

6-26-84

DELTA AIR LINES, INC.

v. 84-SC-44-D

COMMONWEALTH OF KENTUCKY
REVENUE CABINET

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82-CA-2591-MR

FRANKLIN CIRCUIT COURT 81-CI-1347

RECOMMENDATION TO DENY DISCRETIONARY REVIEW BY JUSTICE WINTERSHEIMER

The Court of Appeals opinion written by Judge Howerton, with Judges Cooper and Hogge, is to be published.

The crucial question is whether this is a final and appealable order. There are two separate taxable items, fuel and food. On the fuel issue, the Court of Appeals affirmed the decision of the circuit court and the Board of Tax Appeals. On the food question the Court of Appeals remanded the matter for further proceedings.

Delta presents three arguments: (1) the decisions of the Board of Tax Appeals, the Franklin Circuit Court and the Court of Appeals incorrectly interpreted the applicable statutory law; (2) the fact that the Revenue Department used the formula method to determine the tax for seventeen years precluded the sudden departure from this practice; and (3) as now interpreted, the Kentucky sales tax scheme violates the movant's Fourteenth Amendment rights to Due Process and Equal Protection.

Shortly after the Kentucky General Assembly enacted a sales and use tax upon retail sales and the consumption of personal

property in 1960, the Revenue Department met with several airlines and developed a formula to calculate the tax to be paid by the airlines. The formula derived an amount based on the amount of fuel and meals purchased in Kentucky and consumed within the state's borders. Delta paid the tax computed according to this formula for the next seventeen years. This suit for a refund was filed after movant was notified in January 1979 that the Department was discontinuing the use of the formula and thereafter Delta would be expected to pay tax on all purchases made in Kentucky as provided by the general sales tax statute, KRS 139.200.

This Court does not need to review the substantive arguments behind these issues at this time because the decision of the Court of Appeals is clearly not an appealable decision. Delta had argued that the trial courts had disregarded the applicability of 103 KAR 27:080 to the purchases of meals in Kentucky. This regulation regulates taxation of meals served by various transportation facilities. Delta argued that because these meals purchased in Kentucky were not served until the planes reached cruising altitude, the meals would not be served in Kentucky airspace. The planes, Delta says, do not reach cruising altitude until after leaving Kentucky, so no tax should apply to these sales. No finding of fact was made on whether any meals might be served or consumed in Kentucky, and the circuit court did not consider any interpretation of the regulation in question. For that reason, the Court of Appeals remanded the case in part to the Board of Tax Appeals

for further findings.

Whether a case may properly be appealed is governed by CR 54.01 and 54.02. CR 54.01 specifically provides that "(a) final or appealable judgment is a final order adjudicating all the rights of the parties in an action or proceeding or a judgment made final under R. 54.02." An order which does not put an end to the action, but leaves something further to be done before the rights of the parties are terminated is not a final order from which an appeal may be taken. Campbell v Hulett, 243 S.W.2d 608 (1951). Because the Court of Appeals decision does not adjudicate all the rights of Delta concerning the taxability of meals purchased in Kentucky, and since the Board of Tax Appeals must make further findings before the rights of the parties are terminated, the judgment is not appealable unless it is made so by CR 54.02.

Rule 54.02 permits the appeal of one claim of relief in a multi-claim or multi-party action when certain specified conditions are met. The court may grant a final judgment upon less than all the claims "only upon a determination that there is no just reason for the delay." CR 54.01. Moreover, the judgment "must recite such determination and shall recite that the judgment is final." Id. When a claim remains for adjudication which is not "extinguished as a matter of law" and the judgment does not comply with the recitation requirements of CR 54.02, an appeal must be dismissed. Signer v. Arnold, Ky., 436 S.W.2d 493, 494 (1969). The purposes of Rules 54.01 and 54.02 is to prevent "staggered

appeals or piecemeal proceedings in the appellate court." Cornett v. Wilder, Ky., 307 S.W.2d 752 (1957). If a party seeks to adjudicate one claim immediately, it is that party's duty to persuade the court to fashion its judgment in the manner required by Rule 54.02. Signer, supra.

Regardless of the merits of any of the movant's arguments, there are no special reasons to grant discretionary review until the Board of Tax Appeals and the Circuit Court have resolved the issue of the taxability of the meals.

It may be prudent to consider suspending publication of this case until a final decision.