IN THE
SUPREME COURT OF MISSOURI

No. 83870

EDDIE BAUER, INC.,
Appellant,

v.

DIRECTOR OF REVENUE,
Respondent.

On Petition for Review from the
Missouri Administrative Hearing Commission
Honorable Sharon Busch, Commissioner

BRIEF OF AMICUS CURIAE THE KROGER CO. AND SUBSIDIARIES

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JURISDICTIONAL STATEMENT

This appeal involves the construction of §§ 143.431 and 143.801,[1] both of which are revenue laws of the State of Missouri. Accordingly, this Court has jurisdiction under Article V, Section 3, of the Missouri Constitution.

[1] All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

INTEREST OF THE AMICUS

The Kroger Co. ("Kroger") is an Ohio corporation operating in the retail grocery business. Kroger is the common parent of an affiliated group of corporations ("Kroger Affiliated Group") within the meaning of Section 1504 of the Internal Revenue Code of 1986, as amended.

During the period beginning January 1, 1995 through December 27, 1997 (the "Tax Period"), the Kroger Affiliated Group filed consolidated federal income tax returns.[2] Before and throughout the Tax Period, the Missouri apportionment percentage of the Kroger Affiliated Group was less than fifty percent. Based upon Section 143.431.3(1), the Kroger Affiliated Group could not file Missouri consolidated returns during the Tax Period due to the requirement that "fifty percent or more of its income" must be "derived from sources within this state as determined in accordance with Section 143.451." Consequently, the members of the Kroger Affiliated Group that had nexus with Missouri during the Tax Period filed separate Missouri corporation income tax returns for 1995, 1996, and 1997.

On December 22, 1998, this Court, in *General Motors Corporation v. Director of Revenue*, 981 S.W.2d 561 (Mo. banc 1998), held that "to the extent Missouri Statute 143.431.3(1) requires an affiliated group to derive at least fifty percent of its income from sources within Missouri in order to file a Missouri consolidated income tax return, it violates the Commerce Clause of the United States Constitution, Article I, Section 8."

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[2] The Kroger Affiliated Group's tax years were from January 1, 1995 through December 30, 1995 ("1995"), December 31, 1995 through December 28, 1996 ("1996") and December 29, 1996 through December 27, 1997 ("1997").

As a result of *General Motors*, on April 26, 1999, the Kroger Affiliated Group filed consolidated Missouri income tax returns for the Tax Period and requested refunds as a result of such filing in the amount of $542,225 for 1995; $389,238 for 1996; and $309,229 for 1997.

On June 10, 1999, the Director issued a decision denying the requested refunds. Kroger timely protested that decision by letter dated August 5, 1999. On January 10, 2000, the Director issued her Final Decision upholding the denial of the refund claims for the Tax Period. The Kroger Affiliated Group timely appealed the Director's Final Decision on February 3, 2000, to the Administrative Hearing Commission ("Commission").

At the request of the Kroger Affiliated Group, the Commission continued the case pending the final determination of this case because the primary issue in this case is identical to the primary issue in the Kroger Affiliated Group's appeal. Specifically, Appellant filed Missouri consolidated income tax returns after this Court's decision in *General Motors*. As a consequence, the Kroger Affiliated Group has a direct interest in the outcome of this case.

STATEMENT OF THE ISSUES

1. In *General Motors Corporation v. Director of Revenue*, 981 S.W.2d 561 (Mo. banc 1998), this Court found unconstitutional under the Commerce Clause of the United States Constitution the requirement of Section 143.431.3 that an affiliated group derive at least fifty percent of its income from Missouri sources in order to file Missouri income tax returns as a consolidated group. Federal law requires that every Court, including this Court, give retroactive effect to any decision construing the United States Constitution. Does this Court's decision in *General Motors* apply retroactively?

