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Authors:

Mark F. Sommer
Elizabeth M. Ethington

What are the Governor's Powers? Part One – On Tax Policy, Is the Kentucky Governor Out Ahead of his Skis?

The three branches of government—executive, legislative, and judicial—at both the state and federal level are bound by the federal constitution and their respective state constitutions, which delineate the powers of each branch of government. This is the case for all matters, particularly for taxes.

The Supreme Court of the United States found the nation's executive branch, which has broad constitutional authority, is most narrow when it acts on a power specifically granted to Congress, and Congress has not specifically delegated the power to the executive branch.[1] Similarly, a state governor's broad authority to govern is narrowly tailored in areas where specific authority is constitutionally delegated to the legislative branch. Again, fully applicable in matters of taxation.

Under the United States Constitution, Congress has the power to lay and collect taxes.[2] The Kentucky Constitution, like its federal counterpart, similarly contains provisions empowering the legislature to tax. Section 29 of the Kentucky Constitution grants the General Assembly the power to make laws generally, and Sections 171 and 180 specifically entrust the General Assembly the power to levy taxes. Thus, within the legislative branch rests the authority to tax. The Kentucky Supreme Court has consistently emphasized "the General Assembly has the power to levy and collect taxes without offending either the Federal or State Constitution."[3]

The power of the executive branch is also conferred by the state constitution. Except for power *explicitly* conferred upon the executive branch by the Kentucky Constitution, the only powers the governor has are what the General Assembly chooses to give.[4] Thus, it can be seen that a governor has no implied or inherent

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powers beyond that given to them by the General Assembly, including powers to levy or amend taxes. Additionally, the "[g]overnor has no constitutional authority to exercise legislative powers even when the General Assembly has failed to do so."[5] In sum, the executive branch's primary job is to enforce the laws as written, not create them through action or inaction, matters of taxation included.

The Kentucky Constitution explicitly provides what has been said is "an unusually forceful command" for a strict separation of powers under Section 27 and Section 28.[6] Therefore, although the executive branch has the power to enforce tax policy, it does not have the power to create tax policy unless such power is *expressly* given by the General Assembly.

Thus, although the executive branch is limited in its ability to control Kentucky taxes, the Governor *is* capable of issuing executive orders that may have an effect on Kentucky taxes. An executive order is a declaration by the Governor which has the force of law. Executive orders do not require any action from the legislature to take effect and are typically used in times of emergency. During the COVID-19 pandemic, there was an unprecedented increase in executive orders, intensifying the power struggle between the legislative and executive branches. In Kentucky, the push and pull between the Republican super majority legislature and Democratic executive branch as seen over the last two years, and with it, the many high-profile court cases may now have created a path that could affect Kentuckian's taxes all over the state.

We will continue to follow the rate reduction events and continue to post more as developments ensue. For more information about your Kentucky taxes, visit out Tax Law Defined Blog. You can also read parts two and three in this three-part series:

- The Governor's Impact on Motor Vehicle and Fuel Taxes. Part Two – On Tax Policy, Is the Kentucky Governor Out Ahead of His Skis?
- What's Next? The Individual income Tax. Part Three – On Tax Policy, Is the Kentucky Governor Out Ahead of His Skis?

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We will review recent Executive Branch action in the matter of taxation in part two of this series.

**Taylor Ecleberry contributed to this article as a summer associate at FBT. Taylor Ecleberry is not a licensed attorney.*

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[1] *See* Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.").

[2][2] U.S. Const. art. I, § 8, cl. 1

[3] Farmers National Bank v. Commonwealth Dep't of Revenue, 486 S.W.2d 872, 883 (Ky. 2015).

[4] Ky. Const. § 28 ("No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in instances hereinafter expressly directed or permitted.").

[5] Fletcher v. Com., 163 S.W.3d 852, 869 (Ky. 2005).

[6] Ex parte Auditor of Public Account, 609 S.W.2d 682, 685 (Ky. 1980).

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