IN THE SUPREME COURT
STATE OF MISSOURI

Case No. SC89080
INSURANCE COMPANY OF THE STATE OF PA, Appellant,
v.
DIRECTOR OF REVENUE, STATE OF MISSOURI, and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, STATE OF MISSOURI, Respondents

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Case No. SC89081
ILLINOIS NATIONAL INSURANCE COMPANY, Appellant,
v.
DIRECTOR OF REVENUE, STATE OF MISSOURI, and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, STATE OF MISSOURI, Respondents

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Case No. SC89082
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY, Appellant,
v.
DIRECTOR OF REVENUE, STATE OF MISSOURI, and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, STATE OF MISSOURI, Respondents

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Appeals from the Administrative Hearing Commission of Missouri
Honorable John J. Kopp, Commissioner

BRIEF OF RESPONDENTS, DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION

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STATEMENT OF FACTS

These appeals, consolidated for briefing and argument, involve three insurance companies doing business in Missouri: Insurance Company of the State of PA (No. SC89080; Appellant's Appendix ("App.") at A2); Illinois National Insurance Company (No. SC89081; App. A8); and American International South Insurance Company (No. SC89082; App. at A14). (Because the pertinent facts are identical for each of the three companies, we will refer to them collectively as "the Insurance Companies.")

Each of the Insurance Companies pays an insurance premium tax to the Missouri Department of Revenue, pursuant to § 148.350. App. A2, A8, A14. Each made premium tax payments for the 2004 tax year over the course of that year. App. A2, A8, A14.

During the 2004 tax year, the Department of Revenue reviewed the Insurance Companies' payments and issued a "Notice of Assessment 2004/2005 Estimated Insurance Tax(es)." App. at A2, A8, A14. The Notices reflected payments and assessed amounts still due from each company. App. A2, A8, A14. It announced that assessed amounts were "due June 1, 2005." App. A2, A8, A14.

The Department received the last 2004 payment from each company on June 2, 2005. App. A2, A8, A14.

Nearly two years later, each company took steps to obtain refunds of a portion of the 2004 taxes paid. App. A3, A9, A15. Each company sent refund claims to the Department postmarked June 1, 2007. App. A3, A9, A15. The U.S. Postal Service attempted delivery on Saturday, June 2, 2007. App. A3, A9, A15. But, not surprisingly, the Department's offices were closed that day; the Department received the claims on June 4, 2007. App. A3, A9, A15.

The Director of Revenue rejected the claims in a decision dated June 18, 2007, because they were not filed within two years of the payment of the taxes. App. A3, A9, A15.

On July 17, 2007, each company filed a complaint with the Administrative Hearing Commission ("AHC"), contesting the Director's finding. App. A1, A7, A13. Because the facts pertinent to the timeliness of the refund claims were not disputed, the AHC heard the matter on cross-motions for summary determination. *See* App. A1-2, A7-8, A13-14. On January 16, 2008, the AHC granted the Director's motion and affirmed his decision.

ARGUMENT

This appeal essentially reaches a single question: When the General Assembly required that one claiming money from the State Treasury in the form of a tax refund make that claim within two years of the payment of taxes, did it really mean "two years unless that falls on a Saturday, in which case the deadline is extended"? As discussed below, the language of the pertinent statute is unambiguous; it simply does not crack open the door to filing in the way that other deadline statutes do, allowing the Director, the Administrative Hearing Commission, or this Court to extend deadlines that fall on days (other than Sunday) when state offices are routinely closed.

I. A prerequisite to obtaining a refund of premium taxes paid was to file a request with the Director by June 2, 2007.

State officials can pay money out of the State Treasury only when authorized by the General Assembly. Where the General Assembly allows such payments, it often imposes very specific requirements. Perhaps the most typical is a requirement that a request for payment be made within a particular period of time. That is hardly surprising; the State needs to know, month-to-month and year-to-year, how much money is in the Treasury and how much of what is in the Treasury is subject to being paid out for various purposes.

