No. SC87192

IN THE MISSOURI SUPREME COURT

KIDDE AMERICA, INC., et al.,

Petitioners/Appellants,

v.

DIRECTOR OF REVENUE,

Respondent.

BRIEF OF RESPONDENT DIRECTOR OF REVENUE

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STATEMENT OF FACTS

The Director of Revenue makes the following clarifications to Kidde America, Inc. and its subsidiaries' statement of facts:

For tax year 2000, Kidde America, Inc.[1] and its subsidiaries did not file with the Director of Revenue a consolidated Missouri corporate income tax return, or apply for an extension of time to file such a return, by April 15, 2001. (L.F. 55.) Nor did they file a consolidated Missouri return by October 15, 2001. (L.F. 55.) Nor — with one exception — did they file individual company returns by October 15, 2001.

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[1]Kidde America is a Delaware corporation. (L.F. 10 Ex. 1.)

The one exception was Kidde America's subsidiary, Masterchem Industries, Inc. Masterchem applied for an extension of time to file its Missouri corporate income tax return for tax year 2000 by October 15, 2001. (L.F. 10 Ex. 1, 55, 58 Ex. A-1.) This request was based on Masterchem's request for an extension of time to file its federal tax return by October 15, 2001. (L.F. 58 Ex. A-1.) Masterchem filed a separate company Missouri return for tax year 2000 on October 15, 2001. (L.F. 56, 59 Ex. A-2.) Masterchem reported total tax of $6,327,666 and estimated tax payments of $10,156,268[2] and applied for a refund of $3,828,602. (L.F. 59 Ex. A-2.) The Director refunded that amount to Masterchem on January 30, 2002. (L.F. 56, 85-86 Ex. A-6.)

Kidde America and its subsidiaries, including Masterchem, filed a consolidated federal corporate income tax return for tax year 2000 on September 7, 2001. (L.F. 102.) But they did not file a consolidated Missouri return, under the category of "Amended Corp. Return," for tax year 2000 until March 12, 2004. (L.F. 57, 87 Ex. A-7, 101.) They then reported a total tax of $529,447 and total credits and payments of $6,327,666 and applied for a refund of $5,798,219. (L.F..

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[2]Masterchem had filed three, separate company Missouri corporate estimated income tax payments during tax year 2000. (L.F. 56, 79-84 Exs. A-3 through A-5.)

87 Ex. A-7.) They calculated their total credits and payments by subtracting Masterchem's refund from its estimated tax payments ($10,156,268 - $3,828,602 = $6,327,666). (L.F.. 87 Ex. A-7.) And they calculated their refund by subtracting their total tax from their total credits and payments ($6,327,666 - $529,447 = $5,798,219). (L.F.. 87 Ex. A-7.)[3]

The Director denied Kidde America and its subsidiaries' claim for refund because of their failure to file a timely return:

> The election to file a consolidate Missouri corporation income tax return must be made before the extended due date of the federal consolidated income tax return. The 2000 amended corporation income tax return has been denied because the election was not made by the due date.

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[3]Because of a federal audit, Kidde America and its subsidiaries subsequently reduced its Missouri refund claim to $5,792,993. (L.F. 138.)

(L.F. 115 Ex. A-8.) After a protest (L.F. 23 Ex. 5), the Director issued her final decision and determined that her denial was correct. (L.F. 15 Ex. 2.) She quoted the part of Missouri regulation 12 CSR § 10-2.045 that requires a timely election:

> If an affiliated group qualified to file a Missouri consolidated return wishes to elect to file a Missouri consolidated return, the election must be exercised by the filing of a Missouri consolidated return on or before the due date (including extensions of time) for filing the common parent's separate Missouri return.

(L.F. 18.)

Kidde America and its subsidiaries filed a complaint with the Administrative Hearing Commission (AHC) to appeal the final decision of the Director. (L.F. 1.) The AHC determined that Kidde America and its subsidiaries were not entitled to file a consolidated return or to a refund because they had not timely elected to file a consolidated return. (Appellants' App. A1, A10, A18.) The AHC summarized:

> The key issue here is the timeliness of consolidated return election, and if that election is not timely, the refund provision does not come into play.