2. Federal Constitutional law requires States to provide "meaningful backward-looking relief to rectify any unconstitutional" imposition of tax. Federal Constitutional law considers inadequate for such purposes any remedy that causes a taxpayer to incur a risk of penalties. No remedy under Missouri law, other than allowing affiliated groups a refund of overpaid tax by members of the group, avoids the risk to taxpayers that they may incur penalties. In this context, is a refund of overpaid tax required as a matter of federal Constitutional law?

3. A decision is "unexpected" within the meaning of Section 143.903 if a reasonable person would not have expected the decision or order based on prior law. United States Supreme Court interpretations of federal Constitutional provisions are controlling over interpretations by any other tribunals, including the Missouri Supreme Court. In *Williams Companies, Inc. v. Director of Revenue*, 799 S.W.2d 602, 604 (Mo. banc 1990), *cert. denied*, 501 U.S. 1260 (1991), this Court held that the fifty percent threshold of Section 143.431.3 did not violate the Commerce Clause because a taxpayer could avoid the adverse consequences of the statute by consolidating its business into a single corporation or by conducting a majority of its business in Missouri. Two years later, in *Kraft*

General Foods, Inc. v. Iowa Department of Revenue, 505 U.S. 71 (1992), the United States Supreme Court expressly rejected that position. Would a reasonable person have foreseen this Court's decision in *General Motors* in light of the United States Supreme Court's decision in *Kraft*?

POINT RELIED UPON

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE CLAIM FOR REFUND AT ISSUE BECAUSE UNDER SECTIONS 621.189 AND 621.193 THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THIS COURT'S DECISION IN *GENERAL MOTORS* MUST BE APPLIED RETROACTIVELY TO PERMIT APPELLANTS TO DETERMINE THEIR MISSOURI INCOME TAX LIABILITY ON A CONSOLIDATED BASIS AND BECAUSE A TAX REFUND IS THE ONLY CONSTITUTIONALLY ADEQUATE BACKWARD-LOOKING REMEDY.

General Motors Corporation v. Director of Revenue, 981 S.W.2d 561 (Mo. banc 1998);

McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Fla. Dep't of Business Regulation, 496 U.S. 18 (1990);

North Supply Company v. Director of Revenue, 29 S.W.3d 378 (Mo. banc 2000);

Atchison, Topeka & Santa Fe R.R. Co. v. O'Connor, 223 U.S. 280 (1912);

Bartlett & Company Grain v. Director of Revenue, 649 S.W.2d 220 (Mo. 1983);

Bridge Data Company v. Director of Revenue, 794 S.W.2d 204 (1990);

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Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993);

Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931);

James M. Beam Distilling Company v. Georgia, 501 U.S. 529 (1991);

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Lloyd v. Director of Revenue, 851 S.W.2d 519 (Mo. banc 1993);

Montana National Bank of Billings v. Yellowstone County, 276 U.S. 499 (1928);

Newsweek, Inc. v. Florida Department of Revenue, 522 U.S. 442 (1998);

Reich v. Collins, 513 U.S. 106 (1994);

Ward v. Love County Board of Commissioners, 253 U.S. 17 (1920);

West Lynn Creamery, Inc. V. Healy, 512 U.S. 186 (1994):

Williams Companies, Inc. v. Director of Revenue, 799 S.W.2d 602 (Mo. banc 1990);

Section 143.431.3(1);

Sections 143.611 - 143.621;

Section 143.631;

Section 143.751;

Section 143.801;

Section 143.903;

Section 621.189;

Section 621.193;

12 CSR 10-2.045(4);

12 CSR 10-2.045(14)(B);

12 CSR 10-2.045(15);

12 CSR 10-2.045(32).

ARGUMENT

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE CLAIM FOR REFUND AT ISSUE BECAUSE UNDER SECTIONS 621.189 AND 621.193 THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD IN THAT THIS COURT'S DECISION IN *GENERAL MOTORS* MUST BE APPLIED RETROACTIVELY TO PERMIT APPELLANTS TO DETERMINE THEIR MISSOURI INCOME TAX LIABILITY ON A CONSOLIDATED BASIS AND BECAUSE A TAX REFUND IS THE ONLY CONSTITUTIONALLY ADEQUATE BACKWARD-LOOKING REMEDY.

