

# Appealing a Kentucky tax matter

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**M**any taxpayers resolve their Kentucky tax assessments and refund claims with the Kentucky Department of Revenue. Hopefully, the Department will agree with your position or to some sort of settlement. But, what if you and the Department cannot reach a settlement? Maybe the Department will not come down to your “number.” What do you do when you cannot convince the Department that your position is correct? What if the Department attempts to put pressure on you by saying that they will issue a Final Ruling? What can you do? You could appeal to the Kentucky Board of Tax Appeals.

## Kentucky Board of Tax Appeals

A taxpayer, typically via their counsel, may appeal a Final Ruling issued by the Department to the Board. *See* KRS 131.340. Although the Department generally issues a Final Ruling on its own, a taxpayer can request one. *See* KRS 131.110(4). If a taxpayer does not appeal a Final Ruling, the matter (*e.g.*, an assessment or refund denial) becomes final.

The Board is a three person quasi-adjudicative body, appointed by the Governor, with an attorney, and two business people, one of which is often an accountant or a CPA. Cecil F. Dunn, Esq. (Chair), Lanola Parsons, and Lindy Karns, CPA, now serve on the Board. According to its Web site:

The [Board] provides an independent, impartial and neutral

forum for hearing and resolving disputes on tax issues in a timely, cost-effective alternative to the court system.

In order to ensure impartial decision making, the [Board] is organized under the Public Protection Cabinet and is completely independent of any of the taxing authorities that may appear before the board.

Sounds good, doesn't it?

To appeal a Final Ruling to the Board, a taxpayer must file a written Petition of Appeal. *See* KRS 131.340(3); 802 KAR 1:010. The Board's rules provide for discovery, including depositions (asking questions of a person under oath), interrogatories (written questions), requests for production of documents, and requests for admissions. *See* 802 KAR 1:010. Even when the Department has conducted a field audit, posed written questions to a taxpayer, and requested documents, the Department will often engage in discovery. Taxpayers often find this somewhat redundant. Discovery provides a taxpayer

with an opportunity to explore the Department's position more fully.

Often matters pending before the Board settle before the hearing. So, just because the Department issues a Final Ruling and the taxpayer appeals, it does not mean that the matter will be litigated all the way to the Supreme Court.

Prior to the hearing, the parties each submit a Prehearing Statement which, among other things, summarizes issues of facts and law. *See* 802 KAR 1:010 §6. A typical hearing is akin to an abbreviated bench trial and is conducted. The taxpayer and the Department may “present evidence and argument, conduct cross-examination, and submit rebuttal evidence ...” KRS 13B.080(4). The evidence submitted becomes part of the record. *See* KRS Chapter 13B.

Often, the Board orders the parties to file briefs after the hearing. *See* 802 KAR 1:010 §7. When there are no material facts in dispute, the Board's rules provide for a summary disposition procedure by which the Board may decide an appeal on the basis of the parties' briefs without a hearing. *See* 802 KAR 1:010 §10. Ultimately, the Board will issue a Final Order. *See* KRS 13B.120.

## County Circuit Court

An aggrieved party (which could be the taxpayer, the Department, or both, whoever loses in some way) may appeal a Final Order of the Board to Franklin Circuit Court or to the Circuit Court of the county in which the appealing party resides or operates

a business, by filing a petition for judicial review. *See* KRS 13B.140; KRS 131.370. If the Department loses, it generally appeals to Franklin Circuit Court. Taxpayers often, but not always, prefer to file their appeal in the Circuit Court of a county in which the Court is familiar with their business.

Although styled as an appeal, the Circuit Court review procedure is actually an original action like any other cause of action, and once the Circuit Court acquires jurisdiction, the Kentucky Rules of Civil Procedure apply. *See* KRS 23A.010(4). When both parties appeal, it can get complicated. *See, e.g., Revenue Cabinet v. Marquette Transportation Co., Inc.*, No. 2006-CA-002639-MR; 2007-CA-001666-MR; 2007-CA-001722-MR (Ky. App. 2009).

The Circuit Court does not conduct a new trial; rather, it considers only the KBTA record. *See Monumental Life Ins. Co. v. Dep't of Revenue*, 201 S.W.3d 500 (Ky. App. 2006). It also considers the parties' briefs and any arguments heard. The Court will then render its Opinion based solely on this information.

### **Kentucky Court of Appeals, Kentucky Supreme Court and the U.S. Supreme Court**

Like any other Circuit Court case, a party aggrieved by a Circuit Court's Opinion in a tax matter may appeal that decision to the state-level Court of Appeals, as a matter of right. *See* KRS 13B.160. Similar to a Circuit Court hearing an appeal from the Board, the Court of Appeals renders its opinion based on the Board record, the briefs submitted and oral



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argument, if granted. *See* Ky. Civ. Rul. 72 to 76. This is the last level of appeal to which a party is entitled without the reviewing court's permission.

An appeal from the Court of Appeals is available to the Kentucky Supreme Court, but *only if* the Court grants an aggrieved party's motion for discretionary review. *See* Ky. Civ. Rul. 76.20. Otherwise, it's game over – with one exception. The United States Supreme Court could grant *certiorari* and hear a Kentucky case if it involves a federal question – such as a claim that a statute violates the Commerce Clause of the U.S. Constitution. *See, e.g., Dep't of Revenue v. Davis*, 553 U.S. 328 (2008).

### **Settling Kentucky Tax Matters**

Just because the Department has issued a Final Ruling does not mean that a tax matter cannot still be resolved by agreement. Kentucky tax matters pending at the Board, Circuit Court, Court of Appeals, and the Kentucky Supreme Court are resolved by agreement all the time. By statute, "The Department ... is encouraged to settle controversies on a fair and equitable basis and shall be authorized to settle tax controversies based on the hazards of litigation applicable to them." KRS 131.030(3) ([ ] added in context). Given this statutory encouragement and authorization, demonstrating to the Department that it has hazards of litigation would seem to be essential to settling a tax matter.

### **"Meanwhile, at the Hall of Justice ..." – Super Friends Narrator (DC Comics)**

Most tax matters can be resolved with the Department during audit or in protest. But, resolving tax matters with the Department for the "right" amount sometimes requires being willing to stand your ground and to actually take the next step, *i.e.*, go to the Board and, if necessary, beyond.

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