

IN THE SUPREME COURT OF MISSOURI

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**

Appeal from the Administrative Hearing Commission of Missouri

Case No. 07-1225 RG

Honorable John J. Kopp, Commissioner

Case No. SC89081

ILLINOIS NATIONAL INSURANCE COMPANY, Appellant

v.

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

Appeal from the Administrative Hearing Commission of Missouri

Case No. 07-1230 RG

Honorable John J. Kopp, Commissioner

Case No. SC89082

AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY, Appellant

v.

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

Appeal from the Administrative Hearing Commission of Missouri

Case No. 07-1231 RG

Honorable John J. Kopp, Commissioner

REPLY BRIEF OF APPELLANTS

BLITZ, BARDGETT & DEUTSCH, L.C.

James B. Deutsch, #27093

Marc H. Ellinger, #40828

Jane A. Smith, #28681

308 East High Street, Suite 301

Jefferson City, MO 65101

Telephone No.: (573) 634-2500

Facsimile No.: (573) 634-3358

E-mail: jdeutsch@blitzbardgett.com

E-mail: mellinger@blitzbardgett.com

E-mail: jsmith@blitzbardgett.com

Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities 2

Argument 4

 Point I 5

 Point II 14

Conclusion 16

Certificate of Attorney 18

Certificate of Service 18

TABLE OF AUTHORITIES

Brown Group, Inc., v. Administrative Hearing Commission, 649 S.W.2d 874
(Mo. banc 1983) 13

Community Federal Savings and Loan Association v. Director of Revenue,
752 S.W.2d (Mo. banc 1988) 9, 10

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998) 12

Evergreen Lawn Service, Inc., v. Director of Revenue, 685 S.W.2d 829
(Mo. banc 1985) 5, 6, 7, 8, 9, 11, 13, 16

Investors Title Co., Inc. v. Hammonds, 217 S.W.3d 288 (Mo. banc 2007)..... 15

Matteson v. Director of Revenue, 909 S.W.2d 356 (Mo. banc 1995) 9, 10

Medicine Shoppe International, Inc., v. Director of Revenue, 156 S.W.3d 333
(Mo. banc 2005) 12, 13

Ronnoco Coffee Company v. Director of Revenue, 185 S.W.3d 676 (Mo. banc 2006) ... 15

State Board of Registration for Healing Arts v. Masters, 512 S.W.2d 150 (Mo.App. 1974)
..... 8

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991)..... 15

Chapter 148, RSMo 4, 14, 16

Section 136.035, RSMo 4, 5, 6, 7, 8, 9, 10

Section 143.821, RSMo 10

Section 148.076, RSMo 4, 5, 14, 16, 17

Section 621.205, RSMo 7

ARGUMENT

In responding to Appellants' first point, the Respondents fail to address the key provision of the Missouri refund scheme: that every taxpayer is guaranteed two (2) years to file their claim for refund. Section 136.035, RSMo. The General Assembly could easily have set that time period to be less than two years or more than two years; it did not. With a two year statute, a taxpayer who takes every action necessary to try to file its refund claims within that two year period should not be frustrated because the Director of Revenue has closed its offices for a key day.

The crux of Respondents' argument is that the General Assembly didn't really mean two years, it meant something else...something less than two years. And that something is controlled by the Director of Revenue: when he closes his offices. Clearly the language of Section 136.035 provides a taxpayer two years, from the date of payment, to file its claim for refund. Respondents' position is that one year and 364 days is "close enough" to two years. Respondents are incorrect and this Court should reverse the decision of the Administrative Hearing Commission ("Commission" hereinafter) and find that the claims for refund were timely filed under Section 136.035.

Respondents also have failed to rebut the use of Section 148.076, RSMo, as the proper statute for timely filing a refund claim for taxes under Chapter 148, RSMo. Under the doctrine of *in pari materia*, Section 148.076 should be used to determine the time to file a refund claim. The Commission erred in finding that the provisions of Section 148.076, RSMo, do not apply to the current case. This provision is in 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, RSMo 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.

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.

Respondents have attempted to rewrite Section 136.035 and shorten the time for which taxpayers may file for a refund. This attempt by Respondents is not supported by the plain language of Section 136.035 and this Court's decision in *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985). After failing to distinguish *Evergreen*, Appellants go so far as to assert that this Court was wrong in its decision in *Evergreen*. These attacks should not be adopted by this Court. The Commission's decision

to grant Appellants' Motions for Summary Determination and deny Respondents' Motions for Summary Determination should be reversed.

Under Section 136.035 Appellants' Refund Claims are Timely

Contrary to Respondents' assertions, this Court has directly addressed the same fact pattern in *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985). Respondents offer no valid reason that *Evergreen* should not be followed. When a comparison between this case and *Evergreen* is made, it becomes clear that this Court has unambiguously ruled that attempting to file a claim in a timely manner is sufficient to protect that claim.

In *Evergreen*, the taxpayer attempted to deliver an appeal of an assessment to the Administrative Hearing Commission by delivery, using Airborne Express. *Id.* at 830. 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 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 stating:

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, and the supporting arguments in Respondents' Brief, are in direct conflict with *Evergreen*. Their attempts to distinguish *Evergreen* from the current matters are unsuccessful and should be rejected by this Court. Quite simply, *Evergreen* is controlling.