(Appellants' App. A16.)

ARGUMENT

Introduction and Summary of Argument

Kidde America, Inc. has no right, nearly three years after it chose not to file a timely Missouri tax return, to amend its subsidiary's timely return to also cover the parent and other subsidiaries. Consolidated filing is a "privilege" that exists only by legislative grant upon regulatory conditions that cannot be removed at the election of the affiliated corporations. 26 U.S.C. § 1501 (Respondent's App. A1); *see Export Leaf Tobacco Co. v. Commissioner*, 78 F.2d 163, 165 (2nd Cir. 1935), *aff'g Smith Paper Co. v. Commissioner*, 31 B.T.A. 28, 34–35 (1934). One of Missouri's conditions is filing a consolidated return by the date for filing the parent corporation's separate return.

By statute, Missouri imposes a due date for filing income tax returns. That date is the fifteenth day of the fourth month following the close of the taxpayer's taxable year. *See* § 143.511, RSMo 2000 (Respondent's App. A3).[4] If the taxpayer has an extension of time to file his federal return, Missouri's due date is automatically extended to the federal due date. *See* § 143.551.2 (Respondent's App. A4). These statutes do not limit their application to only some income tax

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[4]All statutory citations are to the 2000 Revised Statutes of Missouri unless otherwise indicated.

returns, resident individual returns, for example. No other statute specifies some other due date for filing consolidated corporate returns. Therefore, this statutory due date applies to all income tax returns, including consolidated corporate returns.

Consistent with this statutory due date for filing income tax returns, the Director of the Department of Revenue requires consolidated corporate returns to be filed "on or before the due date (including extensions) for the filing of the common parent's separate Missouri return." 12 CSR § 10–2.045(15) (Petitioner's App. A23). The Director's regulation does not itself establish a due date for filing consolidated returns. Rather, it links the filing of consolidated returns to the usual due date for filing the corporate parent's return — a due date established by statute.

The Director's regulation is also consistent with a federal regulation that requires consolidated corporate returns to be filed "not later than the last day prescribed by law (including extensions of time) for the filing of the common parent's return." 26 C.F.R. § 1.1502–75(a)(1) (Respondent's App. A2). The federal regulation has been interpreted to "preclude the filing of a consolidated return for the first time after the due date for filing a return has passed." *Millette & Assocs., Inc. v. Commissioner*, 594 F.2d 121, 124 (5th Cir. 1979). The Director's regulation should be interpreted in the same manner. But the Director need not promulgate a second regulation, consistent with another federal regulation, that sets forth what

facts affiliated corporations must show to obtain an extension of time to file a consolidated return beyond the due date for filing the parent's return. Missouri's regulations need not mirror exactly the federal government's.

In spite of not timely filing a Missouri consolidated return, Kidde America and its subsidiaries argue that because no statute prescribes a due date for the filing of consolidated Missouri returns, no due date exists, and they can claim a refund by filing a consolidated return within three years of filing the subsidiary's separate return. They say that the statute authorizing the filing of consolidated returns is silent about the due date, *see* § 143.431.3(1), and that this court has stated that "the only requirement for electing a consolidated return is that the taxpayer's affiliated group file a federal consolidated return," *Eddie Bauer, Inc. v. Director of Revenue*, 70 S.W.3d 434, 436 (Mo. banc 2002). But this argument ignores §§ 143.511 and 143.551.2 and the rules of construction of statutory silence and omission, and this court did not address in *Eddie Bauer* the due date for filing or electing to file consolidated returns.

The taxpayers also argue that they are entitled to a refund because refunds are available for any reason for which tax should not be imposed and consolidated filing gives them a tax advantage. Otherwise, they say, the right to a refund is terminated at the time it begins, when a subsidiary's separate return is filed. But

because consolidated filing is a conditional privilege that affiliated corporations themselves cannot alter, and no consolidated return was filed by the date it was due, no right to a refund on a consolidated basis exists.

