

State Tax Spotlight on Erica Horn

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In the early 1990s, Erica L. Horn was beginning her law career in the general litigation section of the Lexington, Kentucky, office of Stites & Harbison PLLC when a partner in the firm's Frankfort office asked for help.

"There was an attorney in our Frankfort office named Bruce Clark who had more work than he could do, and he asked if there [was] an associate that could come to Frankfort and help him, and I volunteered," Horn, now counsel to the firm at Stoll Keenon Ogden PLLC in Lexington, told Tax Analysts.

Horn didn't know what she was getting into, but the move transformed her life in three major ways: It launched her decades-long career as a state tax lawyer; it introduced her to her mentor; and it thrust her into a major role in some of the most significant Kentucky state tax litigation of the last quarter-century.

"The first case that I worked with [Clark] on was *GTE and Subsidiaries v. Revenue Cabinet*," Horn recalled. The case, decided in 1994 by the Kentucky Supreme Court, meant that GTE and its subsidiaries had the right to file a Kentucky combined income tax return as a unitary business, which was contrary to the Revenue Cabinet's 1988 policy statements prohibiting the filing of combined returns under the unitary business concept. It was a big win for the taxpayer, for the local counsel, Clark and Horn, and for the out-of-town counsel, Paul H. Frankel of Morrison & Foerster LLP.

"She couldn't have worked any better or been more impressive," Clark, now retired, said from his home in Florida. "Erica helped me organize everything. She brought everything together."

Combined Returns in Kentucky

Of course, *GTE* was only the beginning for the team of Horn and Clark and for the right of unitary businesses to file Kentucky combined reports. While *GTE* was pending at the high court, Johnson Controls Inc. alleged that the revenue cabinet was secretly accepting combined returns from select corporate taxpayers. Once *GTE* came down, Johnson Controls filed for a refund based on alleged overpayments it incurred while being forced to file separate corporate returns.

"And that's where economic reality clashed with legal principles," Clark said.

Realizing that refunding corporations that filed separate returns while prohibited from filing combined ones would cost the state many millions of dollars, the General Assembly passed a series of bills to extinguish the refund claims of taxpayers that filed claims as a result of *GTE*, Horn said. "The General Assembly stated the bills were to be applied retroactively. This gave rise to the *Johnson Controls* case."



Erica L. Horn

In *Miller v. Johnson Controls Inc.*, Horn and Clark, along with Frankel, once again represented the taxpayer in its quest to prove that Kentucky's law changes on combined returns were unconstitutional. Those changes maintained the 1988 bar on combined returns under the unitary business concept but instituted retroactivity with the following language:

No claim for refund or credit of a tax overpayment for any taxable year ending on or before December 31, 1995, made by an amended return or any other method after December 22, 1994, and based on a change from any initially filed separate return or returns to a combined return under the unitary business concept or to a consolidated return, shall be effective or recognized for any purpose.

The retroactive statute stuck — the circuit court found for the revenue department. The court of appeals reversed, holding that Kentucky's legislation deprived the taxpayer of due process. But in August 2009, the Kentucky Supreme Court, which had affirmed the taxpayer's right to a combined return in 1994, held for the state.

The state's high court said Kentucky's action to retroactively bar refund claims under combined returns was "rationally related to a legitimate state interest" of raising and controlling revenue. In May 2010 the U.S. Supreme Court declined the taxpayer's petition for certiorari.

“The thing that is worse than losing a case is seeing it cited in other jurisdictions, and it gets cited all the time,” Horn said with a chuckle. “It is so painful.”

More seriously, Horn said she has never been the same. As it has for many in the state tax community, railing against retroactivity became one of her causes. “It’s inherently unfair. It’s egregious. It’s ridiculous,” Horn said. “It’s not the way government should conduct itself. It gets me riled up.”

In another case of what she described as government overreach, Horn worked with Clark, as well as attorneys Mark F. Sommer and Joseph L. Ardery, on *Illinois Tool Works v. Revenue Cabinet*. In it, the Franklin County Circuit Court held that the “domestic preference” in the Kentucky corporation license tax is unconstitutional.

“Illinois Tool Works had facilities in Kentucky, and the statute discriminated against out-of-state corporations,” Horn said, adding that the case was one of her favorites. “It was a license tax, based on capital, and if you had an in-state subsidiary, you got to offset the capital from that in-state subsidiary, but if you were out of state, you did not. It was discriminatory on its face, and it was repealed. I’m passionate about trying to prevent the overreaching by government.”

Professional Relationships

Still, Horn maintains a solid professional relationship with the Kentucky Department of Revenue, according to attorneys who have worked with her for many years.

Gary Morris, policy adviser and a former executive director of income tax at the DOR, said Horn often calls the department informally to suggest ways it can improve, both for itself and for her clients. “We will take that very seriously and in the spirit in which it’s intended,” Morris said. “It’s intended to help her clients, but also it’s very helpful to the department in doing its job better.”

