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

Sep 16, 2022

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Blogs
Tax Law Defined™ Blog

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With the separation of power principle in mind, which we explained in part one of this series, let's examine a few of Governor Beshear's most recent actions.

During the COVID-19 pandemic, the Commonwealth saw an expansion of the Governor's power through numerous executive orders, including face masks requirements, travel bans, and a statewide eviction moratorium. After COVID-19 commenced, the Kentucky Supreme Court upheld legislation limiting the Governor's ability to take unilateral action during declared emergencies. The state's highest court further noted that "the General Assembly establishes the public policy of the Commonwealth," not the executive branch.[1]

There are, however, almost countless legitimate uses for executive orders. The following functions of the governor expressly mentioned in the Kentucky Constitution are among the situations under which the governor may issue at least some directives in the exercise of his constitutional and statutorily delegated powers: (1) head of the Executive Branch, (2) commander-in-chief of armed forces, (3) power to fill Commission vacancies, (4) power to remit fines and forfeitures, (5) power to grant reprieves and pardons, (6) power to call an extraordinary session of General Assembly, and (7) power to enforce laws.

When the governor is lawfully exercising one of these functions, the scope of his power is exceedingly broad. The governor may also issue executive orders in the exercise of his statutorily delegated authority. Through executive orders, the governor effectively instructs the government on how to work within the parameters already set by the General Assembly and the Kentucky Constitution.

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In the aftermath of the COVID-19 pandemic, the Commonwealth saw a continuation of law changes through executive orders. In Kentucky, tax policy is almost always set by statute. The state legislature, however, can give the governor the power to set tax policy through executive orders.

One recent example concerns the tax on motor vehicles which Kentucky taxes annually based upon value. Prices of vehicles we all know have increased substantially. KRS 132.485(1)(a) provides the standard value for cars should be the average trade-in value prescribed by the so-called car valuation "Blue Book." The Kentucky legislature, in the wake of a drastic increase in used car prices, found exigent circumstances existed and granted the Governor the authority to address the issue in 2022 Joint Resolution 99.

Governor Beshear, acting on the narrowly-tailored power granted to him by the Kentucky legislature, issued Executive Order 2022-096 on February 16, 2022. Through the executive order, the Governor froze an increase in motor vehicle property taxes by mandating car assessments for January 2022 and 2023 to remain the same as were assessed in January 2021. But if the property is worth more in the marketplace, and the property is and must be taxed at market value under the Constitution, is this a proper way to operate?

In June 2022, perhaps building on the power granted to him by the state legislature in 2022 Joint Resolution 99, the Governor took his executive power further by preventing a two cent increase in the fuel tax through an emergency administrative regulation.

The emergency administrative regulation was promulgated by the Kentucky Department of Revenue, which is included in the executive branch. KRS Chapter 13A allows for the promulgation of "emergency administrative regulations," when necessary to "meet an imminent threat to public health, safety or welfare." For there to be an emergency administrative regulation, there must first be an emergency. Since 1996, there have been roughly 115 documented emergency events as contemplated by KRS 39A.010. These emergencies, however, have typically involved "biological. . .or etiological. . .hazards."[2]

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Even if the recent increase in fuel price is considered an emergency, an emergency does "not create power; it merely mark[s] an occasion when power should be exercised."[3] In other words, emergencies do not give the governor additional inherent or implied powers. Although the Governor can act through emergency administrative regulations, he cannot unilaterally circumvent the procedures in place to preserve the separation of powers, namely collaboration between the legislative and executive branches when enacting regulations that have the force of law.

Ultimately, Governor Beshear was well within his authority to freeze the vehicle property tax because the legislature affirmatively granted the power used, which ensures the separation of power was not violated. The fuel tax, however, is a little more uncertain as it falls squarely within the legislature's prerogative, there was no express grant of power from the legislative branch, as there was with 2022 Joint Resolution 99, and an increase in fuel prices is not what is typically classified as an emergency under KRS 39A.010.

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 one and three this three-part series:

- What are the Governor's Powers? Part One – 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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[1] Cameron v. Beshear, 628 S.W.3d 61, 74 (Ky. 2021).

[2] Beshear v. Acree, 615 S.W.3d 780, 801 (Ky. 2020).

[3] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring).

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