

## MINUTES OF THE HOUSE TAXATION COMMITTEE

The meeting was called to order by Chairman Richard Carlson at 9:00 a.m. on March 9, 2009, in Room 535-N of the Capitol.

All members were present except Representatives Benlon, Goico, Dillmore and Hayzlett, who were excused.

## Committee staff present:

Gordon Self, Office of the Revisor of Statutes  
Scott Wells, Office of the Revisor of Statutes  
Chris Courtwright, Kansas Legislative Research Department  
Kathy Beavers, Committee Assistant

## Conferees appearing before the Committee:

Sarah Byrne, Office of the Attorney General, Alcohol Beverage Control  
Richard Cram, Kansas Department of Revenue

## Others attending:

See attached list.

Chairman Carlson stated that the committee minutes for February 25, 26, 27 and March 2, 3, 4, and 5, 2009 were e-mailed to them for review. The minutes will be accepted as written on Thursday, March 12, 2009 if there are no corrections or additions.

**SB 97 - Prescribing penalties for violations of liquor enforcement tax act by retailers.**

The Chairman opened the hearing on **SB 97**.

Chris Courtwright, Kansas Legislative Research Department, briefed the committee on **SB 97**.

Sarah Byrne, Office of the Attorney General, assigned to Kansas Department of Revenue, testified in support of **SB 97** (Attachment 1). She stated that this bill would amend the liquor enforcement tax act to mirror that provision and establish clear authority for the director to fine, revoke or suspend the license of any retailer who fails to timely file and pay its liquor enforcement tax.

The amendment would add the wording *farm winery, microbrewery or distributor to Section 1. (a)*. Ms. Byrnes stated the wording would clarify the Director's authority, create consistent enforcement in the industry and encourage compliance with the provisions of the liquor enforcement tax act.

Amy Campbell, Executive Director, Kansas Association of Beverage Retailers, answered queries from the committee members regarding the Associations agreement/disagreement with the amendment. She stated that the Association did not object to the amendment, but would prefer to add *any licensing subject to K.S.A. 79-4101*. That would clarify any additional businesses that would fall under that category. Ms. Byrnes stated they had no objection to that wording. Representative Carlson requested that Gordon Self work with Ms. Byrnes and Ms. Campbell to amend the balloon. Both stood for questions.

The Chairman closed the hearing on **SB 97**.

**SB 98 - Period of limitations for refunds and adjustments of income by the Internal Revenue Service under the Kansas income tax act.**

The Chairman opened the hearing on **SB 98**.

Richard Cram, Kansas Department of Revenue, testified in support of **SB 98** (Attachment 2). Mr. Cram introduced Jim Bartle, General Counsel, Kansas Department of Revenue, Robert Challquist, Legal Services Attorney, Kansas Department of Revenue and Courtney Hadley, Legal Intern, Kansas Department of Revenue, to the committee. Mr. Cram stated that **SB 98** would amend K.S.A. 2007 Supp. 79-3230 to clarify the statutory deadline for filing income tax refund claims. He explained the two court cases, In re McColley or

CONTINUATION SHEET

Minutes of the House Taxation Committee at 9:00 a.m. on March 9, 2009, in Room 535-N of the Capitol.

In re Lemons, which resulted in the recommended amendments. The Department of Revenue also recommends amendments to subsections (f) and (g) of 79-3230, which concern the statute of limitations on refund claims associated with Revenue Agent Reports (RAR).

Mr. Cram stated that the fiscal impact is not yet determined. He stood for questions.

The Chairman closed the hearing on **SB 98**.

Representative Brown introduced his pages for the day - Eric Williams, Diana Marquez, Rebekah Burgweger and Sophia Templin. They are from Lexington Trails Middle School, DeSoto, Kansas.

Representative Hawk introduced his intern, Jessica Schultz, from Kansas State University (KSU).

Representative Menghini introduced her intern, Miranda Metcalf, a Washburn University student.

The next meeting is scheduled for March 10, 2009.

The meeting was adjourned at 10:15 a.m.

# HOUSE TAX COMMITTEE SIGN IN SHEET

DATE: March 9, 2009

NAME	REPRESENTING
Michelle Sullivan	Capital Strategies
Amy Campbell	KS Association of Beverage Retailers
Dawe Holtwick	Overland Park Chamber
SARAH BYRNE	KDOR-ABC
Derek Hahn	Hahn Law Firm
Matt Casey	BBA

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House Tax Committee  
Senate Bill No. 97

Testimony of  
Sarah Byrne  
Assistant Attorney General, Alcoholic Beverage Control

March 9, 2009

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Good morning Mr. Chairman and members of the committee. I thank you for the opportunity to appear here today to present testimony in support of SB97.

The liquor drink tax act currently has a provision authorizing the director of ABC to impose a fine on, revoke, or suspend the license of any licensee who fails to timely file and pay its liquor drink taxes. SB97 would amend the liquor enforcement tax act to mirror that provision and establish clear authority for the director to fine, revoke, or suspend the license of any retailer who fails to timely file and pay its liquor enforcement tax.