The language contained in Section 136.035, RSMo, at question in the current case, should be analyzed in the same manner in which Section 621.205 was previously analyzed by this Court in *Evergreen*. That being: attempted delivery, whether in person by the taxpayer 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 (by June 2, 2007). 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 physically made and documented on June 2, 2007 (a Saturday).

What the Director has effectively done is to subsume the role of the legislature, inserting his preferences into the arena of the legislature's prerogative, and changing the law

in excess of his powers and duties.¹ This Court in *Evergreen* rejected the same attempt by the Commission to amend, through policy or rule, the statutes that controlled the filing deadlines at the Commission.

The Commission cannot, by its own rules or conduct, limit the time - or opportunity - for filing given by the statute.

Id. at 831, citing *State Board of Registration for Healing Arts v. Masters*, 512 S.W.2d 150 (Mo.App. 1974). This Court's analysis and conclusion in *Evergreen* stands in good stead today:

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. This approach does not require an "extension" of the statutory period when the terminal date falls on a Saturday and relieves the Commission of the necessity to keep its offices open every Saturday. It also contemplates

¹ The Commission did the same in its decisions by basically reducing the two year guarantee of Section 136.035, to something less than two years.

the possibility that the thirtieth day may fall on a week day which happens to be a holiday in which State offices are closed.

Id. Regardless of Respondents' contentions to the contrary, the logic of this Court's decision in *Evergreen* applies to the current matter and Section 136.035.

Section 136.035 provides for a two year time period to file a refund claim with the Director of Revenue. Just as in *Evergreen*, the actions of the state agency (here the Director of Revenue; there the Administrative Hearing Commission) have, if approved, the effect of changing time limits imposed by the General Assembly. Even if it is the policy of the Director of Revenue to close his office on Saturday, his action cannot reduce the statutorily guaranteed period of time to file a claim for refund. Just as in *Evergreen*, this Court should re-affirm the two year guarantee and make sure that a taxpayer has the full measure guaranteed and set aside by the General Assembly.

Respondents have also opposed the timing of the refund claims based upon language contained in *Community Federal Savings and Loan Association v. Director of Revenue*, 752 S.W.2d 794 (Mo. banc 1988) and *Matteson v. Director of Revenue*, 909 S.W.2d 356 (Mo. banc 1995).² This Court in both *Community Federal* and in *Matteson* simply identified that taxpayers must follow the refund procedures contained in the statutes. *Community Federal*,

² The other argument previously posited by Respondents, that Postal Service Express Mail delivery is somehow different than Airborne Express delivery, appears to have been waived by Respondents.

752 S.W.2d at 797 and *Matteson*, 909 S.W.2d at 360. In fact, the Court in *Matteson* notes that a taxpayer “must precisely follow the refund procedures delineated by the statute.” *Id.*

This Court then continued by saying:

The director cannot “waive” the appellant taxpayer’s noncompliance with the mandatory statutory prerequisites to obtaining a refund.

Id. In *Matteson*, the issue was whether the taxpayer had properly given notice to the Director of Revenue of the grounds for which it was seeking a refund. This Court found that the taxpayer in *Matteson* did not give notice to the Director of the grounds on which it was seeking a refund and therefore the taxpayer had not complied with a mandatory requirement under Section 143.821, RSMo. *Id.*

This is a very different situation than the current matter. In the current matter, the taxpayer has taken all actions necessary to comply with the refund statute, Section 136.035, within the time frame contained therein. The taxpayer attempted physical delivery within the two year statute, but was frustrated due solely to the Director of Revenue’s decision to shorten that time frame. While in *Matteson* the Director could not “waive” a taxpayer’s noncompliance; similarly, in this case the Director cannot shorten the General Assembly’s statutory dictate for filing of claims for refunds. The Director must follow the statutory provisions and he has not.

Effectively what the Respondents argue in their Brief is that the Director can make any changes to the refund procedure that will have a negative impact upon a taxpayer;

however, a taxpayer must go above and beyond the statutory requirements in order to properly file their claim for refund. This argument is put forth by the Commission and by Respondents with absolutely no support of any Missouri law. It should not be adopted by this Court.

The Commission's decisions are without valid foundation. The Commission seeks, and Respondents urge this Court, 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.

***Evergreen* Should be Followed**

Respondents, unable to differentiate the current case from the facts and ruling in *Evergreen*, drop to the last gasp argument: that this Court was wrong and should reverse itself. (Respondents' Brief 19-20). That Respondents' do not understand the inherent fairness underlying *Evergreen* is not surprising. However, their lack of interest in precedent and *stare decisis* is, to the contrary, quite surprising.

This Court has long held that the precedential value of its decisions should be given great deference. The Respondents wish this Court to simply pitch out *Evergreen*, like yesterday's paper. However, decisions of this Court should instead be followed unless there is a compelling reason to reverse.

Similarly, this Court should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of *stare decisis*, at least in the absence of a recurring injustice or absurd results.

