

**IN THE SUPREME COURT OF MISSOURI**

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**Case No. SC89080**

**INSURANCE COMPANY OF THE STATE OF PA, Appellant**

**v.**

**DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL  
INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents**

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**Appeal from the Administrative Hearing Commission of Missouri**

**Case No. 07-1225 RG**

**Honorable John J. Kopp, Commissioner**

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**Case No. SC89081**

**ILLINOIS NATIONAL INSURANCE COMPANY, Appellant**

**v.**

**DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL  
INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents**

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**Appeal from the Administrative Hearing Commission of Missouri**

**Case No. 07-1230 RG**

**Honorable John J. Kopp, Commissioner**

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**Case No. SC89082**

**AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY, Appellant**

**v.**

**DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL  
INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents**

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**Appeal from the Administrative Hearing Commission of Missouri**

**Case No. 07-1231 RG**

**Honorable John J. Kopp, Commissioner**

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**BRIEF OF APPELLANTS**

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## **JURISDICTIONAL STATEMENT**

The three insurance companies (Insurance Company of State of PA, Illinois National Insurance Company, and American International South Insurance Company, respectively) filed Complaints with the Administrative Hearing Commission seeking review of the Director of Revenue's denials of refunds for insurance company premium taxes paid by the insurance companies for the year 2004.

The Administrative Hearing Commission erroneously upheld the denials of refund determining that insurance companies' claims for refund were not timely filed under Section 136.035, RSMo, on the grounds that a claim for refund must be received no later than two years after the last payment is made for the taxable period.

Resolution of the issues presented in this appeal requires this Court to construe revenue laws, including Sections 136.035, 148.350 and 148.076, RSMo. Because the resolution of these issues involves the construction of one or more revenue laws of this state, jurisdiction is proper in this Court under Article V, Section 3 of the Missouri Constitution and Section 621.189, RSMo Supp. 2007.

## **STATEMENT OF FACTS**

*Insurance Company of the State of PA v. Director of Revenue and Director of Insurance,  
Financial Institutions and Professional Registration*

Supreme Court No. SC89080

Appellant Insurance Company of the State of PA (“Appellant PA,” hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 77.)<sup>1</sup> Under the provisions of Chapter 148, RSMo, Appellant PA is required to pay a tax on the premiums it collects in Missouri. Appellant PA has done so for the time periods in question in this case. Id.

The tax year in question is 2004 (which is also calendar year 2004). During 2004, Appellant PA applied its 2003 tax year overpayment and made a first quarter payment to the Director of Revenue reflecting the estimated amount of tax owed. (L.F. 20-28.) Appellant PA paid a total of \$140,404 in estimated tax payments. (L.F. 17.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant PA and issue an assessment of the amount of tax due,

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<sup>1</sup> All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89080.

but not paid in the estimated payments. Section 148.350, RSMo. The Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent to Appellant PA at some time prior to June 1, 2005. (L.F. 17). The Notice of Assessment states that Appellant PA is to “Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005.” Id. The Notice of Assessment later states, “Tax payments are due June 1, 2005.” Id. The Notice concluded that Appellant PA had incurred a tax liability for 2004 of \$154,826 and had already paid \$140,404. Id. Thus Appellant PA owed an additional \$14,422 in taxes for 2004. Id. The Appellant PA made this final payment for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant PA’s claim for refund, for 2004 taxes, of \$154,826 was postmarked June 1, 2007. (L.F. 49). This claim for refund was sent via Express Mail, a service of the United States Postal Service. Id. Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). Id. Delivery was then effectuated on June 4, 2007. (L.F. 27 and 31).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 50). This denial was based upon the Director’s position that the claim for refund was out of time. Id.

On July 17, 2007, the Appellant PA filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative Hearing

Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant PA filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 51). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 76).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant PA's Cross-Motion for Summary Determination and held the that refund claim was not timely filed. (L.F. 81).

Appellant PA filed its Petition for Review in this Court on February 1, 2008.

On February 14, 2008, this Court sustained Appellant PA's Motion to Consolidate for Purposes of Briefing and Argument. Accordingly, Appellant PA's (SC89080) statement of facts and argument are consolidated in this Appellants' Brief with the statements of facts and arguments of Appellant Illinois National Insurance Company (SC89081) and Appellant American International South Insurance Company (SC89082).