I.

The due date for filing consolidated corporate income tax returns is the same as the statutory due date for filing all income tax returns — the fifteenth day of the fourth month following the close of the taxpayer's taxable year or the day as extended by law. (Responds to Petitioner's Argument I.)

A. Statutory basis for due date

An affiliated group of corporations may file a Missouri consolidated corporate income tax return if they file a consolidated federal return.

> If an affiliated group of corporations files a consolidated income tax return for the taxable year for federal income tax purposes, and fifty percent or more of its income is derived from sources within this state as determined in accordance with section 143.451, *then it may elect to file a Missouri consolidated income tax return.*

§ 143.431.3(1), RSMo 2000 (emphasis added).[5]

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[5]In 1998, this court held the 50% or more Missouri source income requirement unconstitutional. *See General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561 (Mo. banc 1998). "As a result of this Court's severance of the offending provision, the only requirement for electing a consolidated return is that the taxpayer's affiliated group file a federal consolidated return." *Eddie Bauer*, 70 S.W.3d at 436. Section 143.431.3(1) has not been subsequently amended to remove the Missouri income requirement, and the Revised Statues of Missouri still contain this requirement. As the AHC pointed out, though, the notes to § 143.431

The due date for filing a Missouri consolidated return is determined by two other statutes. The first of these two statutes reads in pertinent part:

> *Income tax returns required by section 143.011 to 143.996* shall be filed on or before the fifteenth day of the fourth month following the close of the taxpayer's taxable year[.]

§ 143.511 (emphasis added) (Respondent's App. A3). The second of these two statutes reads in pertinent part:

> If a taxpayer has been granted an extension of time for filing his or its federal income tax return, the filing of a copy of the extension or the form relating to an automatic extension with the director of revenue shall automatically extend the date of *the income return required by section 143.011 to 143.996.*

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in the Revised Statutes of Missouri have referred to the *General Motors* decision and its holding ever since the 1999 Supplement. (Petitioner's App. A8.)

§ 143.551.2 (Respondent's App. A4). These two statutes do not limit their application to only some income tax returns, and no third statute specifies some other due date for filing consolidated corporate returns.[6]

Ignoring §§ 143.511 and 143.551, Kidde America and its subsidiaries argue that because § 143.431 is silent about when consolidated returns must be filed, they may be filed, if the parent corporation has filed a consolidated federal return, in conjunction with a claim for refund filed within three years of filing a subsidiary's separate company Missouri return. This argument rests upon the silence of § 143.431. "To cite the silence of the statute, however, does not end the inquiry." *State ex. rel. Rowland Group, Inc. v. Koehr*, 831 S.W.2d 930, 931 (Mo. banc 1992). The maxim "omissions shall be understood as exclusions" should be used with great caution. *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 269–70 (Mo. banc 2005). No inference should be drawn from § 143.431's

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[6]Missouri's statute is consistent with the federal statute imposing a due date for filing corporate income tax returns that is a month earlier than Missouri's due date. *See* 26 U.S.C. § 6072(b).

silence that consolidated returns may be filed without regard to the time limitation imposed by other statutes that speak to when tax returns may be filed.

Standard rules of statutory construction require that a statute be given a reasonable interpretation in light of legislative intent, *Koehr*, 831 S.W.2d at 931, and that statutes involving related subject matter be considered when construing a statute, *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). "Provisions of an entire legislative act must be construed together and if reasonably possible, all provisions must be harmonized." *Community Fed. Savs. & Loan Ass'n v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988). Sections 143.511, 143.551, 143.431 are all within the same chapter, Chapter 143, Income Tax, of the same title, Title X, Taxation and Revenue, of the Revised Statutes of Missouri, so they must be construed together. In construing statutes, the court's primary goal is to ascertain the legislature's intent from the language used and to give effect to that intent. *Id.*; *Six Flags Theme Parks*, 179 S.W.3d at 268.

