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Procedure

In December 2007, the Pennsylvania Supreme Court reversed a lower court holding that a taxpayer was entitled to a refund of real estate taxes on oil and gas reserves. This decision, *Oz Gas Ltd. v. Warren Area School District*, holds that the municipality cannot impose the tax going forward, but it denies the taxpayer the right to refund of taxes already paid. In this article, author Dan A. Schulder discusses the development of the case and its implications for taxpayers doing business in the state.

Pennsylvania Supreme Court Ruling in Oz Allows Localities To Deny Real Estate Tax Refunds Legally Owed to Taxpayers

By DAN A. SCHULDER

Overview

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At the end of December, the Pennsylvania Supreme Court issued a sweeping new rule relative to local real estate tax refunds. In *Oz Gas Ltd. v. Warren Area Sch. Dist.*,¹ the supreme court reversed the Pennsylvania Commonwealth Court and concluded that a taxpayer was not entitled to a refund of real estate taxes imposed on oil and gas reserves, even though, in *Independent Oil and Gas Association v. Board of Assessment Appeals of Fayette County*,² (IOGA), the supreme court had previously concluded that such oil and gas reserves were exempt from real estate taxation. This re-

¹ *Oz Gas Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274 (Pa. 2007) (*Oz Gas II*), petition for cert. filed (U.S. March 21, 2008) (No. 07-1220). For purposes of this article, the commonwealth court decision, *Oz Gas Ltd. v. Warren Area School District*, 886 A.2d 336 (Pa. Commw. Ct. 2005), will be referred to as *Oz Gas I*.

² 814 A.2d 180 (Pa. 2002).

sult is clearly beyond the pale, and again, the supreme court is shown to be bending over backwards to avoid having local municipalities pay back taxes to which they are not entitled by legislative policy.³ Instead of trying to find a contorted interpretation to safeguard the revenues of local municipalities when the General Assembly has declared otherwise, the court should have provided a true and defensible analysis in line with its applicable precedent and let the chips fall where they may.

This sweeping new rule declares that all the court's decisions invalidating a tax statute will be given "purely prospective application," or be prospective only as of the dates of the decisions.⁴ This new rule nullifies previously well-settled law and the General Assembly's policy decision that successful taxpayer litigants, and others who are similarly situated, are entitled to the benefit of successful court challenges—realization of the expectation of the benefit of their lawsuits through refunds of their payments of invalidated taxes—rather than the mere avoidance of tax liability in the future.⁵ Even if the avoided future liability is significant, that alone may not be sufficient incentive for a taxpayer to expend the considerable time, resources, and money necessary to litigate a case to decision by the Pennsylvania Supreme Court, especially considering that the Pennsylvania Department of Revenue is likely to attempt—as it has successfully done in the past⁶—to nullify even the benefit of avoided future tax liability by pushing for changes in the tax statutes.

Background

This entire issue started in December 2002 with the supreme court's decision in *IOGA*. The court held that Pennsylvania law did not authorize the imposition of ad valorem taxes on oil and gas interests.⁷ The taxpayers owned leasehold interests in oil and gas underlying tracts of land in Fayette County. In June 1998, the Fayette County Board of Assessment Appeals began assess-

ing the taxpayers' oil and gas interests as real estate and imposing ad valorem taxes on said interests. The taxpayers argued that there was no specific statutory authority granting Fayette County the authority to tax the oil and gas interests as real estate.⁸ The court agreed, concluding that §201 of the General County Assessment Law⁹ did not specifically include oil and gas rights in the provision noting what was assessable for real estate tax purposes.¹⁰ The court noted that the General Assembly, in enacting §201 of the Assessment Law, provided a lengthy list of the specific subjects of taxation, and if the General Assembly intended for all real estate to be taxable, then that specific listing would have been superfluous.¹¹

The court also determined that the commonwealth court improperly expanded the category of real estate so that the term "lands" included oil and gas rights. The court noted that all of the subjects in §201 of the Assessment Law related to *surface rights* or of a type that related to various improvements affixed to the real estate.¹² In trying to further analyze the distinction between oil and gas rights, the court reviewed other provisions of the Assessment Law as well as provisions in the Fourth to Eighth Class County Assessment Law.¹³ The court noted that §415 of the Assessment Law and §615 of the County Assessment Law separately tax coal and coal rights.¹⁴ As a result, the court determined that oil and gas rights were different from coal rights with the former not being taxable under the Assessment Law.¹⁵

⁸ *Id.* at 182.