*Illinois National Insurance Company v. Director of Revenue and Director of Insurance,  
Financial Institutions and Professional Registration*

Supreme Court No. SC89081

Appellant Illinois National Insurance Company (“Appellant Illinois National,” hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 77.)<sup>2</sup> Under the provisions of Chapter 148, RSMo, Appellant Illinois National is required to pay a tax on the premiums it collects in Missouri. Appellant Illinois National has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). During 2004, Appellant Illinois National made four quarterly payments to the Director of Revenue reflecting the estimated amount of tax owed. (L.F. 20-28.) Appellant Illinois National paid a total of \$455,508 in these four estimated tax payments. (L.F. 17.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant Illinois National and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The Notice of

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<sup>2</sup> All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89081.

Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent to Appellant Illinois National at some time prior to June 1, 2005. (L.F. 17). The Notice of Assessment states that Appellant Illinois National is to “Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005.” Id. The Notice of Assessment later states, “Tax payments are due June 1, 2005.” Id. The Notice concluded that Appellant Illinois National had incurred a tax liability for 2004 of \$505,211 and had already paid \$455,508. Id.

Thus Appellant Illinois National owed an additional \$49,703 in taxes for 2004. Id. The Appellant Illinois National made this final payment for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant Illinois National's claim for refund, for 2004 taxes, of \$505,211 was postmarked June 1, 2007. (L.F. 49). This claim for refund was sent via Express Mail, a service of the United States Postal Service. Id. Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). Id. Delivery was then effectuated on June 4, 2007. (L.F. 27 and 31).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 50). This denial was based upon the Director's position that the claim for refund was out of time. Id.

On July 17, 2007, the Appellant Illinois National filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative

Hearing Commission entered an order adding the Director of Insurance as a party to the case.

(L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant Illinois National filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 51). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 76).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant Illinois National's Cross-Motion for Summary Determination and held the that refund claim was not timely filed. (L.F. 81).

Appellant Illinois National filed its Petition for Review in this Court on February 1, 2008.

*American International South Insurance Company v. Director of Revenue and  
Director of Insurance, Financial Institutions and Professional Registration*

Supreme Court No. SC89082

Appellant American International South Insurance Company (“Appellant AIS,” hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 77.)<sup>3</sup> Under the provisions of Chapter 148, RSMo, Appellant AIS is required to pay a tax on the premiums it collects in Missouri. Appellant AIS has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). During 2004, Appellant AIS had a 2003 tax year overpayment applied to 2004. (L.F. 20-28.) Appellant AIS paid a total of \$27,120 for 2004. (L.F. 17.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant AIS and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent to Appellant AIS at

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<sup>3</sup> All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89082.

some time prior to June 1, 2005. (L.F. 17). The Notice of Assessment states that Appellant AIS is to “Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005.” Id. The Notice of Assessment later states, “Tax payments are due June 1, 2005.” Id. The Notice concluded that Appellant AIS had incurred a tax liability for 2004 of \$210,379 and had already paid \$27,120. Id.

Thus Appellant AIS owed an additional \$183,259 in taxes for 2004. Id. The Appellant AIS made this final payment for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant AIS's claim for refund, for 2004 taxes, of \$210,379 was postmarked June 1, 2007. (L.F. 49). This claim for refund was sent via Express Mail, a service of the United States Postal Service. Id. Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). Id. Delivery was then effectuated on June 4, 2007. (L.F. 27 and 31).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 50). This denial was based upon the Director's position that the claim for refund was out of time. Id.

On July 17, 2007, the Appellant AIS filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative Hearing Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant AIS filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 51). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 76).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant AIS's Cross-Motion for Summary Determination and held the that refund claim was not timely filed. (L.F. 81).

Appellant AIS filed its Petition for Review in this Court on February 1, 2008.

**POINTS RELIED ON**

**I.**

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT PHYSICAL DELIVERY WAS ATTEMPTED WITHIN TWO (2) YEARS OF THE LAST PAYMENT OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX BY APPELLANTS.**

*Evergreen Lawn Service, Inc., v. Director of Revenue, 685 S.W.2d 829*

(Mo. banc 1985)

## II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT THE PROPER STATUTE OF LIMITATIONS ON THE FILING OF A REFUND CLAIM OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX IS EITHER THREE YEARS FROM THE DATE OF THE TAX RETURN OR TWO YEARS FROM THE LAST PAYMENT UNDER SECTION 148.076, RSMO, AND THE REFUND CLAIM FILED BY APPELLANTS FALLS WITHIN THE THREE YEAR LIMITATION UNDER THIS PROVISION.

