

No. SC87192

IN THE SUPREME COURT OF MISSOURI

KIDDE AMERICA, INC., *et al.*,

Petitioners/Appellants

v.

DIRECTOR OF REVENUE,

Respondent

On Petition for Review from the Administrative Hearing Commission

Karen A. Winn, Commissioner

PETITIONERS' REPLY BRIEF

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Kidde America, Inc. and its 37 Subsidiaries

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ARGUMENT

I.

The Administrative Hearing Commission Erred In Ruling That Kidde's Election To File A Missouri Consolidated Corporate Income Tax Return For The 2000 Tax Year Was Untimely Because Kidde Could File Its Election At Any Time Before The Statute Of Limitations Expired In That §143.431.3 RSMo 2000 Establishes No Time Limit For Making The Election To File A Consolidated Corporate Income Tax Return.

The Director contends that § 143.511 and § 143.551 RSMo 2000 give her the authority to prescribe a due date for making the election permitted by § 143.431.3(1) RSMo 2000. Those statutes prescribe a due date for filing an *original* return, not an *amended* return. Kidde has never contended that there was an open-ended time during which it could file an amended return to make the election provided by § 143.431.3(1) RSMo 2000. Rather, the question is whether the Director can, by regulation, establish a due date for making the election to file a consolidated return that has the effect of cutting off a taxpayer's right to seek a refund under § 143.801.1 RSMo 2000. Neither § 143.511 RSMo 2000 nor § 143.551 RSMo 2000 give her that power.

Section 143.511 RSMo 2000 authorizes the Director to issue regulations that prescribe the "place" for filing any return or other document required by Chapter 143 and the "place" of payment of the tax. Section 143.511 RSMo 2000 does not, by its terms, give the Director the power to prescribe by regulation the date on which an election required by Chapter 143 is to be made. Some of the provisions of Chapter 143 *do* provide for such a date to make an election — most noticeably, § 143.461.1 RSMo 2000 which

provides for a due date for making an election of the method for making an interstate apportionment of income.

The Director's regulation cites § 143.431.3(5) RSMo 2000 as authority for issuance of the regulation, not § 143.511 RSMo 2000 or § 143.551 RSMo 2000. *See* 12 CSR 10-2.045(1). Section § 143.431.3(5) RSMo 2000 gives the Director the power to issue regulations "not inconsistent with the provisions of this chapter" for the express purpose of assuring that the tax liability of any affiliated group of corporations making a consolidated return election is "returned, determined, computed, assessed, collected, and adjusted, in such manner as to reflect the Missouri taxable income derived from sources within this state and in order to prevent the avoidance of tax liability." Nothing in that subdivision authorizes the Director to set a date by which the consolidated return election must be filed — particularly a date that deprives a corporate taxpayer of its right to seek a refund for an overpayment of Missouri corporate income taxes.

The Director does not dispute that the regulatory due date that she has set for making the election deprives a corporate taxpayer of its right to seek a refund. She seeks to sidestep that concession by calling the filing of a consolidated return a "privilege," presumably to distinguish it from a "right." But that distinction is meaningless. Section 143.431.3(1) RSMo 2000 gives a group of affiliated corporations the choice of filing a consolidated return or filing returns on a separate return basis. Whether that choice is a "privilege" or a "right" does not answer the question of whether the Director has the power to impose a deadline for making an election that directly conflicts with another provision of Chapter 143, namely, § 143.801.1 RSMo 2000, which gives taxpayers the

right to seek refunds of overpayments of Missouri corporate income taxes. Regardless of whether the filing of a consolidated return is a right or a privilege, establishing a due date for an election that forecloses the ability to seek a refund of an overpayment is inconsistent with § 143.801.1 RSMo, 2000 — a prohibition that the General Assembly specifically enacted in § 143.431.3(5) RSMo 2000.

Certainly, the General Assembly could have set a due date for the election to file a consolidated return (as it did for making the election required by § 143.461.1 RSMo 2000). And other states' legislatures have made that choice. For example, Massachusetts added such a provision in 1988. *See* Mass. Gen. Laws, Ch. 63, § 32B. Missouri's General Assembly has not established a due date for making the election, but it has given corporate taxpayers both the choice to file a consolidated return and the right to seek a refund of an overpayment if the taxpayers follow the procedures provided by § 143.801.1 RSMo 2000.

The question for this Court is whether, in the absence of a statutory direction (given in similar circumstances by other states), the Director can “legislate” by issuing a regulation that nullifies a clearly established statutory right. Congress may be able to delegate the power to issue “legislative regulations” to the Internal Revenue Service, but that power is denied to the Director under Missouri's statutes. *See, e.g., Matteson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc 1995).

