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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002019-MR

KING DRUGS, INC.;
KING HOME CARE, INC.

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 03-CI-00550

COMMONWEALTH OF KENTUCKY,
REVENUE CABINET; AND KENTUCKY
BOARD OF TAX APPEALS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON, SCHRODER AND TAYLOR, JUDGES.

SCHRODER, JUDGE: This is an appeal from a decision of the Franklin Circuit Court, reversing a decision of the Kentucky Board of Tax Appeals, and reinstating a sales and use tax assessment issued by the Kentucky Revenue Cabinet. We affirm.

This appeal concerns the proper interpretation of KRS 139.472(2). The facts of this case are not in dispute.

Upon audit by the Kentucky Revenue Cabinet, King Drugs and King Home Care (hereinafter collectively referred to as "King") were issued a sales and use tax assessment of \$75,342.09 and \$13,253.86, respectively, for the period April 1, 1997, through January 31, 2001. The assessment corresponded to various medical items for which King claimed tax-exempt status under KRS 139.472(2). King objected to the assessment, and the Revenue Cabinet ultimately issued a final ruling upholding the assessment. King appealed to the Kentucky Board of Tax Appeals ("Board"), and in an order issued April 10, 2003, the Board overruled the decision of the Revenue Cabinet. In an opinion and order entered September 9, 2003, the Franklin Circuit Court reversed the Board and reinstated the assessment. This appeal followed.

KRS 139.472 exempts certain medical-related items from sales and use tax. The sole issue on appeal is the correct interpretation of the first portion of subsection (2) of KRS 139.472 (as it stood during the time period at issue in this case). During the time period for which the assessment was issued in this case (April 1, 1997 through January 31, 2001), KRS 139.472(2) provided as follows:¹

¹ During the time period at issue, section (2) was modified to add the text "wheelchair repair and replacement parts," and "urostomy supplies, ileostomy supplies". 2000 Kentucky Acts, Ch. 209. Subsequent to the time period at issue, the entire statute was extensively modified effective July 1, 2004. 2003 Kentucky Acts, Ch. 124, §21.

"Prosthetic devices and physical aids" for the purpose of this section shall mean and include artificial devices prescribed by a licensed physician, or individually designed, constructed, or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual; artificial limbs, artificial eyes, hearing aids prescribed by a licensed physician, or individually designed, constructed, or altered solely for the use of a particular disabled person; crutches, walkers, hospital beds, wheelchairs, wheelchair repair and replacement parts, and wheelchair lifting devices for the use of invalids and crippled persons; colostomy supplies, urostomy supplies, ileostomy supplies, insulin and diabetic supplies, such as hypodermic syringes and needles, and sugar (urine and blood) testing materials purchased for use by diabetics. (Emphasis added).

At issue is the highlighted portion of the statute.

King maintains that, per the plain language of KRS 139.472(2), any artificial device (which is a prosthetic device or physical aid) prescribed by a licensed physician qualifies as exempt.² The Board of Tax Appeals agreed. The Revenue Cabinet

² The medical supplies were described, per the circuit court's opinion and order, as including: "C-Paps, TENS, heating pads, mattresses, trapeze bars, commode chairs, humidifier, nebulizers, canes, ventilators, suction machines, pressure pads, CPM machines, C-Pap supplies, catheters, IV pumps, IV poles, bandages, milk bag, cups, ileostomy supplies, masks, containers, and urostomy supplies." It was stipulated that all of the items were "artificial devices"; that essentially all were prescribed by licensed physicians; and that none of the items were "individually designed, constructed, or altered solely for the use of a particular crippled person." (We note that while it appears that some of these items (ileostomy supplies, urostomy supplies) qualify under the last portion of KRS 139.472(2) this was not at issue.) It was stipulated that King based its claim for an exemption on KRS 139.472(2) on the fact that the artificial devices were prescribed by a licensed physician.

maintains that the disputed portion of KRS 139.472(2) does not exempt all artificial devices prescribed by a licensed physician, but is properly read to exempt: (1) artificial devices prescribed by a licensed physician for the use of a particular crippled person so as become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual, or (2) artificial devices individually designed, constructed, or altered solely for the use of a particular crippled person so as become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual. The circuit court found the Revenue Cabinet's interpretation correct and overruled the Board.