Section 148.076, RSMo

*Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288 (Mo. banc 2007)

## ARGUMENT

The decision of the Administrative Hearing Commission (“Commission,” hereinafter) erroneously declares the law of Missouri, finding that attempted physical delivery of a claim for refund within the statute of limitations for filing such a claim is not sufficient to protect and preserve that refund claim. Effectively, the decision of the Commission eliminates a taxpayer’s ability to file a refund claim when the Director of Revenue chooses to close her offices in Jefferson City.

Missouri law has been clearly stated by this Court; where physical delivery is attempted prior to a filing deadline and the documents are filed on the next day which the State agency is open, then such filing is made within the requisite timeframe. This Court’s decision in *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985) is controlling and should have been followed by the Commission. For that reason, and for the undisputed facts in this case, the decision of the Commission should be reversed.

Alternatively, the Commission erred in finding that the provisions of Section 148.076, RSMo, do not apply to the current case. This provision establishes a refund timeframe for filing claims that is specific to Chapter 148, RSMo. This is the same chapter in which the foreign insurance company premium tax is found and due to the similar types of taxes and the proximity in the statutes of these provisions, the Commission should have applied Section 148.076 as the appropriate refund statute. Under Section 148.076, RSMo, the refund claims failed by the Appellants were timely filed. Thus the decision of the Commission should be reversed.

This Court has consolidated the above-captioned three cases (Supreme Court Nos. SC89080, SC89081 and SC89082) for purposes of briefing and oral argument. Throughout this Appellants' Brief, the Appellants are cumulatively identified as "Appellants." The arguments contained herein apply equally to all three Appellants and to all three cases relating to each respective individual Appellant.

### **STANDARD OF REVIEW**

The standard of review for tax cases on appeal from the Administrative Hearing Commission is found in section 621.193, RSMo 2000,<sup>4</sup> which provides that this Court is to uphold the decision of the Commission when it is "authorized by law and supported by competent and substantial evidence upon the whole record." *Suburban Newspapers of Greater St. Louis, Inc., v. Director of Revenue*, 975 S.W.2d 107 (Mo. banc 1998). While this case arises out of a Motion for Summary Determination before the Administrative Hearing Commission; the same standard of review applies to such cases. *Buder v. Director of Revenue*, 869 S.W.2d 752, 752 (Mo. banc 1994).

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<sup>4</sup> All citations are to RSMo 2000, unless otherwise noted.

**I.**

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTION FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTION FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT PHYSICAL DELIVERY WAS ATTEMPTED WITHIN TWO (2) YEARS OF THE LAST PAYMENT OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX BY APPELLANTS.**

The decisions of the Commission should be reversed for one clear and simple reason: the refund claims were filed within two years from the final payments being made to the Director of Revenue. The statute of limitations for filing a refund claim does not bar the claims of Appellants since their claims for refund were properly filed in a timely manner with the Department of Revenue. Since the refund claims were timely filed, the Appellants' are entitled to refunds of their taxes paid for the year 2004. The Commission should have denied Respondents' Motions for Summary Determination and should have granted Appellants' Motions for Summary Determination. The Commission's decisions are not authorized by law and are not supported by the undisputed facts in this case.

### **Refund Claim is Timely**

The Commission's justification for its Decisions is that the provisions of Section 136.035, RSMo Cumm. Supp. 2007, establish the filing deadline for a claim of refund at the date of the last payment made for the filing year<sup>5</sup> and that the attempted physical delivery of

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<sup>5</sup> It is not settled that Section 136.035 is the proper statute of limitations for the purpose of refund of the tax imposed under Section 148.340, as the Commission has supposed. Within Chapter 148, there is an alternative refund statute. Section 148.076 provides for a different statute of limitations for the bank tax. While this section only references Sections 148.010 through 148.110, it is in the same chapter and should be found by this Court as the alternative to Section 136.035. Since Section 148.076 is more specific and in the same chapter as Section 148.340, the insurance premium tax, it has

the refund claims were irrelevant. The Commission then concludes that only receipt of the refund claims by the Director of Revenue are of any relevance to the statute of limitations. The Commission is plainly incorrect in this determination and this Court should reverse.

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better application than the broad general statute, Section 136.035. This issue is more fully addressed in Point II, *infra*.

