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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001852-MR

WORLD ACCEPTANCE CORPORATION
AND WORLD FINANCE CORPORATION
OF KENTUCKY — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 14-CI-01193

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET,
DEPARTMENT OF REVENUE — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: This appeal concerns whether the Appellants are due any tax refunds for corporation income taxes for the years ending March 31, 2007, through March 31, 2010. The total claimed refund amount is $1,356,714.00 along with interest. The issue presented is whether World Acceptance Corporation and its

wholly-owned Kentucky subsidiary, World Finance Corporation Kentucky, were required by law to file consolidated Kentucky corporation income tax returns for the periods in question. If so, Appellants are due the claimed refund. The Franklin Circuit Court ultimately determined that the Kentucky Tax Board did not err when it denied the requested refund. Having reviewed the record in conjunction with the applicable legal authority, we AFFIRM.

I. THE PARTIES

The Appellants are World Finance Corporation of Kentucky ("World Finance Kentucky") and its parent corporation, World Acceptance Corporation ("World Acceptance").

The parent company, World Acceptance, is a South Carolina corporation. It owns all of the voting power and all of the ownership interest in World Finance Kentucky. World Finance Kentucky conducts business in over seventy stores throughout the Commonwealth of Kentucky. It primarily provides consumer loans and tax preparation services to its customers.

The Appellee is the Kentucky Department of Revenue ("Department"). The Department is a statutorily created state agency. *See* KRS[1] 131.020(1). It is "headed by a commissioner appointed by the secretary with the approval of the Governor[.]" *Id.* The Department's functions and duties include

[1] Kentucky Revised Statutes.

"conducting conferences, administering taxpayer protests, and settling tax controversies on a fair and equitable basis[.]" KRS 131.020(2).

II. BACKGROUND

World Finance Kentucky originally filed separate tax returns in Kentucky for the tax years ending March 31, 2007, through March 31, 2010. These returns reflected only World Finance Kentucky's business activities. After filing the returns, the parent corporation, World Acceptance, discovered it also carried on some business activities in Kentucky consisting of an employee working in Kentucky[2] and receipt of management fees from World Finance Kentucky. This discovery caused World Acceptance to believe that it was required to file a consolidated corporate income tax return with World Finance Kentucky, its wholly owned subsidiary.

Before it filed consolidated returns, however, World Acceptance engaged the services of its tax adviser, Ernst & Young, to make further inquiries with the Department. Ernst & Young requested an anonymous letter ruling from the Department to help it determine whether World Acceptance and World Finance Kentucky were required to file consolidated corporate returns for the periods in

[2] World Acceptance originally believed it had two employees performing work in Kentucky. It later discovered only one of its employee performed work in Kentucky during the relevant time period.

question. In an email letter dated March 15, 2011, Ernst & Young employee, Eric D. Scott, requested Bob Brooks, the Department's Executive Director, to answer "a few questions we have regarding one of our clients from another office." The email explained that World Finance Kentucky, designated in the email as "Kentucky Subsidiary" for purposes of anonymity, had previously filed Kentucky corporate income tax returns on a separate company basis; but, World Acceptance, designated as "Parent Company," had recently become aware that two of its employees are "consistently performing employment services in Kentucky." The email went on to explain that even though the two employees were residents of other states, they spent approximately 45-60 days annually in Kentucky performing work-related functions for World Acceptance. In addition, the email explained that World Acceptance charged World Finance Kentucky management fees. Based on the recited facts, Ernst & Young asked the Department to answer the following questions:

> 1) Does the Parent Company [World Acceptance] have Kentucky nexus by way of its employees providing services in Kentucky?
>
> 2) Does the Parent Company [World Acceptance] have Kentucky nexus by way of its management fee to the Kentucky Subsidiary [World Finance Kentucky]?
>
> 3) Taken together or separately, would the employee activities in Kentucky and/or transaction arrangement of the management fee be considered more than *de minimis*?

> 4) If the Parent Company [World Acceptance] is deemed to have Kentucky nexus and its activities are more than *de minimus*, should Parent Company [World Acceptance] and Kentucky Subsidiary [World Finance Kentucky] file a nexus consolidated income tax return?