Construing these three statutes together with the goal of determining legislative intent, they can be harmonized, and there is no "necessary repugnance" between them. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, (Mo. banc 2001). There is no conflicting language between §§ 143.511 and 143.551 on the one hand and § 143.431 on the other, nor is there any language

indicating a legislative intent to make § 143.431 mutually exclusive of §§ 143.511 and 143.551. *See id.* In short, the legislature intended for consolidated corporate income tax returns to be filed by the usual date for filing income tax returns.[7]

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[7]The taxpayers cite three statutes within Chapter 143 as examples of the legislature's ability to set a "drop dead" date for making elections. The first statute, § 143.461.1, deals with electing the method of apportioning interstate income to this state by the due date of the taxpayer's return. The second statute, § 143.090, deals with filing returns as a method by which taxpayers with a fiscal period that includes parts of 1972 and 1973 can be treated under repealed pre–1973 tax laws. The third statute, § 143.471.6, deals with filing returns of non–resident shareholders of Subchapter S corporations as an alternative to withholding tax on dividends paid or credited by such corporations. This is not enough from which to conclude, along with § 143.431's omission of a due date, that the usual due date for filing income tax returns does not apply to consolidated returns. Omissions are understood as exclusions "only when it would be natural to assume by a *strong* contrast that that which is omitted must have been intended for the opposite treatment." *Six Flags Theme Parks*, 179 S.W.3d at 270 (emphasis added). Here, because § 143.511 and 143.551 specifically deal with the due date for filing all income tax returns, the contrast is not strong. The Missouri case the taxpayers cite in this connection,

Bartlett & Co. Grain v. Director of Revenue, 649 S.W.2d 220 (Mo. 1983), is no help to them. The taxpayers there argued that they could change their election of a method of apportioning interstate income because § 143.461.1, which established a due date for the election, was silent about whether the election could be revoked. This court did not accept the argument that silence sanctioned a revocation.

Kidde America and its subsidiaries' citation to *Murphy Company* exemplifies their disregard of §§ 143.511 and 143.551. In that case, a statute granted engineering firms a sales and use tax exemption on the purchase of computer equipment. But the statute did not require, *and no other statute required*, that the purchasing firms' revenues be "primarily" derived from engineering services. *See Murphy Co. Mechanical Contractors & Eng'rs v. Director of Revenue*, 156 S.W.3d 339, 341 (Mo. banc 2005). Here, §§ 143.511 and 143.551 both require the returns filed under § 143.431 to be filed by the usual date for filing income tax returns.[8]

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[8]For the same reason — §§ 143.511 and 143.551 require filing consolidated returns by the usual date for filing income tax returns — the foreign state cases the taxpayers cite are unpersuasive. The Massachusetts case was decided without reference to any statute that required filing tax returns by a date certain. *See Felt Process Co. v. State Tax Comm'n*, 162 N.E.2d 76, 78 (Mass. 1959). The issue in the Iowa case, as the taxpayer acknowledges, was only for the 1976 tax year, for which a specific statute set a due date for filing consolidated returns. Prior tax years, for which no specific statute existed, were not at issue. Therefore, the Iowa trial court did not refer to any statutes that required consolidated returns to be filed

by the usual date for filing tax returns, nor did it decide the issue. *See Agri-Dynamics, Inc. v. Iowa State Bd. of Tax Review*, 1982 WL 172529, * 3 (Iowa Dist. Ct. 1982).

Kidde America and its subsidiaries also argue that this court has already decided the issue in their favor when it stated that "the only requirement for electing a consolidated return is that the taxpayer's affiliated group file a federal consolidated return." *Eddie Bauer*, 70 S.W.3d at 436. But this court has not addressed the due date for filing consolidated returns. After this court decided in 1998 that the Missouri source income requirement was unconstitutional, it held in *Eddie Bauer* merely that due process required the post deprivation remedy of refund be extended to consolidated taxpayers for tax years before 1998. *See* 70 S.W.3d at 437. This court's statement must be understood and was made in reference to only the Missouri source income requirement. *See* note 5 above.[9]

B. Regulatory basis for due date

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[9]In addition, this case, unlike *Eddie Bauer*, involves a refund claim for tax years occurring after 1998, when the taxpayer would be aware of the unconstitutionality of the Missouri source income requirement.