The facts in this case are not in question, as noted in the Statement of Facts. Without restating the full Statement of Facts, the salient dates and actions are short and simple. The Notices of Assessment by the Director of Revenue were sent to the Appellants at some time prior to June 1, 2005. (L.F. 17)<sup>6</sup>. The final payments made to the Director of Revenue were received by the Director on June 2, 2005. (L.F. 27).

Appellants' claims for refund were postmarked June 1, 2007 and delivery was attempted, via United States Postal Service Express Mail, on June 2, 2007. (L.F. 49) However, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). Delivery was then effectuated on June 4, 2007. (L.F. 27).

This Court has clearly addressed this point in *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985). In *Evergreen*, the taxpayer attempted to deliver an appeal of an assessment to the Administrative Hearing Commission by delivery, using Airborne Express. *Id.* The Commission was closed on the day delivery was attempted, because it was a Saturday. *Id.* That Saturday was also the last day for an

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<sup>6</sup> The Legal Files in each of the three cases consolidated for purposes of briefing are identically paginated. All citations to the Legal File are to the same page in each Legal File, unless otherwise noted.

appeal to be timely filed. *Id.* The appeal was redelivered on the following Monday and filed. *Id.* The Commission dismissed the appeal as not timely. This Court reversed:

When a petitioner attempts to file an appeal on the thirtieth day (and that terminal date falls on a Monday thru Saturday) by personal delivery to the appropriate office but the actual filing is thwarted because the office is closed, the Commission must treat the petition as timely filed, at the time the office next opens.

*Id.* at 831. This Court concluded:

Thus, we hold that the Commission is deemed to have accepted the terminal Saturday filing when delivered to its offices (though closed) and to have processed the petition as timely filed on its next business day.

*Id.* The decisions of the Commission are in direct conflict with this Court's decision in *Evergreen*. The attempt by the Commission to distinguish *Evergreen* from the current matters is unsuccessful and should be reversed by this Court as *Evergreen* is controlling. This Court should reverse the cases and remand them to the Commission for a determination that the refund claims were filed on June 2, 2007, in a timely manner.

The Commission attempts to distinguish *Evergreen* from the facts in the current situation. The arguments contained in the Commission's decision are not supported either by facts of the cases relied on or by the state of the law in Missouri. The first argument that is used as a justification to distinguish *Evergreen* is the Commission's analysis of Section 621.205, RSMo.

This statute was in question in the *Evergreen* case. The Commission now notes that Section 621.205 has been amended and no longer provides the same language that was originally contained when the *Evergreen* case was decided. On this account the decision is correct because the General Assembly amended Section 621.205 to add the following sentence in subsection 1:

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.

Section 621.205.1, RSMo. This amendment by the General Assembly, coming in 1991, is arguably a response to the *Evergreen* decision referenced herein. However, the General Assembly did not apply this change to all other provisions of law that reference filing dates and deadlines. The General Assembly changed the Administrative Hearing Commission's purview, with respect to filing dates, but did not change the language contained in Section 136.035, or any other provision that would apply to the current case. In fact, the language contained in Section 136.035 is analogous to the language contained in Section 621.205 prior to the amendment.

This Court in reviewing that language in Section 621.205 prior to the amendments of 1991, found that attempted physical delivery by Airborne Express was sufficient to meet the requirements contained in Section 621.205 and thus the Complaint had been properly filed. *Evergreen* at 830-831. The language contained in Section 136.035, RSMo, should be

analyzed in the same manner in which Section 621.205 was previously analyzed by this Court. That being attempted delivery, whether in person or by a delivery service, is sufficient to meet the time limits if such delivery was attempted within the proper time frame.

In this case, it is unquestioned that the delivery was attempted (L.F. 49) and that such attempt was within the proper time frame. That the Director of Revenue had closed her office, much the way the Administrative Hearing Commission had closed its office in *Evergreen*, merely means that the attempted delivery was completed on June 4, 2007 (the next business day) but under the provisions of Section 136.035 delivery and filing was accomplished when the attempt was made and documented on June 2, 2007 (a Saturday).

When the General Assembly amends a statute it is presumed to know the state of the law and amendments made to one statute, without similar amendments made to other analogous statutes reflect that the General Assembly did not intend to amend those other statutes. It would have been easy for the General Assembly to have amended Section 136.035 at the same time it amended Section 621.205; however, it chose not to do so. The Commission now attempts to interpret the General Assembly's explicit choice of amending one statute, but not amending the other, as a basis for repudiating this Court's analysis of the prior language.

