

**IN THE SUPREME COURT  
STATE OF MISSOURI**

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**Case No. SC89106  
AMERICAN HOME ASSURANCE COMPANY, Appellant,**

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**Case No. SC89107  
GRANITE STATE INSURANCE GROUP, Appellant,**

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**Case No. SC89108  
NEW HAMPSHIRE INSURANCE COMPANY, Appellant,**

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**Case No. SC89109  
NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH,  
Appellant,**

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**Case No. SC89110  
AIU INSURANCE COMPANY, Appellant,**

**v.**

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

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**Appeals from the Administrative Hearing Commission of Missouri  
Honorable John J. Kopp, Commissioner**

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

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## STATEMENT OF FACTS

These appeals, consolidated for briefing and argument, involve five insurance companies doing business in Missouri: American Home Assurance Co. (No. SC89106; Appellant's Appendix ("App.") A2); Granite State Insurance Group (No. SC89107; App. A9); New Hampshire Insurance Co. (No. SC89108; App. A16); National Union Fire Insurance Co. of Pittsburgh, PA (No. SC89109; App. A23); and AIU Insurance Co. (No. SC89110; App. A30). (Because many of the pertinent facts are identical for each of the five companies, we will often refer to them collectively as "the Insurance Companies.")

Each of the Insurance Companies pays an insurance premium tax to the Missouri Department of Revenue, pursuant to §§ 148.310-.350.<sup>1</sup> App. A2, A9, A16, A23, A30. Each made premium tax payments for the 2004 tax year over the course of that year. App. A2, A9, A16, A23, A30. The Department received Granite's last 2004 payment on March 1, 2004. App. A9. It received the last payments from American Home, New Hampshire, National Union, and AIU on November 29, 2004. App. A2, A16, A23, A30.

After the end of 2004, the Department of Revenue reviewed the Insurance Companies' payments and issued a "Notice of Assessment

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<sup>1</sup> All statutory references are to RSMo. 2000 unless otherwise noted.

2004/2005 Estimated Insurance Tax(es).” App. A2, A9, A16, A23, A30.<sup>2</sup> The notices reflected payments and assessed amounts still due from each company. App. A2, A9, A16, A23, A30. The notices instructed each company to send the check to the Department of Revenue on or before June 1, 2005, and stated that the tax payments were due on that date. App. A2-3, A9-10, A16-17, A23-24, A30-31.

On June 2, 2005, with a quarterly 2005 payment from American Home (apparently adjusted to compensate for a 2004 overpayment), App. A3, the Department received letters from the other companies indicating that enclosed was “full payment” for 2004 but in the amount of \$0, App. A10, A17, A24, A31.

Nearly two years later, each company sought refunds of a portion of the 2004 taxes paid. Each company sent refund claims to the Department postmarked June 1, 2007. App. A3, A10, A17, A24, A31. The Department received the claims on June 4, 2007. App. A3, A10, A17, A24, A31.

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<sup>2</sup> Unfortunately, the AHC made no finding as to when those assessments were sent or received. Nor do the copies of the assessment letters in the record themselves give a precise answer to that question. We are left knowing only that they were sent out after the end of 2004 and in time for the Insurance Companies to respond by June 1, 2005.

The Director of Revenue rejected the claims in a decision dated June 18, 2007, because they were not filed within two years of the payment of the taxes. App. A3, A10, A17, A24, A31.

On July 17, 2007, each company filed a complaint with the Administrative Hearing Commission (“AHC”), contesting the Director’s decision. App. A1, A8, A15, A22, A29. Because the facts pertinent to the timeliness of the refund claims were not disputed, the AHC heard the matters on cross-motions for summary determination. *See* App. A1-2, A8-9, A15-16, A22-23, A29-30. On January 16, 2008, the AHC granted the Director’s motions and affirmed his decisions. App. A7, A14, A21, A28, A35.

## ARGUMENT

The AHC held that the Insurance Companies failed to timely file requests for refunds of 2004 premium taxes. The Insurance Companies attempt to reverse that result in three ways.

In their Point III (discussed in part II below) they assert that the period for filing refund requests is three years, not the two years applied by the AHC. If they were right, their other points would be irrelevant, for the Director agrees that they filed their refund requests within three years of payment of the taxes. But the plain language of the three-year statute limits its application to taxes other than premium taxes, the only taxes that the Insurance Companies want refunded. The real question here is whether they filed their refund requests “within two years from the date of payment” of the taxes they seek to obtain, the deadline set by § 136.035.3.

