BRIAN and KAREN WYNNE	*	IN THE
	*	
v.		MARYLAND TAX COURT
	*	
COMPTROLLER OF MARYLAND	*	No. 16-IN-OO-0216

MEMORANDUM AND ORDER

This case arises from a dispute between the Comptroller of the Treasury ("Comptroller") and Brian and Karen Wynne ("Wynne's") regarding the Wynne's claim of entitlement to a 13 percent interest rate on a refund of income taxes previously paid. The Comptroller denied the claim, concluding the appropriate interest rate was three percent. This lower rate was set by legislation enacted after the Wynne's had filed their initial appeal and paid the tax. At that time, the statutory interest rate was 13 percent. The Wynne's argue the retroactive interest rate reduction is invalid.

This case is on remand from the Court of Appeals. *Wynne v. Comptroller*, 469 Md. 62 (2020) ("*Wynne III*"). In *Wynne III*, the Court of Appeals reversed this Court's ruling, which accepted the Wynne's assertion that the Comptroller's decision to apply the reduced rate violated the dormant Commerce Clause. The case was remanded back to this Court for consideration of the Wynne's three other assertions, which this Court had not addressed. Those assertions were that the retroactive interest rate reduction violated the 14th Amendment's established right to due process ("14th Amendment"); the Fifth Amendment's protection against takings without just compensation ("Fifth Amendment"); and the prohibition on legislation impairing vested rights established by

Maryland Constitution, Article II δ 40 and Maryland Declaration of Rights, Article 24 ("Article 24" in entirety).

Wynne III provides a detailed history of this case. *Wynne III* at 73-80. The relevant facts for this Court's consideration, extracted from that history and the parties Stipulation of Facts follows.

Maryland's income tax law provided a credit for out of state income tax payments against the State income tax, but not the local income tax. The Wynne's, who paid income tax to other states, ultimately objected to this failure to credit in the context of their tax year 2006 Maryland income tax filing. They argued the failure to credit violated the dormant Commerce Clause. The Court of Appeals agreed with the Supreme Court affirming. *Comptroller v. Wynne* 431 Md. 147 (2013) ("*Wynne I*"); Comptroller *v. Wynne*, 575 U.S. 542 (2015) ("*Wynne II*").

The Wynne's paid the income tax the Comptroller asserted was due in December 2008, before *Wynne I* or *II* were decided and while their case was pending in this Court. At that time, the statutory rate of interest on a refund of that payment was 13 percent.

Before *Wynne II* was decided, the Maryland General Assembly provided contingencies for an adverse decision. Those contingencies were enacted in the Budget Reconciliation and Financing Acts ("BRFA") of 2014 and 2015. Chapter 464 δδ 16 & 20, Laws of Maryland 2014 ("2014 BRFA"); Chapter 489 δ 4, Laws of Maryland 2015 ("2015 BRFA"). The effective dates for these provisions of the 2014 and 2015 BRFA's were June 1, 2014 and June 1, 2015, respectively.

The 2015 BRFA provided, in relevant part, that if the Wynne's prevailed, a credit would be provided against the local income tax for out of state income tax payments. Shortly after 2015 BRFA's passage, the Supreme Court issued its decision. *Wynne II.*

The 2014 BRFA provided, in relevant part, that the interest on a refund for tax years 2006 to 2014, arising from an adverse decision in the Wynne's case, would be an average of the prime rate rounded to the nearest whole number, which computes to three percent for the refund presently due the Wynne's. The 2015 BRFA ultimately established the Wynne's entitlement to this refund. The question before this Court now is whether the retroactive interest rate reduction can apply to the refund.

Fundamental to the analysis of this question insofar as the asserted Article 24 violation is whether the Wynne's right to 13 percent interest on any refund had vested before the interest rate was reduced to three percent. This Court concludes that right had not vested, as a right to a refund did not even exist until the enactment after the 2015 BRFA, which was after the interest rate reduction. This conclusion's foundation arises from the Supreme Court's and Court of Appeals' directions regarding the Wynne's asserted right to a refund.

The Wynne's primarily rely on *Dua* v. *Comcast*, 370 Md. 604 (2002) and *Prince George's County v. Longtin*, 419 Md. 450 (2011) to support their allegation of an Article 24 violation. But these cases are distinguishable, as in the decisions the Court viewed the rights at issue sufficiently defined to create a protected vested right.