Brent Gregory, executive director for protest resolution, said Horn “is one of the best, to be honest. She is a person that we trust. She will take her client’s side, and we’re going to have some disagreements. But I always know where she stands. She backs her arguments. She’s not going to lead us on a wild-goose chase.”

Those relationships are part of why other state tax colleagues frequently send her their Kentucky work.

“My clients love her,” said Marilyn A. Wethekam of Horwood Marcus & Berk Chtd. in Chicago. Wethekam added that Frankel’s frequent collaboration with Horn is a testament to Horn’s skills as a lawyer.

Janette Lohman of Thompson Coburn LLP in St. Louis agreed. She said she serves with Horn on the American Bar Association Section of Taxation’s State and Local Taxes Committee as well as in other professional associations. “She never misses a meeting. She’s never late. She’s absolutely meticulous,” Lohman said. “I imagine she runs her practice just as efficiently.”

Tim Eifler of Stoll Keenon Ogden PLLC said he wooed Horn for years. “One of the best things we ever did was just to get her to join us,” he said. “I worked long and hard on that.”

Maddie Schueler, of the firm, said Horn has been a mentor, introducing her to state tax work and taking her to conferences. “She explains tax issues in a conversational way, almost as if she’s teaching a class,” she said. “That’s important because all judges don’t have tax experience. I’m trying to do that myself.”

One of Horn’s clients, Donald Brown of the Atlas Cos. in Louisville, said Horn worked with his company to get the liability on a sales tax audit down from about \$1 million to \$40,000. But he said he was sold on Horn even before that result because she was recommended by the man he admires most.

“I called my dad for advice, and he said, ‘You know what, there was this lady I worked with in the 1980s,’” when Horn was working as a CPA and Brown’s father was a hospital administrator, Brown said. “Look her up, she was going to go be a tax lawyer.”

Brown said he asked for a name, and it was Erica Horn. “I said that’s pretty funny, Dad, she’s who we’re already using,” Brown added.

Pushing Transparency

In addition to her law practice, Horn is on the tax committee of the Kentucky Society of CPAs and on a tax reform task force of the Louisville Chamber of Commerce. Through both groups, she advises the department and the state budget office on legislation and administration. The department is meeting with businesses and other interested parties on tax administration reform, including publishing tax guidance, establishing a taxpayer bill of rights, and thoroughly reviewing the tax appeals process. (Prior coverage: *State Tax Notes*, Aug. 15, 2016, p. 510.)

Horn said Kentucky’s tax code is too complex and that many companies struggle to comply with all its provisions. Each locality’s net profits license fee, which Horn said “is basically their own little income tax,” presents problems for many companies. She said the state’s administrative resolution process has been “historically slow — there’s not even a description of how slow that is.”

But Horn said she thinks things are looking up. Like many in Kentucky’s business and practitioner community, she was pleased with the December 2015 appointment of DOR Commissioner Dan Bork, a former board member of the Kentucky Chamber of Commerce.

“I think they will be more transparent,” Horn said of the DOR. “I think they will issue more guidance. I think they will be more reasonable when it comes to problem solving. It’s still early, but indications are that will be the case.”

Horn said she isn’t sure yet about Republican Gov. Matt Bevin’s decision to eliminate the Kentucky Board of Tax Appeals and replace it with a commission whose members are not required to have any tax expertise. (Prior coverage: *State Tax Notes*, Aug. 15, 2016, p. 509.)

On the one hand, she said, she understands the financial sense in Bevin's decision. The board of tax appeals, Horn said, "didn't have a workload to justify three members plus an office plus a staff attorney plus a secretary." But still she worries. "Tax is special. It speaks its own language," she said. "You can't take a hearing officer that has been hearing worker compensation claims and make them a hearing officer in a tax case and expect an equitable result. We will have to see how this shakes out."

Fulfilling a Need in the Community

Horn has an avocation that has nothing to do with state taxation. To many who know her, she is secondarily a tax lawyer and primarily the co-founder and president of GleanKY, a nonprofit that now employs several people. In operation since 2010, GleanKY's employees and volunteers collect excess produce from grocery stores, farms, orchards, and farmers' markets. They then distribute it to food pantries, meal programs, and neighborhoods in "food deserts," or those without easy access to fresh food.

The stores and markets "have a set time where their produce people pull what they're not going to sell," Horn said. "They put it in a set location for us. We show up at the appointed time, and everything happens within a very tight window. It just goes from the [market] to the van to the recipient. We don't have to store it."

In its first year of operation, GleanKY collected and distributed 39,761 pounds of food, Horn said. By August 2016 the group had collected and distributed more than 1 million pounds of food.

On her own time, Horn said she has increasingly found herself in the car, traveling the 75 minutes to Louisville to see her 16-month-old granddaughter, Rose — her grandmother's favorite person.

"She is my everything," Horn said. "Not to make any of my other family members second class, but she taught me love I never knew before. And I have a pretty big heart — I thought I knew love pretty well. And then she came along." ■