Crabtree v. Bugby, 967 S.W.2d 66, 69-70 (Mo. banc 1998). Respondents have not demonstrated (or even alluded to) a “recurring injustice” or any type of “absurd result.” Instead, they seek to have this Court do exactly what *Crabtree* stands against, revisit prior decisions where there is no compelling reason to reverse.

The doctrine of *stare decisis* is crucial to the fundamental underpinnings of our judicial system:

The doctrine of *stare decisis* - to adhere to decided cases - promotes stability in the law by encouraging courts to adhere to precedents.

Medicine Shoppe International, Inc., v. Director of Revenue, 156 S.W.3d 333, 334-335 (Mo. banc 2005.) In *Medicine Shoppe* the Director was seeking to have long-standing precedent reversed. This Court understood that following precedents is not an absolute, but that reversing long-standing precedent is something to be done cautiously and only where a “compelling case for changing course” can be demonstrated. *Id.* at 335.

This Court refused to reverse that precedent, with respect to the single-factor apportionment taxation system, and instead affirmed its prior decision in *Brown Group, Inc., v. Administrative Hearing Commission*, 649 S.W.2d 874 (Mo. banc 1983).

The state of Missouri and its corporate taxpayers have had 21 years of applying the *Brown Group* holding to the single-factor apportionment taxation statute. This decision has been undisturbed by subsequent legislation...If the interpretation is incorrect - and it does result in the loss of millions of dollars in revenue - the General Assembly is the proper place for amendment to the statute.

Medicine Shoppe, 156 S.W.3d at 338-339.

There is no compelling case presented by the Respondents that would mandate the reversal of *Evergreen*. No injustice has been identified. Protecting the two year statutory guarantee, established by the General Assembly, is certainly not an absurd result. Quite the contrary, abrogating the two year statute would create both injustice and an absurd result. The logic of *Evergreen* and the long-standing history of *Evergreen*, mandate that it be followed. Thus the refund claims were timely filed and the Commission should be reversed.

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.

Through the vehicle of extensive argument without any citation, the Respondents assert that the doctrine of "*in pari materia*" simply does not apply to the current matter. First they assert that the doctrine can only be applied to provisions that are "part of a single law." A statement which has no support in any case law in the State of Missouri. They next argue that the provisions must be part of a single "statutory scheme."

The taxation of financial institutions is a statutory scheme enacted in Missouri. The use of the time limit to file a refund claim related to Chapter 148, which deals with taxation of financial institutions, is well within the purview of a statutory scheme of financial

institution taxation. Consistently, this Court has applied the doctrine of *in pari materia*, including with respect to taxation cases. In 2006, this Court issued its opinion in *Ronnoco Coffee Company v. Director of Revenue*, 185 S.W.3d 676 (Mo. banc 2006). In *Ronnoco*, this Court addressed the use of *in pari materia* with respect to revenue statutes in Missouri. *Id.* at 683. This Court stated:

Laws are to be interpreted *in pari materia* in order to determine their meaning. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Under this doctrine, statutes involving related subject matter are construed together as though constituting one consistent act, even if adopted at different times. *Id.*

Id. This ruling applies to the current case just as it did to the *Ronnoco* case. Even more recently, this Court has further adopted, by direct quotation, the ruling in *Ronnoco* in *Investors Title Company, Inc. v. Hammonds*, 217 S.W.3d 288, 295 (Mo. banc 2007).

Whether it is statutes relating to county records (*Investors Title*); venue provisions (*Rothermich*) or taxation laws of the State of Missouri (*Ronnoco*), the doctrine of *in pari materia* has been adopted and re-adopted by this Court. Similarly, where the taxation scheme related to financial institutions, such as banks for foreign insurance companies, of Missouri contains a statute of limitations for filing refund claims, this Court should go no further than looking within that chapter, Chapter 148, to determine the appropriate statute of limitations.

In the current matter, the time limit in Section 148.076, is the sole statute related to the filing of refund claims contained in Chapter 148. Accordingly, the Commission should have adopted Section 148.076 as the appropriate statute and therefore determined that the refund claims were timely filed.

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

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 physical attempt to file the claims for refund on Saturday, June 2, 2007, was sufficient to make the claims be timely filed.

The Respondents' arguments to evade *Evergreen* or even to overturn *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 the doctrine of *in pari materia* Section 148.076 is the appropriate statute to determine when refund claims must be filed.

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 abovecaptioned 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,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

James B. Deutsch, #27093
Marc H. Ellinger, #40828
Jane A. Smith, #28681
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358
E-mail: jdeutsch@blitzbardgett.com
E-mail: mellinger@blitzbardgett.com
E-mail: jsmith@blitzbardgett.com

Attorneys for Appellants
Insurance Company of the State of PA,
Illinois National Insurance Company, and
American International South Insurance
Company

CERTIFICATE OF ATTORNEY

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

(A) It contains 3,287 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.

__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 28th day of May, 2008:

Mark Stahlhuth, Senior Counsel
Missouri Department of Insurance
Division of Financial Regulation
P.O. Box 690
Jefferson City, MO 65102-0690

Jim Layton
State Solicitor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102-0899

Marc H. Ellinger