In *Longtin* the Court held a right to damages for injuries sustained was a viable cause of action, when the retroactive legislative action capping the damages available for those injuries was enacted. Citing *Dua*, the Court noted "vested rights protected by the

Maryland Constitution include both "causes of action" and "rights to a particular sum of money," *Prince George's County v. Longtin, supra.* at 486. In this regard, the Court held a viable cause of action without yet a determination of damages was sufficient to establish a protected vested right. *Prince George's County v. Longtin, supra.* at 486-487.

Likewise, in *Dua* the Court considered the protected vested right at issue in the context of a viable cause of action. *Dua* v. *Comcast, supra.* at 632-633. There, the Court rejected a retroactive statute that would extinguish a right to a refund of late fees in excess of the statutory usury limit. The cause of action for this refund had been established before that statute's enactment by the prior decision in *United Cable v. Burch*, 354 Md. 658 (1999).[1]

The Wynne's essentially argue a cause of action for a refund sufficient to establish a protected vested right had arisen before the interest rate reduction, as "after Wynne I, a refund to aggrieved taxpayers was the only constitutional choice." Wynne's Remand Memo at 15. The Court of Appeals and the Supreme Court rejected this assertion in both *Wynne I* and *II*.

In *Wynne I*, the Comptroller, in its Motion for Reconsideration, sought clarification regarding its obligation to provide the refund the Wynne's sought. The Comptroller had "...interpret[ed] a footnote in our earlier opinion to hold that a state must provide a tax credit. (citation omitted)." To clarify the Court of Appeals advised "…. we did not mean to preclude other methods that might be utilized in other contexts." *Id.* at 189. The Supreme Court went further by not only rejecting a refund as the only option, but by also offering guidance as to other options.

[1] *Burch* also defined the damages due as the difference between the usury rate and the rate hypothecated from the charged late fee.

"But while Maryland could cure the problem with its current system by granting a credit for taxes paid to other States, we do not foreclose the possibility that it could comply with the Commerce Clause in some other way. See Brief for Tax Economists 32; Brief for Knoll & Mason 28–30," explained the Supreme Court. *Wynne II*, supra. at 568. Both the cited Amicus Briefs specifically rejected an entitlement to a credit. Brief for Tax Economists at 32; Brief for Knoll and Mason (K&M) at 2, 29-31, 33.

The K&M Amicus Brief noted, "[a]lthough crediting other states' taxes generally will cure a state's internal inconsistence, because Maryland can cure its Commerce Clause violation in a number of ways, and the Constitution provides no guidance for which way is best, discretion lies with Maryland. *Id.* at 29-30. It concluded stating "…[t]he Supreme Court need not, and should not, choose a particular option for Maryland. Rather, it is up to Maryland to decide how to cure its violation." *Id.* at 33. The Supreme Court's decision reflects this reasoning. And the brief went even further in offering a template for structuring options. *Id.* at 29.

An option perhaps not envisioned in that template would be compensating the Wynne's with a carryover non-refundable credit against future taxes due. This option would not be subject to the interest provision upon which the Wynne's rely or any other interest provision.

While the option's implementation could extend the time for the Wynne's to be fully compensated, it would be consistent with the recognized "exceedingly strong….State… interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 & 45 (1990). (cited in *Wynne III supra.* at 82).

The Supreme Court in *McKesson* recognized this interest included a right to "...execute any refunds on a reasonable installment basis," Id. at 45. A carryover non-refundable credit against future taxes due could certainly be structured so as to extend payment of the compensation due the Wynne's on a "reasonable installment basis."[2]

The Comptroller cites *McComas v. Criminal Injuries Board*, 88 Md App. 143 (1991) and *Landsman v. Home Improvement Commission*, 154 Md. App. 241 (2003) to support its assertion that the Wynne's did not enjoy a protected vested right to the 13 percent interest they seek. This Court concurs with the Wynne's observation that the decisions in *Longtin* or *Dua* would have been beneficial to the Court of Special Appeals' considerations of *McComas* and *Landsman*. But those two cases do support the definition of a protected vested right upon which this Court relies.[3]