The Insurance Companies argue, of course, that they even met the two-year deadline. To accomplish that, they posit in their Point I (discussed in part III below) a definition of “date of payment” that finds no support in the language of the statute. The statute requires the Director of Revenue (and the AHC and the courts) to ascertain when the taxes sought were actually paid – here, before June 1, 2005, and thus more than two years before the Insurance Companies even placed their refund requests in the mail.

If the Insurance Companies were right and “date of payment” meant something quite different from what those words say, their refund requests would still be untimely. The timeliness of the requests depends on a holding, urged in their Point II (addressed in part III below), that they were “filed” when the U.S. Postal Service attempted delivery on Saturday June 2, when the Department’s offices were closed. Because attempted delivery does not equal filing, their refund requests were untimely even under their preferred reading of the “date of payment.”

Before addressing the Insurance Companies’ three arguments, however, we must place them in context: they are made in an effort to withdraw funds from the State Treasury.

**I. Taxpayers must strictly comply with the time limits in statutes permitting the refund of excess tax payments.**

State officials can pay money out of the State Treasury only when authorized by the General Assembly. When the General Assembly does partially waive the State’s normal immunity and allow such payments, it often imposes very specific requirements. Typical among them is a requirement that a request for payment be made within a particular period of time. The most pertinent example – and the one that applies here, as discussed in part II, below – is § 136.035.3. That statute bars the Director

from refunding taxes, generally, unless the refund request is filed within two years of the date on which the tax was paid: “No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment.” Though phrased as a prohibition, that statute has been construed and applied to authorize the Director to make refunds in response to appropriate requests that are timely filed. That the General Assembly would impose such time limits is hardly surprising; the State needs to know, month-to-month and year-to-year, how much money is in the Treasury and how much of what is in the Treasury is available.

Consistent with their nature as partial waivers of immunity, the requirements of § 136.035.3 and other statutes that allow individuals to demand the payment of funds out of the State Treasury are strictly enforced. No decision of this Court in the last 25 years has upset the conclusion that “where the statute provides a remedy and a procedure to be followed, it must be complied with.” *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W.2d 599, 600-601 (Mo. 1983). In fact, this Court has recently applied that rule to tax refunds:

Missouri’s statutory tax refund provisions operated as a limited waiver of the state’s sovereign immunity. “When a state consents to be sued, it may be sued only in the manner and to the extent

provided by the statute; and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit.”

*City of Hazelwood v. Peterson*, 48 S.W.3d 36, 41 (Mo. banc 2001), quoting *Charles v. Spradling*, 524 S.W.2d 820, 823 (Mo. banc 1975). So applied, § 136.035.3 ensures that in the absence of a refund request in hand, on the second anniversary of the payment of most taxes, the Department of Revenue, the General Assembly, the Governor, the Office of Administration, and the State Treasurer know that claims against those tax payments have expired.

The question here is not whether the Insurance Companies are entitled to a refund of any of the premium taxes they paid; neither the Director nor the AHC reached that question, and consideration of it would require a remand. Instead, it is whether the Insurance Companies strictly complied with a statutory prerequisite for obtaining a refund: a timely request. They did not.

**II. The statute regulating refunds of excess premium tax payments is § 136.035.3, which requires that refund requests be filed “within two years from the date of payment.” (Responds to Appellants’ Point III.)**

There is no dispute here that the usual or default authority for tax refunds is § 136.035.3, which requires that requests be filed within two years of payment of the taxes sought to be refunded: “No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment.” Appellants’ points I and II address whether the Insurance Companies’ June 2, 2007, filings were “within two years from the date of payment.” But first we address Appellants’ point III, for there they ask the Court to apply a three-year limitation period – and the Director agrees that if the three-year period applied, the refund requests would have been timely regardless of how the issues presented in the Insurance Companies’ first two points were decided.

The Insurance Companies insist on a three-year period by claiming that the Director’s authority to make the refunds of premium taxes is not governed by the generally applicable language of § 136.035.3, but instead by a provision in Chapter 148. The Revisor of Statutes has labeled that chapter, “Taxation of Financial Institutions.” Insurance companies are among the

“financial institutions” covered; the premium tax that these insurance companies claim to have overpaid is imposed pursuant to §§ 148.310-.350. But Chapter 148 does not contain a generally applicable instruction regarding the timing of refund claims, nor a specific one that applies to premium taxes.