(WAC 83).[3]

By return letter dated March 25, 2011 ("March 2011 letter"), the Department responded as follows:

> 1) Does the Parent Company [World Acceptance] have Kentucky nexus by way of its employees providing services in Kentucky?
>
> Answer: Yes. Subsection 2(a) of Section 4 of 103 KAR 16:240 provides that doing business in Kentucky includes performing services in Kentucky by an employee or a third party, so long as the services provided by the employees in Kentucky are not protected by Public Law 86-272. In addition, Section 2 of KAR 18:010 provides that wages paid to nonresidents of Kentucky are subject to withholding to the extent they are wages for personal services in Kentucky as a regular employee in the conduct of the business of an employer in Kentucky.
>
> 2) Does the Parent Company [World Acceptance] have Kentucky nexus by way of its management fee to the Kentucky Subsidiary [World Finance Kentucky]?
>
> Answer: Yes. Subsection 4(a)3.e. of Section 4 of 103 KAR 16:240 provides that a corporation is doing business in Kentucky if the corporation is receiving

[3] The pages of the administrative record are not numbered. The documents contained in the record, however, are identified by bates numbers bearing a "WAC" descriptor. All documents cited in this opinion are contained in either the administrative record or the circuit court record.

income from a contract between and a corporation and a related corporation doing business in Kentucky if the income is derived from the related corporation's activities in Kentucky.

3) Taken together or separately, would the employee activities in Kentucky and/or transaction arrangement of the management fee be considered more than *de minimis*?

Answer: The employees' activities are not *de minimus* since the employees spend 45-60 days annually in Kentucky in performance of their employment services for the Parent [World Acceptance]. The management fee is not *de minimus* since Parent's [World Acceptance's] employees perform activities in Kentucky. Management fees that do not require any activities to be performed in Kentucky may not create Kentucky nexus as subsection 4(b) of section 4 of 103 KAR 16:240 provides that a corporation that is otherwise not doing business in Kentucky may be considered not to be doing business in Kentucky, even if its employees are performing certain *de minimus* activities in Kentucky.

4) If the Parent Company [World Acceptance] is deemed to have nexus and its activities are more than *de minimus*, Should Parent [World Acceptance] and Kentucky Subsidiary [World Finance Kentucky] file a nexus consolidated income tax return?

Answer: If the Parent Corporation [World Acceptance] owns directly 80% or more of the voting power of all classes of stock and has a value equal to at least 80% of the total value of the stock of the Kentucky Subsidiary [World Finance Kentucky], The Parent Company [World Acceptance] should file a nexus consolidation income tax return.

(WAC 84-85). The letter included the following disclaimer with respect to the answers provided: "Please note that the above answers are based on the information presented, and additional facts could change some or all of our answers." (WAC at 85).

After receiving the Department's response, World Finance Kentucky amended its prior returns and filed consolidated returns with World Acceptance for the relevant time periods. The amended returns reflected tax overpayments and sought refunds totaling $1,356,714.00.

Citing KRS 141.040, KRS 141.120, and KRS 141.200[4] the Department denied the refund request. According to the Department, World Finance Kentucky was not authorized to file a consolidated return with World Acceptance because World Acceptance does not meet the definition of an includible corporation as outlined by KRS 141.200(9)(e). (WAC at 87).

By letter dated September 24, 2012, World Acceptance notified the Department that it was protesting the determination that it did not meet the definition of an includible corporation as outlined in KRS 141.200(9)(e). (WAC 89). World Acceptance requested that its case be forwarded to the Department's

[4] KRS 141.200 has been amended during the pendency of this litigation. The quotations and citations referred to herein refer to the statute in effect during the relevant time period. The amendments do not appear to substantively affect the outcome of the present dispute.

Division of Protest Resolution. It further requested an "in-person conference to discuss . . . the facts and circumstances further." (R. at 89).

Prior to the conference, World Acceptance provided the Department with the March 2011 letter Ernst & Young received in response to its inquiries to the Department as well as "a technical analysis" supporting its position that it was an includable corporation. In the technical analysis, World Acceptance indicated that it understood the Department's position as being that it did not meet the definition of an includable corporation as defined by KRS 141.200(9)(e) because World Acceptance did not satisfy the Kentucky factors set forth in KRS 141.200(9)(e)7&8.[5] World Acceptance conceded that it "does realize a net operating loss for the tax years being amended." However, it disputed that its activities in Kentucky were *de minimus* "in terms of absolute dollar amounts as well as relative percentages when viewed together." (WAC. at 92).

The in-person conference took place on January 17, 2013. Following the conference and the exchange of some additional information, the Department issued a letter dated January 24, 2013, maintaining its position that World Acceptance was not an includable corporation. The letter explained that World

[5]This section provides: "As used in subsections (9) to (14) of this section: . . . 'Includible corporation' means any corporation that is doing business in this state except . . . (7) Any corporation that realizes a net operating loss whose Kentucky property, payroll, and sales factors pursuant to KRS 141.120(8) are de minimis; [and] (8) Any corporation for which the sum of the property, payroll and sales factors described in KRS 141.120(8) is zero[.]"
.