On appeal, King contends that the plain language of the disputed portion of the statute creates two separate exemptions - one for any artificial device which is a prosthetic device or physical aid prescribed by a licensed physician, and, following the word "or", a second and separate exemption which encompasses artificial devices that are "individually designed, constructed, or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure, including the extremities of the individual."

Statutory construction is a matter of law and subject to de novo review. Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488, 490-491 (Ky. 1998). "[T]ax exemptions are narrowly construed, and the party seeking the exemption has the burden to show that he, she, or it is entitled to the exemption." Revenue Cabinet v. Hubbard, 37 S.W.3d 717, 719 (Ky. 2000) (citing Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet, 689 S.W.2d 14, 17 (Ky. 1985)).

Where the language of a statute is clear and unambiguous, it must be given effect as written. McCracken County Fiscal Court v. Graves, 885 S.W.2d 307 (Ky. 1994). "A statute is not open to construction unless it is ambiguous and will bear two or more constructions." Fayette County v. Hill, 201 S.W.2d 886, 889 (Ky. 1947). "When a statute is ambiguous and its meaning uncertain, the legislative intent should be ascertained by considering the whole statute and the purpose intended to be accomplished." Lexington-Fayette Urban County Health Dept. v. Lloyd, 115 S.W.3d 343, 347 (Ky.App. 2003). A court's interpretation of a statute should produce a practical and reasonable result. Id.

We believe the placement of the comma and the word "or" following the words "prescribed by a licensed physician"

does create an ambiguity. However, we conclude that the ambiguity is resolved by consideration of the statute's history.

As originally enacted (effective January 1, 1971), S.B. 4 added a new section to Chapter 139 of the KRS to read as follows:

"Prosthetic devices and physical aids" for the purpose of this Act shall mean and include artificial devices individually designed, constructed or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction or substitute for the bodily structure including the extremities of the individual; artificial limbs, artificial eyes, hearing aids individually designed, constructed or altered solely for the use of a particular disabled person; crutches and wheelchairs for the use of invalids and crippled persons.

1970 Kentucky Acts, Ch. 12.

In 1986, KRS 139.472 was amended to add the words "prescribed by a licensed physician" (as well as other modifications not pertinent to this appeal) as follows:

(2) "Prosthetic devices and physical aids" for the purpose of this section shall mean and include artificial devices prescribed by a licensed physician, or individually designed, constructed or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction or substitute for the bodily structure including the extremities of the individual; artificial limbs, artificial eyes, hearing aids prescribed by a licensed physician, or individually designed, constructed or altered solely for the use of a particular disabled person[.]

1986 Kentucky Acts, Ch. 471. (Emphasis added).

We believe the addition of the words "prescribed by a licensed physician" evidences a legislative intent to exempt the types of devices enumerated in the original version ("artificial devices . . . for the use of a particular crippled person so as to become a brace, support, supplement, correction or substitute for the bodily structure including the extremities of the individual" and "artificial limbs, artificial eyes, hearing aids . . . for the use of a particular disabled person") whether such devices were prescribed, or, without a prescription, if individually designed, constructed, or altered.³ Accordingly, we conclude that the disputed portion of KRS 139.472(2) required an artificial device prescribed by a licensed physician to be "for the use of a crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual."⁴

The order of the Franklin Circuit Court is affirmed.

³ We note that the current version of KRS 139.472, effective July 1, 2004, is more inclusive as to prosthetic devices which qualify as exempt, and eliminates the "crippled" requirement. See Revenue Cabinet v. Hubbard, 37 S.W.3d 717 (Ky. 2000).

⁴ We note that King, in its brief to this court, appears to misconstrue both the Revenue Cabinet's and the circuit court's interpretation of the statute. King asserts that the Revenue Cabinet and circuit court interpreted the disputed portion of KRS 139.472(2) as requiring an artificial device to be both prescribed by a physician and be individually designed, constructed, or altered solely for the use of a particular crippled person so as to become a brace, support, etc., in order to qualify as exempt. Such an interpretation is not what the Revenue Cabinet argues, nor what the circuit court concluded.

MINTON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE
COMMONWEALTH OF KENTUCKY,
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