The position of the Commission is untenable and should be rejected by this Court. What the Commission is effectively doing is subsuming the role of the legislature, inserting its preferences into the arena of the legislator's prerogative, and changing the law in complete

derogation of its powers and duties. This Court should reject the Commission's dramatic attempted expansion of the law and of its powers and reverse the decision with respect to the Motions for Summary Determination.

The Commission cites to *Darr v. Director of Revenue*, 877 S.W.2d 697 (Mo. App. E.D. 1994) for the proposition that Section 610.205 would have no application to a refund claim filed with the Director of Revenue. *Darr* tacitly accepts this Court's ruling in *Evergreen* where physical attempt of filing is made. *Id.* at 699. In *Darr*, the question resulted from a driver who mailed a request for hearing after the deadline for the postmark on such request for hearing had elapsed. *Id.* at 698. The Eastern District determined that *Darr* could have mailed the request for hearing in a timely manner, where the final day to request a hearing was on a Saturday and a postmark was available on a Saturday. *Id.* The Eastern District in *Darr* did reflect that Section 621.205 does not apply to actions before the Department of Revenue. *Id.* at 699. However, the Court did **not** reject the *Evergreen* principle as not applying to the Department of Revenue. *Id.* at 698-699. Accordingly, *Darr* is of no support to the Commission's decision in this matter.

The other two cases cited by the Commission in support of its position are *Morant v. State*, 783 S.W.2d 139 (Mo. App. E.D. 1989) and *Ely v. Parsons*, 399 S.W.2d 613 (St.L.Ct. App. 1966). Neither of these two cases assist or support the position of the Commission in this matter. The more recent case, *Morant*, never references the *Evergreen* case whatsoever. The only thing *Morant* stands for is that the certified mail argument, which appears to have been made by the prisoner, Morant, in this case did not apply under Supreme Court Rule

29.15(c). *Id.* at 143. This rule provides a motion to be filed with the Clerk of the Court. *Id.* at 143. The Court referenced solely criminal cases and criminal rules and did not refer to any administrative provisions, including any reference to the Department of Revenue. Moreover, the Eastern District in *Morant* was not dealing with attempted physical delivery to the Clerk. An attempted physical delivery, if rejected by the Clerk, would present an entirely different opinion and an entirely different set of facts. Accordingly, *Morant* does not support the decision of the Commission.

The latter case referenced by the Commission, the *Ely* case, has similar defects. First, it was a pre-*Evergreen* decision of the St. Louis Court of Appeals. Thus, the Court had no guidance from this Court as to how that type of issue might be interpreted. Again, the *Ely* case does not deal with any attempted physical delivery of a document with the Clerk, but instead deals with mailing and receipt upon mailing. *Id.* at 619. The Court held that “mailing” does not represent or constitute “filing.” *Id.* The Court does not address what happens when attempted delivery is made in a timely manner but rebuffed by the receiving party. Based upon this Court’s decision in *Evergreen*, it is apparent that where attempted physical delivery occurs, filing is accomplished.

No further inquiry is required. Based upon this Court’s decision in *Evergreen*, the Commission’s decisions must be reversed and these cases remanded to the Commission for entry of decisions in favor of the Appellants.

Respondents, in their Commission filings, have also opposed the timing of the refund claims based upon language contained in *Community Bancshares, Inv. v. Secretary of State*,

43 S.W.3d 821 (Mo. banc 2001). This argument is based upon their mistaken belief that the claims for refund were beyond the filing deadline for a claim of refund: two years from the date of the last payment made for the tax year. As admitted by the Respondents (L.F. 63), one date for filing a claim for refund of the 2004 taxes was two years from the final payment which was made on June 2, 2005; June 2, 2007.<sup>7</sup>

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<sup>7</sup> This point appears to be conceded by the Respondents in their Response to Appellants' Cross-Motion for Summary Determination. (L.F. 63).

Respondents' have previously argued that since the delivery was attempted by the Postal Service (via Express Mail), that there was no delivery attempted and only when the Department physically opened and accepted the refund claim was it received. The other argument posited by Respondents appears to be that Postal Service Express Mail delivery is somehow different than Airborne Express delivery.<sup>8</sup> This is a frivolous distinction. The methods (Airborne Express and USPS Express Mail) are the same. This phoney distinction stands in stark contrast to the unambiguous decision of this Court in *Evergreen* and the clear, uncontroverted facts of this case.

