

IN THE SUPREME COURT OF MISSOURI

Case No. SC89106

AMERICAN HOME ASSURANCE 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. 07-1224 RG

Honorable John J. Kopp, Commissioner

Case No. SC89107

GRANITE STATE INSURANCE GROUP, 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. 07-1229 RG

Honorable John J. Kopp, Commissioner

Case No. SC89108

NEW HAMPSHIRE 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. 07-1228 RG

Honorable John J. Kopp, Commissioner

Case No. SC89109

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, 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. 07-1227 RG

Honorable John J. Kopp, Commissioner

Case No. SC89110

AIU INSURANCE COMPANY, Appellant

v.

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

Case No. 07-1226 RG

Honorable John J. Kopp, Commissioner

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ARGUMENT

Respondent has perpetuated the same fundamental mistake that the Administrative Hearing Commission (“Commission” hereinafter) made in its decisions; mistaking estimated installments under Section 148.350, RSMo, for final payments for the purpose of determining when a refund claim must be filed. When estimated installments are made, they do not represent payments that start the clock ticking on the final date for a refund claim. Instead, the date upon which a final return (whether requiring a payment or authorizing a credit) is known and filed is the correct date for calculation of the deadline under the refund statute. To determine that estimated installments are the starting point for the statute of limitations would be inequitable and illogical. Following Respondents’ reasoning, it is possible if a taxpayer made a large estimated payment two-and-a-half years prior and has not used estimated payment by the current year, that the statute of limitations would have run prior to the return even being filed. The Respondents fail to properly look at the plain meaning of the refund statutes and instead to create a harsh barrier by falsely attempting to use the doctrine of sovereign immunity to effectively amend the plain language contained in Section 136.035. The filing of the final return is the only fair and logical date on which to base the statute of limitations and the same should be adopted by this Court.¹

¹ The Respondents’ Brief addresses Appellants’ Points Relied On in a different order than presented in the Initial Brief of Appellants. This Reply Brief stays faithful to the order of Points in the Initial Brief. Respondents did raise a general argument in

opposition to Appellants in Respondents' "Point I", which is addressed prior to the main body of the argument, see page 7 herein. The remainder of this Reply Brief holds form to the order of the Initial Brief and rebuts Respondents' arguments to each of Appellants' Points accordingly.

In responding to Appellants' second 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 under the general refund statute, 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 on the terminal day.

The crux of Respondents' argument is that the General Assembly did not really mean two years, it meant something less than two years and that something is controlled by the Director of Revenue: when he chooses to close 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 filed by the Appellants were timely filed. Thus the decisions of the Commission should be reversed.

This Court has consolidated the above-captioned five cases (Supreme Court Nos. SC89106, SC89107, SC89108, SC89109, and SC89110) for purposes of briefing and oral argument. Throughout this Appellants' Brief, the Appellants are cumulatively identified as "Appellants."

Construction and Application of Refund Provisions

Respondents' first point in argument does not directly tie to any of the arguments or points presented by Appellants in their Initial Brief. Respondents rely on the general proposition that refund of tax provisions are waivers of sovereign immunity and thus must be strictly construed. As Respondents note at the beginning of their argument, where refund provisions do occur, it is typical "that a request for payment be made within a particular period of time." Respondents' Brief at 9. The procedures established by statute, such as the refund provision of Section 136.035, are not broadly and liberally construed. To that extent, Appellants and Respondents agree.

However, there is a fundamental disagreement between the parties (and the Commission below), to wit: should the statutes be so tightly construed that plain language and legislative intent should be ignored. Respondents and the Commission say yes and they

are simply wrong. Appellants correctly note that the plain language and legislative intent controls the construction of the statutes.

Respondents' first citation is *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W.2d 599 (Mo. 1983), which simply stands for the observation that the statutory procedures established for appeals have to be followed by all parties. *Id.* at 600-601. There is no dispute that the statutory time limits must be followed, only a dispute over Appellants' compliance with these time limits. All parties must comply with the statutory procedures. This was previously addressed by this Court in *Charles v. Spradling*, 524 S.W.2d 820 (Mo. banc 1975). In *Charles*, a case also cited by Respondents, this Court expressed the importance for all parties to comply with the statutory provisions. The legislature "may prescribe the procedures to be followed and such other terms and conditions it sees fit." *Id.* at 823. This Court continued that where a definition of a term exists, it should be used. *Id.*

Where, as here, there is no definition of a key term, then the full body of the taxing statute should be reviewed to determine the context of the term in question and the plain meaning should also be consulted. *Weske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. banc 2007). As noted later in this Brief, under Point I, the term "payment" is not a defined term in Section 136.035 and must therefore be construed in this case. Using both the context of section 148.350 (the foreign insurance company premium tax statute) and the plain dictionary meaning of "payment," it is clear that the Appellants have complied with all statutory requirements and that the refund claims were timely filed.