⁹ General County Assessment Law, 72 Pa. Cons. Stat. §§5020-101 to 5020-602 (Assessment Law).

¹⁰ *IOGA*, 814 A.2d at 183. Section 201 of the Assessment Law provides, in pertinent part, as follows:

The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city borough, town, township, school and poor purposes at the annual rate:

(a) All real estate, to wit: houses, house trailers, and mobile homes, buildings permanently attached to land or connected with water, gas electric or sewerage facilities, buildings, lands, lots of ground and ground rents, trailer parks and parking lots, mills, and manufactories of all kinds, furnaces, forges, bloomeries, distilleries sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, all office type construction of whatever kind, that portion of a steel, lead, aluminum or like melting and continuous casting structures which enclose, provide shelter or protection from the elements for the various machinery, tools, appliances, equipment, materials or products involved in the mill, mine, manufactory or industrial process, and all other type of real estate not exempt by law from taxation.

72 Pa. Cons. Stat. §5020-201(a).

¹¹ *IOGA*, 814 A.2d at 183.

¹² *Id.* at 184.

¹³ *Id.* The taxpayers further tried to distinguish oil and gas rights from coal rights—coal rights were taxable but oil and gas rights were not under the Assessment Law and the Fourth to Eighth Class County Assessment Law 72 Pa. Cons. Stat. §§5453.101, *et. seq.* (County Assessment Law).

¹⁴ *Id.* See also 72 Pa. Cons. Stat. §§5020-415, 5453.612, and 5453.616.

¹⁵ *Id.*

³ This type of contorted logic was first utilized by the Pennsylvania Supreme Court in *Annenberg v. Commonwealth*, 757 A.2d 333 (Pa. 1998); 757 A.2d 338 (Pa. 2000). The Pennsylvania personal property tax imposed a tax on the stock of non-Pennsylvania corporations that did not do business within, or have nexus with, the state, while exempting the stock of corporations that did have business or nexus with Pennsylvania. More than \$60 million was potentially owed back by Montgomery County to resident taxpayers as a result of the court's finding that Pennsylvania's personal property tax was facially discriminatory and violated interstate commerce, but the court rejected the taxpayer's argument that they were entitled to a refund, holding that it had not concluded that counties were not legally entitled to levy the tax, only that they were not entitled to exempt Pennsylvania taxable corporations from the tax calculation.

⁴ *Oz Gas II*, 938 A.2d at 285.

⁵ This new rule is also contrary to the court's statements that the application of a court decision is a judicial matter to be decided on a case-by-case basis.

⁶ See, e.g., *PPG Industries Inc. v. Pennsylvania Bd. of Fin. and Rev.*, 790 A.2d 261, 266, n.9 (Pa. 2001) (Act 1999-63, in direct response to *PPG Industries Inc. v. Pennsylvania Bd. of Fin. and Rev.*, 790 A.2d 252 (Pa. 1999)); *First Natl. Bank of Fredericksburg v. Commonwealth*, 553 A.2d 937 (Pa. 1989) (Act 1983-66, in direct response to *Dale National Bank v. Commonwealth*, 502 Pa. 170, 465 A.2d 965 (1983)).

⁷ *IOGA*, 814 A.2d at 184-185.

Lower Court Decision: Oz Gas I

From 1999 through 2002, Oz Gas paid ad valorem taxes on its oil and gas interests to the various taxing authorities of Fayette County. After the *IOGA* decision, however, Oz Gas filed a complaint seeking tax refunds for the previous three years' ad valorem taxes under §5566b of the Local Tax Collection Law¹⁶ (hereinafter, the Refund Law). After considering various motions, the Warren County Court of Common Pleas concluded that the Refund Law was not independently retroactive and that under *Chevron Oil*,¹⁷ the *IOGA* decision was not to be applied retroactively. As a result, the trial court granted the taxing authority's motion for summary judgment, and Oz Gas appealed.