In this regard, the Court in *McComas* observed that "[t]o be vested, a right must be more than a *mere expectation* based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Div. of Workers' Comp., Etc. v. Brevda*, 420 So.2d at 891 (citing *Aetna Insurance Co. v. Richardelle*, 528 S.W.2d 280, 284 (Tex.Civ. App. 1975)." *McComas v. Criminal Injuries Board, supra.* at 150 (emphasis added). The Court relied on this definition to conclude a protected vested right did not arise for an uncapped award sought pursuant to the Criminal Injuries Compensation Law, which was subsequently capped statutorily. With alternatives other than a refund available to the

---

[2] Even if the credit were refundable, thereby assuring the Wynne's full compensation in a single payment without installments, there would be no statutory authority for the interest the Wynne's seek.

[3] *McComas* was decided before *Dua* or *Longto*n, while *Landesma*n was decide after Dua, but before *Longtin.* It is noteworthy that Judge Barbera authored *Landesman.*

State, the Wynne's envisioned 13 percent interest rate on an anticipated refund was a "mere expectation" not sufficient to create a protected vested right.

In *Landesman* the Court considered whether protected vested rights were violated, in holding that a law increasing the recovery available pursuant to the Home Improvement Guarantee Fund applied retroactively. "In any case, Landsman did not have a vested, legally enforceable right to compensation from the Fund until July 24, 2001, the date on which the Commission determined that he was entitled to compensation," concluded the Court. *Landsman v. Home Improvement Commission, supra. at* 254. Likewise, a protected vested right to interest on Wynne's refund could not arise until the enactment of 2015 BRFA, which was after the interest rate reduction effected by the 2014 BRFA.

"From its infancy, our vested rights jurisprudence focused on a plaintiff's ability (or inability) to bring a cause of action." *Longtin v. Prince Georges County, supra.* at 515 (Harrell, J. dissenting).[4] Applying this observation hypothetically, before the enactment of the 2015 BRFA, if there was authority for the Wynne's to bypass administrative remedies and file an action for a refund directly in the Circuit Court, that action would be vulnerable to a motion to dismiss. Simply, a viable cause of action would not exist until the State exercised an option to address the dormant Commerce Clause violation. A protected Article 24 vested right could not arise until then.

The Wynne's aptly observe that "...the Maryland Constitution's provisions prohibiting retroactive legislation- Article 24 of the Declaration of Rights and Article III,

[4] This observation was not an issue in dispute with the majority opinion, as the dissent's objection was the majority's failure to characterize the legislative action at issue as remedial, thereby rendering the rejected retroactivity valid.

Section 30 of the Constitution- are more restrictive than their federal counterparts." Wynne's Remand Memo at 8. Consistent with this observation and with this Court's determination that Article 24 protected vested rights are not violated by the interest rate reduction, the Wynne's asserted 14th Amendment and Fifth Amendment violations must fail. Further support for this failure arises as the requisite underlying rights to establish violations of these constitutional provisions are analogous to the requisite underlying rights for an Article 24 violation, as discussed above.

The often-articulated foundation for a 14th Amendment violation is a "legitimate claim of entitlement." The appropriate reference for this "entitlement" is an "...independent source such as state law." *Memphis Light, Gas, & Water Div.*, 436 U.S. 1, 9 (1978), quoting *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). In this regard, the burden rests with the Wynne's "...to show that such right was clearly established at the time of the alleged deprivation." *Upton v. Thompson*, 930 F. 2d 1209, 1212 (7th Cir. 1991). "A unilateral expectation, by itself, is not sufficient to create a constitutionally protected property interest. (citations omitted.)" *Young v. Wall*, 642 F.3d 49, 53 (1st Cir. 2011). Since the right to refund was enacted subsequent to the interest rate reduction, the Wynne's do not have the requisite "legitimate claim of entitlement" required to support their 14th Amendment violation claim.

The Fifth Amendment claim meets the same fate, as "[t]he *Roth* approach to identifying and defining property rights applies in Taking Clause cases. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001, 104 S.Ct. 2862, 2871, 81 L.Ed.2d 815 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980)." *Calvert Investments v. Metropolitan Sewer Dist*, 847 F.2d 304, 307

(6th Cir. 1988). Consistent with this direction, the Court in *Ward v. Ryan*, 623 F. 3rd. 807, 810 (9th Cir. 2010) held as follows.