Consistent with the statutory due date for filing income tax returns, the Director promulgated a regulation that requires consolidated corporate income tax returns to be filed "on or before the due date (excluding extensions) for filing of the common parent's Missouri return." 12 CSR § 10–2.045(15) (Petitioner's App. A23).[10] This regulation is authorized by both §§ 143.431.3(5) and 143.961.1. The former statute authorizes the Director to promulgate regulations "not inconsistent with the provisions of this chapter" that are necessary for the return, determination, computation, assessment, collection, and adjustment of consolidated returns. § 143.431.3(5). The latter statute authorizes the Director to promulgate regulations that are necessary "to enforce the provisions of sections 143.011 to 143.996." § 143.961.1.

This regulation is consistent with the provisions of Chapter 143 because it does not itself establish a due date for filing consolidated returns. Rather, it links the filing of consolidated returns to the usual date for filing the corporate parent's return, which is the due date established by statute, §§ 143.511 and 143.551, and

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[10]The current regulation is numbered 12 CSR § 10–2.045(13) (Petitioner's App. A22). That part the regulation discussed here has not changed. Rather, in accordance with *General Motors*, the Missouri source income requirement has been eliminated.

thereby assists in the enforcement of the income tax laws. This regulation is also consistent with § 143.431.3(4), which determines the federal taxable income of affiliated corporations who file a consolidated federal return, but not a consolidated Missouri return, as if separate company federal returns had been filed.

This regulation is also consistent with a federal regulation that requires consolidated corporate income tax returns to be filed "not later than the last day prescribed by law (including extensions of time) for the filing of the common parent's return." 26 C.F.R. § 1.1502–75(a)(1) (Respondent's App. A2). The federal regulation has been interpreted to "preclude the filing of a consolidated return for the first time after the due date for filing a return has passed." *Millette & Assocs.*, 594 F.2d at 124. The Missouri regulation should be interpreted in the same manner.

Here, a consolidated return for tax year 2000 was filed for the first time by Kidde America and its subsidiaries on March 12, 2004, and then under the misnomer of "Amended Corp. Return." (L.F. 87 Ex. A–7.) One subsidiary, Masterchem, had already timely filed a separate Missouri return on October 15, 2001, (L.F. 58 Ex. A–1, 59 Ex. A–2). Kidde America and its subsidiaries did not file a consolidated Missouri return by April 15, 2001, nor did they file a consolidated Missouri return by October 15, 2001, the due date for their

consolidated federal return. (L.F. 55, 58 Ex. A-1.) The consolidated Missouri return for tax year 2000 filed on March 12, 2004, was not timely filed, and should be precluded.

Kidde America and its subsidiaries argue, however, that the Director's regulation is inconsistent with Chapter 143 because it cuts off a taxpayer's right to claim a refund at the time the statute of limitations for claiming a refund begins, "the time the return was filed." § 143.801.1.[11] And they argue that they are entitled to a refund, in spite of not timely filing a consolidated Missouri return, because a taxpayer is entitled to a refund for any reason for which tax should not be imposed and that the economic realities of Masterchem's sale that resulted in a gain to Kidde America is a sufficient reason. Though Kidde America's gain from Masterchem's

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[11]The three years for filing a refund claim begins to run on the date the return is due, rather than the date it is filed, so that Missouri's procedure conforms to the federal procedure. *See Hammacher v. Director of Revenue*, 779 S.W.2d 565, 566-67 (Mo. banc 1989). In addition to timely filing a refund claim, the other requirement for a refund is an overpayment or erroneous or illegal payment of tax. *See Hackman v. Director of Revenue*, 771 S.W.2d 77, 81 (Mo. banc 1989); *Community Fed. Savs. & Loan*, 752 S.W.2d at 798.

sale may be a sufficient reason to reduce their tax liability, it is not sufficient reason to eliminate as a condition of claiming a refund for that reduced liability the filing of a timely consolidated return. Under federal law, filing a consolidated return is a "privilege" that exists only by legislative grant upon regulatory conditions that cannot be removed at the election of the affiliated corporations. 26 U.S.C. § 1501 (Respondent's App. A1); *see Export Leaf Tobacco,* 78 F.2d at 165, *aff'g Smith Paper Co.*, 31 B.T.A. 34–35 (no reporting on consolidated basis where taxpayers reported separate returns for prior years). Missouri consolidated filing should also be interpreted as a conditional privilege.

