Section 180.

enacted for the specific statutory purpose of reimbursing vendors for the cost of collecting and remitting sales tax, and thus the 2009 Act violates Section 180 by repurposing those reimbursement funds for the General Fund. The Retailers note that KRS 139.020<sup>6</sup> provides sales tax generally for General Fund purposes, while KRS 139.570 assigns a different purpose to a portion of the collected taxes, namely reimbursing vendors for collection and remittance costs. Additionally, the Retailers cite *City of Winchester v. Bd. of Educ.*, 182 Ky. 313, 206 S.W. 492 (1918) (invalidating under Section 180 a commission deducted and retained out of taxes levied and collected as school taxes), arguing that the purpose of compensating vendors was intentionally included in KRS 139.570 to avoid invalidation under Section 180 for unconstitutionally repurposing tax funds.

The Department argues, and the trial court held, that KRS 139.570 is not a tax purpose statute, but rather merely provides for a tax allowance or deduction. The trial court reasoned that the Retailers “have no property interest or private right to any of the funds collected from consumers as a sales tax” because the money is collected for and contained in the General Fund all along, with the Retailers acting as trustees, rather than impermissibly transferred from a private fund to the General Fund.

A “strong presumption of constitutionality [is] afforded an enactment of the General Assembly.” *Jefferson Cnty. Police Merit Bd. v. Bilyeu*, 634 S.W.2d 414, 416 (Ky. 1982). Furthermore, tax refund statutes represent a waiver of

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<sup>6</sup> Repealed by 2008 Ky Acts, ch. 95, § 20, effective August 1, 2008.

sovereign immunity. *See Haydon Bridge*, 416 S.W.3d at 296. Such tax exemptions are to be strictly construed, and all doubts are to be resolved against the exemption. *LWD Equip., Inc. v. Revenue Cabinet*, 136 S.W.3d 472, 475 (Ky. 2004).

We agree with the trial court that the 2009 Act was not a violation of Section 180 of the Kentucky Constitution. We do not believe that KRS 139.570 was intended as a tax purpose statute; rather, it appears to serve as an allowance or deduction statute that provides a purpose for the deduction, not the purpose for the tax itself. KRS 139.570 notably does not provide for the sales tax, merely the reimbursement to vendors. KRS 139.200 and KRS 139.310 levy the tax, and KRS 139.020 provides the purpose of the sales tax: to pay off certain state bonds and to provide monies for the General Fund. The fact that the tax withheld never physically enters the General Fund is irrelevant; the purpose of the tax, supplying the General Fund, remains. We further agree that the taxes are held in trust by the Retailers for the Commonwealth, and thus belong to the Commonwealth at all times.<sup>7</sup> Consequently, the trial court did not err in ruling that the 2009 Act, repealing and reenacting KRS 139.570 to retroactively include the \$1,500 per taxpayer cap on reimbursement to vendors for the cost of collecting and remitting sales tax, does not violate Section 180 of the Kentucky Constitution.

### **C. Constitutionality under Section 51**

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<sup>7</sup> By contrast, in *Savage*, 140 S.W.2d at 1076, this court held that railroad workers' contributions to the unemployment compensation benefits fund were private funds "separate and apart from all public moneys or funds of the State" in which each contributor had an interest.

Since we have held that the 2009 Act was not a violation of Section 180, refunds due to the Retailers from July 1, 2003 to June 30, 2004, and from July 1, 2005 to June 30, 2008 were constitutionally capped at \$1,500. The Retailers do not appear to allege that the 2009 Act violates Section 51; they solely argue that the Budget Bills violate Section 51. Since the 2009 Act applied the \$1,500 cap retroactively throughout the Refund Period, we need not address the constitutionality of the similar cap provisions contained in the Budget Bills.<sup>8</sup>

#### **IV. Conclusion**

In sum, we believe the trial court correctly held that the 2009 Act was constitutional, and thus correctly affirmed the Department's final order denying Retailers' claims for refunds. The opinion and order of the Franklin Circuit Court is affirmed.

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

#### **BRIEFS FOR APPELLANT:**

Mark A. Loyd, Jr.  
Kate B. Ward  
Bailey Roese  
Louisville, Kentucky

#### **BRIEF AND ORAL ARGUMENT FOR APPELLEE:**

Douglas M. Dowell  
Frankfort, Kentucky

#### **ORAL ARGUMENT FOR APPELLANT**

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<sup>8</sup> We find it unclear why the trial court decided to address the constitutionality of the Budget Bills under Section 51 after determining that the 2009 Act constitutionally applied the \$1,500 cap retroactively throughout the Refund Period. Nonetheless, we do not believe we need to reach this issue given our conclusion that the 2009 Act is constitutional.



WAL-MART STORES EAST, LP:

Mark A. Loyd, Jr.  
Louisville, Kentucky