

**COMMONWEALTH OF KENTUCKY
BOARD OF TAX APPEALS
FILE NO. K10-R-27**

**INTERSTATE GAS SUPPLY, INC
FOR THE USE AND BENEFIT OF
TRI-STATE HEALTHCARE LAUNDRY, INC.**

APPELLANT

V.

ORDER NO. K-22157

**FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE**

APPELLEE

The Appellant having filed a Motion for Summary Disposition, the Appellee having filed a Response, the parties having participated in an oral argument on May 21, 2012, and the Board being otherwise sufficiently advised, the Board hereby enters the following decision as a matter of law.

BACKGROUND

The Department of Revenue denied a refund claim made for periods from September '05 to August '09 by Interstate Gas Supply Inc., (IGS), who assigned its refund claim of approximately \$100,000 in use tax plus applicable interest, to Tri-State Healthcare Laundry, Inc. IGS is an Ohio for-profit natural gas marketing company. IGS sells gas to Kentucky customers by delivering the gas to a Kentucky "city gate" belonging to the applicable public utility that serves the taxpayer and then the gas is distributed through a pipeline system to the customer.

Tri-State Healthcare (Tristate) is a company located in Kenton County that provides laundry services to several non-profit hospitals in Northern Kentucky. Tristate purchased significant amounts of natural gas from IGS for use in its business in Kentucky. IGS collected

use tax from Tristate for these transactions and remitted it to the state. The taxpayer does not deny that use tax is due when an out- of- state seller consummates a sale outside of Kentucky, and the tangible personal property is shipped to the purchaser in this state, nor does the taxpayer argue that out- of- state sellers, like IGS, may be required to collect the use tax.

What IGS and Tristate are claiming, is that the sales of natural gas were completely exempt from use tax under the Kentucky Constitution, because Tristate is an institution of purely public charity. There is no question about whether Tristate is an institution of purely public charity. The Department of Revenue sent Tristate a letter in 1998 stating that it was exempt from property taxation as an institution of purely public charity under Section 170 of the Constitution.

The specific and sole question before this Board, is whether institutions of purely public charity are exempt from the use tax under Section 170 of the Constitution, as well as property tax. The Department of Revenue argues that the Kentucky Supreme Court's decision in Children's Psychiatric Hospital of Northern Ky. v. Revenue Cabinet, 989 S.W.2d 583 (Ky. 1999) is controlling and that it limits the Section 170 constitutional exemption to an exemption from property taxes.

The taxpayer claims that the Children's Psychiatric decision applies only to the health care provider tax at issue in that case and that Section 170 of the Constitution applies to all revenue raising taxes. The taxpayer claims alternatively, that even if the exemption is limited to property taxes, the incidence of the use tax is so similar to a property tax that it should be exempt from use taxes as well.

This Board is presented then with the first task of reviewing the Children's Psychiatric decision to determine what the Court held. If this Board agrees that it limits the constitutional exemption for institutions of purely public charity to an exemption from property taxes, then it

will need to address the taxpayer's alternative legal argument that the use tax is akin to a property tax. This Board and the parties are aware that the Court of Appeals was recently presented with the very issue that is before this Board--whether the Children's Psychiatric case holds that Section 170 of the Constitution is limited to an exemption from property taxes only. The case of Commonwealth v. Saint Joseph Health System, 2010-CA-001086-MR, was decided on October 7, 2011 and a motion for discretionary review is pending in the Kentucky Supreme Court. This case has a different preliminary issue concerning the utility tax. The Court of Appeals ruled on the preliminary issue in a way that did not allow it to reach the constitutional exemption issue before this Board. If the St. Joseph Hospital case is presented to and taken by the Supreme Court, the Supreme Court, however, might address and resolve the very issue before this Board. Rather than hold this case in abeyance, this Board will enter its decision as a matter of law, so that the parties may progress with this matter and proceed to a higher court.

CONCLUSIONS OF LAW

In the Children's Psychiatric case, seventeen hospitals and the Kentucky Hospital Association challenged the constitutionality of the hospital provider tax, claiming that it violated Section 170 of the Kentucky Constitution. Less than a page and a half of the 16-page opinion concerns Section 170 of the Kentucky Constitution. In its discussion, the Court looked to the constitutional debates and the first compilation of statutes following the constitutional debates and determined that according to those debates "Section 170 only exempts property tax" and that the Kentucky Statutes title for Section 170 ("Property exempt--cities may exempt manufactories") was "strong evidence that Section 170 applies only to ad valorem taxes." Id. at 11,12.

The Appellant argues, however, that there is "an unbroken line of cases stretching back

to 1896 [that] holds that Ky. Const. Section 170 exempts 'institutions of purely public charity' from all Kentucky taxes levied to raise revenue for general expenditure purposes." The Appellant describes Children's Psychiatric as "an unabashedly result-oriented decision involving the Kentucky hospital provider tax, " that does not overrule this long line of cases. The Department of Revenue argues that this decision implicitly overruled numerous older decisions to the contrary, including those relied upon by the Appellant in this case. Although the Supreme Court expressly overruled Corbin YMCA v. Commonwealth, 205 S.W. 388 (1918), calling the Corbin decision "an aberration," the Court further stated that "when faced with incidental decisions from the past, this Court must follow the decisions that resonate the sounder of reasoning." Id. at 11.

The Supreme Court in no way limited its decision to a denial of the exemption for the health care provider tax only. The Court very clearly states that "Section 170 applies only to ad valorem taxes." Id. at 12. The denial of exemption is for all non-property taxes. This Board, therefore, must follow this most recent pronouncement by the Kentucky Supreme Court on this issue and conclude that under Children's Psychiatric, the Section 170 exemption is limited to property taxes and does not apply to exempt Tristate from use taxes.

The taxpayer claims alternatively, that even if the exemption is limited to property taxes, the incidence of the use tax is so similar to a property tax that it should be exempt from use taxes as well. The taxpayer, who argues that the use tax is imposed on Tri-state's exercise of property rights--the use, storage, or consumption of natural gas purchased from IGS, relies upon several of the older Section 170 cases as support. The use tax, however, is clearly an excise tax by the express terms of the statute. See KRS 139.310(1). The courts have held that "an excise tax includes every form of taxation not imposed directly upon property or a person." Circle "C" Coal

Co., Inc. v. Commonwealth, 628 S.W.2d 883 (Ky.App. 1981) In the Circle "C" Coal case, the taxpayer argued that the severance tax was an ad valorem tax, because its measure was based upon the valuation of the coal severed. In rejecting this argument, the Court held that the severance tax is not imposed directly on property, but rather is an excise tax and that the measure of the taxation was but a standard. Id. at 885. While the use tax is imposed upon the use, storage and consumption of one's property, it certainly is not a tax that is levied on a percentage or rate of the value of that property on a regular basis. See, American Life & Accident Insurance Co. of Kentucky, Inc. v. Revenue Cabinet, 173 S.W.3d 910 (Ky. App. 2004) The use tax is not a property tax and the Appellant, therefore, is not exempt from the use tax.

The Department of Revenue's Final Ruling No. 2010-56 is upheld and the Appellant's refund claims are denied.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

**DATE OF ORDER
AND MAILING: June 20, 2012**

**KENTUCKY BOARD OF TAX APPEALS
FULL BOARD CONCURRING**

**Cecil Dunn
Chair**