Introduction

In this case, this Court is called upon to determine what remedies are permitted to recoup Missouri income taxes collected under an unconstitutional provision of Missouri law. In *General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561 (Mo. banc 1998), this Court unanimously invalidated a provision in Section 143.431.3(1) that limited the right to file Missouri consolidated returns to affiliated groups that derived at least fifty percent of their income from Missouri sources (the "Fifty Percent Threshold").[3] General Motors argued, among other things, that the Fifty Percent Threshold violated the Commerce Clause of the United States Constitution, an argument this Court found ***dispositive*** in ruling for General Motors. *Id*. at 564. The Director acknowledges that Appellant has paid too much tax as a result of the unconstitutional Fifty Percent Threshold. Yet, the Director, under

[3] The Director's regulation 12 CSR 10-2.045(14)(B) imposed the same requirement.

the guise of "procedural protections," attempts to deny taxpayers any effective remedy to undo this unconstitutional deprivation.

A tax refund is the proper remedy here. There can be no dispute that, but for the Fifty Percent Threshold, members of affiliated groups would have filed consolidated Missouri income tax returns, and would have been relieved of additional Missouri income taxes. Under both federal and Missouri law, and as a matter of fundamental fairness, the Director must refund these unconstitutional tax collections to Appellant and to similarly situated affiliated corporations such as the Kroger Affiliated Group.

I. The *General Motors* Decision Must Be Applied Retroactively.

This Court must apply its decision in *General Motors* not only to General Motors, but also to other taxpayers. In *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537-44 (1991), the United States Supreme Court rejected "selective prospectivity" of decisions interpreting federal law. In so doing, the Supreme Court noted that it would be a breach of the fundamental component of *stare decisis* to treat litigants in similar situations differently, and that one departs from this basic judicial tradition by choosing from among similarly situated litigants those who alone will receive the benefit of the "new" rule of constitutional law violates this fundamental rule. *Id*. at 537-38.

The Supreme Court reiterated its position regarding selective prospectivity in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). In that case, the Court addressed the failure of the Virginia Supreme Court to apply retroactively the decision of *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) (holding that a State may not constitutionally tax retirement benefits paid by the Federal government while exempting benefits paid by the State or its political subdivisions). Virginia argued that even if rules determined by federal courts must be applied retroactively by federal courts, a state's retroactivity policy governs. The Supreme Court rejected the

State of Virginia's argument, holding that the Supremacy Clause of the United States Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach under state law:

> "Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law ***cannot extend to their interpretations of federal law***."[4]

Id. at 100, *citing Great Northern Rail Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

The Supremacy Clause applies here. This Court stated in *General Motors* that the "Commerce Clause claim is dispositive" in concluding that the Fifty Percent Threshold discriminates against interstate commerce. *Id*. at 564. Because this Court's decision was an interpretation of federal law, the Supremacy Clause requires retroactive application to all periods for which suit is not barred by *res judicata* or by statutes of limitations or repose. Because Appellant's refund claim was not so barred, this Court's decision in *General Motors* must be applied retroactively to Appellant.

II. The Due Process Clause Requires Relief in the Form of Refunds.

The Supremacy Clause requires retrospective application of state court decisions applying federal law, but the clause does not mandate any particular form of relief. If a state imposes an impermissibly discriminatory tax, the state retains flexibility in responding to the determination. *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, Florida Department of Business Regulation*, 496 U.S. 18 (1990). For example, a state may choose to

[4] Emphasis added here and throughout, unless otherwise noted.

provide a form of "predeprivation process" in which individuals are given an opportunity for a hearing before they are deprived of any significant property interest. *Id*. at 37-38, *citing Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). A state is not required, however, to provide predeprivation process with respect to taxation; states may elect to provide an exclusively predeprivation process, an exclusively postdeprivation process or a hybrid of the two. *McKesson*, 496 U.S. at 38.