Acceptance had identified only one employee who performed services in Kentucky during the relevant time periods. That employee, a Tennessee resident, performed audit services for World Acceptance. While the employee worked in Kentucky sixty to seventy days per year, the Department explained that the employee performed more than incidental services in a state other than Kentucky and the base of operations, employee residency and place from which the services were directed or controlled was not Kentucky. The Department reasoned that the payroll for the employee in question should be allocated to Tennessee, where the employee resides, or South Carolina, where World Acceptance is headquartered. As such, the Department determined that the payroll factor for World Acceptance during the period in question was zero. *See* KRS 141.120(8)(b). Likewise, the Department observed that World Acceptance did not own any property in Kentucky making that factor zero as well. The Department further determined that the management fees World Finance Kentucky paid to World Acceptance could not be classified as a sale in Kentucky because the fees were based on costs of performance from accounting, payroll, management and administrative services that were performed in South Carolina, not Kentucky. This meant that World Acceptance also did not have any sales in Kentucky during the relevant time period. Based on the fact that the payroll factor, property factor, and sales factor were all zero, the Department reasoned that World Acceptance could not be

considered an includable corporation for purposes of filing a consolidated tax return with World Finance Kentucky. *See* KRS 141.200(9)(e)7&8.

The parties continued to exchange correspondence. Relevant to this appeal, by letter date February 13, 2013, World Acceptance presented the Department with an alternative argument regarding its status as an includable corporation. While World Acceptance still believed it satisfied the Kentucky factors necessary to make it an includable corporation in its own right under KRS 141.200(9)(e), it now took the position that the Kentucky factor test was not applicable because it qualified as a "common parent" corporation making it an includable corporation under the "separate definition" contained in KRS 141.200(9)(b)1-2. According to World Acceptance, this portion of the statute contemplates a separate 80% ownership test for a common parent corporation to be an includible corporation. World Acceptance explained that the only requirement for a common parent corporation to be included in a nexus consolidated return is that it meet the ownership requirements of KRS 141.200(9)(b). To support its interpretation of the statute, World Acceptance cited the Department to a March 3, 2006, letter ruling the Department provided to Ernst & Young in response to an inquiry it initiated for another one of its clients whose situation was similar to that of World Acceptance and World Finance Kentucky. (WAC 112-13).

The Department responded with a short letter reiterating its determination that World Acceptance was not an includable corporation under KRS 141.200(9)(e). It did not address World Acceptance's alternative position that this section was of no consequence because World Acceptance met the 80% ownership requirement contained in KRS 141.200(9)(b). The Department was nonplussed with its prior letter ruling of March 3, 2006. It stated that the letter ruling was irrelevant because it "was based upon a completely different company with completely different facts." (WAC at 118).

Eventually, World Acceptance requested a final ruling on its amended consolidated returns pursuant to KRS 131.110(4).[6] The Department issued its Final Ruling on May 23, 2013. Therein, the Department determined that it had properly denied World Acceptance's refund claims for the taxable years ending March 31, 2007 through March 31, 2010. (WAC at 125-26). The Department determined that World Acceptance did not meet the definition of an includable corporation pursuant to KRS 141.200(9)(e). The Department did not address World Acceptance's argument that it was only required to show that it met the ownership requirements set forth in KRS 141.200(9)(b)1.

[6] "(4) The taxpayer may request in writing a final ruling at any time after filing a timely protest and supporting statement. When a final ruling is requested, the department shall issue such ruling within thirty (30) days from the date the request is received by the department.
(5) After a final ruling has been issued, the taxpayer may appeal to the Kentucky Board of Tax Appeals pursuant to the provisions of KRS 131.340."

World Acceptance appealed the Department's Final Ruling to the Kentucky Board of Tax Appeals ("Board"). As part of its appeal to the Board, World Acceptance noted that the Department's Final Ruling failed to address its argument that it was an includable corporation by virtue of the fact that it was a common parent corporation doing business in Kentucky with its subsidiary, World Finance Kentucky, an includable corporation. World Acceptance explained that the Department erred by subjecting it to KRS 141.200(9)(e)'s separate test for an includable corporation. Alternatively, World Acceptance argued that it was an includable under KRS 141.200(9)(e). It maintained that its sales and payroll factors were not zero as the Department had concluded making it fall outside of the exclusions of KRS 141.200(9)(e)7.-8. Finally, World Acceptance asserted that the Department should not be permitted to rely on KRS 141.200(9)(e)8. because the Department did not refer to that portion of the statute in either of its previous letter rulings to Ernst & Young.

