

IN THE SUPREME COURT OF MISSOURI

No. SC94097

MUMTAZ LALANI,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

**From the Administrative Hearing Commission of Missouri
The Honorable Mary E. Nelson, Commissioner**

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is a petition for review of a Decision issued by the Administrative Hearing Commission (“the Commission”) on March 19, 2014. The case came before the Commission on August 23, 2011, seeking an appeal of the Director of Revenue’s assessment of taxes, interest, penalties and costs for the sales of “Other Tobacco Products” sales per RSMo. Sec. 149.011 and RSMo. Sec. 149.160. By appealing to the Commission and having received an unfavorable final decision, Appellant has exhausted his administrative remedies under RSMo. Sec. 506.384 and the petition is ripe for review by this Court. The resolution of this petition for review requires the construction and determination of the validity of Missouri’s revenue laws, in particular, Sec. Sec. 149.011 and 149.160 RSMo. Accordingly, the jurisdiction of this Court is invoked under Art. V, Sec. 3 of the Missouri Constitution as well as Sec. 621.189 RSMo.

STATEMENT OF FACTS

I. Procedure

On August 23, 2011, Appellant filed a complaint with the Missouri Administrative Hearing Commission appealing the Respondent's decision assessing tax, interest, penalties and costs in the amount of \$42,863.19 against Appellant for the period of July 2009 from August 2010. (L.F. 10; Tr. 5). On September 19, 2011, Respondent filed an answer. (L.F. 10). The Honorable Mary E. Nelson for the Commission held a hearing and received evidence from the parties on April 19, 2013. (L.F. 10). Judge Nelson issued her decision on March 19, 2014, finding that Appellant owes the tax, interest and penalties assessed by the Respondent. (L.F. 17).

In the hearing, the Commission heard testimony from Keith Gast for the Respondent and Appellant testified on his own behalf. (Tr. 7-19; Tr. 20-35).

II. Underlying Facts

Between July 2009 and August 2010, Appellant sold merchandise to Missouri retailers, and about 50% of Appellant's sales to retailers consisted of tobacco products. (Tr. 20). Respondent assessed cigarette taxes, interest, penalties and costs in the amount of \$42,863.19 against Appellant for the period of July 2009 through August 2010. (Tr. 5). All cigarette taxes, interest, penalties and costs assessed against Appellant result from his sales of Other Tobacco Products (OTP) to retailers, which he purchased from a wholesaler known as Rock Bottom Wholesale. (Tr. 8).

Rock Bottom Wholesale is a Missouri wholesaler that sold OTP to Appellant in Missouri between July 2009 and August 2010. (Tr. 10, 23; Ex. A). During an independent investigation into the business dealings of Rock Bottom Wholesale, Respondent discovered that Rock Bottom Wholesale did not pay taxes on all of its transactions. (Tr. 8). Respondent began investigating Appellant when it noticed that Rock Bottom Wholesale did not pay taxes on its sales to Appellant. (Tr. 8, 12). Rock Bottom Wholesale claimed to be exempt from taxes on its sales to Appellant, proposing that Appellant was another wholesaler and therefore the party responsible for OTP taxes. (Tr. 8).

Rock Bottom Wholesale did not manufacture tobacco products between July 2009 and August 2010. (Tr. 15). Rock Bottom Wholesale always issued receipts to Appellant for his purchases of OTP. (Tr. 23-24; Ex. A). The receipts Rock Bottom Wholesale provided to Appellant always listed a separate tax amount of \$0.00, and contained the statement, "Tobacco tax is automatically added for Missouri customers." (Tr. 23-24; Ex. A). Between July 2009 and August 2010, Appellant also purchased OTP from Sam's Club and Unique Distributors for the purpose of reselling the OTP to local retailers. (Tr. 28). Between July 2009 and August 2010, the total post-tax cost per unit of OTP Appellant bought from Sam's Club and Unique Distributors was comparable to the total cost per unit of OTP Appellant bought from Rock Bottom Wholesale. (Tr. 34). Between July 2009 and August 2010, Appellant also received receipts of his purchases from

Sam's Club and Unique Distributors that listed separate tax amounts of \$0.00, and contained statements tobacco tax is automatically added for Missouri customers. (Tr. 31, 35). No OTP taxes were assessed against Appellant for his resale of OTP purchased from Sam's Club and Unique Distributors. (Tr. 28).

