What Was Old is New Again: Executive Order Reinstates Kentucky Board of Tax Appeals and Potential Bonding Requirements for Tax Appeals

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On August 31, 2020, Governor Andy Beshear signed an Executive Order to restructure the Public Protection Cabinet, including abolishing the Kentucky Claims Commission (KCC) which was responsible for the administrative appeals process of all state and local tax disputes, reinstating the Kentucky Board of Tax Appeals to handle such matters as it did under Governor Steve Beshear's term, as well as try to require taxpayers to post a bond to appeal decisions from the KBTA in direct contravention to Kentucky law.

According to the Order, the Gov. Andy Beshear believes the KCC had failed to serve its important government function in a way that "promotes economy or efficiency." Specifically, in the Order's explanation for the change, the Governor provided that while the restructure under the Gov. Matt Bevin administration in 2016 to create the KCC created more efficiency for the Crime Victim's Compensation Board and the Board of Claims, it was inefficient for the Board of Tax Appeals that has a "backlog of about sixty (60) cases, some of which are two (2) years old."

In order to address these concerns, the Gov. Andy Beshear dismantled the KCC and instead instated, or rather reinstated, the Office of Claims and Appeals within the Public Protection Cabinet that is made up of three separate Boards with separate duties: the Crimes Victim Compensation Board, the Board of Claims, and the Board of Tax Appeals (KBTA). The Office of Claims and Appeals will be governed by an Executive Director appointed by the Secretary of the PPC and each of its Boards will have three members; one that will initially be appointed for a two-year term, one for a three-year term, and one for a four-year term. Afterwards, each member may be reappointed for four-year terms.

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Specific to the KBTA, the Order provides that each member must be 35 years of age or older, one must be an attorney (with qualifications required of candidates for a circuit judge), and the other two members shall be "with a general business background except that not all of the members shall be of the same occupation or profession."

However, this "new" structure is in fact almost identical to what Gov. Steve Beshear initiated during his term. Until 2016, the structure of the Office of Claims and Appeals also included the KBTA serving as the administrative governing body for tax disputes, and the other two Boards separately handling their respective claims and appeals. In 2016, Governor Bevin restructured the Office by abolishing the separate Boards, appointing new members (reducing the number of members from eight to three), and renaming the governing body to the Kentucky Claims Commission. This restructure created a more efficient process for providing funds to crime victims and hearing claims against the government.

Following the reinstatement of the KBTA there are some familiar faces on this board. Two of its three members, Lanola Parsons and now Chairperson Melinda Karns served on the prior KBTA under Gov. Steve Beshear's administration. Lanola was reappointed by Governor Steve Beshear in 2012 and served until July 26, 2016. Similarly, Karns was appointed for the first time by Gov. Steve Beshear and served until April 16, 2016. New to the Board is Tony Colyer, an attorney from Louisville, Kentucky. As provided in the Executive Order, Karns is expected to serve a three-year term, Colyer is to serve a two-year term, and Lanola will serve a four (4) year term with each capable of being reappointed for four more years at the end of their respective terms.

The substantive powers vested to the Board via the Executive Order remained largely the same, except for an attempt to reintroduce a bonding requirement for taxpayers to appeal an adverse order from the KBTA. In Subsection G of the Order, it provides that if a taxpayer appeals a final order of the KBTA affirming a tax assessment against the taxpayer to the appropriate circuit court, the Department of Revenue or local taxing authority may move the circuit court to require the taxpayer to post a bond for the payment

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of any judgment of the court if the agency believes its ability to obtain the payment is at jeopardy because of the appeal or if it believes the appeal was only meant to delay payment of the involved tax liability.

This provision, however, *directly conflicts* with prior Kentucky case law[1] and KRS 49.250 which provides, "If the appeal is from an order sustaining a tax assessment, collection of the tax shall be stayed by the filing of a petition or an appeal to any court. *Full payment of the tax or a supersedeas bond is not required to appeal an order sustaining a tax assessment*." KRS 49.250 was amended in 2018 as a part of a larger effort to strengthen Kentucky's Taxpayer Bill of Rights to ensure bonds did not hinder a taxpayer's right or ability to appeal. Thus, the Governor's Executive Order should face opposition; however, it appears the Order puts the burden on the Department to request such a bond from a reviewing court rather than making it mandatory. Additionally, these changes and new appointees may be subject to approval by the General Assembly during the upcoming 2021 legislative session.

Considering the similarity of this Order to those of the past, this could be viewed as a way for the current administration to revert back to the former way to review Kentucky tax and revenue matters.

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[1] Chegg, Inc. v. Dept. of Revenue, No. 14-CI-00170 (Franklin Cir. Ct. Mar. 26, 2014); CSX Transp., Inc., v. Dept. of Revenue, No. 14-CI-00532 (Greenup Cir. Ct. Feb. 25, 2015).

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