Chapter 148 does contain a specific refund provision for bank taxes: § 148.076.1, which the Insurance Companies invoke. Their argument ignores that section’s first clause, which carefully circumscribes the availability of the three-year limitations period:

A claim for credit or refund of an overpayment of any tax imposed by sections 148.010 to 148.110 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.

Section 148.076.1 thus provides authority to pay refunds on claims made up to three years after a return was filed – but only of “tax[es] imposed by sections 148.010 to 148.110.”

Section 148.076.1 thus does not apply to taxes on financial institutions generally – nor to taxes on credit institutions (§§ 148.120-.230), nor to taxes

on credit unions and savings and loan associations (§§ 148.600-.710), nor to premium taxes on insurance companies (§§ 148.310-.350). There is simply no room in the language of § 148.076.1 on which to base a claim that it replaces the Director's general refund authority under § 136.035.3 with regard to premium tax refunds.

In light of the specific, unambiguous limiting language of § 148.076.1, it simply does not matter that the section is “in the same chapter as the insurance premium tax.” (Appellants' brief at 32 and again at 33). And that limiting language precludes use of the canon of construction that statutes are to be read *in pari materia*. Such canons are useful only where the language is ambiguous. *See Spradlin v. City of Fulton*, 982 S.W.2d 255, 264 (Mo. banc 1998) (“Where the language of the statute is unambiguous, there is no room for construction”) (Holstein, J. concurring). The language of § 148.076.1 is not.

But the canon would not help the Insurance Companies in any event. It has not been used, historically, nor can it be used, logically, to argue that a provision of Chapter 148 applies to all of Chapter 148 despite its own express language. Nor is the Insurance Companies' reading supported by the cases they cite. The Director does not read § 148.076.1 so as to render any portion of that or any other statute meaningless, in contrast to the interpretation rejected in *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 295 (Mo.

banc 2007). Reading the premium tax statute (without its own refund authority) and the banking tax statute (which has one) separately is entirely consistent with *Investors Title, Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676 (Mo. banc 2006), and *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. banc 1991).

Under the *in pari materia* canon, provisions that are part of a single “law” or statutory scheme are interpreted as a harmonious whole. The typical – and proper – use of the canon is thus to take a particular phrase and try to ensure its consistent use among inter-related provisions. That use has no application here, even if “the law” to be read harmoniously in this case could be defined as an entire chapter of the Revised Statutes, rather than the more logical definition, limited to the premium tax law, §§ 148.130-.461. The phrase in § 148.076.1 for which the Insurance Companies would need to find other – much, much broader – uses would be “credit or refund of an overpayment of any tax imposed by sections 148.010 to 148.110,” and that phrase is not found anywhere else in Chapter 148 – nor elsewhere in the Revised Statutes of Missouri.

But again, neither *in pari materia* nor any other canon of construction should be used here, for given the language of § 148.076.1, even “when the statute as a whole is considered, the intent of the legislature and the

language of the statute are both intrinsically clear.” *J.B. Vending v. Director of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001).

**III. For purposes of the premium taxes, “two years from the date of payment” means just that, not two years from the date of some other submission. (Responds to Appellants’ Point I.)**

Section 136.035.3 requires that a refund request be filed with the Director “within two years from the date of payment.” To succeed in their claim that their refund requests were timely under that standard, the Insurance Companies must prevail on both their Points I and II. We begin with I, because if that argument fails – and it does – Point II is moot.

To calculate when the “two years” end, we must first calculate when they begin. To do so, we first reiterate the AHC’s finding as to the last date when any of the taxes at issue were received by the Director: November 29, 2004. *See* App. A2 (American Home); A16 (New Hampshire, same); A23 (National Union, same); A30 (AIU, same). *See also* A9 (Granite State’s last payment made on March 1, 2004). If “payment” means when the State received the taxes sought to be refunded, there can be no dispute that all of the refund requests were outside the two-year period – as the AHC held. *See* App. A6 (“the taxpayer made each payment on the date that the Director of Revenue received it”); A13; A20; A27; A34.