**Facts Demonstrate Delivery Attempt on June 2, 2007**

Appellants attempted delivery upon the Department of Revenue via United States Postal Service Express Mail Saturday, June 2, 2007. (L.F. 49). That delivery was unsuccessful since the offices of the Director were closed. Then delivery was successfully completed on June 4, 2007. (L.F. 49).

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<sup>8</sup> The purpose of the delivery rule, versus postmark date, is fairly simple to understand. Since regular mail (postmarked mail) is not tracked and attempted delivery dates (or actual delivery dates) cannot be ascertained, it makes sense that receipt becomes controlling. However, Airborne Express and USPS Express Mail utilize identical hand-delivery options that include tracking of the package and offer delivery on Saturdays, in addition to Monday through Friday. These services were, in fact, used by Appellants in filing their refund claims. (L.F. 49.)

The Respondent Directors' own exhibit demonstrates that hand-delivery was attempted on June 2, 2007. (L.F. 49). This exhibit indisputably shows that delivery was attempted on the Director. Exhibit A-4, submitted and verified by the Director's own witness, is a copy of the Express Mail receipt. Id. It shows in the upper right hand corner that "Delivery Attempt" was made on "Mo. 6 Day 2" at "Time 1230." Id. This document then shows an employee signature of the Postal Service attesting to that date and time of attempted hand delivery. Id.

There can be no reasonable argument made that hand-delivery was not made in a timely manner. The facts are uncontroverted and, based upon Missouri case law, clearly demonstrate that the deadline for filing the refund claim was met, under any analysis.

### **Case Law Does Not Support the Commission's Decisions**

The Commission did not cite to any case that is directly on point with the exact same facts as the current case. Instead the Commission created a patchwork attempt to overcome the precedential holding of this court in *Evergreen.*, also discussed on Pages 24-24, supra.

First there is not one case cited in the Commission's decisions that relates to the insurance premium tax.<sup>9</sup>

There is only one recent Missouri case that addresses the insurance premium tax. *Fidelity Security Life Insurance Company v. Director of Revenue*, 32 S.W.3d 527 (Mo. banc 2000). The *Fidelity* case does not address the deadline for filing a refund claim and instead dealt with the assessment of tax by the Director of Revenue. *Id.* Interestingly, the decision

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<sup>9</sup> Respondents previously cited to franchise tax cases, e.g. *Community Bancshares, Inc., v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001) and to savings and loan tax cases, e.g. *Macon County Savings & Loan Association v. Director of Revenue*, No. 91-001328 RI (Mo. Admin. Hearing Comm'n Oct. 7, 1992). See, L.F. 9, et seq. Not one of these cases dealt with the insurance premium tax in question in this case.

of this Court reinforces Appellants' position in this case, as it refers to the assessment process contained in Section 148.350. *Id.* at 528.

Aside from *Evergreen Lawn Service, Inc., v. Director of Revenue*, 821 S.W.2d 829 (Mo. banc 1985), there is no other case law required to be reviewed to resolve this case.

The Commission's decisions are without valid foundation. The Commission seeks to avoid this Court's decision in *Evergreen*; however, such avoidance is impossible. When the facts were exactly the same as the current facts, this Court ordered a Complaint filed in the Commission. Similarly, under identical facts, this Court should reverse the Commission's decisions and declare that the refund claims were timely filed with the Director of Revenue.

## II.

**THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTION FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTION FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT THE PROPER STATUTE OF LIMITATIONS ON THE FILING OF A REFUND CLAIM OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX IS EITHER THREE YEARS FROM THE DATE OF THE TAX RETURN OR TWO YEARS FROM THE LAST PAYMENT UNDER SECTION 148.076, RSMO, AND THE REFUND CLAIM FILED BY APPELLANTS FALLS WITHIN THE THREE YEAR LIMITATION UNDER THIS PROVISION.**

Appellants' alternatively assert that the refund claims were filed before the appropriate three year deadline. Section 148.076, RSMo, is the appropriate refund state for insurance premium tax refund claims. The Commission rejected the use of the filing deadline contained in Section 148.076, RSMo. This provision is in the same chapter as the insurance premium tax. More importantly, it relates to the same general field and area of taxation: taxation of financial entities. Section 148.076 provides for a three year statute of limitations from the date the return is filed, or two years from the final payment being made. *Id.* Under this statute, there is no question that the refund claim is timely.