For this reason and those further addressed in this Reply Brief and the Initial Brief of Appellants, the Commission's decisions should be reversed and the refund claims of the Appellants should be paid by the Director of Revenue.

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 THE FINAL TAX PAYMENT ONLY OCCURS WHEN THE FINAL TAX RETURN IS FILED FOR THE TAX YEAR.

Respondents focus exclusively upon the term “payment” contained in Section 136.035 for their argument that the refund claims filed by Appellants’ were out of time. This very narrow focus ignores the provisions of the statute imposing the tax in question in this case and also the plain meaning of the term “payment.” As a result, Respondents’ arguments should be rejected and this Court should reverse the Commission’s decision.

The term “payment” contained in Section 136.035 does not relate to the date when cash was sent to or received by the state, but instead it is the date upon which the actual obligation to the state is 1) known and 2) received with the proper, mandated filings. That date under Section 148.350 is not November of a tax year (or March in the case of Appellant Granite State) as adopted by the Commission and urged by the Respondents. This is due to the simple terms of the taxing statute itself:

Beginning January 1, 1983, the amount of the tax due for that calendar year and each succeeding calendar year thereafter shall be paid in four approximately equal estimated quarterly installments and a fifth reconciling installment. The first four installments shall be based upon the tax assessed for the immediately preceding taxable year ending on the thirty-first day of December, next preceding. The quarterly installment shall be made on the first day of March, the first day of June, the first day of September, and the first day of December. Immediately after receiving from the director of the department of insurance, certification of the amount of tax due from the various companies, the director of revenue shall notify and assess each company the amount of taxes on its premiums for the calendar year ending on the thirty-first day of December, next preceding. The director of revenue shall also notify and assess each company the amount of the estimated quarterly installments to be made for the calendar year. If the amount of the actual tax due for any year exceeds the total of the installments made for such year, the balance of the tax due shall be paid on the first day of June of the following year, together with the regular quarterly installment due at that time. If the total amount of the tax actually due is less than the total amount of the installments actually paid, the amount by which the amount paid exceeds the amount due shall be credited against the tax for the following year and deducted from the quarterly installment otherwise due on the first day of June.

Section 148.350.2, RSMo. (Emphasis added). As is clear from the first sentence of this statute, each insurance company is required to make four (4) “estimated installments” for each taxable year. *Id.* The final payment is to be made on June 1 of the ensuing year. *Id.*

Respondents ignore the entire statutory scheme of Section 148.350 in their argument. Instead they focus on the definition of payment contained in Section 136.035, a statute that is not in the same statutory scheme as tax in question in this action. Section 136.035 is the general refund statute, which provides for a window of two years from the date of payment of taxes to claim a refund.²

Respondents assert that the term “payment” includes all estimated installments under Section 148.350. Respondents make this assertion with no law or cases to support their position. Moreover, Respondents fail to even address the use of “installments” in Section 148.350.

Respondents concede that the installments under Section 148.350 are no more than estimates. Respondents’ Brief at 18. They further concede that the amount of tax due from

² Appellants do not concede that Section 136.035 is the proper statute for refund claims. Section 148.076 should instead be adopted as the refund statute for taxes in Chapter 148. See Point III, *infra*.

the Appellants to the state is not known until well after the end of the tax year. *Id.* They even go farther and admit that “full payment” was received from each Appellant. Respondents’ Brief at 6. In spite of this admission, they stubbornly cling to the argument that the quarterly installments are “payments.” In light of their concession and the plain language definition of “payment,” Respondents are hoist on their own petard.

This Court has always held that words should be given their “plain and ordinary meaning.” *Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007). When looking at the plain meaning of a term, this Court has consistently adopted the dictionary definition of a term. *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 490 (Mo. banc 2003). In *Karpierz*, this Court looked to WEBSTER’S THIRD INTERNATIONAL DICTIONARY for the definition of “due.” *Id.* Where a term is not defined, “this Court will rely on the plain and ordinary meaning of the word, as derived from the dictionary.” *Curry v. Ozarks Electric Corporation*, 39 S.W.3d 494, 496 (Mo. banc 2001) citing *Hemeyer v. KRCG TV*, 6 S.W.3d 880, 881 (Mo. banc 1999).

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 1659 defines “payment” as follows:

1: the act of paying or giving compensation: the discharge of a debt or obligation to fulfill a promise **2:** something that is paid: something that is given to discharge a debt or obligation to fulfill a promise.

Clearly the taxes in question do not constitute “compensation” as the first part of the definition references. Thus the key definition becomes “something that is given to discharge

a debt.” *Id.* There are two key terms in this definition: “discharge” and “debt.” An inquiry into the plain meaning of these terms closes out Respondents’ argument.