Appellant's profit margin for OTP is between 2 and 3 percent over the purchase price. (Tr. 20-21, 32). The additional tax claimed by Respondent is 10% over purchase price from the manufacturer. (Tr. 16, 31).

Appellant was previously fined in 2006 for purchasing OTP out of state and making the first sales of OTP in Missouri. (Tr. 21-22). Appellant contacted Respondent's representatives after paying the 2006 fine to make sure he complied with Missouri's laws and regulations in his future purchases and sales of OTP. (Tr. 25-26). Among other representatives of Respondent, Appellant spoke with Kaidy Martin, Revenue Processing Technician I, Excise Tax, for clarification and instruction on how to proceed lawfully in buying and selling OTP to retailers. (Tr. 26-28).

In Appellant's communications with Ms. Martin, Ms. Martin told Appellant that he would not have to pay the tobacco tax on OTP so long as his future purchases of OTP were from wholesalers within the state of Missouri. (Tr. 27-28, Ex. B). Ms. Martin told Appellant that he would still need to file monthly tax returns to reflect he purchased OTP, but that he should report inventory and balances due of zero. (Tr. 26-28).

Appellant followed Ms. Martin's instructions. (Tr. 8-10, See Ex 1-14).

Respondent's assessments against Appellant in this case result from the transactions Appellant made in reliance on Ms. Martin's instructions. (Tr. 8-10).

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN FINDING THAT APPELLANT IS RESPONSIBLE FOR PAYMENT OF TAXES FOR "OTHER TOBACCO PRODUCTS" TO THE DEPARTMENT OF REVENUE UNDER RSMo. Sec. 149.160 BECAUSE APPELLANT WAS NOT THE FIRST PURCHASER OF "OTHER TOBACCO PRODUCTS" UNDER RSMo. Sec.149.160 AND THEREFORE NOT RESPONSIBLE FOR PAYMENT OF THE TAX UNDER THAT STATUTE IN THAT APPELLANT PURCHASED THE "OTHER TOBACCO PRODUCTS" AT ISSUE FROM A WHOLESALER IN MISSOURI AND DID NOT MAKE SUBSEQUENT TOBACCO SALES OF THOSE PRODUCTS AS A MANUFACTURER OR WHOLESALER, OR IN A CAPACITY THAT IS FUNCTIONALLY EQUIVILENT TO THAT OF A MANUFACTURER OR WHOLESALER.

RSMo. 149.011(5)

RSMo. Sec. 149.011(7)

Hyde Park Housing Partnership v. Director of Revenue,

850 S.W.2d 82, 84 (Mo. App. S.C. 1995).

State ex rel. Normandy School District v. Small, 356 S.W.2d 864, 872

(Mo.App. S.C. 1962)

II. ALTERNATIVELY, THE COMMISSION ERRED IN ENFORCING RSMo. Sec. 149.160 AGAINST APPELLANT, AND APPELLANT APPEALS THE VALIDITY OF STATUTE UNDER ARTICLE V, SECTION 3 OF THE MISSOURI CONSTITUTION BECAUSE RSMo. Sec. 149.160 IS UNCONSTITUTIONALLY VAGUE IN THAT ITS ENFORCEMENT WOULD ARBITRARILY SUBJECT APPELLANT TO TAXATION AN AN UNCERTAIN AMOUNT THAT HE HAD NO RIGHT OR ABILITY TO KNOW.

RSMo. 149.011(5)

RSMo. Sec. 149.011(7)

State of Missouri v. Self, 155 S.W.3d 756, 760 (Mo. banc 2005)

State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985).