The ABC proposes that section 1 of the bill be amended to include farm wineries, microbreweries, and distributors as persons who may be restrained from engaging in business for a violation of the act:

Section 1. (a) The director of taxation or the director of alcoholic beverage control may enjoin any person from engaging in business as a retailer, *farm winery, microbrewery or distributor* when the retailer, *farm winery, microbrewery or distributor* is in violation of any of the provisions of K.S.A. 79-4101 et seq., and amendments thereto, or any of the terms of this act, and shall be entitled in any proceeding brought for that purpose to have an order restraining the person from engaging in business as a retailer, *farm winery, microbrewery or distributor*. No bond shall be required for any such restraining order or for any temporary or permanent injunction issued in that proceeding.

The ABC supports the passage of SB97, amended as proposed, as it will clarify the Director's power, create consistent enforcement throughout the industry, and encourage compliance with the provisions of the liquor enforcement tax act.

House Taxation Committee

Richard Cram

March 9, 2009

**Testimony in Support of Senate Bill 98**

Representative Carlson, Chair, and Members of the Committee:

Senate Bill 98 would amend K.S.A. 2007 Supp. 79-3230 to make clear the statutory deadline for filing income tax refund claims. Recent opinions issued by the Court of Appeals, *In re Appeal of Lemons*, Docket No. 98,468 (filed September 19, 2008) and the Court of Tax Appeals, *In re Appeal of McColley*, Docket No. 2008-957-DT (filed September 24, 2008) (copies attached), have created confusion in identifying the appropriate statute of limitations for income tax refund claims. The Department recommends Senate Bill 98 to eliminate that confusion.

The purpose of a statute of limitations is to bar stale claims. This is especially important for income tax refund claims, because they seek the return of tax payments from prior years, after that revenue has already been spent. The refunds for those prior tax payments must be paid out of current tax revenues. At some point, the clock must run out on the filing of claims for refund of prior year tax payments. Otherwise, the State bears substantial risk of paying stale refund claims essentially forever. Also, records and evidence become more difficult to retrieve or substantiate as time passes.

Subsection (c) amendment

K.S.A. 2008 Supp. 79-3230(c) provides the general income tax refund statute of limitations for filing income tax refund claims. The amendments proposed to 79-3230(c) are shown below:

No claim shall be allowed for credit or refund of overpayment of any tax imposed by this act unless filed by the taxpayer within three years from the date the original return was filed due, including any extension allowed pursuant to law, or two years from the date the tax claimed to be refunded or against which the credit is claimed was paid, whichever of such periods expires later, or if no return was filed by the taxpayer, within two years from the date the tax claimed to be refunded or against which the credit is claimed was paid. Where the assessment of any income tax imposed by this act has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court;

~~but only if begun within one year after the period of limitation as defined in this act.~~

A claim for an income tax refund is filed as part of the original return or if not, in an amended return. The Department has interpreted 79-3230(c) to mean that a taxpayer must file a refund claim within 3 years of filing the original return, assuming it was timely filed, or if the return was not timely filed (either filed late or not filed at all), then the claim must be filed within 2 years of the date of payment of the tax for which the refund is sought.

*In re McColley*

The taxpayer timely paid estimated taxes and sought and obtained an extension until August 15, 2005 to file his 2004 Kansas income tax return, but failed to file his original 2004 income tax return (claiming a refund) until August 13, 2007. The Department denied the refund as untimely under K.S.A. 2008 Supp. 79-3230(c), and the taxpayer appealed to the Court of Tax Appeals (COTA, formerly Board of Tax Appeals), which held for the taxpayer. The Department has not appealed this case, but seeks clarification of the refund statute of limitations with this proposal.

In *McColley*, COTA held that under 79-3230(c), an untimely-filed return is indistinguishable from a timely-filed one. Under COTA's reading of 79-3230(c), there is essentially no limitations period for filing a refund claim. A taxpayer may file an original return seeking a refund at any time. A taxpayer waiting several years past the due date to file an original return claiming a refund is better off than a taxpayer who timely files an original return and later seeks a refund in an amended return. The proposal seeks to correct that result.

The proposed amendment to 79-3230(c) will provide a simple limitations rule easily understood by taxpayers, practitioners, the Department, and the courts: a taxpayer will have 3 years from the date that the original return was due, including any extensions allowed, to file a refund claim. Also, even if the taxpayer fails to file a refund claim within that time period, the taxpayer will always be allowed 2 years from the date of payment of the tax to seek a refund claim. This is essentially the same as the federal income tax refund statute of limitations in I.R.C. Section 6511, but with elimination of the confusing language. It is also similar to the income tax refund statute of limitations of many other states.

For example, a taxpayer has withholding taxes taken out of wages by his employer for tax year 2008. His original income tax return for tax year 2008 is due by April 15, 2009, although he can obtain an extension until August 15, 2009. If he obtained an extension, he must file the refund claim (either in his original return or an amended return) for any withholding tax on his 2008 wages by August 15, 2012, or it will be barred.