“Discharge” is defined in WEBSTER’S as follows:

1 a: the act of relieving of something that oppresses (as an obligation, accusation, penalty): ACQUITTANCE, DISCHARGE, RELEASE (ask for the ~ of a debtor)

Id. at 5–). As can be seen, “discharge” means the resolving a “debt,” which is defined as follows:

2: a state of owing <hopelessly in ~> **3:** something (as money, goods, or services) owed by one person to another

Id. at 583. WEBSTER’S continues to give an explanation of what a debt really is, stating:

DEBT often applies to a single definite amount of money owed.

Id. To summarize, WEBSTER’S defines “payment” as the “act of relieving [discharge] of a single definite amount of money owed [debt].”

Using nothing but what the Respondents have urged, the plain, dictionary meaning of “payment,” it is clear that there can be no payment until there is a “single definite amount of money owed.” *Id.* That amount is unknown until the Director sends the final assessment to the Appellants AND they file their return with the Director.

That installments are made, under Section 148.350, does not convert those estimates to a payment, since there is no definite amount owed to the Director. Therefore, the estimates are not “payments” under Section 136.035.

Respondents object to the holding of this Court which has indicated that a timely claim on any of a tax year's payments is sufficient to allow the full year's tax to be subject to refund. *Community Bancshares, Inc., v. Secretary of State*, 43 S.W.3d 821, 825 (Mo. banc 2001). After finding that tax payments for 1996 were made up through February 17, 1996, this Court stated:

the last possible day for Bancshares to file its claim for the 1996 refund would have been February 17, 1998.

Id. This Court did not hold that Bancshares was limited to seeking refund of the amount paid on February 17, 1996, but a refund for all of 1996.³ Appellants do not, as Respondents assert, believe that the final payment for the 1996 tax year opens up refunds from the 1994 tax year. Respondents' Brief at 20. This Court was clear in *Community Bancshares*, that the final payment for a tax year is the date used under Section 136.035. Respondents have deliberately distorted the Appellants' position and should not be rewarded for that distortion.

³ Under the statutory scheme for the tax in *Community Bancshares*, the February return was the final return for that tax year.

Respondents also focused on the income tax payment scheme but ignored the sales tax payment scheme.⁴ Under the Missouri sales tax scheme, payments are made on a monthly basis, then the two year statute applies to the period of time covered by the payment. E.g. if the return and payment is made on February 20, for January taxes; the refund limitation applies to taxes for the entire month of January. This is because each sales tax payment made is the final payment, based upon final sales for the return period, and the refund

⁴ The income tax statutes provide for estimated payments, with a final return and payment to be made after the tax year's end. Chapter 143, RSMo. The deadline for filing a refund claim runs from due date of the final return. While the income tax refund provisions are not incorporated into Chapter 148, they do reflect a desire to make sure the refund deadline runs from the date at which the definite amount of tax is know, due and paid. Respondents reject this logic entirely; a rejection that should not be affirmed by this Court.

deadline then runs from that final payment of taxes. The estimated installments under Section 148.350, in this case, are universally agreed not to be final payments.

The Commission has created a new policy where the final payment and return for a tax year is ignored; only the individual estimated installments matter for the purpose of filing a refund claim. Nothing in Section 136.035, Chapter 148 or any case remotely suggests ignoring the full tax year for purposes of refund claims. In fact, everything points in the other direction; that is, a timely filed refund claim covers the entire tax period represented by the final payment. The Respondents' position is not well taken, nor is the position of the Commission.

The final payment occurred on June 2, 2005 in the cases before this Court. That was the day the final payment was made to the Director in the form of the credit returns. It was only on that date that a firm and definite amount was known and paid. At any date before, this was not the case. As a result, the filing deadline for the refund claims was June 2, 2007; a deadline which the Appellants complied with by attempting to physically file such claims on June 2, 2007. (See Point II, *infra*).

Respondents appear to concede that there are no Missouri cases which directly address the calculation of the statute of limitations for refund claims where there are estimated tax installments, followed by a final return and payment. This has occurred in other states. Respondents have failed to discuss these sister state cases, much less rebut them. Without restating this precedent from Ohio and other states, Appellants refer to the original discussion in their Initial Brief at pages 37 to 39. This Court should follow the decision of the Ohio

Supreme Court in *Hanna Mining Co. v. Limbach*, 484 N.E.2d 691 (Ohio 1985) and reverse the decision of the Commission and determine that the refund claims of the Appellants were properly and timely filed.

Simply put the plain language of Section 136.035, as defined by WEBSTER'S, reflects that the payment of taxes for the tax year 2004 did not occur until June 2, 2005 and thus the refund claims were timely filed when presented on June 2, 2007. Respondents' arguments do not give adequate cause to overrule the plain language of Section 136.035. Where other states' similar schemes have been reviewed, the final return and payment date has been adopted as the start of the refund period. Similarly this Court should reverse the Commission and find that the refund claims of the Appellants were timely filed.