III. IN THE ALTERNATIVE, THE COMMISSION ERRED IN DECIDING THAT APPELLANT IS RESPONSIBLE TO PAY THE TAX ASSESSED BY THE RESPONDENT BECAUSE THE RESPONDENT IS ESTOPPED FROM COLLECTING THAT TAX IN THAT RESPONDENT AFFIRMATIVELY TOLD APPELLANT HOW TO CONDUCT HIS BUSINESS TO AVOID TAXATION AND APPELLANT COMPLIED WITH RESPONDENT'S INSTRUCTIONS.

Costal Mart, Inc. v. Dept of Natural Resources, 933 S.W.2d 947, 956 (Mo.App. W.D. 1996)

ARGUMENT

STANDARD OF REVIEW

On a petition for review, the Administrative Hearing Commission's decision is reviewed on an abuse of discretion standard regarding issues of fact, and on a de novo standard standard with respect to conclusions of law. Department of Social Services v. Peace of Mind Adult Day Care Center, 377 S.W.3d 631, 637 (Mo. App. W.D. 2012). In this petition for review, Appellant only challenges the Commissions conclusions of law and the validity of those laws.

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN FINDING THAT APPELLANT IS RESPONSIBLE FOR PAYMENT OF TAXES FOR "OTHER TOBACCO PRODUCTS" TO THE DEPARTMENT OF REVENUE UNDER RSMo. Sec. 149.160 BECAUSE APPELLANT WAS NOT THE FIRST PURCHASER OF "OTHER TOBACCO PRODUCTS" UNDER RSMo. Sec.149.160 AND THEREFORE NOT RESPONSIBLE FOR PAYMENT OF THE TAX UNDER THAT STATUTE IN THAT APPELLANT PURCHASED THE "OTHER TOBACCO PRODUCTS" AT ISSUE FROM A WHOLESALER IN MISSOURI AND DID NOT MAKE SUBSEQUENT TOBACCO SALES OF THOSE PRODUCTS AS A MANUFACTURER OR WHOLESALER, OR IN A CAPACITY THAT IS FUNCTIONALLY EQUIVILENT TO THAT OF A MANUFACTURER OR WHOLESALER.

RSMo. 149.160

RSMo. Sec. 149.011(7)

Hyde Park Housing Partnership v. Director of Revenue,

850 S.W.2d 82, 84 (Mo. App. S.C. 1995).

State ex rel. Normandy School District v. Small, 356 S.W.2d 864, 872

(Mo.App. S.C. 1962).

This petition for review hinges on the application and interpretation of various statutes contained in Chapter 149 of the Missouri Statutes, as Respondent claims that

Appellant failed to pay taxes required under RSMo. Sec. 149.160.1. The issue before this Court is novel because Appellant's business model is unusual. The standard of review is de novo because Appellant does not challenge the Commission's factual determination but rather its legal conclusion that Appellant is subject to the OTP tax. *See Department of Social Services v. Peace of Mind Adult Day Care Center*, 377 S.W.3d 631,637 (Mo. App. W.D. 2012).

Appellant was at all relevant times a "jobber" or "runner", buying goods from a Missouri wholesaler to sell them at a very small profit margin to local Missouri retailers who essentially paid him to acquire and deliver goods to save them time. As such, no Missouri case directly addresses the issue before this Court; careful construction of Chapter 149 RSMo. is required.

According to RSMo. Sec. 149.160.1, "A tax is levied upon the first sale of tobacco products, other than cigarettes, within the state. The tax on tobacco products shall be at the rate of ten percent of the manufacturer's invoice price before discounts and deals, and shall be paid by the person making the first sale within the state." *Id.*

This statute contains various terms which are defined in RSMo. Sec. 149.011.

The key terms are:

1. First Sale within the State;
2. Manufacturer's Invoice Price;
3. Retailer; and

4. Wholesaler.

The "first sale within the state" is the first sale of a tobacco product by a manufacturer, wholesaler or other person to a person who intends to sell such tobacco products at retail or to a person at retail within the state of Missouri. RSMo. 149.011(5).

The "manufacturer's invoice price" is the original net invoice price for which a manufacturer sells a tobacco product to a distributor, wholesaler or first seller in the state as shown by the manufacturer's original invoice RSMo. Sec. 149.011(7).