In 2005, the commonwealth court reversed the trial court and determined in *Oz Gas I*¹⁸ that the taxpayer was entitled to tax refunds associated with the real estate taxes paid on its oil and gas interests pursuant to §201(a) of the Assessment Law. In rendering its decision, the court cited the *IOGA* decision and concluded that the Assessment Law did not authorize counties to tax oil and gas interests.¹⁹

In the commonwealth court, Oz Gas argued that the Refund Law was independently retroactive. The Refund Law provides, in pertinent part, as follows:

(a) Whenever any person or corporation of this Commonwealth has paid . . . into the treasury of any political subdivision . . . any taxes of any sort . . . to which the political subdivision is not legally entitled . . . the proper authorities of the political subdivision . . . are hereby directed to make . . . refund of such taxes . . . Refunds of said money shall not be made unless a written claim therefor is filed . . . within 3 years of payment thereof.

(b) The right to a refund afforded by the Act may not be resorted to any case in which the taxpayer involved has had or has available under any other statute, ordinance or resolution, specific remedy by way of review, appeal, refund or otherwise, for recovery of monies paid as aforesaid, unless the claim for refund is for recovery of monies paid under a provision of a statute, ordinance or resolution subsequently held by final judgment of a court of competent jurisdiction, to be unconstitutional, or under an interpretation of such provision subsequently held by such court, to be erroneous.²⁰

The court concluded that because Oz Gas filed a written claim for a refund within three years of its payment of tax, it was entitled to a tax refund as the political subdivision was not legally entitled to collect the tax under *IOGA*.²¹ Finally, the court concluded that because Oz Gas paid tax under a law that was subsequently interpreted to be erroneous, it was entitled to a refund under the clear and unambiguous terms of the

¹⁶ Local Tax Collection Law, 72 Pa. Cons. Stat. §5511.1, et seq. (Refund Law).

¹⁷ *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*Chevron Oil*).

¹⁸ *Oz Gas I*, 886 A.2d 336 (Pa. Commw. Ct. 2005)

¹⁹ *Id.* at 338.

²⁰ 72 Pa. Cons. Stat. §5566b (emphasis added).

²¹ *Oz Gas I*, 886 A.2d at 338.

Refund Law, rendering the retroactive application issue moot.²²

Supreme Court Reverses Oz Gas I

In December 2007, the Pennsylvania Supreme Court reversed the commonwealth court and concluded that Oz Gas was not entitled to a refund of real estate taxes improperly imposed on oil and gas reserves. The supreme court stated the two issues as follows:

- whether the *IOGA* decision applied retroactively as a jurisprudential matter during the three year look-back period; and

- whether §5566b²³ of the Refund Law applied automatically in light of the *IOGA* decision giving rise to a refund because the taxing authority is not legally entitled to the tax payments.²⁴

The supreme court noted that the commonwealth court did not address the retroactivity issue that was raised by the *Chevron Oil* decision.²⁵ In analyzing this issue, the court relied on *Chevron Oil*²⁶ and two related tax challenges, *McNulty* and *Smith*.²⁷

The court observed that *IOGA* determined that the real estate taxes could not be assessed against oil and gas reserves that remained underground as a matter of statutory construction. The court then concluded that it would "defy logic to hold that *IOGA*'s holding, based on statutory interpretation, must apply retroactively"²⁸ when the tax in *McNulty* and *Smith* was invalidated on constitutional grounds and applied prospectively only. Without any further analysis, the court utilized the *McNulty* and *Smith* rationale to reach this problematic conclusion.

²² In a footnote in *Oz Gas I*, the court stated that because the Refund Law was independently retroactive, it did not need to address whether the *Chevron Oil* analysis was necessary to determine if the *IOGA* decision had to be retroactively applied. See *Oz Gas I*, 886 A.2d at 338, n. 3.

²³ 72 Pa. Cons. Stat. §5566b.