The Insurance Companies argue that the actual date on which the State received the taxes sought to be refunded doesn't matter, *i.e.*, that "payment" doesn't mean "payment" – that it means something else entirely. In response we begin, as we must, with the plain meaning of "payment."

"Payment" is, of course, a commonly understood term. Few Missouri citizens avoid making payments each month – for utilities, mortgages, rent, etc. It seems obvious that legislators voting for § 136.035.3 would use the term in the same fashion as paying bills, *i.e.*, saying that the "payment" occurs when the check is sent by the debtor or received by the creditor. That is consistent with the dictionary definitions of "payment": "the act of paying or giving compensation" or "something that is paid: something that is given to discharge a debt or fulfill an obligation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 1659.

The Insurance Companies, of course, argue for a very different meaning of "payment," one that is entirely divorced from actually paying money or giving anything of value to the State.

Their argument is based on the structure of the payment scheme set out by § 148.350. *See* App. Br. at 31-32. That scheme does, as the Insurance Companies describe, provide for a series of periodic payments during the tax year, to be followed by a reconciliation during the subsequent year. In that regard, it is similar to the income tax withholding that we all experience – we

make payments during the tax year, reconcile them with our total income, then file a return during the subsequent year, which may be accompanied by a check for taxes owed, or may prompt a refund of taxes overpaid.

Literally read and applied, § 136.035.3 allows the Director to refund only that portion of the overpayment requested that was paid within two years of the request. That reading, of course, does not specifically address the fact that what the Insurance Companies paid during 2004 – just like what is withheld from paychecks – is an “estimated” amount, required to be paid in advance of the end of the year. The Insurance Companies are correct in asserting that the amount of the premium tax ultimately due for the year cannot be finally established until after the year ends, and that liability for final payment of any remaining tax is not due (as a general rule, with exceptions not pertinent to this argument) until a deadline sometime the following year. But § 136.035.3 still sets the deadline for seeking a refund from the actual payment, estimated or not. Refund request deadlines set by § 136.035.3 are staged throughout the year, depending on when the Director received the dollar that taxpayer asks the Director to refund.

In the sole Missouri precedent the Insurance Companies cite, *Community Bancshares, Inc. v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001), the Court reached a simpler result – because it did not have to address the issue presented here. There, the Court held that the last date for filing a

claim for any refund was two years from the date of Bancshares' last actual payment:

Section 136.035.3 expressly provides that the claim accrues at the time of payment of the tax. ... Bancshares' returns with the overpayments were filed with the Secretary on August 11, 1994, March 9, 1995, and February 17, 1996. The last possible day for Bancshares to file its claim for the 1996 refund would have been February 17, 1998. Having filed its claims on or after May 2, 1998, all of the refunds are barred by the applicable statute of limitations.

43 S.W.3d at 825-26. The Court did not hold, as the Insurance Companies suggest, that a refund request filed in February 1998 could reach payments made in August 1994. It simply defined the "last possible day" for filing a refund request, without addressing whether a request filed on that day could reach funds paid 35 or 40 months before. Under *Community Bancshares*, the question before the AHC and this Court would be whether the refund request was made within two years of any payment. And the Insurance Companies are in a position parallel to Bancshares: their last payments were made no later than November 29, 2004, far more than two years before they filed their refund requests.

The Insurance Companies concluded from *Community Bancshares* that a February 1998 request would have been timely as to an August 1994 payment. In other words, they read *Community Bancshares* to say that the entire year's payments are deemed to have been made on the date of the last payment. But not only does that go beyond even any dicta in *Community Bancshares*, it goes beyond any possible reading of § 136.035.3. And it would not be enough in any event, for the Insurance Companies require a reading of § 136.035.3 under which the time begins to run on a date well after the final payment of the year's taxes to the Treasury.

Neither the Commission nor the Director “ignores the entire concept of a final payment for purposes of a refund claim deadline.” App. Br. at 35. Rather, it is the Insurance Companies that ignore the word “payment” entirely, asking the Court not to set the deadline based on when they made “a final payment,” but on the last date a “final payment” could have been made, had they failed to make adequate “estimated” payments during 2004.

