IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

October 17, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

LEWIS FORD, INC.,	)	
	)	
Plaintiff/Appellee	)	
	)	Shelby Chancery No. 103501-3 R.D.
VS.	)	
	)	
JOE B. HUDDLESTON, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,	)	Appeal No. 02A01-9410-CH-00235
	)	
Defendant/Appellant	)	
	)	

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE D. J. ALISSANDRATOS, CHANCELLOR

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AFFIRMED AND REMANDED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

DAVID R. FARMER, JUDGE

O P I N I O N

The appellee, an automobile dealer, collected sales tax on extended warranty contracts purchased by its customers and remitted these taxes to the Department of Revenue. On December 30, 1992 it filed a claim for refund of the taxes collected and remitted in 1989. The claim was deemed denied, and this action was filed November 2, 1993, pursuant to TENN. CODE ANN. § 67-1-1801(a)(1)(A) *et seq.* seeking to recover the aggregate amount of the taxes.

We take note, parenthetically, that other post-deprivation actions were filed by the appellee in Davidson County to recover sales tax collected and remitted for the tax years 1987 and 1988. A claim for refund for taxes paid in 1987 was filed on December 31, 1990. Upon denial, suit was filed December 31, 1991. A claim for refund for taxes paid in 1988 was filed December 31, 1991. Upon denial, suit was filed Dec. 31, 1992. Each claim stated:

> "Claim is based on determination that Rule 54 is broader than Sales Tax Act and, therefore, (1) those mechanical insurance policies are not taxable as "repair services," (2) performance of the contract is limited to a time after expiration of manufacturers warranty (12 months), therefore, there is no performance of those contracts at the time the automobile is sold, (3) many units are repaired outside of Tennessee, hence, this tax impermissibly burdens Interstate Commerce."

So far as this record reveals these suits have not been concluded.

The Department of Revenue had issued several assessments against various taxpayers who were not collecting and remitting the tax on these warranty contracts, one of whom was Covington Pike Toyota, of Memphis, which declined to pay the assessment and filed a pre-deprivation action in Shelby Chancery, as authorized by TENN. CODE ANN. § 67-1-1801(a)(1(B), challenging its validity. A judgment was entered on July 20, 1990 in favor of the taxpayer, and the Commissioner appealed. As reported in *Covington Pike Toyota v. Cardwell*, 829 S.W.2d 132 (Tenn. 1992), the Supreme Court, on March 2, 1992, affirmed, holding that the Department was not statutorily authorized to levy the tax on warranty contracts.

The sales tax was levied on warranty contracts pursuant to TENN. CODE ANN. § 67-6-102(23)(F)(iv), which provides that taxable retail sales shall include "[t]he performing for a consideration of any repair services with respect to any kind of tangible personal property."

The Commissioner promulgated Department Rule 54, which provided that "repair services" included warranty contracts; as noted, both the trial court and the Supreme Court held otherwise, the former judgment tending to galvanize the executive and legislative branches.

On March 26, 1991, after the entry of the trial court judgment but before the affirmance, the Legislature enacted Chapter 80 of the 1991 Tennessee Public Acts. This Chapter, *inter alia*, imposed a sales tax on "[c]harges for warranty or service contracts warranting the repair or maintenance of tangible personal property, provided that any repairs to the extent covered by the contract shall not also be subject to tax."

Section 3 of Chapter 80 further provided that notwithstanding the provisions of TENN. CODE ANN. § 67-1-1802, "no sales or use tax paid prior to the effective date of this act with respect to charges for warranty or service contracts shall be refunded unless a properly documented refund claim was filed within *thirty days* after the effective date of this act." (emphasis added)

TENN. CODE ANN. § 67-1-1802 generally allowed claims for the refund of taxes collected by the Commissioner to be filed within *three (3) years* from December 31 of the year in which payment was made.