This case involves the authority of the Director of Revenue to authorize the payment of funds from the Treasury as a refund of insurance premium taxes. As discussed below, the General Assembly cut off the possibility of such tax funds flowing back out of the Treasury at two years – not at two years and a few days.

a. Section 136.035.3 allows the Director to make refunds only if the request was filed within two years of payment. (Responding to appellant's Point II)

Section 136.035.3[1] generally bars the Director from refunding taxes unless the request is filed within two years of the date on which the tax was paid: "No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment." Implicitly, that statute allows the Director to make refunds when the request is filed within two years of payment. Here, the last date of payment for each of the Insurance Companies was June 2, 2005. App. A2, A8, A14. The parties agree that the two-year period ended on June 2, 2007.

The Insurance Companies, however, assert that the Director's authority to make the refunds they sought is not limited by § 136.035. They correctly point out that although § 136.065 sets a limit on tax refund claims

[1] Except as otherwise indicated, all citations are to RSMo. 2000.

generally, the General Assembly has in certain instances established different periods for refunds of particular taxes.

The Insurance Companies look for such an instance in Chapter 148. That chapter, as the Insurance Companies point out repeatedly, addresses what the Revisor of Statutes has labeled, "Taxation of Financial Institutions." Insurance companies are among the "financial institutions" covered; the premium tax that these insurance companies claim to have overpaid is imposed pursuant to § 148.340. But Chapter 148 does not contain a generally applicable instruction regarding the timing of refund claims.

Chapter 148 does contain a specific provision, § 148.076.1, for taxes imposed on banking institutions:

> A claim for credit or refund of an overpayment of any tax imposed by sections 148.010 to 148.110 shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later; or if no return was filed by the taxpayer, within two years from the time the tax was paid.

The application of § 148.076.1 is limited by its very specific reference to the banking tax, *i.e.*, it provides authority to pay refunds on claims made up to

three years only of "tax[es] imposed by sections 148.010 to 148.110." That excludes the premium tax, which is imposed by § 148.350.

In light of the specific limiting language of § 148.076, it simply does not matter that the section is "in the same chapter as the insurance premium tax" (Appellants' brief at 32 and again at 33). Section 148.076 does not apply to taxes on credit institutions (§§ 148.120-.230), nor to taxes on credit unions and savings and loan associations (§§ 148.600-.710). There is no language in § 148.076 on which to base a claim that it extends the Director's authority with regard to premium tax refunds beyond the two-year scope of § 136.035.3.

The Insurance Companies invoke the canon of construction that statutes are to be read *in pari materia*. Such canons are useful only where the language is ambiguous: *See Spradlin v. City of Fulton*, 982 S.W.2d 255, 264 (Mo. banc 1998) ("Where the language of the statute is unambiguous, there is no room for construction") (Holstein, J. concurring). And § 148.076.1 is not.

But the canon does not help the Insurance Companies in any event. The Insurance Companies use it to argue that one provision of Chapter 148 has to apply to all of Chapter 148 – an argument that finds no support whatsoever in any of the logic or precedent the Insurance Companies cite. The Director's refusal to read § 148.076 in a way that its language will not permit does not render any language of that or any other statute

meaningless, in contrast to the interpretation rejected in *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 295 (Mo. banc 2007). Reading the premium tax statute (without its own refund authority) and the banking tax statute (which has one) separately is entirely consistent with *Investors Title*, *Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676 (Mo. banc 2006), and *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991).

The canon cannot be applied in the fashion the Insurance Companies urge. Under the canon, provisions that are part of a single "law" or statutory scheme are interpreted as a harmonious whole. The typical – and proper – use of *in pari materia* is thus to take a particular phrase and try to ensure its consistent use among inter-related provisions. But that use has no application here, even if "the law" to be read harmoniously could be defined as an entire chapter of the Revised Statutes, rather than the more logical definition, limited to the premium tax law, §§ 148.130-.461. The phrase in § 148.076 for which the Insurance Companies would need to find other uses would be "credit or refund of an overpayment of any tax imposed by sections 148.010 to 148.110," and that phrase is not found anywhere else in Chapter 148 – nor elsewhere in the Revised Statutes of Missouri.

But again, neither *in pari materia* nor any other canon of construction should be used here, for given the language of § 148.076, even "when the statute as a whole is considered, the intent of the legislature and the

language of the statute are both intrinsically clear." *J.B. Vending v. Director of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001).

b. Failure of a taxpayer to comply with the specific requirements of the refund provisions, including § 136.035, bars the Director from making a refund.