What the Insurance Companies really want is for “payment” to mean the final paperwork for the tax year. That is the rule for income taxes, for two reasons. The first is practical. Most of us do not really have a way of knowing whether we owe additional taxes or are owed a refund until we finish work on our return. But even there, the logic fails. After all, what the income tax scheme contemplates is that in the normal course, calculation of a

refund due is completed with the preparation of the return, and the request for refund is filed with it – not just within two years of the last payment, but within less than 16 months of the first payment of the tax year. Even those who give the least attention to fluctuations in the State’s fiscal posture through the course of the fiscal year understand that the system operates on the understanding that most refunds are paid out soon after the deadline for returns.

The second and more important reason that the last filing, not the last actual payment, triggers the limitations period for income taxes is a legal one. Because Missouri has largely adopted federal income tax law, *see, e.g.*, § 143.091, it has also adopted the federal rule that taxes withheld during the year are “deemed” paid not at the time of withholding, but on April 15 of the following year – the normal deadline for filing an income tax return. *See* 26 U.S.C. § 6513(b)(1) (“Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year ....” ).

There is no legal basis for treating premium taxes like income taxes. No statute “deems” estimated premium taxes to be paid on some date in the following year. Nor is such treatment required by the practical concerns. There is no direct counterpart to the April 15 “return” date. There really isn’t

a premium tax “return” in the sense we as income taxpayers understand the term; the final reconciliation of the premium tax is simply done with the second quarterly payment of the subsequent year. And an argument based on a logical counterpart to the income tax “return” date would not give the Insurance Companies what they want. After all, as they say, it is the Director in his premium tax assessment, not the taxpayer in a return or quarterly filing, who calculates the proper amount of tax and compares it to the amount already paid. *See, e.g.*, App. Br. at 33 (“the Director is responsible for truing up the actual tax due with the estimated payments made by an insurance company”); App. Br. at 34 (“when the assessment for a tax year is made by the Director ... [and] the Director determines that the estimated taxes remitted during the tax year exceeded the liability, then a credit (negative payment) is ordered by the Director.”). If § 136.035.3 could be read to allow two years from something other than an actual payment, the last logical date would be two years from the date of the Director’s assessment.

Even that would be more liberal than what the Insurance Companies themselves characterize as the “intent” of § 136.035.3: “The intent of Section 136.035.3 is to have a deadline for claiming a refund that is two years from the date upon which the final amount of tax paid was known and remitted.” App. Br. at 35. The “final amount of tax paid [by the Insurance Companies]

was known and remitted,” of course, when they made their last 2004 payments. So what they are really arguing is that the deadline, for them, was not when they knew what they had paid, but when they knew how much of the payment was an overpayment. And again, that calculation was made not in a “return” filed by the taxpayer, but in the assessment made by the Director and sent to the Insurance Companies.

Unfortunately, the AHC did not make a finding of fact as to the date of the Director’s assessments. Nor did the Insurance Companies present any evidence as to when those assessments were issued or received. So it is impossible, on this record, to determine the assessment date. But we do know that it was sufficiently in advance of June 1, 2005, as to allow payments to be received in advance of that deadline. So we know that it was early enough that the refund requests mailed on June 1, 2007, were too late even if the assessment date somehow constituted the “date of payment.”

**IV. If the “date of payment” were the last date on which the premium taxpayer files something with the Director for a tax year, the Insurance Companies still did not meet the two-year deadline. (Responds to Appellants’ Point II.)**

If the Insurance Companies were right as to the “date of payment” in § 136.035.3, and their “date of payment” really was June 2, 2005,<sup>3</sup> they would

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<sup>3</sup> On that date, the Director received the Insurance Companies’ letter listing their “Estimated Premium Tax-2<sup>nd</sup> Quarter 2005,” listing \$0 for Granite State (A10), New Hampshire (A17), National Union (A24), AIU (A31), but \$667,741 for American Home (A3). (Pursuant to § 148.350.2, the required June 1, 2005, filing combines the second quarter 2005 payment and the last 2004 reconciliation; the American Home payment was its 2005 quarterly payment, not further payment for 2004 – *see* App. A2). We note that those filings were late – *i.e.*, they were due on June 1, 2005. *See* App. A3, A10, A17, A24, A31. There is no explanation in the Insurance Companies’ brief for how they could file a day late in 2005, then bootstrap that delay to extend the two-year refund request deadline to June 2 rather than June 1, 2007. If the two years began when the “return” was due – as some of the Insurance Companies’ arguments seem to suggest – the period

have to prove that they filed their refund requests within two years of that date – *i.e.*, no later than June 2, 2007. But the Insurance Companies did not file their refund requests until June 4, 2007 – the date on which the Director received those requests.