Subsection (f) and (g) amendments

Senate Bill 98 also would also amend subsections (f) and (g) of 79-3230, which concern the statute of limitations on refund claims associated with Revenue Agent Reports (RAR). The proposed amendments to those subsections are shown below:

(f) Any taxpayer whose income has been adjusted by the federal internal revenue service or by the income tax collection agency of another state is required to report such adjustments to the Kansas department of revenue by mail within 180 days of the date the federal or other state adjustments are paid, agreed to or become final, whichever is earlier. Such adjustments shall be reported by filing an amended return for the applicable taxable year and a copy of the federal or state revenue agent's report detailing such adjustments. In the event such taxpayer is a corporation, such report shall be by certified or registered mail.

Notwithstanding the provisions of subsection (a) or (c) of this section, additional income taxes may be assessed and proceedings in court for collection of such taxes may be commenced and any refund or credit may be allowed by the director of taxation within 180 days following receipt of any such report of adjustments by the Kansas department of revenue, or within two years from the date the tax claimed to be refunded or, against which the credit is claimed was paid, whichever period expires later. No assessment shall be made nor any refund or credit shall be allowable under the provisions of this ~~paragraph~~ *subsection* except to the extent the same is attributable to changes in the taxpayer's income due to adjustments indicated by such report. *Failure by the taxpayer to comply with the provisions of this subsection shall not bar the Kansas department of revenue from assessing additional taxes or proceeding in court to collect such taxes.*

(g) ~~In the event of failure to comply with the provisions of this section, the statute of limitations shall be tolled.~~ *Failure by the taxpayer to comply with the requirements for filing returns shall toll the limitation periods for the Kansas department of revenue to assess or collect taxes.*

Prior year federal income tax returns may be examined by the IRS, and if this causes adjustment to the tax liability (either assessment of additional tax or a refund), the IRS will issue an RAR to the taxpayer. The adjustment on the federal return often results in a corresponding adjustment of Kansas income tax liability. An RAR can sometimes be issued many years after the tax year in question, long after the statute of limitations applicable to refunds or assessments may otherwise have expired on any resulting additional state income tax liability or refund. Under subsection (f), a taxpayer receiving an RAR from the IRS is required to file with the Department an amended Kansas income tax return reporting the adjustments, including a copy of the RAR, within 180 days after the earlier of the RAR becoming final or agreed to, or the payment of the adjusted taxes.

Subsection (f) further provides that notwithstanding any otherwise applicable statute of limitations under (a) or (c), the Department has 180 days after receipt of the RAR adjustments to assess any additional tax. The Department may allow a refund resulting from the RAR adjustments within 180 days after receipt of the RAR, or within 2 years of payment of the tax sought to be refunded, whichever date expires later. If the taxpayer fails to timely report the RAR to the Department within 180 days and owes additional tax, then (g) applies, tolling the statute of limitations as to the Department's ability to assess those additional taxes.

*In re Lemons*

After filing their 1994 federal and Kansas income tax returns, the taxpayers were audited by the Internal Revenue Service and were assessed additional taxes in a Revenue Agent's Report (RAR) issued in 1999. The taxpayers paid the additional taxes in 1999 and sought a refund in federal court. The matter was later resolved, the IRS issued the taxpayers an adjusted RAR in 2003 reflecting a federal income tax refund and paid them the refund in early 2004. In late 2004, the taxpayers filed an amended 1994 Kansas return claiming a Kansas income tax refund. The Department refused to accept the return and denied the refund claim as untimely, relying on K.S.A. 2008 Supp. 79-3230(f). Since the taxpayers failed to file the amended 1994 Kansas income tax return claiming the refund within 180 days after the RAR became final or within 2 years of payment of the tax sought to be refunded, Department denied the refund as untimely.

In appealing the denial of the refund claim to the Board of Tax Appeals, the taxpayers argued that the statute of limitations on their refund claim should be tolled under subsection (g), which provided: "In the event of failure to comply with the provisions of this section, the statute of limitations shall be tolled." Despite the Department's argument that the tolling provisions of (g) were not intended to benefit a taxpayer who had failed to comply with the RAR filing deadlines in (f), the Board of Tax Appeals disagreed, allowing the taxpayer's amended return and refund request. The Court of Appeals affirmed the result. Under the *Lemons* court's interpretation, there is apparently no statute of limitations for filing refund claims attributable to an RAR. The taxpayer may file it any time, and the tolling provision in (g) will cure any statute of limitations problem. If the *Lemons* court rationale is applied broadly, then there is no statute of limitations for any income tax refund claim. The Department has filed a petition for review of this decision before the Kansas Supreme Court and is awaiting a decision whether review will be granted.

The Department always understood subsection (g) as not intended to benefit a taxpayer who fails to meet filing deadlines. When a taxpayer fails to comply with the RAR filing requirements of (f), the person should not be better off than someone who complied with them. Otherwise, the RAR filing requirements and the refund statute of limitations become meaningless. The amendments to (f) and (g) proposed by the Department are intended to make clear that a taxpayer's failure to comply with the filing deadlines for RAR's has consequences: an amended return claiming a refund resulting from an RAR is untimely, if filed more than 2 years after the date of payment of the taxes



sought to be refunded and more than 180 days following the earlier of the date that the RAR becomes final or agreed to.