No decision of this Court in the last 25 years has upset the conclusion that "where the statute provides a remedy and a procedure to be followed, it must be complied with." *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W.2d 599, 600-601 (Mo. 1983). In fact, this Court has recently applied that rule to tax refunds:

> Missouri's statutory tax refund provisions operated as a limited waiver of the state's sovereign immunity. "When a state consents to be sued, it may be sued only in the manner and to the extent provided by the statute; and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit."

City of Hazelwood v. Peterson, 48 S.W.3d 36, 41 (Mo. banc 2001), quoting *Charles v. Spradling*, 524 S.W.2d 820, 823 (Mo. banc 1975).

Under § 136.035.3, then, the taxpayer *must* comply with the statutory requirement that it file a claim for refund with the Director "within two years

from the date of payment" of the taxes sought to be refunded. Here, the taxes were paid on June 2, 2005. The last day of the second year was June 2, 2007. Unless the refund request was filed by that day, the Director lacked authority to order its payment.

c. The period allowed is not extended because it falls on a Saturday.

The Insurance Companies do not claim that the period set by § 136.065.3 was extended because the last day fell on a Saturday. And with good reason.

The General Assembly has oft demonstrated its understanding of weekend deadlines. Since at least 1855, the legislature has made a specific accommodation for deadlines that fall on Sunday: "The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded." § 1.040, RSMo. 2000 (a two-sentence version of a clause in "new" § 22, Chapter 96, RSMo. 1855). The legislature last reenacted that provision – without adding Saturday – in 1957. A.L. 1957 p. 587. Meanwhile, the legislature has added Saturday in various other places. Most pertinent here, the legislature has put Saturday alongside Sunday in statutes relating to taxation deadlines: § 137.495

(property tax lists); § 143.851 (income tax returns).[2] The legislature has also demonstrated that it can order an office to be open on Saturday to accommodate those wishing to meet a deadline. *See* § 115.057 (election authority offices to be open on the Saturday before an election). But the legislature did neither here: it made no provision for Saturday to be skipped in calculating the deadline, nor did it mandate that the Director maintain office hours every Saturday to receive last-minute filings.

This court has included Saturday among days that do not count for various deadlines. Rules 6.01(a), 20.01(a), 44.01(a). But those rules apply

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[2] Examples outside the tax context include: § 70.327, Art. II § 3.4 (veto of acts of the Kansas-Missouri Flood Prevention and Control Commission); § 71.625 (municipal license tax); § 105.487.4 (financial disclosure reports); § 105.964.1 (reports to the Missouri Ethics Commission); § 211.032.2 (protective custody hearings); §§ 211.061.4, 211.063.1 (juvenile detention); § 227.552(7) (utility relocation); § 273.403.2 (animal sterilization); § 288.240 (Labor and Industrial Relations Commission filings); § 301.640.4 (release of liens); § 302.178.6(2) (renewal of intermediate drivers' licenses); §§ 307.365.5, 307.366.4, 643.330.2 (repair of defects found in vehicle inspection); § 407.937.2 (cancellation of certain contracts); § 506.060 (commencement of civil actions); § 552.040.17 (conditional release revocation hearing).

only to filings with the courts; they do not apply to administrative filings, even those made with adjudicatory bodies such as the AHC. *See*, *e.g.*, *Evergreen Lawn Service, Inc. v. Director of Revenue*, 685 S.W.2d 829, 831 n. 6 (Mo. banc 1985) ("[T]his Court has expressly rejected applying Rule 44.01 to administrative matters.").

The result of the legislature's decision not to generally follow the pattern of excluding Saturdays as it excludes Sundays is that, absent some more specific statute, when a statutory deadline falls on the first day of the weekend, Saturday, it is as a practical matter moved up a day, while a deadline that falls on Sunday is extended a day. Here, of course, the deadline was on Saturday, June 2, 2007. So as a practical matter, the deadline moved up a day; the refund claims had to be presented to the Director by the end of the business day Friday, June 1 – unless there was some mechanism for declaring something filed as a matter of law before it was, in fact, received.

II. The Insurance Companies' refund requests were not filed by June 2, 2007. (Responding to appellants' Point I)

The Insurance Companies assert that their refund claims were filed with the Director on Saturday, June 2, 2007, even while conceding that they never reached the Director until Monday, June 4, 2007. In other words, the Insurance Companies assert that the claims were filed as a matter of law

before they were filed as a matter of fact. The legislature, however, has not opened the door to demands on the State Treasury that far.

a. Because no mailbox rule applies, mailing a premium tax refund claim on or before the day it is due does not constitute filing.