The parties filed cross-motions for summary disposition. Following briefing and oral argument, the Board issued an order upholding the Department's determination that World Acceptance was not entitled any refund because it was not authorized to file a consolidated return with World Finance Kentucky. The Board also determined that the letter ruling issued by the Department was not

binding because the actual facts turned out to be significantly different than the factual scenario Ernst & Young described to the Department.

World Acceptance appealed the Board's decision to the Franklin Circuit Court pursuant to KRS 131.370 and KRS Chapter 13B. On August 14, 2015, the circuit court entered an opinion and order reversing the Board and holding that the Department improperly denied the refund request. In so doing, the circuit court adopted World Acceptance's argument that it only had to meet ownership requirements of KRS 141.200(9)(b) to be considered an includable corporation. Specifically, the circuit court held as follows:

> This Court agrees that [World Acceptance's] construction and interpretation of the statutes reaches the appropriate conclusion. The Department's interpretation violates the rules of statutory construction. The Department ignores the plain language in KRS 141.200(9)(b)1. Specifically, the Department ignores the phrase "which is an includible corporation if." The word "if" has a plain meaning. "If is used to say something that must happen before another thing can happen. Merriam-Webster defines "if" as "in the event that" or "on condition that." The Kentucky Supreme has also followed this interpretation of the word "if." *Points v. Points*, 312 Ky. 348, 349, 227 S.W.2d 913 (Ky. 1950); *Ellison v. Smoot's Adm'r*, 151 S.W.2d 1017, 1019 (Ky. 1941). Thus, an alternative reading of KRS 141.200(9)(b)1 would be "which is an includible corporation [on the condition that all of subparagraphs a. and b. are met]" The Department's brief does not address the language of KRS 141.200(9)(b)1, nor does the Department offer an alternative way of interpreting the subject statute. Thus, [World Acceptance] correctly interprets and construes KRS 141.200(9)(b)1.

> [World Acceptance's] interpretation and construction of the statute shows that KRS 141.200(9)(b) contains a separate provision for "common parent corporations" to be an "includable corporation." Thus, KRS 141.200(9)(e)'s definition of "includable corporation" would apply to any other corporation that does not qualify as a "common parent corporation". If KRS 141.200(9)(e) were the controlling definition for common parent corporations to be "includable corporations," the phrase "which is an includable corporation if" would have no meaning. The Court cannot interpret the statue [sic] in that manner.
>
> [World Acceptance's] statutory interpretation argument is dispositive and visiting the other issues is not necessary. [World Acceptance] argues correctly that it is a common parent corporation under KRS 141.200(9)(b)1, and that a common parent corporation need not be an "includable corporation" under KRS 141.200(9)(e). In fact, KRS 141.200(9)(b) provides a standalone definition for common parent corporations to be "includable corporations." [World Acceptance] meets all of the relevant standards to qualify as a common parent corporation under KRS 141.200(10)(b). Thus, [World Acceptance] is required to file a consolidated tax return.

(Cir. Ct. Op. 8/14/2015 at 9-10).

The Department filed a motion to alter, amend or vacate. On November 10, 2015, the circuit court entered an opinion and order granting the Department's motion, vacating its prior opinion and order, and affirming the Board. In so doing, the circuit court determined that its previous order was "based on an incomplete and thus erroneous analysis of the applicable sections of KRS 141.200, specifically subsections (9), (10), and (11)." (Cir. Ct. Op. 11/10/2015 at

6). The circuit court then embarked on lengthy and detailed analysis of why, in its opinion, the Department's interpretation of the statute was actually correct.

> [T]he General Assembly did not intend for the phrase "a common parent which is an includible corporation" to be a new concept defined by the requirements following "if." Indeed, if the phrase, "which is an includible corporation" was inserted into the definition for "affiliated group" to *clarify*, that is, to narrow the types of "common parent corporations" that could qualify to be part of an "affiliated group." After all, as World Acceptance points out in its own *Brief*, the stated purpose of the amendment was to "clarify affiliated group," *not* "common parent corporation." If the General Assembly had wanted to clarify the definition of "common parent corporation," then the logical course of action would have been to amend (9)(c), the definition for "common parent corporation." The General Assembly never intended for subsections (9)(b)1.a and (9)(b)1.b to be a second definition for "common parent corporation" pre-2006 or "a common parent corporation which is an includible corporation" post-2006.
>
> In conclusion, [World Acceptance] must be subjected to the "includable corporation" analysis of (9)(c). This Court cannot permit World Acceptance to override the express intent of the General Assembly and, to in essence, write into subsection (9) two new definitions for "includable corporations": One for non-common parent corporations to be found in (9)(e) and another in (9)(b)1 for common parent corporations. This is not what the General Assembly intended by any stretch of the imagination. To do otherwise would be to defy the meaning of already-defined terms, violate the internal logic of the applicable statutes, and go against the legislative history of the section. The General Assembly is quite clear: Pursuant to subsection (9)(c), a common parent corporation must be a member of an affiliated group that meets the requirements of (9)(b)1; an affiliated

> group must contain a common parent corporation that is itself an includible corporation; and an includible corporation is defined only in (9)(e). There is nothing more.