A "retailer" is any person who sells to a consumer or to any person for any purpose other than resale. RSMo. Sec. 149.011(11).

A "Wholesaler" is any person, firm or corporation organized and existing, or doing business, primarily to sell cigarettes or tobacco products to, and render service to, retailers in the territory the person, firm or corporation chooses to serve; that purchases cigarettes or tobacco products directly from the manufacturer; that carries at all times at his or its principal place of business a representative stock of cigarettes or tobacco products for sale; and that comes into the possession of cigarettes or tobacco products for the purpose of selling them to retailers or to persons outside or within the state who might resell or retail the cigarettes or tobacco products to consumers. This shall include any manufacturer, jobber, broker, agent or other person, whether or not enumerated in this chapter, who so sells or so distributes cigarettes or tobacco products. RSMo. Sec.

149.011(18).

There can only be one “first sale within the state” of Other Tobacco Products (OTP). RSMo. 149.011(5). (Tr. 17). Appellant purchased the tobacco products at issue in Missouri from a Missouri company—Rock Bottom Wholesale. There is no evidence that Rock Bottom Wholesale knew Appellant to be anything other than a retailer at the time of sale.

There is no dispute that Rock Bottom Wholesale is a wholesaler under RSMo. Sec. 149.011(18). (Tr. 10, 23). Thus, there is no dispute that Rock Bottom Wholesale is “doing business primarily to sell cigarettes or tobacco products to [...] retailers.” *See Id.* There is no dispute that Rock Bottom Wholesale “purchases cigarettes or tobacco products directly from the manufacturer.” *See Id.* Therefore, Rock Bottom Wholesale alone can know the base amount of the manufacturer’s sale upon which the 10% tax is calculated.

Respondent has attempted to classify Appellant as a wholesaler to argue that Appellant must pay the tobacco tax in light of Rock Bottom’s failure to pay its taxes. (*See* Tr. 11). However, Appellant is not a wholesaler as defined by law because he does not buy tobacco directly from the manufacturer or rely primarily on tobacco sales for his business. (Tr. 20). He does not know the manufacturer’s invoice price—only Rock Bottom’s. (*See* Exhibit A). **Therefore, he could not even know the amount of tax he would be expected to pay.**

Despite Respondent’s inaccurate classification of Appellant as a wholesaler, Respondent also suggests that the classification ultimately does not matter, as the “first sale” within the state may be made by any person, wholesaler or otherwise. The "first sale within the state" is the first sale of a tobacco product by a manufacturer, wholesaler or other person to a person who intends to sell such tobacco products (1) at retail or (2) to a person at retail within the state of Missouri. RSMo. 149.011(5). Respondent has taken the position that the any individual is responsible for the tax if that person made the first sale to a retailer, as Appellant did. However, that argument does not take into account the “whole definition” of the first sale.

The meaning of “first sale within the state” requires the identification of two classes of individuals—the first seller and the first buyer. The statute suggests that the first person or entity with knowledge of the manufacturer’s invoice price for OTP is the first “seller.” Although the statute states that the class of sellers that can make the first sale may include any “person,” that general class description is limited by the preceding terms “manufacturer” and “wholesaler”. The rule of ejusdem generis holds that a general term, followed, or preceded by, specific terms, is limited by the nature of the specific terms and is not to be given its broadest inclusive meaning. *See McIntyre v. Kilbourn*, 885 S.W.2d 54, 55 (Mo.App. W.D. 1996). Therefore, the term “other person” must be a person bearing something in common with wholesalers and manufacturers. A “jobber,” “broker”, “agent” or other person who intends to sell tobacco products to

retailers is not sufficiently similar to a wholesaler or manufacturer because that class of people is defined as a class of buyers from wholesalers, according to RSMo. Sec. 149.011(18).