The most typical method of opening the door to make a filing legally effective prior to receipt is the use of a "mailbox rule," one that makes the filing effective upon sending. Such rules exist in a variety of Missouri statutes. The example most notable here is § 621.205, whose predecessor was at issue in the Insurance Companies' principal authority. That section, regulating the initiation of review by the AHC, provides:

> 1. For the purpose of determining whether documents are filed within the time allowed by law, documents transmitted to the administrative hearing commission by registered mail or certified mail shall be deemed filed with the administrative hearing commission as of the date shown on the United States post office records of such registration or certification and mailing. If the document is sent by any method other than registered mail or certified mail, the administrative hearing commission shall deem it to

be filed on the date the administrative hearing commission receives it.

Thus a filing with the AHC is effective when properly mailed. But the General Assembly did not include any such rule in the statute authorizing the Director of Revenue to refund taxes already in the State Treasury. Thus the Insurance Companies do not and cannot assert that their refund claims were filed upon mailing.

b. Attempted delivery on a day that the Department is closed for business does not constitute filing.

Unable to assert that the refund claims were filed upon mailing, and with filing upon receipt being too late, the Insurance Companies are required to find an unusual, alternative approach. They advocate a "presentation" rule – *i.e.*, a rule that filing is complete when someone arrives at the government office ready to present a document, apparently without regard for what day or time that might be.

The Insurance Companies base their claim to that rule on a single decision of this Court: *Evergreen Lawn Service, Inc. v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985), in which the Court was addressing not § 136.065 or a similar law, but instead § 161.350, RSMo. Cum.Supp. 1981 – the predecessor of § 621.205.

Like current § 621.205, former § 161.350 contained a "mailbox rule":

> For purposes of determining whether pleadings are filed within the time allowed by law for filing of such pleadings, pleadings transmitted to the administrative hearing commission by registered mail, but not by certified mail, shall be deemed filed with the administrative hearing commission as of the date shown on the United States post office records of such registration and mailing.

§ 161.350, RSMo. Cum.Supp. 1981 (quoted in *Evergreen*, 685 S.W.2d at 830 n. 4). Rather than send its petition for review to the AHC by registered or any other form of mail, Evergreen sent its petition via a private overnight delivery service on the 29th day. 685 S.W.2d at 830. "Airborne attempted to deliver the petition for filing with the Commission on Saturday, August 23rd, the thirtieth day, but the offices of the Commission were closed and no one was present to receive or file the petition." *Id.* at 831. The Court deemed the question not to be whether transmission via Airborne Express was the legal equivalent of transmission via U.S. mail, but whether attempted delivery is "filing" under former § 161.350. The Court held that it was: "Attempted filing on the thirtieth day by a petitioner in person or by any proper agent of the petitioner constitutes a proper mode of filing necessarily contemplated by the law." § 161.350.

The Court did not cite any statutory law to support that conclusion. Nor did it cite any precedent in which attempted filing was deemed to be the legal equivalent of filing. Nor did it address the numerous complications and permutations of such a rule. Its analysis was limited to a simple premise: that the "express legislative intent [was] that the taxpayer act *within* the thirty days prescribed" by the statute providing for AHC review. 685 S.W.2d at 831 (emphasis in original). The Court ignored the express legislative intent that the petition actually be mailed or filed within 30 days. It insisted on "[a] fair construction [that] mandates that the taxpayer be given the *full* thirty days in which to affect his appeal," *id.* (emphasis in original),[3] despite the fact that Evergreen had the full 30 days regardless, because of the mailbox rule. And the Court proclaimed that the AHC, by its own conduct in

[3] For that proposition, the Court cited *Ball Stores, Inc. v. State Bd. of Tax Commissioners*, 316 N.E.2d 674 (Ind. 1974). But the Indiana Court did what this Court, as noted above, cannot do: in the absence of legislative language expressly answering the question of Saturday deliveries, it applied court rules saying that Saturday deadlines are extended to the next business day. *Id.* at 677-678.

setting business hours, could not limit the time or opportunity for filing. *Id.*[4] But taken literally, that means agencies' business hours would have no impact on filing, *i.e.*, that merely showing up at a state building at any hour of any day or night is sufficient to constitute "filing" – an approach that even the more liberal rules promulgated by this Court for judicial filings would not permit.