**a. Saturday refund deadlines are not extended to Monday.**

Before addressing their claim that they met the June 2 deadline despite the fact that their requests didn't reach the Director until June 4, however, it is important to exclude one deceptively attractive solution to their problem: treating the refund deadline that fell on Saturday June 2, 2007 as having been extended by law to the following Monday. The Insurance Companies do not even claim that the two-year period set by § 136.035.3 is extended when the last day falls on a Saturday. And with good reason.

The General Assembly has oft demonstrated its understanding of weekend deadlines. Since at least 1855, the legislature has made a specific accommodation for deadlines that fall on Sunday: “The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded.” § 1.040, RSMo. 2000

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began to run on June 1, 2005, and the argument in their Point II that mere mailing on June 1, 2007 was adequate evaporates.

(a two-sentence version of a clause in “new” § 22, Chapter 96, RSMo. 1855). The legislature last reenacted that provision – still without adding Saturday – in 1957. A.L. 1957 p. 587. Meanwhile, the legislature has added Saturday in various other places. Most pertinent here, the legislature has put Saturday alongside Sunday in statutes relating to taxation deadlines: § 137.495 (property tax lists); § 143.851 (income tax returns).<sup>4</sup> The legislature has also demonstrated that it can order an office to be open on Saturday to accommodate those wishing to meet a deadline. *See* § 115.057 (election authority offices to be open on the Saturday before an election). But

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<sup>4</sup> Examples outside the tax context include: § 70.327, Art. II § 3.4 (veto of acts of the Kansas-Missouri Flood Prevention and Control Commission); § 71.625 (municipal license tax); § 105.487.4 (financial disclosure reports); § 105.964.1 (reports to the Missouri Ethics Commission); § 211.032.2 (protective custody hearings); §§ 211.061.4, 211.063.1 (juvenile detention); § 227.552(7) (utility relocation); § 273.403.2 (animal sterilization); § 288.240 (Labor and Industrial Relations Commission filings); § 301.640.4 (release of liens); § 302.178.6(2) (renewal of intermediate drivers’ licenses); §§ 307.365.5, 307.366.4, 643.330.2 (repair of defects found in vehicle inspection); § 407.937.2 (cancellation of certain contracts); § 506.060 (commencement of civil actions); § 552.040.17 (conditional release revocation hearing).

the legislature did neither here: it made no provision for Saturday to be skipped in calculating the deadline, nor did it mandate that the Director maintain office hours every Saturday to receive last-minute filings.<sup>5</sup>

The result of the legislature's decision not to generally follow the pattern of excluding Saturdays as it excludes Sundays is that, absent some more specific statute, when a statutory deadline falls on the first day of the weekend, Saturday, it is as a practical matter moved up a day, while a deadline that falls on Sunday is extended a day. Here, of course, the deadline, according to the Insurance Companies, was on Saturday, June 2, 2007. So as a practical matter, the deadline moved up a day; the refund claims had to be presented to the Director by the end of the business day Friday, June 1 – unless there was some mechanism for declaring something filed as a matter of law before it was, in fact, received.

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<sup>5</sup> This Court has included Saturday among days that do not count for various deadlines. Supreme Court Rules 6.01(a), 20.01(a), 44.01(a). But those rules apply only to filings with the courts; they do not apply to administrative filings, even those made with adjudicatory bodies such as the AHC. See, e.g., *Evergreen Lawn Service, Inc. v. Director of Revenue*, 685 S.W.2d 829, 831 n. 6 (Mo. banc 1985) (“[T]his Court has expressly rejected applying Rule 44.01 to administrative matters.”).

**b. Because no mailbox rule applies, mailing a premium tax refund claim on or before the day it is due does not constitute filing.**

Assuming that the Insurance Companies really did have until June 2, 2007 to file, we reach the Insurance Companies' assertion that their refund requests were filed as a matter of law before they were filed as a matter of fact – *i.e.*, that they were filed with the Director on Saturday, June 2, 2007, even though they did not reach the Director until Monday, June 4. The legislature has not opened the door to demands on the State Treasury that far.