The final sentence of the bill provides: "The provisions of this act shall apply to any refund claim filed after the effective date of this act." This sentence should make clear that the amended language in the bill will apply to refund claims filed after the effective date of this act. It will not apply to refund claims already on file with the Department.

#### Fiscal Impact

The Department is not changing its interpretation of K.S.A. 79-3230(c), (f) and (g) as a result of either *In re McColley* or *In re Lemons* at this point, so there is no immediate fiscal impact with this proposal. As mentioned above, the Department is petitioning for review of the *Lemons* decision. If review is denied, we may need to re-evaluate the fiscal impact. Since the *McColley* decision is a Court of Tax Appeals decision and not an appellate court decision, it is not binding precedent. However, as explained above, statements in both of those decisions can be used to argue that there is no statute of limitations on income tax refunds for someone who never files a return. If that were in fact the case, then approximately \$3-\$5 million additional income tax refunds could be paid out per year. The Department currently denies approximately \$3-\$5 million of income tax refund claims, because those claims were filed after the statute of limitations had expired. Passage of Senate Bill 98 will make clear the existence of a statute of limitations on income tax refund claims.

BEFORE THE COURT OF TAX APPEALS  
STATE OF KANSAS

IN THE MATTER OF THE APPEAL  
OF MCCOLLEY, RANDALL H. & VICTORIA L.  
FROM AN ORDER OF THE DIVISION  
OF TAXATION ON ASSESSMENT OF  
INCOME TAX

Docket No. 2008-957-DT

RECEIVED  
LEGAL SERVICES  
SEP 25 2008  
DEPARTMENT OF REVENUE

ORDER

Now the above-captioned matter comes on for consideration and decision by the Court of Tax Appeals of the State of Kansas. The Court conducted a final hearing in this matter on June 9, 2008. The Taxpayer, Randall H. McColley, appeared pro se. The Kansas Department of Revenue, Division of Taxation, appeared by its counsel of record, Bob Challquist.

After considering all of the evidence and arguments presented, the Court finds and concludes as follows:

The Court has jurisdiction of the subject matter and the parties, as an appeal has been properly and timely filed pursuant to K.S.A. 74-2438 (as amended by 2008 Substitute for House Bill 2018).

The subject matter of this appeal is a claim for a credit of overpayment of income tax for the 2004 tax year.

I.  
Facts

The material facts are not in dispute. Sometime prior to April 15, 2005, the McColleys (the "Taxpayers") filed with the Kansas Department of Revenue (the "Department") an application requesting an automatic extension of time to file their 2004 Kansas Income Tax Return using IRS Form 4868. With their request they included a \$2,000 check as an estimated partial payment of their 2004 tax liability. The Department granted the Taxpayers' request, and the deadline to file their 2004 return was automatically extended to August 15, 2005.

The Taxpayers filed their 2004 return on August 13, 2007. The return showed a tax liability of \$2,519 and payments of withholding in the amount of \$2,048. The return also showed estimated payments totaling \$1,773, along

with the \$2,000 payment included with the Taxpayers' extension request application. The total payment represented on the return was \$5,821, and an overpayment in the amount of \$3,302 was designated as a credit forward, which was to be applied to the Taxpayers' 2005 estimated tax liability.

On October 17, 2007, the Department denied the \$3,302 credit forward because the Taxpayers' 2004 return was filed more than two years after the original due date of April 15, 2005. The Taxpayers appealed the Department's final action to the Board of Tax Appeals Small Claims Division, which affirmed the Department's decision. The Taxpayers timely appealed to the Board of Tax Appeals Regular Division.<sup>1</sup>

## II. Analysis

The central issue in this appeal is whether the Taxpayers claimed their 2004 credit of income tax overpayment within the limitations period prescribed in K.S.A. 79-3230(c) when on August 13, 2007 they filed their 2004 Kansas Income Tax Return designating a claim for a credit forward to 2005.

Under § 79-3230(c), a taxpayer claiming a credit of overpayment must file the claim within:

. . . three years from the date the original return was filed or two years from the date the tax claimed to be refunded or against which the credit is claimed was paid, whichever of such periods expires later, or if no return was filed by the taxpayer, within two years from the date the tax claimed to be refunded or against which the credit is claimed was paid.

The Kansas Legislature revised K.S.A. 79-3230(c) in 2001. The revised statute eliminated the distinction between timely filed returns and late returns regarding refunds, and it conformed state law to the federal income tax statute of limitation provisions. *See* Kan. Legis. Summ. (S.B. 45) (2001). The 2001 revisions clarified, rather than changed, the statutory purpose. *See id.*

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<sup>1</sup> The Board of Tax Appeals is the predecessor in authority to the Court of Tax Appeals.

The current version of § 79-3230(c) is nearly identical to I.R.C. 6511(a). See I.R.C. 6511(a) (2000). However, the Internal Revenue Code limits the amount of the credit to the tax paid within the three-year period preceding the date in which the return was filed, plus any extension of time for filing. I.R.C. § 6511(b)(A)(B). In Revenue Ruling 76-511, the Internal Revenue Service concluded that the limitations period in section 6511(a) could commence on the date a return is untimely filed. See Rev. Rul. 76-511, 1976-2 C.B. 428.