In order for the law to make any sense, the common nexus between wholesalers, manufacturers and others must entail some other element that could make the seller aware of and liable for the amount of the tax due under RSMo. Sec. 149.160. That element is identified in RSMo. Sec. 149.160. It is the amount of the manufacturer's invoice from which the 10% tax originates. *Id.* Even the term "manufacturer's invoice price" presupposes there is a buyer-seller relationship between the manufacturer and "first seller." *See* RSMo. Sec. 149.011(7) (The "manufacturer's invoice price" is the original net invoice price for which a manufacturer sells a tobacco product to a distributor, wholesaler or first seller in the state as shown by the manufacturer's original invoice.)

Therefore, the class of "sellers" must be limited to that group of people that manufacture tobacco or buy directly from the manufacturer. In this case, Rock Bottom Wholesale was the entity that bought directly from the manufacturer. Appellant was not. Therefore, he does not fit within the class of "sellers" contemplated by law, and cannot be responsible for making the "first sell" under RSMo. Sec. 149.160.

Determining the identity of the buyer is not necessary in this case because

Appellant was not the seller under the plain meaning of the law. However, Appellant's status as the buyer at the first sale further clarifies that he did not make the first sale within the state.

Determining the identity of the buyer at a first sale requires a two pronged analysis because the buyer can be either (1) a retailer or (2) a person who intends to sell to a "person at retail." The statute cannot be interpreted in such a manner as to treat the second prong as superfluous or meaningless. It is presumed the legislature intended that every word, clause, sentence and provision of a statute have effect; it is presumed the legislature did not insert idle verbiage or superfluous language in a statute. Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. App. S.C. 1995).

Unfortunately, RSMo. Chapter 149 does not define "person who intends to sell to a person at retail". But since that type of buyer cannot be considered a "retailer" by another name (*See Hyde Park* at 84), the only logical manner to construe the statute is to classify the second type of buyer as a broker or intermediary, i.e., a person who intends to sell to a retailer. In other words, the first sale of a tobacco product occurs when the "wholesaler... or other person... sells tobacco to a person ...who intends to sell such tobacco products to a [retailer] within the state of Missouri." *See* RSMo. Sec. 149.011(5). This interpretation is most logical because it would not subject vendors such as Appellant to unknown tax liabilities based on transactions to which they were not a party, i.e., the purchase price from the manufacturer. It would also allow for

logical harmony between the defined classes of “sellers” and “buyers” described under the statute, without gaps allowing for untaxable transactions.

At the time of sale, Rock Bottom appears to have relied on this interpretation because it passed its tax onto Appellant (as did Sam’s Club and Unique Distributors, who paid their taxes). In fact, it represented to Appellant that the tax owed was included in the purchase price for the OTP. Exhibit A. It operated primarily to sell to retailers but was at all times responsible for the tax regardless of the identity of the Missouri purchaser.

Respondent essentially desires to subject Appellant to double-taxation because Rock Bottom Wholesale did not pay its taxes. Its request not only raises significant constitutional concerns but, more important, is not supported by the plain language of RSMo. Sec. 149.160.1.

Any other interpretation of the statute would render the law vague, overbroad and unenforceable. A statute is unconstitutionally vague if it does not give a person or ordinary intelligence sufficient warning as to the prohibited behavior. State of Missouri v. Self, 155 S.W.3d 756, 760 (Mo. banc 2005). A statute is unconstitutionally vague if it fails to "speak with sufficient specificity and provide sufficient standards to prevent arbitrary and discriminatory enforcement." State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995) (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)). The "vagueness doctrine assures that guidance, through explicit standards, will be afforded to

those who must apply the statute, avoiding possible arbitrary and discriminatory application." State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985).

Requiring Appellant to pay the tax assessments at issue would be unjust and unconstitutional because Appellant he did not know the manufacturer's invoice price upon which the tax is based. Thus, interpreting the statute as Respondent suggests would prohibit a person of reasonable intelligence from being able to know their legal obligations, and would lead to random and arbitrary enforcement of the statute. See footnote 1.