The most typical method of opening the door to make a filing legally effective prior to receipt is the use of a “mailbox rule,” one that makes the filing effective upon sending. We find such rules in a variety of Missouri statutes. The example most notable here is § 621.205, whose predecessor was at issue in the Insurance Companies' principal authority, *Evergreen Lawn Service, Inc. v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985). That section, regulating the initiation of review by the AHC, provides that a filing with the AHC is effective when properly mailed:

1. For the purpose of determining whether documents are filed within the time allowed by law, documents transmitted to the administrative hearing

commission by registered mail or certified mail shall be deemed filed with the administrative hearing commission as of the date shown on the United States post office records of such registration or certification and mailing. If the document is sent by any method other than registered mail or certified mail, the administrative hearing commission shall deem it to be filed on the date the administrative hearing commission receives it.

But the General Assembly did not include any such rule in the statute authorizing the Director of Revenue to refund taxes already in the State Treasury. Thus the Insurance Companies do not and cannot assert that their refund claims were filed upon mailing.

**c. Attempted delivery on a day that the Department is regularly closed for business does not constitute filing.**

Unable to assert that the refund claims were filed upon mailing, and with filing upon receipt being too late, the Insurance Companies are required to find an unusual, alternative approach. They advocate a “presentation” rule – *i.e.*, a rule that filing is complete when someone arrives at the

government office ready to present a document, apparently without regard for what day or time that might be.

The Insurance Companies base their claim to that rule on a single decision of this Court: *Evergreen Lawn Service, Inc.*, in which the Court was addressing not § 136.065 or a similar law, but instead § 161.350, RSMo. Cum. Supp. 1981 – the predecessor of § 621.205.

Like current § 621.205, former § 161.350 contained a “mailbox rule”:

For purposes of determining whether pleadings are filed within the time allowed by law for filing of such pleadings, pleadings transmitted to the administrative hearing commission by registered mail, but not by certified mail, shall be deemed filed with the administrative hearing commission as of the date shown on the United States post office records of such registration and mailing.

§ 161.350, RSMo. Cum. Supp. 1981 (quoted in *Evergreen*, 685 S.W.2d at 830 n. 4). Rather than send its petition for review to the AHC by registered or any other form of mail, Evergreen sent its petition via a private overnight delivery service on the 29<sup>th</sup> day. 685 S.W.2d at 830. “Airborne attempted to deliver the petition for filing with the Commission on Saturday, August 23<sup>rd</sup>, the thirtieth day, but the offices of the Commission were closed and no one

was present to receive or file the petition.” *Id.* at 831. The Court deemed the question not to be whether transmission via Airborne Express was the legal equivalent of transmission via U.S. mail, but whether attempted delivery is “filing” under former § 161.350. The Court held that it was: “Attempted filing on the thirtieth day by a petitioner in person or by any proper agent of the petitioner constitutes a proper mode of filing necessarily contemplated by the law.” § 161.350.

The Court did not cite any statutory law to support that conclusion. Nor did it cite any precedent in which attempted filing was deemed to be the legal equivalent of filing. Nor did it address the numerous complications and permutations of such a rule. Its analysis was limited to a simple premise: that the “express legislative intent [was] that the taxpayer act *within* the thirty days prescribed” by the statute providing for AHC review. 685 S.W.2d at 831 (emphasis in original). The Court ignored the express legislative intent that the petition actually be mailed or filed within 30 days. It insisted on “[a] fair construction [that] mandates that the taxpayer be given the *full*

thirty days in which to affect his appeal,” *id.* (emphasis in original),<sup>6</sup> despite the fact that Evergreen had the full 30 days regardless, because of the mailbox rule. And the Court proclaimed that the AHC, by its own conduct in setting business hours, could not limit the time or opportunity for filing. *Id.*<sup>7</sup> But taken literally, that means agencies’ business hours would have no impact on filing, *i.e.*, that merely showing up at a state building at any hour of any day or night is sufficient to constitute “filing” – an approach that even

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<sup>6</sup> For that proposition, the Court cited *Ball Stores, Inc. v. State Bd. of Tax Commissioners*, 316 N.E.2d 674 (Ind. 1974). But the Indiana court did what this Court, as noted above, cannot do: in the absence of legislative language expressly answering the question of Saturday deliveries, it applied court rules saying that Saturday deadlines are extended to the next business day. *Id.* at 677-678.