This case turns on the meaning of K.S.A. 79-3230(c). The rule of statutory interpretation to which all other rules are subordinate is that the intent of the legislature controls if the intent can be ascertained from the plain language of the statute. *State v. Scherzer*, 254 Kan. 926, 933-934 (1994). Statutory language should be interpreted in such a way that is in reasonable accord with the legislative intent, and there is a presumption that the legislature manifests its intent in the words it chooses for a statute. See *In re Allen, Gibbs & Houlik, L.C.*, 29 Kan. App. 2d 537, 545 (App. 2001). When a court examines an unambiguous statute, it should not add to or read into the statute language that is not there. See *id.* A statute is ambiguous if it can be given two or more different constructions. See *In Interest of Shelton*, 8 Kan. App. 2d 226, 228-229 (App. 1982). Because the statute in issue here is a tax statute, it must be construed in a light most favorable to the taxpayer. See *In re United Teleservices, Inc.*, 267 Kan. 570, 572 (1999).

The Taxpayers argue that they met the timeliness requirements of K.S.A. 79-3230(c) because the due date for filing their 2004 return was automatically extended to August 15, 2005. According to the Taxpayers, it should then follow that the limitations period commenced upon the extended due date and that the return they filed on August 13, 2007 was a claim made within the two-year limitations period.

The Department disagrees, arguing that the extension request did not extend the original due date of the return and that because the Taxpayers did not submit a return, they had two years from the date the tax was paid. In other words, according to the Department, in order to satisfy K.S.A. 79-3230(c), the Taxpayers would have had to file their claim within two years from April 15, 2005, the date they remitted the \$2,000 as their estimated 2004 tax liability.

The Court finds no legal basis for the Department's interpretation. The language of K.S.A. 79-3230(c) is unambiguous. The word *original* modifies the word *return*. If the legislature had intended for a return's original due date to trigger the limitations period, the legislature could have drafted the statute to effectuate such an intent. Notably, in other statutory provisions, the words "due date," "original due date," and "timely filed" are used to indicate when a return must be filed. *See e.g.* K.S.A. 79-3221(c) (1997); K.S.A. 79-3221(e)(2) (1997); K.S.A. 2007 Supp. 79-32,100e(a).

Based on the plain meaning of K.S.A. 79-3230(c), when read in context with other related statutory provisions, it is clear that the Kansas Legislature did not intend for a return's original due date to trigger the limitations period for bringing a claim, as the Department contends. Notwithstanding the potential problematic effect of interpreting K.S.A. 79-3230(c) as written, the Court must resist adding a requirement, or relying on an interpretation, that is not manifest in the text of the statute. This is particularly true in view of the fact that the statute in issue here is a tax statute, which is penal in nature and thus construed strictly against the state. *See In re Harbour Bros. Constr. Co.*, 256 Kan. 216, 222 (1994).

Further, regardless of whether an extension modifies the original due date of a return, the distinction between timely and untimely-filed returns in K.S.A. 79-3230(c) has been eliminated. *See* KS Legis. Summ., 2001 Reg. Sess. S.B. 45. Even though the language of K.S.A. 79-3230(c) is unambiguous, the summary of the legislative history confirms the Court's interpretation of the statute.

While the Taxpayers failed to file their 2004 return on the original or extended due date, they did file a return. Clearly, filing the 2004 return on August 13, 2007 was an untimely filing, but it was a filing nonetheless. *See* K.S.A. § 79-3221 (1997). Because the amended version of K.S.A. 79-3230(c) contains no language regarding a return's due date, the Taxpayers' untimely-filed return is indistinguishable from a return filed on the original due date of April 15, 2005, or the extended due date of August 15, 2005. As such, the Taxpayers' claim for credit of overpayment—the \$3,302.00 credit forward—was filed on the same date as their return because the return was their claim. The Court concludes that the Taxpayers' claim was filed within three years from the date the original return was filed and thus within the limitations period prescribed in K.S.A. 79-3230(c).

III.  
Conclusion

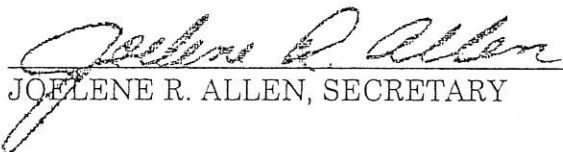
Based on the record evidence, the Court finds that the Taxpayers claimed their 2004 credit of tax overpayment within the limitations period set forth in K.S.A. 79-3230(c) when on August 13, 2007 they filed their 2004 Kansas Income Tax Return, designating their claim as a credit forward. While the return was originally due April 15, 2005, Kansas law does not require that a tax return be filed on its due date in order for a taxpayer to bring a claim for a credit of overpayment. The Taxpayers are thus entitled to their \$3,302.00 credit of tax overpayment.

IT IS THEREFORE ORDERED that, for the reasons stated above, the Taxpayers' 2004 claim for credit of tax overpayment is granted.