Evergreen lacks a persuasive basis. It is contrary to the rule, cited above, that the state legislature can define the terms of an administrative remedy, and that those invoking that remedy must comply with those terms. *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W.2d at 600-601; *Charles v. Spradling*, 524 S.W.2d at 823; *Matteson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc) 1995. It fails to give full credit to the legislative decision to always extend Sunday deadlines until Monday, but to selectively extend Saturday deadlines.

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[4] There, the Court invited the reader to "see" *State Bd. of Registration for Healing Arts v. Masters*, 512 S.W.2d 150 (Mo. App. W.D. 1974). But the only pertinent language in *Masters* is the general statement that the AHC "has no more and no less authority than that granted to it by the legislature." *Id.* at 161. That decision says nothing about requiring the AHC – or the Director – to accept filings attempted outside of normal business hours.

But even if it were a precedent to which this Court should adhere, it is not one that should be applied here, for three reasons.

First, the Court's conclusion in *Evergreen* that the legislature intended to give taxpayers the full 30 days in former § 136.065.3 finds some support in the legislature's willingness to open the door to filings received after 30 days by including a mailbox rule. There, it really was possible for a taxpayer to use every one of the 30 days in debating and drafting the petition for review; the taxpayer merely had to get the document to the post office on time for a 30th day postmark. The legislature expressly chose not to demand actual delivery within 30 days. Here, there is no mailbox rule, and thus no basis in the statute for supposing that the legislature was fixated on giving taxpayers every one of the 730 days allowed for seeking a refund, nor for supposing that the legislature wanted to allow the filing of documents that arrive after the deadline.

Second, though broadly worded, the *Evergreen* "filed when attempted" rule is dicta to the extent it reaches beyond former § 161.350. It has never been applied by this or any other court in any reported decision to any other statute, whether that statute deals with tax refunds or with any other filing deadlines. Nor has it ever been applied to filing with any administrative officer or agency other than the AHC – logically, since the statute it applied was limited to the filing of petitions of review with the AHC. And its

application to the AHC may well be a function, in part, of the AHC's quasi-judicial role and the courts' desire to keep AHC procedures consistent with judicial ones to the extent statutes permit.

The fact that the *Evergreen* holding has never been applied outside the scope of former § 161.350 deprives the Insurance Companies of the argument that the legislature has left that holding in place by acquiescence. In 1991 the legislature amended § 621.205 (A.L. 1991 H.B. 366/S.B. 283), "arguably a response to the *Evergreen* decision" (App. Br. at 22), and did not amend § 136.035.3 or other deadline statutes. But nothing in *Evergreen* alerted the legislature to the possibility that other statutes also needed amending – a logical prerequisite to an acquiescence argument.

Third, *Evergreen* addresses taxes yet unpaid, while this case involves money already deposited in the State Treasury. This Court has held that "the state is entitled to invoke its sovereign immunity unless it expressly consents not to do so." *Community Federal Savings and Loan Association v. Director of Revenue*, 752 S.W.2d 794, 797 (Mo. banc 1988). *See also Matteson v. Director of Revenue*, 909 S.W.2d at 360. The consent to refund taxes is a "narrow waiver of the state's sovereign immunity." 909 S.W.2d at 360. To receive a refund of taxes, the taxpayer must precisely follow the procedures set forth in the refund statute, because statutes waiving sovereign immunity are strictly construed. *Id.*; *Community Federal*, 752 S.W.2d at 797. It should

be apparent that the State's interests in the *Evergreen* circumstances and those here (and in *Community Federal* and *Matteson*) are different – the difference between funds that one expects (or hopes) to get, and funds that one already has, believes it can appropriate, and may have already spent.

Because removing money from the State Treasury, as the Insurance Companies seek to do, goes to the very essence of sovereign immunity, the Court should insist that they comply to the letter with the statute permitting their claim. In other words, they should be required to place their claim in the hands of the Director during business hours on a business day – rather than authorize them, by *post hoc* judicial decree, to "file" merely by showing up, document in hand, at a government office that they must know is closed.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,412 words.

The undersigned further certifies that the labeled disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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