²⁴ *Oz Gas II*, 938 A.2d at 276.

²⁵ *Id.* at 279.

²⁶ *Chevron Oil*, 404 U.S. 97. The U.S. Supreme Court provided a three pronged test in analyzing retroactivity:

- whether the decision established a new principle of law;
- a balancing of the merits via a review of the history of the rule, its purpose and effect, and whether retroactive application will further retard the rule; and

- An evaluation of the equities involved.

Id. at 106-107. See also *Oz Gas II*, 938 A.2d at 278.

²⁷ *American Trucking Assn. Inc. v. McNulty*, 596 A.2d 784 (Pa. 1991). In *McNulty*, the trucking association challenged Pennsylvania's axle tax and marker fees assessed against common carriers. The U.S. Supreme Court found that such taxes and fees violated the Commerce Clause. See *American Trucking Association v. Scheiner*, 483 U.S. 266 (1987). Similar to the situation in *Oz Gas II*, upon remand the U.S. Supreme Court was charged with determining whether the association was entitled to a refund of taxes previously paid. Before a decision could be rendered, however, this same issue was also taken up by the U. S. Supreme Court in a case from Alabama, *American Trucking Assn. v. Smith*, 496 U.S. 167 (1990) (plurality opinion). This plurality decision by the U.S. Supreme Court determined that a new principle of law was established by *Scheiner* in declaring the highway taxes unconstitutional, retroactive application would not enhance the operation of the decision, and that the equities dictated a prospective application as the legislature did not believe that the taxes were unconstitutional. *Id.* at 179-182.

²⁸ *Oz Gas II*, 938 A.2d at 283.

In trying to find additional support for this conclusion, the court also noted that the prospective application of the *IOGA* decision was buttressed by the application of the three-factor *Chevron Oil* test. The court determined that the *IOGA* decision established a new principle of law, so that prior to the decision, these taxes were deemed lawful and collectible by the local municipalities. The court further noted that “as a practical matter, [the *IOGA* decision] unsettled expectations and a long-standing governmental reliance interest.”²⁹ The court further indicated that the other two factors in *Chevron Oil* required a prospective-only holding. First, applying *IOGA* retroactively, the court reasoned, would not advance the operation of the decision because the decision speaks for itself, and the court established that taxes are uncollectible going forward. Second, the court concluded that the financial hardship on the municipalities involved weighted the equities heavily in favor of prospective only application.

Once the court concluded that *IOGA* did not apply retroactively, it then easily dismissed the second question and concluded that because of the *McNulty* rationale, as buttressed by the *Chevron* analysis, the *IOGA* decision would be applied prospectively only. The court concluded that because the real estate taxes were valid until the date of the *IOGA* decision, the taxing authorities were legally entitled to collect the taxes up to that date. As a result, the court held that a refund was not warranted under §5566b of the Refund Law.³⁰

Problems With the Court’s Analysis

The first and most glaring error in the court’s analysis deals with its heavy reliance on the *McNulty* and *Smith* rationales, the latter of which was a plurality decision, instead of its own precedent and, most importantly, the General Assembly’s policy decision expressed in clear and unambiguous terms in the Refund Law.³¹ This misplaced reliance is especially egregious because in later decisions the U.S. Supreme Court concluded, by unanimous vote in one case (i.e., *McKesson*), that it was clear error if a state did not “provide meaningful backward-looking relief to rectify any unconstitutional deprivation.”³² As a result, the U.S. Supreme Court has clearly determined that relief should not be given selectively and prospectively as was done in *Oz*

²⁹ *Id.*

³⁰ *Id.* at 284.

³¹ The court’s error in relying on the *Smith* and *McNulty* rationales is further demonstrated by

- the opinion of the four dissenting justices in *Smith* that a statute declared unconstitutional does not become unconstitutional as of the date of the decision, but rather was always unconstitutional, and

- the fact that there is no indication in *Smith* that Alabama had a statute such as Pennsylvania’s Refund Law.

³² *McKesson Corp. v. Florida*, 496 U.S. 18, 31 (1990) (*McKesson*). The clear question before the court in *McKesson* was:

whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax’s legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward looking relief to rectify any unconstitutional deprivation.