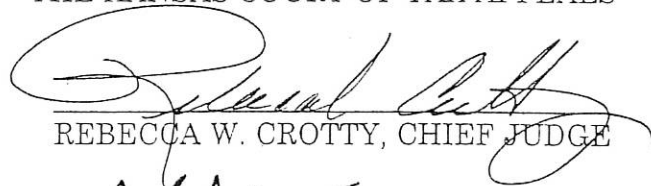
Any party to this action who is aggrieved by this decision may file a written petition for reconsideration with this Court as provided in K.S.A. 2007 Supp. 77-529 (as amended by 2008 Substitute for House Bill 2018). The written petition for reconsideration shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Court's order is unlawful, unreasonable, capricious, improper or unfair. Any petition for reconsideration shall be mailed to: Secretary, Court of Tax Appeals, Docking State Office Building, Suite 451, 915 SW Harrison St., Topeka, KS 66612-1505. A copy of the petition, together with any accompanying documents, shall be mailed to all parties at the same time the petition is mailed to the Court. Failure to notify the opposing party shall render any subsequent order voidable. The written petition must be received by the Court within fifteen (15) days of the certification date of this order (allowing an additional three days for mailing pursuant to statute). If at 5:00 pm on the last day of the specified period the Court has not received a written petition for reconsideration of this order, no further appeal will be available.

IT IS SO ORDERED



  
JOELENE R. ALLEN, SECRETARY

THE KANSAS COURT OF TAX APPEALS

  
REBECCA W. CROTTY, CHIEF JUDGE

  
J. FRED KUBIK, JUDGE

  
BRUCE F. LARKIN, JUDGE

CERTIFICATION

I, Joeline R. Allen, Secretary of the Court of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket No. 2008-957-DT and any attachments thereto, was placed in the United States Mail, on this 24<sup>th</sup> day of September, 2008, addressed to:

Randall H and Victoria L McColley  
11164 Eby  
Overland Park, KS 66210

and a copy was placed in capitol complex building mail, addressed to:

General Counsel  
Legal Services Bureau, Dept. of Revenue  
DSOB, 915 SW Harrison, 2nd Floor  
Topeka, KS 66612

Robert Challquist, Attorney  
Legal Services Bureau, Dept. of Revenue  
DSOB, 915 SW Harrison, 2nd Floor  
Topeka, KS 66612

IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

  
Joeline R. Allen, Secretary



No. 98,468

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF LEMONS,

STEPHEN AND LORETTA,

FROM A FINAL DETERMINATION REGARDING

1994 KANSAS INCOME TAX.

## SYLLABUS BY THE COURT

1. Kansas statute, K.S.A. 2007 Supp. 79-3230(f), directs the taxpayer to report any adjustment by the Internal Revenue Service to the taxpayer's federal income to the Kansas Department of Revenue by filing an amended return within 180 days of the date the federal adjustments are paid, agreed to, or become final, whichever is earlier.

2. K.S.A. 2007 Supp. 79-3230(g) provides that failure to comply with the provisions of 79-3230 tolls the statute of limitations.

3. When a statute is plain and unambiguous, this court must carry out the intent of the legislature as expressed, rather than decide what the law should or should not be.

4. Our appellate courts resort to the analytical step of applying the canons of statutory construction or relying on legislative history to construe a statute in order to effect the legislature's intent only if the statute's language or text is unclear.

5. Under the facts of this case, the 180-day statute of limitations is tolled as a result of the plain language of K.S.A. 79-3230(g).

Appeal from the Kansas Board of Tax Appeals. Opinion filed September 19, 2008. Affirmed.

*Jay D. Befort*, of Kansas Department of Revenue, for appellant.

*S. Lucky DeFries* and *Jeffrey A. Wietharn*, of Coffinan, DeFries & Nothorn, of Topeka, for appellees Stephen and Loretta Lemons.

Before HILL, P.J., PIERRON and GREEN, JJ.

HILL, J.: This case is a judicial review of an order of the Board of Tax Appeals (BOTA) allowing a tax refund to Stephen and Loretta Lemons, a couple who successfully sued the Internal Revenue Service (IRS) for a tax refund. The Kansas Department of Revenue (KDOR) argues the Lemons failed to file their adjusted return in a timely way. Because we cannot read words into a plainly written statute that would



alter its meaning, we affirm the Board of Tax Appeals.

*A time line correctly presents the background of this appeal.*

August 1995: The Lemons filed their 1994 federal and state income tax returns.

April 1999: The IRS sent a report to the Lemons about the audit of their 1994 return. The Lemons disagreed with the report and elected to pay the added tax as requested by the IRS and then sue for a refund.

November 30, 2001: The Lemons filed suit in the United States District Court, District of Kansas, seeking a refund of the added taxes they paid because of the IRS's 1999 report.

December 22, 2003: The Lemons received documents from the IRS reporting their adjusted federal income tax liability for 1994.

February 9, 2004: The Lemons and the IRS agreed to a refund to the Lemons of \$410,000 from overpaid taxes and interest.

March 2004: The Lemons received federal tax refund checks under the settlement agreement.