Here, no consolidated Missouri return was filed by the date it was due, October 15, 2001 — the date the taxpayers' consolidated federal return was due by reason of the automatic extension provided for in § 143.551.2. And here, no tax was overpaid or even paid on a consolidated basis. Therefore, no right to a refund of tax on a consolidated basis exists.[12]

II.

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[12]In addition, no right to a refund of tax on a separate basis would exist. The tax Masterchem paid was not an overpayment or an erroneous or illegal payment. Masterchem received the refund it claimed. (L.F. 59 Ex. A–2, 56, 85–86 Ex. A–6.)

Missouri's regulation in the field of consolidated returns need not mirror exactly the federal regulation for an extension of time to file consolidated corporate income tax returns. (Responds to Petitioner's Argument II.)

A federal regulation authorizes the Commissioner of Internal Revenue to permit an extension of time to make an election, such as to file a consolidated federal income tax return, beyond the usual due date for making the election upon a showing that the taxpayer acted reasonably and in good faith. *See* 26 C.F.R. § 301.9100–3(a). Kidde America and its subsidiaries argue that they are entitled to a refund because they can make that showing and because § 143.961.2 requires the Director to use that federal regulation to interpret and thus to ameliorate Missouri's regulation, 12 CSR § 10–2.045(15), requiring a consolidated return to be filed by the usual due date for filing the parent corporation's return. But that is a problematic assertion for two reasons.

First, it is doubtful that the taxpayers can show that they acted reasonably. A taxpayer acts reasonably and in good faith, so that he can obtain an extension of time to make an election, when he reasonably relies on a qualified tax professional and the tax professional failed to make or to advise the taxpayer to make the election. *See* 26 C.F.R. § 301.9100–3(b)(1)(v). But a taxpayer will not be

considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or was not aware of all the relevant facts. *See* 26 C.F.R. § 301.9100-3(b)(2). Here, Kidde America and its subsidiaries should have known that their tax professional was not aware that Missouri source income was not needed to file a consolidated return in Missouri. This court held the Missouri source income provision unconstitutional in late 1998, over two years before the consolidated return for tax year 2000, the year at issue here, was due to be filed. And this court's decision, *General Motors*, has been reported in the Revised Statutes of Missouri since 1999. Persons — whether they be the taxpayer himself or a certified public accounting firm like Kidde America's tax professional, Pricewaterhouse Coopers — are conclusively presumed to know the law. *See Missouri Highway & Transp. Comm'n v. Myers*, 785 S.W.2d 70, 75 (Mo. banc 1990).

Second, even assuming that the taxpayers could show that they acted reasonably, Missouri's statute does not require the Director's regulations to mirror the federal regulations or to even use the federal regulations to interpret hers. The statute merely states that the Director's regulations "shall follow as nearly as practicable" the federal regulations. § 143.961.2. In the absence of a specific

statutory directive that the Director's regulations mirror the federal regulations, *see State ex rel. Nixon v. Alternate Fuels, Inc.*, ___ S.W.3d ___, 2005 WL 2977815, * 4 (Mo. App. W.D. Nov. 5, 2005) ("mirror" requirement in § 444.800.4 requiring regulations to be "no more stringent than the comparable federal regulations"), this court should not second guess the Director's determination not to promulgate such a regulation and not to use the federal regulation to interpret hers.