Gas II by the Pennsylvania Supreme Court. Moreover, in a subsequent decision, the U.S. Supreme Court applied the principles enunciated in *Beam v. Georgia* to state courts.³³ *Chevron Oil* has been viewed as eviscerated (and overruled) by *Beam* and *Harper v. Virginia Dept. of Taxn.*³⁴ Indeed, in *Beam*, a plurality decision which *Oz Gas II* ignored, the plurality concluded that the first and usual choice is to apply a decision fully retroactively,³⁵ and three justices found selective prospectivity and pure prospectivity (the first two “variations” of applying decisions described in *Geschwendt*,³⁶ above, and one applied in *Oz Gas II*) beyond the court’s power because they are unconstitutional.³⁷

Second, the decision announced by the court in *Oz Gas II* flies in the face of a prior Pennsylvania Supreme Court decision directly on point,³⁸ as well as others in which statutes similar to the Refund Law were applied retroactively according to their express terms, with no question concerning whether they should be so applied.³⁹ In *Fredericksburg*, a taxpayer appealed the re-

496 U.S. at 32 (emphasis added); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (*Beam*).

The U.S. Supreme Court in *Beam* determined that once a new rule has been fashioned for litigants in one action, the courts must apply such new rule to all others not otherwise barred by a limitations period. *Id.* at 534-535 (emphasis added). The court stated that the grounds for its decision “are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*.” *Id.* at 544.

³³ *Harper v. Virginia Dept. of Taxn.*, 509 U.S. 86 (1993). In reversing the lower court, the U.S. Supreme Court held that “when this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases. *Id.* at 97.

³⁴ See, e.g., *Ditto v. McCurdy*, 510 F.3d 1070, 1077, n. 5 (9th Cir. 2007):

[T]he Court effectively overruled [*Chevron Oil*] in *Harper*, 509 U.S. at 97-98, 113 S.Ct. 2510 (“[T]he legal imperative ‘to apply a rule of federal law retroactively after the case announcing the rule has already done so’ must ‘prevail[] over any claim based on a *Chevron Oil* analysis.’”) (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (opinion of Souter, J.)). This circuit has recognized that the *Chevron Oil* equitable exception “has been discredited by the subsequent Supreme Court decisions of *Griffith v. Kentucky* and *Harper v. Virginia Dept. of Taxation*.” *United States v. Newman*, 203 F.3d 700, 701 (9th Cir. 2000) (citations omitted).”

See also Terri L. Pastori, “TOPICAL SURVEY: Constitutional Law—Rhode Island Supreme Court Follows United States Supreme Court Lead In Eviscerating *Chevron Oil* Test—*Dart Industries, Inc. v. Clark*, 657 A.2d 1062 (R.I. 1995),” 30 Suffolk U.L.Rev. 505 (1997).

³⁵ *Beam*, 501 U.S. at 535, 111 S.Ct. at 2443 (Souter, Stevens, White, Blackmun, Scalia).

³⁶ *Commonwealth v. Geschwendt*, 454 A.2d 991 (Pa. 1982) (*Geschwendt*).

³⁷ *Beam*, 501 U.S. at 547-549, 111 S.Ct. at 2450-51 (Scalia, concurring; Marshall and Blackmun joining).

³⁸ *Fredericksburg*, 523 A.2d 937.

³⁹ *Skepton v. Borough of Wilson*, 755 A.2d 1267 (Pa. 2000), reconsideration denied; appeal after remand *Wilson Area Sch. Dist. v. Skepton*, 860 A.2d 625 (Pa. Commw. Ct. 2004), affirmed 895 A.2d 1250 (Pa. 2006); *Box Office Pictures Inc. v. Pennsylvania Bd. of Fin. and Rev.*, 166 A.2d 656 (Pa. 1961); *Calvert*

fusal of the state to refund certain taxes paid prior to a decision of the Pennsylvania Supreme Court which invalidated the tax in question. As with the *Oz Gas II*, the taxpayer claimed its right to a refund was secured by statute and the state argued that invalidating decision should not be given retroactive effect under *Chevron Oil*. The court concluded that “where a litigant’s right to some legal remedy may be derived from statute, it would be a meaningless exercise for a court to determine whether an identical right is vested in the litigant or as a result of prior decisional law.”⁴⁰ Despite this clear statement of law, the court engaged in that “meaningless exercise” in *Oz Gas II* and, predictably,⁴¹ determined that application of the *Chevron Oil* test required prospective and not retroactive relief.