(R. 230-31).

After concluding that the Department correctly interpreted KRS 141.200, the circuit court turned to World Acceptance's alternative arguments. The Board upheld the Board's conclusion that both the payroll and sales factors were zero. It also upheld the Board's determination that the Department was not bound by its prior letter rulings. Finally, the circuit court addressed and rejected World Acceptance's arguments that the Department's denial of its refund request violated KRS 13A.130, Sections 27 and 28 of the Kentucky Constitution and the contemporaneous construction doctrine.

This appeal followed.

III. ANALYSIS

Appellants maintain that the circuit court erred when it upheld the Department's denial of the requested tax refund. In their brief to this Court, Appellants advance three main reasons that the circuit court's opinion must be reversed. First, they argue that the circuit court incorrectly concluded that World Acceptance must meet the definition of an "includable corporation" in KRS 141.200(9)(e) in order to qualify as a "common parent corporation doing business in this state" required to file a consolidated corporation income tax return. Second,

they assert that the circuit court improperly held that the Department should not be bound by Department's March 2011 letter. Finally, Appellants take issue with the circuit court's conclusions that denial of the refunds did not violate KRS 13A.130, Sections 27 and 28 of the Kentucky Constitution or the contemporaneous construction doctrine. We address each argument below.

A. World Acceptance's Status as an Includable Corporation

The central issue in this case is whether World Acceptance is required to file a consolidated return with its wholly owned subsidiary World Finance Kentucky. As presented to us, this question is answered by interpreting the relevant provisions of KRS 141.200(9)-(14). Therefore, our review is *de novo*. *Bob Hook Chevrolet Isuzu, Inc. v. Com. Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

As we must, we begin by examining the terms of the statute itself. Any corporation doing business in Kentucky is required to file a separate return unless it is statutorily exempt or statutorily required to file a consolidated return. *See* KRS 141.200(10). Pertinent to this appeal, a separate return is not required to be filed for "an includable corporation in an affiliated group" or "a common parent corporation doing business in this state." KRS 141.200(10)(a)&(b). "An affiliated group . . . shall file a consolidate return which includes all includable corporations." KRS 141.200(11)(a).

By default, any corporation doing business in Kentucky is considered to be an "includable corporation" unless it falls within at least one of the nine statutory exceptions set forth in KRS 141.200(9)(e)1.-9. During the administrative proceedings below, the parties hotly contested whether World Acceptance fell within exceptions (7) & (8). At this point, however, World Acceptance is not challenging the applicability of those sections. Instead, it argues that KRS 141.200(9)(b)1.-2. contains an alternative definition of an includable corporation that it satisfies. This section states:

> (b) 1. For taxable years beginning after December 31, 2006, "affiliated group" means one (1) or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if:
>
> > a. The common parent owns directly stock meeting the requirements of subparagraph 2. of this paragraph in at least one (1) other includible corporation; and
> >
> > b. Stock meeting the requirements of subparagraph 2. of this paragraph in each of the includible corporations, excluding the common parent, is owned directly by one (1) or more of the other corporations.
>
> 2. The stock of any corporation meets the requirements of this paragraph if the stock encompasses at least eighty percent (80%) of the voting power of all classes of stock and has a value equal to at least eighty percent (80%) of the total value of all stock[.]

KRS 141.200(9)(b)1.-2.

The statute we are confronted with is anything but a model of clarity. However, we cannot accept that World Acceptance's interpretation is the correct one. KRS 141.200(9) is a definitional section. It defines nine terms: (a) "affiliated group" for years 2004 through 2006; (b) "affiliated group" for years beginning after December 31, 2006; (c) "common parent corporation"; (d) "foreign corporation"; (e) "includable corporation"; (f) "ownership interest"; (g) consolidated return; (h) "separate return"; and (i) "stock." The terms are arranged alphabetically beginning with the definition of an affiliated group.

Relevant to this appeal, are the definitions of an affiliated group, common parent, and includable corporation. Pursuant to KRS 141.200(10), a separate return is not required for either (a) "an includable corporation in an affiliated group" or (b) "a common parent corporation doing business in this state." KRS 141.200(10)(a)-(b). All corporations are considered includable unless they fall with one of the nine exceptions set out in KRS 141.200(9)(e). The Department has successfully asserted that World Acceptance falls within subsections (7) and (8) of that section in that, under (7), it realizes a net operating loss and its Kentucky property, payroll and sales factors are *de minimis*; and, under (8), the sum of its Kentucky property, payroll and sales factors is zero. *See* KRS 141.200(9)(e)7.-8. Therefore, according to the Department, World Acceptance cannot be considered an "includable corporation" in an affiliated group. Even

though World Acceptance is affiliated with World Finance Kentucky, it is not an includable corporation. Therefore, it cannot rely on KRS 141.200(10)(a).