December 29, 2004: The Lemons filed an amended 1994 Kansas income tax return with the KDOR. The return contained schedules reflecting federal income adjustments that would result in a state tax refund for the 1994 tax year.

Following a completed audit, the IRS, by agreement with KDOR, provides a Revenue Agent's Report (RAR) to KDOR about any adjustments made to a Kansas taxpayer's income. On July 1, 2005, KDOR refused to accept the Lemons' amended 1994 return and refund request because their amended return was not filed within the 180-day period required for reporting adjustments to federal income under K.S.A. 2007 Supp. 79-3230(f). The Lemons timely protested this action to the Secretary of Revenue.

After an informal conference, the Secretary's designee issued a written decision continuing the denial of the Lemons' claim for a refund for the 1994 tax year. The designee decided:

"The purpose of subsection (g) is to prohibit a party who fails to act from obtaining the protection of a period of limitation. . . . Just as a taxpayer should not be allowed to shield themselves from liability by failing to act, [he did not] believe a taxpayer should be allowed to claim a refund by failing to act."

The Lemons timely appealed to BOTA. The parties' filed cross-motions for summary judgment. BOTA, relying on this court's interpretation of the subject statute in the case, *In re Tax Appeal of Trickett*, 27 Kan. App. 2d 651, 8 P.3d 18 (2000), decided the statute of limitations was tolled under K.S.A. 1999 Supp. 79-3230(g). Thus, BOTA ordered KDOR to process the return. Now, by authority of K.S.A. 74-2426(c)(3), KDOR seeks this court's judicial review of BOTA's decision.

*We list the standard of review and the controlling statute.*

This appeal is controlled by the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* The parties do not dispute the facts and limit their arguments to BOTA's interpretation and application of the tolling rules of K.S.A. 2007 Supp. 79-3230(g). So, K.S.A. 77-621(c) defines this court's scope of review in relevant part as follows:

"The court shall grant relief only if it determines any one or more of the following:

.....  
"(4) the agency has erroneously interpreted or applied the law;

.....  
"(8) the agency action is otherwise unreasonable, arbitrary or capricious."

The statutory provisions that are the focus of this appeal are K.S.A. 2007 Supp. 79-3230(f) and (g). They govern the time limits for KDOR's assessment of added taxes or a taxpayer's request for a refund of state income taxes after the IRS adjusts the taxpayer's federal income following an audit. Subsection (f) gives the parties 180 days to act and subsection (g) tolls the statute of limitations:

"(f) Any taxpayer whose income has been adjusted by the federal internal revenue service . . . is required to report such adjustments to the Kansas department of revenue by mail within 180 days of the date the federal . . . adjustments are paid, agreed to or become final, whichever is earlier. Such adjustments shall be reported by filing an amended return for the applicable taxable year and a copy of the federal . . . revenue agent's report detailing such adjustments. . . .

"Notwithstanding the provisions of subsection (a) or (c) of this section, additional income taxes may be assessed and proceedings in court for collection of such taxes may be commenced *and any refund or credit may be allowed by the director of taxation* within 180 days following receipt of any such report of adjustments by the Kansas department of revenue, or within two years from the date the tax claimed to be refunded or, against which the credit is claimed was paid, whichever period expires later. No assessment shall be made *nor any refund or credit shall be allowable* under the provisions of this paragraph except to the extent the same is attributable to changes in the taxpayer's income due to adjustments indicated by such report.

"(g) *In the event of failure to comply with the provisions of this section, the statute of limitations shall be tolled.*" (Emphasis added.)

*BOTA's ruling follows our holding in Trickett.*

Kansas law, K.S.A. 2007 Supp. 79-3230(f), directs the taxpayer to report any adjustment by the IRS to their federal . . . income to KDOR by filing an amended return "within 180 days of the date the federal adjustments are paid, agreed to or become final, whichever is earlier." The Lemons do not dispute they failed to comply with subsection (f). This noncompliance was the basis of the KDOR's refusal to accept and work their return.

Nevertheless, K.S.A. 2007 Supp. 79-3230(g) provides that "[i]n the event of failure to comply with the provisions of this section, the statute of limitations shall be tolled." As noted above, BOTA viewed K.S.A. 2007 Supp. 79-3230(f) and (g) because of this court's interpretation in *Trickett* to mean the Lemons' failure to comply with subsection (f) tolled the 180-day statute of limitations.

Relying on legislative history, KDOR argues subsection (g) tolls the statute of limitations only in its favor but does not excuse a taxpayer's failure to comply with the compulsory duty in subsection (f) to report timely any federal adjustments to their income. It insists that in relying on *Trickett*, BOTA failed to recognize this court's reason for its holding therein. The Lemons argue in response that BOTA correctly applied *Trickett* to the statute and to the undisputed facts of the case.