Fredericksburg reflects the proper roles of the court and the General Assembly with respect to policy. The court’s policymaking in *Oz Gas II* is puzzling because the court had appropriately recognized these roles in a decision issued only a few months before *Oz Gas II*, in August 2007.⁴² The court’s analysis in *Oz Gas II* begs

Distillers Corp. v. Pennsylvania Bd. of Fin. and Rev., 103 A.2d 668 (Pa. 1954); *Land Holding Corp. v. Pennsylvania Bd. of Fin. and Rev.*, 130 A.2d 700, 703-04, 707 (Pa. 1957) (“*Pennsylvania, acting through its Legislature, has created by The Fiscal Code of 1929 the Board of Finance and Revenue, to which under §503 of the Code claims for taxes or other monies alleged to have been erroneously paid to the Commonwealth may be made, entertained and determined by the Board. . . In permitting the prosecution of claims against the Commonwealth the Legislature as a matter of grace may make refunds of taxes paid mandatory as it was held it did in §503(a)(4) under the circumstances presented in the Hotel Casey case . . .*”) (emphasis added); *Federal Deposit Ins. Corp. v. Pennsylvania Bd. of Fin. and Rev.*, 470, 84 A. 2d 495, 498-99 (1951) (“We understand the clear meaning of Section 503(a)(4) of the Fiscal Code to be that, in order to entitle a taxpayer to obtain a refund, two conditions must be met—(1) the petition must be filed within five years of the settlement or payment of the tax, and (2) the claim for refund must be based upon averment and proof that it had been held, since the payment of the tax, by a court of competent jurisdiction, that the statute under which payment was made had been erroneously interpreted. . . . These requirements were not merely procedural provisions, but express conditions of the right to obtain a refund, failure to comply with which operated as an absolute bar to the right itself.” (footnote omitted; emphasis added); *Hotel Casey Co. v. Ross*, 23 A.2d 737, 741 (Pa. 1942) (“We therefore hold that if an application is made for a refund under §503 of the Fiscal Code within the period of limitations fixed thereby and it appears that there was a tax paid to the Commonwealth to which the Commonwealth was not equitably or rightfully entitled, the provision for a refund or credit is mandatory.”).

⁴⁰ *Id.* at 941 (emphasis added).

⁴¹ See, e.g., *Swanson v. North Carolina*, 407 S.E.2d 791 (N.C. 1991) (using the *Chevron Oil* test, court concluded that *Davis v. Michigan Dept. of Treas.* does not apply retroactively because none of the three prongs of *Chevron Oil* favor retroactivity).

⁴² With respect to the common law principle that governing bodies cannot bind their successors to contracts involving “governmental” functions as distinguished from “proprietary” or business functions (which can bind successors), the court noted the roles of the courts and the legislature with respect to public policy:

Thus, the precept that governmental contracts are voidable in some range of circumstances is a common-law rule premised upon considerations of public policy. In applying this principle, however, courts should not lose sight of the respective roles of the General Assembly and the courts in

the question. What does §5566b of the Refund Law mean and how does it apply if it does not apply in these circumstances? Moreover, all of the clear Pennsylvania and U.S. Supreme Court authority to the contrary was only recognized, but not addressed at all, by the court in *Oz Gas II* as the court instead simply applied the *Chevron Oil* test.