As we have noted, the appellee filed a claim on December 30, 1992 for a refund of taxes it remitted for the tax year 1989. On the basis of the pertinent provision of Chapter 80 of the 1991 Tennessee Public Acts, which we have reproduced, the claim was denied, presumably because it was not timely filed, that is, within 30 days after Chapter 80 became effective, March 26, 1991. This suit followed.

The Commissioner answered the complaint, denying the entitlement of the appellee to a refund of the 1989 taxes and affirmatively defending the suit upon the same ground for which it presumably was denied administratively, that "Lewis Ford failed to file any claim for refund . . . within thirty (30) days after March 26, 1991, as required by the provisions of Chapter 80 of the 1991 Tennessee Public Acts."

Issue was thus joined, with each party moving for summary judgment. The issue at trial and on appeal is whether the State may, consistently with due process, shorten the period of limitations from 3 years to 30 days without, as alleged by the appellee, notice to potential claimants? The chancellor held the shortened period was unreasonable and thus was a denial of due process. We agree.

The asserted lack of notice arises from the fact that the 30-day limitation was never codified and was never included in TENN. CODE ANN. § 67-1-1802, the refund statute. It was footnoted as a compiler's note and when the code supplement was published in late 1991 the thirty days had already expired. Of added significance, according to the appellee, are the facts that (1) the 30-day limitation was applicable only to claims for refunds of sales tax remitted on warranty contracts, while the 3-year general limitation remained undisturbed and (2) the 30-day limitation was enacted eleven (11) months *before* the *Covington Pike* decision.

While there may be a hint of unfairness inherent in this scheme, we agree with the appellant that a statute "is duly enacted and vitalized upon full compliance by the Legislature with the requirements of the Tennessee Constitution for the enactment of laws." *See, e.g., State ex rel. Banks v. Taylor*, 287 S.W.2d 83 (1956). Chapter 80 of the 1991 Tennessee Public Acts became effective, according to its enacted pronouncement, on March 26, 1991, and we are referred to no authority which requires the State or any of its agencies to give special notice of its passage to affected parties.

The appellee argues that the special 30-day limitation expired ten (10) months before the cause of action arose, that is, before the *Covington Pike* decision

came down in 1992. We cannot agree. This decision did not create a cause of action; it merely affirmed that the sales tax scheme did not authorize the Department of Revenue to exact a tax on warranty contracts. We agree with the appellant that the appellee's right to bring this action accrued when it remitted the aggregate taxes to the Department of Revenue.

But the notice issue is only tangential to the thrust of this case. Appellee argues that the drastic shortening of the period of limitations deprived it of procedural and substantive due process; the appellant responds that the appellee and others similarly situated had no vested interest in the 3-year delimiting period and that the Legislature was constitutionally free to shorten the period provided a reasonable time was accorded to claimants within which to file their claims. Appellant further correctly argues that unless the shortened time is so obviously insufficient as to be a denial of justice, the Courts cannot interfere with the Legislature's discretion. Further, the appellant argues that, even so, other statutory remedies were available to the appellee and others similarly situated which afforded them a meaningful opportunity to contest or recover sales taxes on warranty contracts, thereby mooting the question of the unreasonableness of the 30-day limitation.[1]

We think a due process analysis requires an in-depth consideration of whether the State, in attempting to protect its treasury, provided the appellee a fair and meaningful opportunity to contest the validity of its tax obligation. The State argues that *prior* to the enactment of Chapter 80 the appellee and other similarly situated taxpayers could have paid the tax and filed a claim for refund as provided in

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[1] Stated differently, the appellee is taken to task (1) because it did not earlier seek a refund, a claim for which could have been filed as early as January 2, 1990. This argument implies that a taxpayer should somehow anticipate legislative action, or (2) because it should not have collected and remitted the tax on warranty contracts but should have awaited an assessment and then filed a pre-deprivation action. Either procedural course, according to the appellant, would have obviated this litigation. This argument begs the question, in our judgment. The taxpayer did not rely on the available procedure at its peril of selecting the wrong one.