If there is any doubt regarding the plain language of the statute, the law requires construction harmonizing with reason and tending to avoid harsh, unreasonable or incongruous consequences and, especially, results detrimental to the public interest. State ex rel. Normandy School District v. Small, 356 S.W.2d 864, 872 (Mo.App. S.C. 1962). As stated, the law must be interpreted as to define the "first sale" in the state as the first sale made by a person or entity with knowledge of the manufacturer's invoice price upon which the tax is based, when the "wholesaler... or other person... sells tobacco to a person ...who intends to sell such tobacco products to a [retailer] within the state of Missouri." *See* RSMo. Sec. 149.011(5). That is the only way to interpret the statute in a manner allowing people of reasonable intelligence to know their legal rights and obligations.

Under the plain meaning of the law and reasonable interpretation thereof, the first

seller of OTP in Missouri was Rock Bottom Wholesale. Therefore, Appellant does not owe the tax imposed under RSMo. Sec. 149.160.1.

II. ALTERNATIVELY, THE COMMISSION ERRED IN ENFORCING RSMo. Sec. 149.160 AGAINST APPELLANT, AND APPELLANT APPEALS THE VALIDITY OF STATUTE UNDER ARTIVLE V, SECTION 3 OF THE MISSOURI CONSTITUTION BECAUSE RSMo. Sec. 149.160 IS UNCONSTITUTIONALLY VAGUE IN THAT ITS ENFORCEMENT WOULD ARBITRARILY SUBJECT APPELLANT TO TAXATION AN AN UNCERT AIN AMOUNT THAT HE HAD NO RIGHT OR ABILITY TO KNOW.

Mo. Constitution, Art. I, Sec. 10

State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995)

State of Missouri v. Self, 155 S.W.3d 756, 760 (Mo. banc 2005)

State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985).

Even if the plain language of RSMo, Sec. 149.160 and RSMo. Sec. 149.011(5) were to otherwise support Respondent's claim to tax assessments, the statutes are unenforceable under the facts of this case because they are vague and overbroad. The Commission declined to decide this issue for lack of jurisdiction. (L.F. 14). Therefore, this matter is subject to de novo review. Department of Social Services v. Peace of Mind Adult Day Care Center, 377 S.W.3d 631,637 (Mo. App. W.D. 2012).

Under MO Const. Art I, Sec. 10, the state may not take property from any person

without due process of law, and certainty within the laws is required to afford sufficient due process. A statute is unconstitutionally vague if it does not give a person of ordinary intelligence sufficient warning as to the prohibited behavior. State of Missouri v. Self, 155 S.W.3d 756, 760 (Mo. Banc 2005). A statute is unconstitutionally vague if it fails to "speak with sufficient specificity and provide sufficient standards to prevent arbitrary and discriminatory enforcement." State v. Allen, 905 S.W.2d 874, 877 (Mo. banc 1995) (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)). The "vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application." State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985).

Requiring Appellant to pay the tax assessments at issue would be unjust and unconstitutional because Appellant did not know the manufacturer's invoice price upon which the tax is based. Thus, interpreting the statute as Respondent suggests would prohibit a person of reasonable intelligence from being able to know their legal obligations, and would lead to random and arbitrary enforcement of the statute.

In fact, the statute has been randomly enforced in this instance. Appellant purchased OTP during July 2009 through August 2010 from three licensed wholesalers: Sam's Club, Unique Distributors and Rock Bottom Wholesale. (Tr. 28). Respondent did not assess taxes against Appellant for his OTP sales following his purchases from Sam's Club or Unique Distributors. (Tr. 28). It only enforced the law after investigation

revealed that Rock Bottom Wholesale did not pay its taxes on the OTP it sold to Appellant. (Tr. 8). Respondent essentially takes the position that the tax can be assessed against either the wholesaler or Appellant (if the wholesaler subsequently claims an exemption or otherwise fails to pay its taxes).