> "To establish a violation of the Takings Clause, ... [the Plaintiff]..." must first demonstrate he has a property interest that is constitutionally protected. *Schneider v. Cal. Dep't of Corr.* (*Schneider II*), 151 F.3d 1194, 1198 (9th Cir. 1998).[5] "Only if [the plaintiff] does indeed possess such an interest will a reviewing court proceed to determine whether the expropriation of that interest constitutes a `taking' within the meaning of the Fifth Amendment." *Id.* Property interests are not constitutionally created; rather, protected property rights are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)."

In its analysis, this Court has been mindful of the restrained status interest has in the context of tax refunds. As the Court observed in *Wynne III, supra.* at 82 f.26, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra.*at 50), "....the Supreme Court ... did not suggest that interest was a required element of such a refund...." The Court further observed, "[i]ndeed, it seems safe to say that the vast majority of income tax refunds in Maryland are paid without interest" and that "[f]or those circumstances in which the General Assembly has authorized the payment of interest on tax refunds, it has periodically adjusted the rate of interest." *Id.* at 68 & 69. These observations reflect that "payment of interest on a tax refund is a "matter of grace" that must be authorized by legislative enactment." *Id.* at 68; *Comptroller v. Fairchild Indus., Inc.*, 303 Md. 280, 284 (1985).[6] Reflecting this restrained status, the Court in

---

[5] Unlike *Schneider* and *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra.*, where the Court held that the interest was a protected property right, the Wynne's tax payment was not deposited in a private identifiable interest-bearing account. See Comptroller Remand Reply Memo at 26-27.

[6] The Attorney General cited this principle in advising the 2014 BRFA was constitutional. Attorney General Letter of Advice, Senate Bill 172, "Budget Reconciliation and Financing Act of 2014," May 14, 2014.

Bertelsen & Petersen Engineering v. U.S., 60 F. 2d. 745, 748 (1st. 1932) noted that "[t]here is no fixed right to [interest]. It depends on the law at the time when the [refund] claim is allowed by the department, or, if the claim is litigated, when the case is heard by the court."

This Court has similarly been mindful of the flexibility recognized for retroactive taxes. In this regard, the Court of Appeals has "...held that a tax is not necessarily invalid because it is retroactive. See *Diamond Match Co. v. State Tax Comm'n* 175 Md. 235, 241 (1938)." *Comptroller v. Glenn L. Martin*, 216 Md. 235, 247 & 250-251 (1958), also citing *Milliken v. U.S.* 283 U.S. 15, 21-22 & 24 (1931).[7]

Consistent with this recognized flexibility, the Court of Appeals in *Baltimore County v. Churchill,* 271 Md. 1, 13 (1974) held "[i]f the State had the power to impose the tax in the first instance, it had the power by retroactive legislation to cure defects and ensure equality of treatment." This holding validated a retroactively established right to a refund of taxes paid, which did not exist previously and to which Baltimore County objected.

Reconciling the flexibility for retroactive taxation with the restrained status of interest payments on tax refunds, diminishes the deference due the property right the Wynne's assert. This perspective further supports this Court's rejection of that asserted right.

The Wynne's made an economically calculated choice in seeking to benefit from the above market 13 percent interest rate on refunds existing when they paid the tax at issue. Wynne's Remand Reply Memo at 1. But, the benefit of that choice was uncertain,

---

[7]Less deference is given to taxes on transactions not previously taxed, than to rate adjustments. *Comptroller v. Glen L. Martin, supra.* at 251.

as it was dependent on the State's response to forthcoming administrative and judicial determinations. The Wynne's had notice of this dependency in the precedent relied upon in the *Wynne I & II*, which pre-dated their December 2006 payment of the asserted tax obligation. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, supra. The ultimate State response undermines the Wynne's assertion of entitlement to the 13 percent interest rate they seek.

Accordingly, it is this 31st day of MAR 2021, by the Maryland Tax Court **ORDERED** that the decision of the Comptroller is affirmed and the Wynne's claim for additional interest is denied. [8]

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

CC: Sean Marotta, Esq.
Steven F. Barley, Esq.
Brian L. Oliner, Esq.

[8] Issues raised not specifically addressed by this Court were deemed not relevant, upon this Court concluding the right asserted was not sufficient to support the alleged violation, or *de minimus*.