This brings us to KRS 141.200(1)(b) which states that a separate return is not required for "a ***common*** parent doing business in this state." "Common parent" is defined in KRS 141.200(9)(c) as "the member of an ***affiliated group*** that meets the ownership requirements of paragraph (a)1. or (b)1. of this subsection." Based on the tax years at issue, we are concerned with the ownership requirements in (b)1.[7] KRS 141.200(9)(b)1. provides:

> (b) 1. For taxable years beginning after December 31, 2006, "affiliated group" means ***one or more chains of includable*** corporations connected through stock ownership with a ***common parent*** corporation **which is an includible corporation if:**
>
> > a. The ***common parent*** owns directly an ownership interest meeting the requirements the requirements of subparagraph 2. of this paragraph ***in at least one (1) other includable corporation***; ***and***
> >
> > b. Stock meeting the requirements of subparagraph 2. of this paragraph in ***each of the includible corporations***, ***excluding the common parent corporation***, is owned directly by one or more of the other corporations.

[7] The statute is referring to KRS 141.200(9)(a), which applies to "for taxable years beginning after December 31, 2004 and before January 1, 2007," and KRS 141.200(9)(b), which applies "for taxable years beginning after December 31, 2006." The importance of this distinction is that the ***or*** refers to KRS 141.200(9)(a)1. or KRS 141.200(9)(b)2. not the a. and b. subsections of KRS 141.200(9)(b)1. This means that to qualify as a common parent both requirements of KRS 141.200(9)(b)1. must be present. The statute itself is plain to this end because subsection a. and b. are joined by the conjunctive "and" instead of the disjunctive "or".

> 2. The stock of any corporation meets the requirements of this paragraph if the stock encompasses at least eighty percent (80%) of the voting power of all classes of stock and has a value equal to at least eight percent (80%) of the total value of all stock[.]

KRS 141.200(9)(b)1.-2. (emphasis added).

The Department concedes that World Acceptance meets the ownership requirements necessary to make it a common parent. Appellants maintain that this ends the parts dispute. They maintain that this fact alone means that it meets the "alternative" definition of an includable corporation that is contained in KRS 141.200(9)(b)1.

KRS 141.200(9)(b)1. begins with the phrase "'affiliated group' means one or more chains of includable corporations connected through stock ownership with a common parent. . . ." World Finance Kentucky and World Acceptance constitute a corporate chain in that they are connected through ownership. However, before we can ever even get to the portion of the statute World Acceptance relies on, there must be a chain of includable corporations connected through ownership with a common parent. The term "includable corporation" is defined in KRS 141.200(9)(e). As already explained, World Acceptance does not fall within the corporations our Commonwealth deems includable under KRS 141.200(9)(e). This would seem to end the analysis. However, World Acceptance posits that KRS 141.200(9)(b)1. contains a separate, alternative definition for an

includable corporation based on the statutory language preceding the ownership requirements of KRS 141.200(9)(b)1.a-b. This section states: "'affiliated group' means one or more chains of includable corporations connected through stock ownership ***with a common parent corporation which is an includible corporation if***: . . ." World Acceptance maintains because it owns all of World Finance Kentucky it satisfies the ownership requirements of KRS 141.200(9)(b)1. making it an includable corporation under this alternative definition.

Having closely examined the parties' arguments and the statutory framework, we disagree. Like the circuit court, we are do not believe the General Assembly meant to place a separate, and entirely alternative definition for the term "includable corporation" within the section of the statute defining an "affiliated group." While the statute certainly could have been defined with more precision and clarity, it seems to us that the both the language and organization of the statute are consistent with each term having been defined separately and in its entirety within the separate, alphabetically arranged subsections of KRS 141.200(9)(a)-(i), meaning we must look to those subsections exclusively when a defined term is used elsewhere in the statute. *See Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) ("We presume that the General Assembly intended for the statutory scheme to be construed as a whole.").

