Kentucky Tax Talk: What Appeals Board Reinstatement Means

This article was originally published in Law360 Tax Authority.

Oct 21, 2020

Categories:

Blogs
Tax Law Defined™ Blog

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On Aug. 31, Kentucky Gov. Andy Beshear signed an executive order to restructure the Public Protection Cabinet effective Sept. 1.[1] Among other actions, the restructuring abolished the Kentucky Claims Commission, which was created in 2016 under then-Gov. Matt Bevin's administration, and reinstated the Kentucky Board of Tax Appeals to preside over the administrative appeals process of all state and county tax disputes.

What does that mean for taxpayers and tax practitioners? Potentially a lot from an administrative process, procedure and taxpayer rights perspective.

Prior to the Kentucky Claims Commission, under the administration of Beshear's father, former Gov. Steve Beshear, the Office of Claims and Appeals within the Public Protection Cabinet consisted of three independent boards: the Crime Victims Compensation Board, the Board of Claims and the Board of Tax Appeals.

In 2016, Bevin's executive order eliminated the three boards, and created one governing body, the Kentucky Claims Commission, to hear all administrative appeals previously heard by the Office of Claims and Appeals in an attempt to be more cost efficient, among other things. The General Assembly subsequently legislated the order into statutes.

In his August executive order, Beshear announced that while the Kentucky Claims Commission structure created more efficiency for the Crime Victims Compensation Board and the Board of Claims, it was inefficient for the Board of Tax Appeals that has a "backlog of about 60 cases, some of which are two years old."

While this "new" structure of the Public Protection Cabinet is almost identical to the three board system that was present under Steve Beshear and many prior governors, there have been a few notable differences in the reinstatement of the tax appeals board, as well as other consequences of the executive order, including emergency

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administrative regulations.

While the Board of Tax Appeals will have three members, the executive order imposes some new limitations on board members. One of the members must be an attorney — with qualifications required of candidates for a circuit judge. The other two members shall have a "general business background except that not all of the members shall be of the same occupation or profession."

At least one board member will now have substantive knowledge of the law from an evidentiary standpoint, which was not always the case in the past, despite the board's rules generally permitting evidence that may not be admissible in court (e.g., hearsay) and allowing discovery to be primarily handled by counsel for the parties.

Another notable change is that the order does make an attempt to reintroduce an appeal bonding requirement for taxpayers seeking to appeal an adverse order from the Board of Tax Appeals.

However, the substantive powers vested to the board via the executive order remained largely the same. The order specifically gives the board exclusive jurisdiction over both state and county revenue matters, which was the generally understood rule before but is now explicitly stated.

Subsection G of the order provides that if a taxpayer appeals a final board order affirming a tax assessment against the taxpayer to the appropriate circuit court, the Kentucky Department of Revenue or local taxing authority may move the circuit court to require the taxpayer to post a bond for the payment 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[2] and Kentucky Revised Statutes Section 49.250, which provides, [i]f 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.

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Section 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. The governor's executive order may well 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.

The Public Protection Cabinet recently promulgated a new regulation as a result of the reorganization.[3] The regulation primarily provides updated and more in-depth information to reflect the abolition of the claims commission and reinstatement of the tax appeals board.

The regulation in most material areas essentially reinstates prior rules of practice for the tax appeals board in place before the Kentucky Claims Commission, such as requiring petitions to the board be filed within 30 days of a final order from the applicable administrative agency in accordance with Chapter 13B of the state code, instructions for the required content of the petition, requirement to file entry of appearance within 30 days of notice of appeal, requirement that business entities must be represented by an attorney, etc.

However, there are some notable changes and updates in the regulation such as: (1) increased notice/electronic filing guidelines; (2) direct citation to the civil rules of practice (particularly discovery), including that parties must disclose expert witnesses they intend to use at the hearing at least 90 days before the hearing absent a stipulation, and a rebuttal expert witness within 30 days of the other party's disclosure of same; (3) the ability for a tax appeals board member or hearing officer to have a telephonic/electronic prehearing or status conference prior to the hearing; (4) stricter rules on what must occur after a prehearing conference and timeframes for when a hearing must be held thereafter; and (5) updated rules for prehearing and post-hearing procedural and substantive filings.

The above changes from the executive order and proposed regulation also seem to be moving from the hearing officer concept that was used with the Kentucky Claims Commission, wherein a hearing officer generally would preside for a hearing and provide a

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recommended order to all commission members to affirm or reject, and bring back the tax appeals board process of using individual hearing officers almost exclusively for real property tax hearings throughout the commonwealth, with most non-real property tax hearings being held before the three-person Board of Tax Appeals panel. While now in effect, these significant procedural changes are not yet permanent as the changes and appointees in the executive order are subject to approval by the General Assembly during the upcoming 2021 legislative session. The regulation is not yet final as a public hearing to allow for notice and comment must still be held on Nov. 24, (either in person or via a Zoom link included in the proposed regulation).

It appears that both formal tax practice and procedure — with a few twists — and local customs and precedent set by the Kentucky Board of Tax Appeals prior to 2016 will likely be back.

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[1] See Executive Order 2020-708.

[2] 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). [3] 802 KAR 010.

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