Additionally, the Pennsylvania Supreme Court had previously addressed the considerations against retroactive relief in its *Geschwendt*⁴³ decision. The court described the applicability of a newly articulated pronouncement of state law a “most troublesome question” with “virtually infinite” variations, but distilled these variations to four:

- purely prospective,
- prospective for future litigants but retroactive for the parties at bar,
- applicable to all cases on direct review at the time of pronouncement, or
- all cases already final at the time it is adopted.⁴⁴

The court in *Oz Gas II* distinguished the concerns against retroactive relief addressed in *Geschwendt* as limited to criminal cases, not civil cases, to justify not granting retroactive relief in *Oz Gas II*. With this limitation,⁴⁵ the court easily concluded that the equities under the *Chevron Oil* test weighed against having municipalities refund real that they had already collected and spent. The court’s concern for the municipalities’ “fisc”⁴⁶ is misplaced⁴⁷ and represents judicial policymaking.

terms of establishing public policy. In particular, *it is the Legislature’s chief function to set public policy and the courts’ role to enforce that policy, subject to constitutional limitations. See generally Parker v. Children’s Hosp. of Philadelphia*, 394 A.2d 932, 937 (Pa. 1978) (explaining that “the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature”). Accordingly, with the common-law framework as a backdrop, and absent constitutional infirmity, *the Legislature may nonetheless modify the approach in particular sets of circumstances. See generally, Hilkmann v. Hilkmann*, 858 A.2d 58, 68 (Pa. 2004); *Scheipe v. Orlando*, 739 A.2d 475, 477 (Pa. 1999); *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 323 (Pa. Super. 1989) (“The function of the common law is to fill the interstices left by the legislatures.” (quotation marks omitted)).

Program Admin. Svcs. Inc. v. Dauphin County Gen. Auth., 928 A.2d 1013, 1017-18 (Pa. 2007) (emphasis added). There are no such “constitutional limitations” with respect to the Legislature’s policy as expressed in the Refund Law and similar laws previously held to require retroactive refunds. See *Box Office Pictures Inc. v. Pennsylvania Bd. of Fin. and Rev.*, 166 A.2d 656 (Pa. 1961).

⁴³ *Geschwendt*, 454 A.2d 991 (Pa. 1982).

⁴⁴ *Id.* at 994-995.

⁴⁵ The distinction between criminal and civil cases to justify “prospective only” relief does not stand up under close scrutiny and, nonetheless, is irrelevant when the General Assembly has expressly required retroactive relief.

⁴⁶ “To avoid the potentially devastating consequences to taxing entities, it is important that taxes collected pursuant to a valid statute remain valid unless and until otherwise determined by this Court.” *Oz Gas II*, 938 A.2d at 285.

⁴⁷ *McKesson*, 496 U.S. at 50, n. 35 (state cannot deny refund simply because of the amount: “We reject respondents’ intimation that the cost of any refund considered by the State might justify a decision to withhold it.”).

Conclusion

By not fully using the later analyses that are more on point *and* that were majority or unanimous decisions (and not a plurality decision with four justices unanimous in their dissent), the Pennsylvania Supreme Court has set out a sweeping rule that is not grounded on clear precedent and is plainly suspect. This new rule nullifies well-settled principles of law and the General Assembly's policy decision that successful taxpayer litigants are entitled to the benefit of a court victory, and other similarly situated taxpayers should be afforded similar relief. This is the very point of §5566b of the Refund Law—if a tax statute is held to have been interpreted erroneously, the taxpayer is entitled to relief. That is exactly what happened in *Oz Gas II* and in *Fredericksburg*, but the supreme court came to opposite results even though the same tax refund statute was involved in both cases. The General Assembly has di-

rected that successful taxpayer litigants be afforded retroactive relief through refunds, and the court should have granted that relief to *Oz Gas* in accordance with *Fredericksburg* and the court's other decisions.

By not applying the terms of the Refund Law, the court has given municipalities and the Department of Revenue leave to deny refunds in all future actions, even if the underlying statute grants relief, unless the court in a particular case provides for retroactive relief. As a result, *Oz Gas II* is defective and enables municipalities to avoid refunding monies that the General Assembly has directed be refunded. The General Assembly should correct this grave injustice by reaffirming, in language more clear and unambiguous than the present Refund Law, its policy that taxpayer litigants are entitled to retroactive relief in the form of refunds when they have obtained a judicial decision invalidating a state or local tax provision.