To this end, we note that KRS 141.200(9) begins by stating that the definitions set forth within that section apply whenever the defined terms are used in KRS 141.200(9)-(14). This means that when the term "includable corporation" is used in KRS 141.200(9)(b) we must look to KRS141.200(9)(e) to define the term. We agree with the circuit court's conclusion that the purpose of KRS 141.200(b)1. is to define "affiliated group" and nothing more. This explanation is both logical and in harmony with the General Assembly's overall statutory scheme. As the circuit court pointed out KRS 141.200(9)(b)1.a-b are "not the ownership requirements for a 'common parent corporation which is an includable corporation;' rather they are the ownership requirements for an 'affiliated group' as a whole." As explained by the circuit court, "subsection (9)(b)1b by its very terms does not refer to the common parent corporation, but instead refers to the ownership of stock by other includible corporations within the statutory group. We can only presume that when the drafters use a defined term in the very subsection in which they have already defined the term, that the term must mean what is written in its definition and nothing more." The Department's interpretation, which the circuit court adopted, is cogent and fits within the overall statutory framework.

Moreover, as pointed out by the Department and the circuit court, this interpretation is most consistent with the legislative history of KRS 141.200(9). In

the 2006 Special Session, the General Assembly amended various sections of the Kentucky tax code including KRS 141.200. Prior to 2006, KRS 141.200(9)(a) contained only one definition of an affiliated group as opposed to the two definitions that it now contains. At that time, the definition of "affiliated group" read as follows:

> "[A]ffiliated group" means one (1) or more chains of includable corporations connected through stock ownership. Membership interest or partnership interest with a common parent if:
>
> a. The common parent owns directly an ownership interest meeting the requirements of subsection 2. of this paragraph in at least one (1) other includable corporation; and
>
> b. An ownership interest meeting the requirements of subparagraph 2. of this paragraph in each of the includible corporations, excluding the common parent is owned directly by one (1) or more of the other corporations.

Absent from the pre-2006 version of subsection (9)(a) is the phrase "which is an includable corporation" after "common parent corporation." Thus, if we were to follow World Acceptance's reasoning, prior to 2006, subsections (9)(a)a and (9)(a)b defined "common parent corporation." This is inconsistent with the statutory framework because the Code already contained a definition of "common parent corporation."

In 2006, the General Assembly amended KRS 141.200 to "clarify affiliated group and consolidated return determinations." State Fiscal Note

Statement, House Bill 1, Kentucky General Assembly 2006 Extraordinary Session, June 27, 2006. We believe, as did the circuit court, that General Assembly did not amend the statute to include the phrase "a common parent corporation which is an includible corporation" to expand the definition of an includable corporation. Rather, the most logical interpretation is that the General Assembly inserted the "which is an includable corporation" language to clarify and narrow the types of "common parent corporations" that could qualify to be part of an affiliated group.

In conclusion, we agree with the circuit court that World Acceptance must qualify as an includable corporation in its own right to allow it file a consolidated return. As succinctly summarized by the circuit court: "Pursuant to subsection (9)(c), a common part corporation must be a member of an affiliated group that meets the requirements of (9)(b)(1); an affiliated group must contain a common parent corporation that is itself an includable corporation; and an includible corporation is defined only in (9)(e).

World Acceptance argues that this interpretation renders KRS 141.200(10)(b) meaningless. There is some logic to this argument. To this end, however, we note that the 2006 amendment adding the includable corporation requirement for common parent corporation was enacted after the list in KRS 141.200(10) was created; so, the later enacted amendment is controlling. *Commonwealth v. Schindler*, 685 S.W.2d 544, 545 (Ky. 1984) ("Where statutes are

"inconsistent" the "last expression of legislative will prevails."). Perhaps most importantly, the remainder of the statute, which relates specifically to consolidated returns, references only corporations in an "affiliated group" as opposed to common parent corporations. This lends credence to our interpretation that only members of an affiliated group that are includable corporations under KRS 141.200(9)(e) can file consolidated returns. Otherwise, these portions of the statute would refer to a common parent separately, like KRS 141.200(10). Instead, only the term "affiliated group" is used.

For example, KRS 141.200(11)(a) states "an affiliated group shall file a consolidated return which includes all includable corporations." Pursuant to KRS 141.200(8), the definition of an includable corporation in KRS 141.200(9)(e) applies to this mandate. Therefore, regardless of whether World Acceptance is a common parent of World Finance Kentucky, it is not required to file a consolidated return because it is not an includable corporation. KRS 141.200(11)(b) states that "an affiliated group required to file a consolidated return shall be treated for all purposes as a single corporation under the provisions of this chapter." More telling is KRS 141.200(12) which states "[e]ach includable corporation included as part of an affiliated group filing a consolidated shall be jointly and severally liable for the income tax liability computed on the consolidated return." These statutes refer only to includable corporations in affiliated groups. Given the numerous times

those terms are used within the statute, we are thoroughly convinced that the singular definitions, arranged alphabetically, in KRS 141.200(9) are intended to be used throughout the statute. We simply cannot accept that the General Assembly intended to include an alternative definition of includable corporation in the section of the statute meant to define an affiliated group.