Where a State allows only a postdeprivation action, the relief must be meaningful:

> "If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to ***provide meaningful backward-looking relief to rectify any unconstitutional deprivation.***"

Id. at 31.

Here, Appellant had no constitutionally adequate predeprivation process to contest the legality of the Fifty Percent Threshold. The Director is thus required to provide meaningful postdeprivation relief to rectify its unconstitutional deprivation of additional income tax as a result of the application of the unconstitutional Fifty Percent Threshold.

A. There Was No Constitutionally Adequate Predeprivation Process Available to Appellant.

Under Missouri law, taxpayers face various sanctions designed to encourage payments of tax "***before*** their objections [to tax] are entertained and resolved." *McKesson*, 496 U.S. at 38. *See* Section 143.751 (imposing five percent penalty for a deficiency due to the intentional disregard of the

Director's regulations). A penalty in the amount of almost $700,000 (excluding interest on the penalty), was, in fact, imposed upon General Motors for those periods where it ignored the Fifty Percent Threshold and filed consolidated returns. *See General Motors Corp. v. Director of Revenue*, Case Number 96-1882RI (Mo. Admin. Hrg. Comm. 1998), Findings of Fact ¶¶ 21, 24.

1. The Postdeprivation was Inadequate.

The Commission found that Appellant had an adequate predeprivation remedy. Specifically, the Commission found that Appellant should have invoked the process pursued by General Motors: ignore the Fifty Percent Threshold and file consolidated Missouri income tax returns, await assessment by the Director under Sections 143.611 to 143.621, and file a protest of the same (L.F. 209). But as the General Motors assessment makes abundantly clear, that process subjects taxpayers to the risk of incurring ***substantial penalties*** (almost $700,000 in the case of General Motors) by operation of Section 143.751. Thus, the remedy that the Director and Commission found to be constitutionally adequate imposed a "serious disadvantage" upon General Motors, and would have imposed that disadvantage upon Appellant, Kroger, and all other similarly situated taxpayers. As explained below, any purported remedy that imposes a serious disadvantage upon its exercise is a constitutionally inadequate remedy.

When a tax is paid in order to avoid financial sanctions, the tax is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure. *McKesson*, 496 U.S. at 38, n.21. For example, in *Ward v. Love County Board of Commissioners*, 253 U.S. 17, 23 (1920), the United States Supreme Court found that a payment of taxes to avoid financial penalties constituted a payment under "duress." Because Appellant would have been subject to financial penalties by awaiting the Director's assessment under Section 143.631, the protest of assessment

mechanism set forth in Section 143.631 was not a remedy sufficient to satisfy Due Process. *McKesson*, 496 U.S. at 38, n.21.

B. The Postdeprivation Refund Remedy is the Only Adequate Remedy.

As noted above, states have some flexibility in determining the means by which meaningful, backward-looking relief is fashioned. *McKesson*, 496 U.S. at 39-40. The most obvious is to refund the difference between the tax paid and the amount that would have been due if the taxpayer group had been extended the same privilege to file consolidated Missouri income tax returns as those corporations favored by the Fifty Percent Threshold. *See Montana Nat. Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931). A refund remedy is the only means by which the taxpayer avoids the risk of assessment of substantial penalties.

If a constitutionally adequate remedy is not provided by the clear language of the statutes or regulations, it is provided as a matter of law. *McKesson*, 496 U.S. at 32 (*citing Atchison, Topeka & Santa Fe Railroad Company v. O'Connor*, 223 U.S. 280 (1912)) ("After finding that the railroad company's tax payment 'was made under duress,' … the Court issued a judgment entitling the company to a 'refunding of the tax.'"). Although the Commission attempted to deprive Appellant of any remedy, it acknowledged (L.F. 210) that "a court may find that due process considerations outweigh the procedural analysis on which [the AHC rests its] decision." This understatement acknowledges the constitutional truism that an adequate remedy is still required.