Finally, Kidde America and its subsidiaries argue that the Director's regulation requiring a consolidated return to be filed by the usual due date for filing the common parent's separate return, 12 CSR 10-2.045(15), is invalid because it is consistent with the federal regulation, 26 C.F.R. § 1.1502-75(a)(1), which is a "legislative" regulation unknown to Missouri law. Undoubtedly, the Director's regulation is law, but only because it was promulgated in conformance with the Missouri Administrative Procedure Act. *See State ex rel. Martin-Erb v. Missouri Comm'n on Human Rights*, 77 S.W.3d 600, 607 (Mo. banc 2002).

Furthermore, the scope of the Secretary of the Treasury's regulatory power in the field of consolidated returns does not arise, as the taxpayers suggest, from 26 U.S.C. § 1502, which allegedly gives the Secretary authority to prescribe unique "legislative" regulations for determining the tax liability of affiliated corporations. Rather, in this field, regulatory power is enhanced when, by filing consolidated

returns, taxpayers *consent* to the regulations prescribed by the Secretary, and Congress has been slow to legislate in the field of consolidated returns. *See* 26 U.S.C. § 1501; *Charles Ifeld Co. v. Hernandez*, 292 U.S. 62, 65 (1934); 13 *Mertens Law of Federal Income Taxation* § 46:03 (2005).[13] There is nothing particularly unusual about federal or state regulation in the field of consolidated returns except that regulation in this field is particularly appropriate in light of the conditional privilege of filing consolidated returns.

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[13]This does not mean, however, that a taxpayer cannot challenge the validity of a regulation inconsistent with the statute. *See Corner Broadway–Maiden Lane, Inc. v. Commissioner*, 76 F.2d 106, 108 (2nd Cir. 1935).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that 1 copy and 1 computer diskette of the foregoing was served by first-class mail, postage prepaid, this day of 16th day of February, 2006, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4,672 words and that the diskettes provided this court and counsel have been scanned for viruses and are virus-free.

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Assistant Attorney General

APPENDIX

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26 U.S.C. § 1501

An affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

26 C.F.R. § 1.1502-75(a)(1)

§ 1.1502-75 Filing of consolidated returns.

(a) Privilege of filing consolidated returns — (1) Exercise of privilege for first consolidated return year. A group which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation which has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner) provided in paragraph (b) of this section) to the regulations under section 1502. If a group wishes to exercise its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions of time) for the filing of the common parent's return. Such consolidated return may not be withdrawn after such last day (but the group may change the basis of its return at any time prior to such last day).

143.511. Time and place for filing returns and paying tax, exception. — Income tax returns required by sections 143.011 to 143.996 shall be filed on or before the fifteenth day of the fourth month following the close of the tax payers's taxable year except where the taxpayer is an exempt organization. Exempt organizations shall have the same due date as set by the Internal Revenue Code of 1986, as amended. A person required to make and file a return under sections 143.011 to 143.996 shall, without assessment, notice, or demand, pay any tax due thereon to the director of revenue on or before the date fixed for filing such return (determined without regard to any extension of time for filing the return). The director of revenue shall prescribe by regulation the place for filing any return, declaration, statement, or other document required pursuant to this chapter and for the payment of any tax.

143.551 Extension of time for filing and payment. — 1. The director of revenue may grant a reasonable extension of time for payment of tax or estimated tax or any installment thereof, or for filing any return, declaration, statement, or other document required in sections 143.011 to 143.996 on such terms and conditions as he may require. Except for a taxpayer who is outside the United States, no such extension for filing any return, declaration, statement, or document, shall exceed six months.

2. If a taxpayer has been granted an extension of time for filing his or its federal income tax return, the filing of a copy of the extension or the form relating to an automatic extension with the director of revenue shall automatically extend the due date of the income tax return required by sections 143.011 to 143.996.

3. If a taxpayer has been granted an extension of time for paying his or its federal income tax, the filing of a copy of the extension with the director of revenue shall automatically extend the time for the payment of the tax required by sections 143.011 to 143.996.

4. If the time for filing a return is extended under subsection 2, but the time for payment is not extended under subsection 3, the taxpayer shall pay, on or before the date prescribed for the filing of the return (determined without regard to any

extensions of time for such filing), the amount properly estimated as his or its tax for the taxable year.