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TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

2011-CA-000512-MR

COMMONWEALTH OF KENTUCKY,  
FINANCE AND ADMINISTRATION CABINET,  
DEPARTMENT OF REVENUE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 10-CI-01509

COMMONWEALTH AGRI-ENERGY, LLC

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Appellant, Commonwealth of Kentucky, Finance and Administration Cabinet, Department of Revenue (Revenue), appeals from an order affirming the decision by the Kentucky Board of Tax Appeals (Board) directing Revenue to consider as timely filed the application for a tax credit by Appellee, Commonwealth Agri-Energy, LLC (Agri-Energy). Revenue argues that: (1) Agri-

Energy failed to satisfy the statutory requirements for the tax credit; (2) Revenue is not authorized to waive the filing deadline for the tax credit; and (3) the due process rights of Agri-Energy were not violated. We affirm.

In 2007, the Kentucky General Assembly passed KRS<sup>1</sup> 141.4242, which created a nonrefundable income tax credit of up to one dollar for each gallon of ethanol produced in this state. In order to receive the tax credit, ethanol producers are required to file the Schedule ETH reporting form with Revenue. Revenue submitted the reporting form for the tax credit to the Legislative Research Commission (LRC) on January 15, 2009, which was the date of the deadline for filing. The LRC first published the regulation, which made the reporting form official on February 1, 2009. Agri-Energy filed its application for the tax credit on February 4, 2009 and requested that Revenue extend the filing deadline. Revenue denied the request. On February 11, 2009, Agri-Energy made a second request for Revenue to extend the deadline, which was also denied. Agri-Energy appealed the Revenue's ruling that its application was barred as untimely to the Board. The Board reversed the ruling of Revenue finding that the decision to publish the official reporting form on the day it was due was arbitrary and capricious and directed Revenue to consider the application as timely filed. The Franklin Circuit Court affirmed the decision of the Board. This appeal followed.

“The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was

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<sup>1</sup> Kentucky Revised Statutes.

erroneous as a matter of law.” *Kroger Ltd. P'ship I v. Cabinet for Health Serv., Commonwealth of Kentucky*, 174 S.W.3d 516, 518 (Ky. App. 2005) (citation omitted). A decision is clearly erroneous if it is “unsupported by substantial evidence.” *Danville-Boyle County Planning & Zoning Comm'n v. Prall*, 840 S.W.2d 205, 208 (Ky. 1992).

Revenue first argues that Agri-Energy has failed to demonstrate that it is entitled to the tax credit. KRS 141.4242(3) states:

Each ethanol producer eligible for the credit provided under subsection (1) of this section shall file an ethanol tax credit claim for ethanol gallons produced in this state on forms prescribed by the department by January 15 following the close of the preceding calendar year.

Revenue correctly states that it is undisputed that Agri-Energy failed to timely file its application for a tax credit under the statute. However, Revenue fails to acknowledge the equally undisputed evidence that the required reporting form was not effective as a regulation until the day it was due and it was not officially published until after the application was due. We conclude that substantial evidence supported the trial court’s finding that the denial of the application as untimely was arbitrary and capricious.

Revenue next argues that it can only extend filing deadlines for good cause and that Agri-Energy failed to show good cause because Agri-Energy was on notice of the January 15, 2009 deadline. Again, while Agri-Energy was on notice that January 15 was applicable, the official reporting form to apply for the credit

was not available until the day it was due. We agree with the Board and the trial court that to demand that the application be filed on the same day the form was officially provided is unreasonable. The finding that Revenue's failure to extend the filing deadline was arbitrary was supported by substantial evidence.

Finally, Revenue argues that the due process rights of Agri-Energy were not violated. Revenue argues that Agri-Energy: (1) lacked standing to assert a violation of due process; and (2) could have complied with KRS 141.4242.

An objection to standing is waived unless timely raised. *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). Any "question of law which is not presented to or passed upon by the trial court cannot be raised [on appeal] for the first time." *Commonwealth of Kentucky, Transp. Cabinet, Bureau of Highways v. Roof*, 913 S.W.2d 322, 325 (Ky. 1996) (quoting *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky. 1955)). Revenue raised the issue of standing for the first time on appeal to the trial court, who declined to address the issue. Similarly, the issue is also unpreserved for our review.

Revenue also argues that Agri-Energy could have complied with KRS 141.4242 because the reporting form was available in other places at an earlier date. We find this argument to be without merit because Revenue concedes in its brief on page 4 that the official reporting form did not become legally effective until January 15, 2009, the day it was due. We conclude that substantial evidence supported the finding of the trial court on this issue.

Accordingly, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank L. Dempsey  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

William J. Cooper, Jr.  
Jeremy J. Beck  
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