The protest payment scheme places a price on exercising constitutional rights (risk imposition of penalties), and is thus not a constitutionally adequate remedy. Neither the Director, nor the

Commission, has identified any other remedies available to taxpayers. Therefore, as a matter of law, Appellant is entitled to a refund. *McKesson*, 496 U.S. at 31.

III. Appellant Satisfied the Requirements of Section 143.801.

As stated above, Appellant is entitled to meaningful backward-looking relief to remedy the State's unconstitutional deprivation of Appellant's property, ***even if there is no existing provision in Missouri law for such relief***. However, Missouri law provides a means through which Appellant is entitled to relief, Section 143.801.

A. The Director's Regulations Cannot Defeat Appellant's Claim for Refund.

Section 143.801 provides for an income tax refund:

> "A claim for credit or refund of an overpayment of any tax imposed by sections 143.011 to 143.996 shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later; or if no return was filed by the taxpayer, within two years from the time the tax was paid."

The Commission concluded that the refund statute did not apply because Appellant was not the "taxpayer" that paid the overpaid tax it seeks to have refunded (L.F. 209-210).[5] The Commission

[5] Although the Director apparently never asserted a limitations defense, the Commission erroneously concluded that "a good argument could be made that the refund claim for 1995 [wa]s untimely" because it was filed more than three years after April 15, 1996 (L.F. 210, fn. 11). The Commission's conclusion in this regard is not supported by its findings since they fail to disclose when the original returns were in fact filed.

also concluded that Appellant was entitled to no refund under section 143.801 because Appellant allegedly failed to meet a "procedural protection"—Appellant failed to make a timely consolidated return election, even though such an election was expressly precluded by the Fifty Percent Threshold (L.F. 206-209). Thus, the Commission accepted the argument, disingenuous at best, that Appellant properly paid its income tax on a separate company basis. Each of these conclusions are, as a matter of law, erroneous.

Contrary to the Commission's conclusion, Appellant was the "taxpayer" entitled to a refund under Section 143.801. That is because it acts as the agent for the consolidated group and its other affiliates. The Director's regulation 12 CSR 10-2.045(32) provides that the common parent of an affiliated group is the agent of other subsidiary members "in all matters relating to the Missouri tax liability for the Missouri consolidated return year." Regulation 12 CSR 10-2.045(4) defines "Missouri consolidated return year" as "a taxable year for which a Missouri consolidated return is filed or required to be filed by an affiliated group under this rule" (L.F. 209-210). Because Appellant's consolidated group filed consolidated returns for the tax years at issue and because Appellant was the common parent for the other subsidiaries of the group, Appellant was entitled to seek a refund on behalf of the group and its members.

The Director's regulation 12 CSR 10-2.045(15) requires that an affiliated group make an election to file a consolidated return within a certain time frame. But that requirement is not contained anywhere in the statutes. This Court has repeatedly concluded that the Director is without power to add requirements to a tax statute; such power is reserved exclusively to the Legislature. *See, e.g.*, *Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 206 (1990). In short, one of the procedural

rules (L.F. 208) the Director has invoked to avoid remedying the State's unconstitutional deprivation of Appellant's property is without force of law.

Even assuming *arguendo* that the Director could impose additional requirements to the tax statutes, the regulation the Director invokes did not apply to Appellant when the original separate company returns were filed. The Director's regulation, 12 CSR 10-2.045(15), provides:

> "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 the filing of the common parent's separate Missouri return."