<sup>7</sup> There, the Court invited the reader to “see” *State Bd. of Registration for Healing Arts v. Masters*, 512 S.W.2d 150 (Mo. App. W.D. 1974). But the only pertinent language in *Masters* is the general statement that the AHC “has no more and no less authority than that granted to it by the legislature.” *Id.* at 161. That decision says nothing about requiring the AHC – or the Director – to accept filings attempted outside of normal business hours.

the more liberal rules promulgated by this Court for judicial filings would not permit.

*Evergreen* lacks a persuasive basis. It is contrary to the rule, cited above, that the state legislature can define the terms of an administrative remedy, and that those invoking that remedy must comply with those terms. *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W.2d at 600-601; *Charles v. Spradling*, 524 S.W.2d at 823; *Matteson v. Director of Revenue*, 909 S.W.2d 356, 360 (Mo. banc 1995). It fails to give full credit to the legislative decision to always extend Sunday deadlines until Monday, but to selectively extend Saturday deadlines.

But even if it were a precedent to which this Court should adhere, it is not one that should be applied here, for three reasons.

First, in concluding in *Evergreen* that the legislature intended to give taxpayers the full 30 days in former § 161.350, the Court had before it some support in the legislature's willingness to open the door to filings received after 30 days by including a mailbox rule. There, it really was possible for a taxpayer to use every one of the 30 days in debating and drafting the petition for review; the taxpayer merely had to get the document to the post office on time for a 30<sup>th</sup> day postmark. The legislature expressly chose not to demand actual delivery within 30 days. Here, there is no mailbox rule, and thus no basis in the statute for supposing that the legislature was fixated on giving

taxpayers every one of the 730 days allowed for seeking a refund, nor for supposing that the legislature wanted to allow the filing of documents that arrive after the deadline.

Second, though broadly worded, the *Evergreen* “filed when attempted” rule is dicta to the extent it reaches beyond former § 161.350. It has never been applied by this or any other court in any reported decision to any other statute, whether that statute deals with tax refunds or with any other filing deadlines. Nor has it ever been applied to filing with any administrative officer or agency other than the AHC – logically, since the statute it applied was limited to the filing of petitions of review with the AHC. And its application to the AHC may well be a function, in part, of the AHC’s quasi-judicial role and the courts’ desire to keep AHC procedures consistent with judicial ones to the extent statutes permit.

The fact that the *Evergreen* holding has never been applied outside the scope of former § 161.350 deprives the Insurance Companies of the argument that the legislature has left that holding in place by acquiescence. In 1991 the legislature amended § 621.205 (A.L. 1991 H.B. 366/S.B. 283), “arguably a response to the *Evergreen* decision” (App. Br. at 22), and did not amend § 136.035.3 or other deadline statutes. But nothing in *Evergreen* alerted the legislature to the possibility that other statutes also needed amending – a logical prerequisite to an acquiescence argument.

Third, *Evergreen* addresses taxes yet unpaid, while this case involves money already deposited in the State Treasury. This Court has held that “the state is entitled to invoke its sovereign immunity unless it expressly consents not to do so.” *Community Federal Savings and Loan Association v. Director of Revenue*, 752 S.W.2d 794, 797 (Mo. banc 1988). See also *Matteson v. Director of Revenue*, 909 S.W.2d at 360. The consent to refund taxes is a “narrow waiver of the state’s sovereign immunity.” 909 S.W.2d at 360. To receive a refund of taxes, the taxpayer must precisely follow the procedures set forth in the refund statute, because statutes waiving sovereign immunity are strictly construed. *Id.*; *Community Federal*, 752 S.W.2d at 797. It should be apparent that the State’s interests in the *Evergreen* circumstances and those here (and in *Community Federal* and *Matteson*) are different – the difference between funds that one expects (or hopes) to get, and funds that one already has, believes it can appropriate, and may have already spent.

Because removing money from the State Treasury, as the Insurance Companies seek to do, goes to the very essence of sovereign immunity, the Court should insist that they comply to the letter with the statute permitting their claim. They should be required to place their claim in the hands of the Director during business hours on a business day – rather than authorize them, by *post hoc* judicial decree, to “file” merely by showing up, document in hand, at a government office that they must know is closed.

## CONCLUSION

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of the foregoing brief were mailed, postage prepaid, via United States mail, on July 2nd, 2008, to:

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**CERTIFICATION OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,932 words.

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