KRS 141.200(9)(b) defines an affiliated group only. And, as the circuit court correctly determined, the affiliated group must contain an includable common parent. Whether the common parent is includable is determined by KRS 141.200(9)(e), not the ownership requirements contained in KRS 141.200(9)(b). World Acceptance falls within the exceptions for an includable corporation. Accordingly, it was not required to file a consolidated return with Kentucky World Finance.

B. The Department's March 2011 Letter Ruling

World Acceptance argues that the circuit court erroneously concluded that the Department is not bound by its March 2011 letter. The March 2011 letter was issued by the Department in response to an anonymous email inquiry from Ernst & Young. The email inquired whether a parent needed to file consolidated returns with its subsidiary when the parent had two employees working in Kentucky and had received a management fee from its Kentucky subsidiary. The Department responded that a consolidated return was required if the eighty percent

tests were met. However, the Department included the following disclaimer: "Please note that the above answers are based on the information presented, and additional facts could change some or all of our answers."

Ultimately, the facts turned out to be different than presented in Ernst & Young's original email inquiry. Instead of two employees working in Kentucky, World Acceptance ultimately only identified a single employee. Additionally, the nature of the management fee involved a complex analysis dependent on several factors that were not fully covered by the very basic factual scenario set out in the email inquiry. Opinion letters lack the force of law. *Board of Trustees of Judicial Form Retirement System v. Attorney General of Commonwealth*, 132 S.W.3d 770, 787 (Ky. 2003). Moreover, even if an opinion letter could bind the Department with respect to a particular taxpayer, the additional and differing facts that came to light in this particular instance make the letter ruling non-controlling and non-binding.

C. World Acceptance's Remaining Arguments

Lastly, World Acceptance maintains that the circuit court mistakenly held that the Department's denial of its refund request did not violate the contemporaneous construction doctrine, KRS 13A.130 and Section 27 and 28 of the Kentucky Constitution. We disagree.

"According to the doctrine of contemporaneous construction, if an administrative agency has a policy according to which it has interpreted an ambiguous statute, it may not change its long standing interpretation." *Dayton Power and Light Co. v. Department of Revenue, Finance and Admin. Cabinet*, Commonwealth, 405 S.W.3d 527, 530 (Ky. App. 2012). The only evidence of a "long standing interpretation" pointed to by World Acceptance is two letter rulings, the Department's 2011 letter ruling in response to the inquiry Ernst & young made on World Acceptance's behalf and a 2006 letter ruling issued in response to an inquiry made by a separate corporation. Two letter rulings issued over a five-year span do not constitute a long-standing "policy" that falls within the contemporaneous construction doctrine. "[T]he construction must have been continued for a long period, from a course of conduct and not from an isolated case." *Ashcraft v. Currier*, 694 S.W.2d 707, 709 (Ky. 1985). Here, there is no evidence of a longstanding policy inconsistent with the Department's current interpretation. Accordingly, the circuit court was correct to reject this argument.

KRS 13A.130 provides that the Department shall not modify, expand or limit a statute by internal policy, memorandum or other form of action. *See* KRS 13A.130(1)(a)-(b). Appellant's argument ignores KRS 13A.130(3) which provides: "This section shall not be construed to prohibit an administrative body issuing an opinion or administrative decision that is authorized by statute." The

Department is authorized to make determinations on refund requests, and the Board is authorized to render administrative opinions on disputed issues between the taxpayers and the Department. There is no evidence that the Department sought to expand or modify the statute inconsistent with its stated terms. It interpreted and applied the statute consistent with its terms. *See Central Kentucky Cellular Telephone Co. v. Commonwealth, Revenue Cabinet*, 897 S.W.2d 601, 603 (Ky. App. 1995) ("The Revenue Cabinet has not expanded or limited a statute or administrative regulation but has applied the statute in a reasonable manner to a taxpayer as defined by the statute.").

Finally, World Acceptance argues that the Department's action violated Section 27 and Section 28 of the Kentucky Constitution. Section 27 is Kentucky's separation of powers provision, and Section 28 provides that no department shall exercise power that belongs to another. This argument does not hold water. Even if the Department had incorrectly interpreted KRS 141.200, it was still acting within its statutory power to interpret, apply, and issue determinations in taxpayer dispute cases. Nothing suggests that the Department was acting in bad faith or totally inconsistent with the statutes it was charged with enforcing. There is no merit to this argument.

IV. Conclusion

For the reasons set forth above, we affirm the Franklin Circuit Court.

ALL CONCUR.

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