On the dates when the separate company returns were due, Appellant's consolidated group, Speigel Group, was not qualified under Section 143.431.3(1) to file a Missouri consolidated return because of the Fifty Percent Threshold. One may only make an election if there is an element of choice involved. Because Appellant did not have an available choice, there was no election that could be made.[6]

The Commission conceded that "there is merit to [the] position" that an affiliated group should not be required to make an election that had no effect under then-current law (L.F. 209). Nonetheless, the Commission attempted to avoid the obvious implication of this argument (*i.e.*, that the "timely election" regulation does not affect Appellant's statutory right to seek a refund of the unconstitutionally

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[6] The Director also attempted to analogize this case to *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220 (Mo. 1983), in which this Court held that an election to apportion income was irrevocable. Because Appellant was ineligible to make an election, this line of authority is irrelevant.

collected taxes) by finding that a "reasonable taxpayer—which in this case, by definition, is an affiliated group of corporations and is therefore considerably more likely to be sophisticated in tax matters" "*should* have foreseen the problem presented by the current situation" and acted in the same manner as General Motors (L.F. 209) (emphasis in original). Presumably, the Commission meant that Appellant should have ignored the Fifty Percent Threshold, filed consolidated Missouri income tax returns, assumed the risk of substantial penalties, and protested the ultimate assessment (with penalties) made by the Director based upon what it ***should*** have foreseen.

The Commission's position that Appellant "should have foreseen" the consequences of its decisions is contrary to the United States Supreme Court's decision in *Reich v. Collins*, 513 U.S. 106 (1994). In *Reich*, a retired federal military officer sought a refund based upon Georgia's tax refund statute. The Georgia taxing authorities denied the refund by claiming that the taxpayer could have made use of predeprivation procedures to contest the assessment; therefore, under *McKesson*, the state was not required to permit the taxpayer to utilize the refund statute. The Court agreed that, under *McKesson*, Georgia maintained the flexibility to have an exclusively predeprivation remedial scheme, and was free to reconfigure its remedial scheme over time. *Id*. at 110-11. However, the Court concluded that a State may not reconfigure its scheme in mid-course—to "bait and switch." *Id*. at 111. Specifically, during the period in question, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy in the form of its tax refund statute, and then declared, only after the disputed taxes had been paid, that the remedy did not exist. The Court held that Georgia's predeprivation procedures were irrelevant because, even assuming their constitutional adequacy, no reasonable taxpayer would have believed that the predeprivation procedures represented the exclusive remedy for unlawful taxes based upon the refund statute. *Id*.

The Supreme Court also rejected Georgia's argument that the refund should not be required because the taxpayer did not know that his taxes were unconstitutionally collected when the payment was made. The Supreme Court noted that the refund statute did not contain a contemporaneous protest requirement; therefore, the taxpayer's "knowledge" was irrelevant. *Id.* at 113-14. Thus, the Supreme Court required Georgia to allow a refund, even though the refund statute did not otherwise apply, and provide meaningful backward-looking relief to Reich. *See also Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442 (1998) (Florida could not avoid refunding unconstitutionally collected taxes by arguing that the taxpayer should have used other predeprivation remedies).

More recently, in *North Supply Co. v. Director of Revenue*, 29 S.W.3d 378 (Mo. banc 2000), this Court rejected an argument similar to that of the Director in this case. In *North Supply*, the Director argued that a taxpayer seeking a refund of unconstitutionally collected local use tax should have paid its taxes under protest and sought an immediate refund after payment, or at least during the pendency of existing litigation of the constitutionality of the local use tax. This Court flatly rejected that contention, citing *Reich*. This Court held that the taxpayer was entitled to pursue a refund of its taxes, notwithstanding the availability of other remedies. It concluded that the taxpayer "should not be penalized for waiting until both the courts and the legislature had spoken." *Id.* at 380. Here, the Commission's decision imposes such a penalty upon Appellant. Therefore, the Commission's use of its newly created "reasonable corporate taxpayer" standard must be rejected by this Court.

In short, the Director's "timely election" consolidated return regulation does not affect Appellant's right to a refund of the taxes unconstitutionally collected by the Director, and Appellant is, therefore, entitled to recover such taxes under Missouri law.