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 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*, Respondents go so far as to assert that this Court was wrong in its decision in *Evergreen*. These assertions 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 hand 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 these cases, 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 attempt to deliver 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 commenced 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.⁵ 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

⁵ 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 Respondents even imply that since the statutory period to file is two years (and not thirty days) that there is plenty of time to file and thus the delivery attempt should be disregarded. Respondents' Brief at 33.

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 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 even if by one day. Just as in *Evergreen*, this Court should re-affirm the two year guarantee and make sure that a taxpayer has the full measure of time 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). This Court in both *Community Federal* and in *Matteson* simply identified that

taxpayers must follow the refund procedures contained in the statutes. *Community Federal*, 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.*

The Court in *Matteson* dealt with 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. 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.

Respondents appear to imply that under these two cases (*Community Federal* and *Matteson*) sovereign immunity trumps express statutory language. It does not. This Court has never recognized Respondents' newly created principle. Where a statute grants a taxpayer two years to file a refund claim, neither the Director of Revenue or a new theory of sovereign immunity allows that time to be shortened even by one day. This expansion of sovereign immunity should not be favored and thus the Commission should be reversed.

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 was adopted by the Commission and urged by Respondents with no support of any Missouri law. It should be rejected by this Court.

The Commission's decisions are without valid foundation. The Commission seeks, and Respondents urge this Court, to undermine this Court's decision in *Evergreen*; however, such an action is impossible. When the facts were exactly the same as the current facts, this Court ordered a Complaint as timely 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 consummate last gasp argument: that this Court was wrong and should

reverse itself. (Respondents' Brief at 31-33). 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. See e.g., *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. banc 1998), *infra*. The Respondents wish this Court to simply toss *Evergreen*, like spoiled milk. The decisions of this Court stand for more than a disposable thought, they are the basis for our system of precedence. As such, they 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 unjust or 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.

III.

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.

The Respondents assert without any citation 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.⁶

CONCLUSION

As is clear in these consolidated cases, the Appellants filed their claims for refund in a timely manner. The final payment and return for tax year 2004 was filed with the Director of Revenue on June 2, 2005. This is the proper starting date, under Section 136.035, for the two year limit to file a refund claim. The estimated tax installments made during the course of 2004 are not final payments and should not have been used by the Commission or the Respondents under Section 136.035. The plain language of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY shows that the "payment" referred to in Section 136.035 is the date upon which the amount of tax is finally and definitely known. That date is the date the final return is filed...June 2, 2005, in these cases. Respondents urge this Court to look at the

⁶ Respondents concede that the refund claims would be timely filed under Section 148.076. Respondents' Brief at 12.

plain meaning of payment...an urging that is fatal to their argument. Thus the Decisions of the Commission should be reversed.

Additionally, a review of the tax scheme in Chapter 148 and Section 148.350 shows that the estimated installments are not payments. Section 148.350 does not call them “payments” and does not treat them as final. Instead, Section 148.350 treats them as estimates to be trued up by the Director after the tax year is ended. Only then does an assessment issue to taxpayers and only upon filing of the return and final payment is the amount of tax set. This statutory scheme mandates that the Appellants’ final payment and return on June 2, 2005 is the date at which the time limit to file a refund claim began running. Thus, the claims presented on June 2, 2007 were timely and the Commission should be reversed.

Further the decision of the Ohio Supreme Court in *Hanna Mining Co. v. Limbach*, 484 N.E.2d 691 (Ohio 1985) should be adopted by this Court. It is only fair and equitable that the date of filing of the final return be the date the statute of limitations commences. For these reasons, the decisions of the Commission should be reversed.

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. *Evergreen* is on point, is still precedent in Missouri and *Evergreen* should be followed by this Court.

The Respondents’ arguments to evade *Evergreen* or even to overturn *Evergreen* should not be accepted by this Court. The Commission’s decisions 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.

For the reasons stated in this Reply Brief and in the Initial Brief of Appellants, Appellants pray this Court reverse the Commission's decisions in all five cases and remand the cases to the Commission to enter orders compelling refunds of \$429,107 (Appellant American Home), \$61,854 (Appellant Granite State), \$53,408 (Appellant New Hampshire), \$4,255,399 (Appellant National Union), and \$56,834 (Appellant AIU).

WHEREFORE Appellants pray that this Court reverse the decisions of the Commission in the above-captioned 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 Initial 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 6,847 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 M

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Initial Brief of Appellants were sent U.S. Mail, postage prepaid, to the following parties of record on this 31st day of July, 2008:

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