The *Trickett* court's interpretation of the statute was in a factual context opposite to this case. Larry N. Trickett lived and worked in Kansas during the tax years of 1988-1991. The KDOR received an RAR from the IRS, but after 2 years the department had received no amended tax return from Trickett. The department eventually assessed taxes based on the RAR. Trickett argued the department only had 180 days after the receipt of the RAR to assess taxes and they failed to do so. In reply, the KDOR argued subsection (g) tolled the 180-day period. *Trickett* overruled BOTAs and found subsection (g) tolled KDOR's time for assessing added taxes against any taxpayer who fails to file an amended return on receiving an RAR. 27 Kan. App. 2d at 652.

The *Trickett* court rejected BOTAs prior conclusion the second paragraph of subsection (f) meant KDOR must assess taxes within 180 days of its receipt of the RAR. *Trickett* found such an interpretation had been previously rejected in the holding *In re Morgan*, 209 B.R. 531, *motion to alter order denied* 211 B.R. 56 (Bankr. D. Kan. 1997), which decided that subsection (g) was triggered because the taxpayers failed to file the amended return and RAR required by subsection (f). Therefore, *Trickett* decided "[s]ubsection (g) tolls the statute of limitations when a taxpayer does not comply with the provisions of the statute." 27 Kan. App. 2d at 659.

Given this holding in *Trickett*, BOTAs decided the factual distinction between KDOR assessing more taxes versus the Lemons seeking a refund is immaterial because subsection (g) does not state the tolling provision can only be invoked by KDOR and not the taxpayer.

KDOR suggests that this distinction is critical and argues the legislature intended to toll the limitation period only for KDOR and not the delinquent taxpayer. Specifically, KDOR suggests the rationale of *Trickett* and *Morgan* is based only on the system of self-assessment of taxes in Kansas. It argues that BOTAs reliance on the one sentence from *Trickett* set forth above

"does not recognize nor contemplate the additional language found in that case which explains the court's rationale as its holding. . . . Reading the whole case reveals the *Trickett* court analyzed that the limitations period is tolled in favor of the KDOR as a result of a taxpayer's failure to comply with the statute requiring them to amend their returns within 180 days of the date the federal or state adjustments are paid, agreed to, or become final. The *Trickett* court, relying on *Morgan*, states that a '[t]axpayer who fails to comply under subsection (f) should not reap greater rewards than a taxpayer who fails to comply under subsections (a) and (c).' 27 Kan. App. 2d at 660. BOTAs reliance on one statement from the *Trickett* case without acknowledging the rationale of that case and *Morgan* does not warrant rewarding non-compliant Appellees with the opportunity to amend a return outside the statutory time frame."

KDOR further asserts that BOTAs order allowing the Lemons to amend their returns after the time frame set out in K.S.A. 2007 Supp. 79-3230(f) ignores the Kansas tax system and "relegates the applicable statute and its limitation periods to meaningless verbiage." See *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 630-31, 132 P.3d 870 (2006) (where a statute is found to be ambiguous, the rules of statutory construction provide that, generally, courts should construe it to avoid unreasonable results and presume the legislature does not intend to enact useless or meaningless legislation).

The trouble with the KDOR's argument is that when a statute is plain and unambiguous, this court must carry out the intent of the legislature as expressed, rather than decide what the law should or should not be. See *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003). Our appellate courts resort to the analytical step of applying canons of statutory construction or relying on legislative history to construe the statute to effect the legislature's intent only if the statute's language or text is unclear. See *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007).

KDOR fails to show how the statutory language here is unclear. Rather, KDOR argues what the law

should be. K.S.A. 2007 Supp. 79-3230 (g) does not distinguish between when or in whose favor the statute is tolled. The law's plain language states, "[i]n the event of failure to comply with the provisions of this section"—which includes subsection (f)—"the statute of limitations *shall be tolled.*" (Emphasis added.)

Despite KDOR's request, in cases such as this, where a taxpayer is seeking a refund, we need not speculate why the taxpayer would not immediately seek a refund within the 180-day window that subsection (f) requires. The distinction between applying subsection (g)'s tolling provision in favor of KDOR or in favor of the delinquent taxpayer has no clear legal significance—at least as the statute now reads.

Stated another way, the plain language of K.S.A. 2007 Supp. 79-3230(g) provides that a failure to comply with subsection (f)'s requirement to report adjustments to federal income, the statute of limitations "shall be tolled," without regard to the results such an adjustment will have on the taxpayer's state income tax obligation. This includes KDOR's assessment of added taxes versus the taxpayer's claim to a refund.

KDOR's argument there is no legislative intent for subsection (g) to toll the statute of limitations where the taxpayer is seeking a refund and fails to file timely the amended return, ignores our mandate that this court cannot read into a statute words not readily found therein. Subsection (g)'s tolling provision is not limited to the tolling of the statute of limitations for purposes of KDOR's assessment of added taxes. If the legislature intends to limit the tolling provided for in subsection (g), it is free to do so. As subsection (g) currently reads, the legislature has not done so.

Therefore, we hold that BOTA did not erroneously interpret K.S.A. 2007 Supp. 79-3230(f) and (g) because of *Trickett's* holding. The Lemons' 1994 amended tax return, though untimely under subsection (f), should be allowed under the tolling provision of subsection (g). Further, we do not find BOTA's ruling unreasonable, arbitrary, or capricious.

Affirmed.

END



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