IV. *General Motors* Was Not an Unexpected Decision.

The Director argued before the Commission that she was not required to refund Appellant's overpaid income tax because this Court's decision in *General Motors* was "unexpected" within the meaning of Section 143.903. Section 143.903 provides that a refund is not due for any period prior to the issuance of an "unexpected decision." In *Lloyd v. Director of Revenue*, 851 S.W.2d 519, 523 (Mo. banc 1993), this Court held that for a decision to be unexpected, it must:

> (1) overrule a prior case or invalidate a previous statute, regulation or policy of the director of revenue; ***and***
>
> (2) not be reasonably foreseeable.

There is no question that *General Motors* overruled this Court's decision in *Williams Cos., Inc. v. Director of Revenue*, 799 S.W.2d 602, 604 (Mo. banc 1990), *cert. denied*, 501 U.S. 1260 (1991). Contrary to the arguments of the Director before the Commission, this Court's decision in *General Motors* was foreseeable.

In *Williams Cos.*, this Court upheld the constitutional validity of the Fifty Percent Threshold against a claim that it violated the Commerce Clause. The basis of the Court's decision was that, even though the Fifty Percent Threshold was facially discriminatory, it was constitutionally valid because a taxpayer could avoid the adverse consequences of the statute by consolidating its business into a single corporation or by conducting a majority of its business in Missouri. *Williams*, 799 S.W.2d at 605.

The *Williams* decision, however, preceded several United States Supreme Court decisions addressing the Commerce Clause, most notably *Kraft General Foods, Inc. v. Iowa Department*

of Revenue, 505 U.S. 71 (1992).[7] In *Kraft*, the Supreme Court rejected the argument that a facially discriminatory statute can be rendered constitutionally valid by demonstrating that a taxpayer could avoid the adverse consequences of the statute by reorganizing its business. *Id*. at 78, 82.

United States Supreme Court interpretations of the United States Constitution are controlling. *McKesson*, 496 U.S. at 29-30, n. 12. Recognizing that undeniable concept, the Director argued below that *Kraft* did not necessarily require the overruling of *Williams* because *Kraft* dealt with foreign commerce and an income tax deduction, and that if it were so clear that *Kraft* would cause the overruling of *Williams*, Appellant should have pursued its position in the same manner as General Motors. In advancing this argument, the Director misapplies the test for determining whether a decision is "unexpected." It is an objective determination, not a subjective one. Since the United States Supreme Court expressly rejected the basis of the *Williams* decision in *Kraft*, as noted by this Court in *General Motors*, any reasonable person would have foreseen the *General Motors* decision.

CONCLUSION

Federal law requires the State of Missouri to provide Appellant with meaningful backward-looking relief to remedy the State's unconstitutional deprivation of Appellant's property through the application of the Fifty Percent Threshold. The only such relief available to Appellant and similarly situated taxpayers is a refund. Furthermore, even in the absence of federal Constitutional requirements,

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[7] Additionally, as this Court noted in *General Motors*, the *Williams* decision also preceded *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Fulton Corporation v. Faulkner*, 516 U.S. 325 (1996) and *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

Appellant is entitled to the refund sought as a matter of Missouri law, specifically Section 143.801. Therefore, this Court should reverse the decision of the Commission with instructions to grant Appellant's claim for income tax refund in connection with its filing of consolidated Missouri income tax returns.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing were mailed first class, postage prepaid, this _____ day of October, 2001, to State Solicitor James Layton, P.O. Box 899, Jefferson City, Missouri 65102, Attorney for the Director, to Marilyn A. Wethekam, Fred O. Marcus and Brian L. Browdy, 180 N. LaSalle Street, Suite 3700, Chicago, Illinois 60601, and to Janette Lohman, Michael Annis, and Eric G. Enlow, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, Attorneys for Appellant.

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CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 5,479 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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