The Commission rejected the use of Section 148.076 based upon the language apparently limiting the application of this statute to the tax on banking institutions.<sup>10</sup> However this provision is contained in the chapter dealing with taxation of financial institutions: Chapter 148, RSMo. This chapter contains taxes on banks (Sections 148.010-148.110); credit institutions (Sections 148.120-148.230); insurance companies (Sections 148.310-148.541, including Section 148.350 in question in this case); and credit unions and savings and loan associations (Sections 148.600-148.710). Section 148.076 is the only refund provision found in Chapter 148; but it IS found in Chapter 148.

The Commission, upon determining that there was no refund provision in Sections 148.340-148.350, immediately jumped to Section 136.035, the general refund provision.

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<sup>10</sup> The only citation offered on this point is *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996). *Akin* does not address the effect of refund provisions in similar tax provisions in the same chapter, but instead addresses (at the reference point noted by the Commission) to a discussion of severability. *Id.* That issue is not before this Court in this case and thus *Akin* is of no weight on the issues presented in this case.

However, the Commission failed to look at the refund provision contained in the same chapter as the foreign insurance company premium tax...Section 148.076. This provision is the nearest refund provision and should be utilized in the current matter.

This Court has held that laws are to be read *in pari materia* and where laws apply to a similar topic they should be so interpreted. *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 295 (Mo. banc 2007).

[L]aws are to be interpreted in *pari materia* in order to determine their meaning. Under this doctrine, statutes involving related subject matter are construed together as though constituting one consistent act, even if adopted at different times.

*Id.* quoting *Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676, 683 (Mo. banc 2006). Whether it is different statutes relating to county records (in *Investors Title*); or venue provisions (as in *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991); or taxation on financial institutions as in the current case; statutes on similar topics should be read together. The Commission tossed aside the one statute on refunds that should have been read as applying to Section 148.350.

Before the Commission, the Respondents offered *Community Bancshares, Inc., v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001) to support their position rejecting the use of Section 148.076 and instead using Section 136.035. *Community Bancshares* addressed the provisions of the franchise tax and not the insurance premium tax. Notably, the franchise tax is not found in Chapter 148, but instead in Chapter 147. Chapter 147 only deals with the

corporate franchise tax and no other topic. Since there is no statute creating a refund deadline in Chapter 147, the Respondents urged Section 136.035 be adopted by default as it was in *Community Bancshares*. (L.F. 79). However, there is a refund section in the same chapter as the insurance premium tax: Section 148.076 and it should have been adopted by the Commission.<sup>11</sup> Under the provisions of Section 148.076, the refund claim is timely. This is also addressed in the Response to Motion for Summary.

Therefore Appellants pray this Court reverse the Commission's decisions in all three cases and remand the cases to the Commission to enter orders compelling refunds of \$154,826 (Appellant PA), \$505,211 (Appellant Illinois National), and \$210,379 (Appellant AIS).

### **CONCLUSION**

As is clear in these cases, the Appellants filed their claims for refund in a timely manner. Under this Court's decision in *Evergreen Lawn Company, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985), the attempt to file the claims for refund on Saturday, June 2, 2007, was sufficient to make the claims be timely filed.

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<sup>11</sup> Respondents' relied below upon *Community Bancshares, Inv. v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001), in opposition to the use of Section 148.076 as the appropriate statute. However, *Community Bancshares*, never addressed the application of Section 148.076. This provision was never discussed by the Court. This must be in great part, due to the tax in question being the franchise tax and not a financial institution tax.

The Commission's attempts to distinguish, avoid and evade the reach of *Evergreen* should not be accepted by this Court. The Commission's decision should be reversed.

In the alternative, Section 148.076, RSMo, provides the proper statute for calculating the timeliness of a claim for refund of the foreign insurance company premium tax which is also in Chapter 148, RSMo. That provision allows filing within three years from when the return is filed or two years from the final payment. Under Section 148.076, the refund claims are clearly timely and the Commission should be reversed.

**WHEREFORE** Appellants pray that this Court reverse the Decisions of the Commission in the abovementioned cases, determine that the refund claims of Appellants were timely filed remand this case to the Commission for issuance of a decision approving the refund claims of Appellants, and for such other relief as this Court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF ATTORNEY**

I hereby certify that the foregoing Brief of Appellants complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 7,175 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 1/2" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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Marc H. Ellinger

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent via U.S. Mail, postage prepaid to the following parties of record on this 13<sup>th</sup> day of March, 2008:

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