TENN. CODE ANN. § 67-1-1802, which, as we have noted, initially required claims for refund to be filed within three (3) years from December 31 of the year in which the payment was made. Thus, the appellee believed at the time it remitted the tax that it had until December 31, 1992 within which to file or claim for refund. But this belief was not a vested right because "no person has a vested interest in a statute of limitations in force at the time his cause of action accrues." *Arnold v. Davis*, 503 S.W.2d 100 (Tenn. 1973).

In *Morris v. Gross*, 572 S.W.2d 902 (Tenn. 1978), the Supreme Court said:

> " . . . the Legislature ordinarily may change existing remedies for the enforcement of rights, including those which have already vested, without denying due process of law, provided, a substantial remedy to redress that right by some effective procedure is given." (citations omitted)

Chapter 80 did not affect the remedy. It merely shortened the time within which the remedy might be exercised. This is constitutionally permissible, provided "the new period of limitations accords to claimants a reasonable time within which to file suit, ..." *Morris, supra.* Implicit in the enactment of Section 3 of Chapter 80 is the knowledge and approbation of the Legislature of its consequences, which gives us pause to reflect at length since the courts may not interfere with the legislative discretion. 51 AM. JUR. 2D, *Limitations of Actions*, §§ 38-39 (1970).

We cannot agree with the appellant that, assuming, *arguendo*, the shortened filing period is "manifestly insufficient," the pre-deprivation remedy saves the day for due process. The State provided both kinds of remedies to accommodate the varying circumstances of taxpayers and to insure due process, *See Harper, supra,* but it cannot be said that a taxpayer must be clairvoyant in his election of remedies or that he opts for post-deprivation relief at his peril for not having sought pre-deprivation relief in the event the legislature changes the rules. The State correctly argues that its legitimate interest in sound fiscal planning entitled it to "avail [itself] of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those

taxpayers paying under protest, *or enforcing relatively short statutes of limitation applicable to refund actions*," citing *McKesson v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 78, 110 S. Ct. 2238 (1990). We recognize that sound fiscal planning necessarily justifies strong and meaningful measures to protect the State's treasury, and Chapter 80 manifestly had for its purpose the intent to thwart claims for refunds of taxes collected only on the warranty contracts; but the new period of limitation must accord a reasonable time within which to commence proceedings. *Morris, supra*. A shortening of the filing period from three (3) years to 30 days is, in our judgment, so draconian as to be "manifestly insufficient."

In *Reich v. Collins, Revenue Commissioner of Georgia*, 63 U.S.L.W. 4032, 115 S. Ct. 547 (1994), the taxpayer, a federal retiree, paid state income tax on his pension. The Supreme Court invalidated such taxes and Reich brought an action for refund. The Georgia Supreme Court held that Reich's failure to follow pre-deprivation remedies barred his claim. The U.S. Supreme Court disagreed, holding that the existence of pre-deprivation remedies does not satisfy due process requirements if post-deprivation remedies upon which the taxpayer relied are repealed and that a state may not, consistently with due process, change its procedures for attaining a refund of taxes in mid-stream when a taxpayer had relied on the existence of a post-deprivation remedy.

Whether the filing period may be shortened from 36 months to one month, in mid-stream, consistently with due process, is largely a matter of perspective. The enactment of Section 3 of Chapter 80 did not eliminate the post-deprivation procedure for refund of sales tax collected on warranty contracts, but it was so artfully inhibitive as to accomplish the same objective. It thus offends our notion of due process.

Our review is *de novo* with no presumption of correctness, *Presley v. Bennett,* 860 S.W.2d 857 (Tenn. 1993), and we affirm the judgment. Costs are assessed to the appellant, and the case is remanded to the Chancery Court of

Shelby County for all necessary purposes, including diligent and appropriate action to ensure reimbursement to the appellee's customers or their assigns.

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William H. Inman, Senior Judge

Concur:

_____
Paul G. Summers, Judge

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David R. Farmer, Judge