The Director seeks to distinguish *Felt Process Co. v. State Tax Commission*, 339 Mass. 651, 162 N.E.2d 76 (1959) on the grounds that it was “decided without reference to any statute that required filing tax returns by a date certain.” Resp. Br. at 20 n.8. The

Director is incorrect. In *Felt*, the court noted at the outset that the corporations that later sought to file an amended consolidated return “each *seasonably* filed separate returns in Massachusetts for the year 1955.” *Id.*, 339 Mass. at 651, 162 N.E.2d at 76-77(emphasis added). This can mean only that the taxpayers filed by the due date required by statute. The notion which seems to underlie the Director’s attempted distinction, that Massachusetts allowed corporations to file a tax return at any time of their choice, suggests a chaotic tax system that just did not exist. Massachusetts, then and now, required corporations to file their tax returns by a date certain. *See, e.g.*, Mass. Gen. Laws, Ch. 62C, § 11.

The point of the *Felt* decision was that the filing of a separate return by one or more members of the affiliated group did not preclude the filing of an amended consolidated tax return by the entire affiliated group, so long as that amended consolidated return was filed within the time allowed for applying for an abatement. That is precisely the issue in this case, and this Court should reach the same result.

In *Homestake Lead Co. v. Director of Revenue*, 759 S.W.2d 847, 849 (Mo. banc 1988), the Court said that, unlike some tax refund statutes, § 143.801.1 RSMo 2000 does not require payment under protest as a pre-condition to filing a claim for refund. The Court concluded that the General Assembly “apparently thought that the intricacies of income taxation were such that *means for correcting inadvertencies . . .* should be provided.” (Emphasis added.) The filing of an amended consolidated income tax return is the only way to correct an inadvertent failure to make the election earlier. And the refund statute provides to taxpayers three years in which to correct it. The Director’s regulatory

due date, however, denies corporate taxpayers any opportunity to correct such “inadvertencies.” The regulation, 12 CSR 10-2.045, is inconsistent with the language and the spirit of Chapter 143.

II.

The Administrative Hearing Commission Erred In Holding That Kidde Should Not Be Allowed To Make An Election To File A Missouri Consolidated Corporate Tax Return After The Extended Due Date Of The Original Return Because § 143.961.2 RSMo 2000 Requires The Director To Follow As Nearly As Practicable The Federal Regulations And Kidde Qualified Under Federal Regulations For Relief From The Filing Deadline In That It Acted Reasonably And In Good Faith In Relying Upon PricewaterhouseCoopers, A Qualified Tax Professional That Failed To Advise Kidde Of Its Option To Elect To File A Consolidated Missouri Return.

The Director defends the failure of her regulations to follow 26 C.F.R. § 301.9100-3 because § 143.961.2, RSMo 2000 does not require her regulations to “mirror” the federal regulations. Resp. Br. at 27. In support, she cites *State ex rel. Nixon v. Alternate Fuels, Inc.*, 181 S.W.3d 177 (Mo. App., W.D. 2006). In *Alternate Fuels*, the statute provided that Missouri’s regulations “be no more stringent than the comparable federal regulations” promulgated by the federal government. *See id.* at 183. This language, the court held, showed an “intent to mirror the federal act.” *See id.*

Section 143.961.2, RSMo 2000 provides that the Director’s regulations “shall follow as nearly as practicable the [federal] rules and regulations . . . regarding income taxation.” This is a far more direct command that the State income tax regulations “mirror” the

comparable federal regulations than the language found in *Alternate Fuels*. If the Director borrows the federal rule on when an election to file a consolidated return should be filed, then she should also include the corresponding rule giving relief from the deadline when the taxpayers reasonably and in good faith relied upon a qualified tax professional who failed to give to them proper tax advice.

The Director claims that Kidde could not qualify under 26 C.F.R. § 301.9100-3(b) because it should have known that PricewaterhouseCoopers — one of the largest and most respected multi-national accounting firms in the world — did not understand Missouri tax law. But that ignores both the undisputed facts as recounted in Mr. Hannon's affidavit, and the examples given in the regulations of how to apply that provision.

Mr. Hannon was neither an attorney nor a tax professional. He testified in his affidavit that PwC was given access to all of Kidde and its subsidiaries' information, books and records to prepare tax returns for eighteen different states, including Missouri. L.F. 135. He relied on these highly qualified professionals to know the law. L.F. 135.

Kidde's situation is virtually identical to Examples 1 and 2 in the federal regulation (Petitioner's App. A27). Mr. Hannon was unaware that Missouri's consolidated return election was available. L.F. 136. Mr. Hannon relied upon PwC to know that the Court had invalidated a statutory provision in 1998 that, on its face, would otherwise have precluded the Kidde Group from filing a consolidated Missouri return. L.F. 135-136. Mr. Hannon should not be faulted for failing to read the pocket parts. That is what Kidde hired PwC to do.

CONCLUSION

For the foregoing reasons, Kidde and its 37 subsidiaries request that this Court reverse the Commission's order, direct that the Kidde Group's request for refund of the overpayment of Missouri corporate income taxes and all applicable interest be granted, and grant such other relief as this Court deems proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 2,083 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and a virus-free diskette were mailed, first class postage prepaid this ____ day of March, 2006 to:

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