But, since he did not have a buyer-seller relationship with the manufacturer, Appellant could not reasonably be expected to know he owed additional taxes. (*See also* RSMo. Sec. 149.011(7), which presupposes that the first seller purchases tobacco directly from the manufacturer). In fact, the receipts Rock Bottom Wholesale provided to Appellant always listed a separate tax amount of \$0.00, and contained the statement, “Tobacco tax is automatically added for Missouri customers.” (Tr. 23-24; Ex. A). Appellant reasonably believed this statement because it is a standard representation from wholesalers of OTP. (*See* Tr. 34). Further, the total post-tax cost per unit of OTP Appellant bought from Sam’s Club and Unique Distributors was comparable to the total cost per unit of OTP Appellant bought from Rock Bottom Wholesale during that timeframe. (Tr. 34). Therefore, it was reasonable for Appellant to believe that he had accounted for his tax liabilities in his transactions with Rock Bottom Wholesale. Even Respondent believed Appellant’s business practices were adequate at the time. (*See* Tr. 25-28; Exhibit B.)

To the extent that RSMo. Chap. 149 may suggest that Appellant in fact owes the tax on the OTP he purchased from Rock Bottom Wholesale, the statute is null and void

for vagueness under Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, at least insofar as the statute applies to intermediaries in Appellant's line of business. As seen in the very history of this case, the definition of the "first sale within the state" is illusive, especially when read in conjunction with the definitions of "wholesaler" and "manufacturer's invoice price". Even Respondent has changed its interpretation of the statute over the years; before changing its mind, Respondent, through its representative, told Appellant that he would not have to pay the OTP tax so long as he purchased OTP in state from a licensed wholesaler within the state. This is understandable because RSMo. Chapter 149 does not clearly and precisely define the role of intermediaries in such transactions. To the extent the statute requires intermediaries, with no knowledge of the amount of tax owed, to be responsible for the unknown tax amounts, it constitutes a fundamental offense to the due process rights of those intermediaries. Further, there is no law giving those intermediaries a right to ascertain the amount of the wholesaler's purchase price from the manufacturer. As such, enforcement of this law under these circumstances would impose obligations upon Appellant while denying him the right be able to comply with those obligations. Therefore, in this instance, a statutory requirement that Appellant pay the OTP tax is unconstitutionally vague and violative of Appellant's due process rights guaranteed under Art. I, Sec. 10 of the Missouri Constitution, along with the Fifth and Fourteenth Amendments of the US Constitution.

III. IN THE ALTERNATIVE, THE COMMISSION ERRED IN DECIDING THAT APPELLANT IS RESPONSIBLE TO PAY THE TAX ASSESSED BY THE RESPONDENT BECAUSE THE RESPONDENT IS ESTOPPED FROM COLLECTING THAT TAX IN THAT RESPONDENT AFFIRMATIVELY TOLD APPELLANT HOW TO CONDUCT HIS BUSINESS TO AVOID TAXATION AND APPELLANT COMPLIED WITH RESPONDENT'S INSTRUCTIONS.

Costal Mart, Inc. v. Dept of Natural Resources, 933 S.W.2d 947, 956 (Mo.App. W.D. 1996)

Even if Appellant were otherwise responsible for the tax assessments, interest and penalties, Respondent is estopped from claiming those assessments. The Commission did not address this point due to lack of jurisdiction. (L.F. 13). Review of this issue is de novo. Department of Social Services v. Peace of Mind Adult Day Care Center, 377 S.W.3d 631,637 (Mo. App. W.D. 2012).

After previously suffering severe tax penalties for his failure to comply with the tobacco tax, Appellant reached out to Respondent to make sure his future business dealings were above board. (Tr. 26-28). He contacted Keith Gast and Kaity Martin from Respondent's office for instructions on how to proceed. (Tr. 26-28). Knowing that Appellant operated a business in which he sold OTP to retailers, they told Appellant that he would not owe additional taxes so long as he purchased OTP from licensed Missouri

wholesalers. (Tr. 8-10, 26-28). They told him that he would still need to file tax returns for tobacco sales, but that he could just write in zeros for his OTP sales subsequent to his purchases of OTP within the state. (Tr. 26-28). On behalf of Respondent, Ms. Martin sent Appellant written confirmation to this effect. (Exhibit B). Appellant then complied with Respondent's instructions. (Tr. 8-10, 26-28). Appellant relied on those representations in his decision to operate his business without a wholesaler's license and purchase OTP at a higher rate from Missouri wholesalers. (Tr. 8-10, 26-28). He then sold the OTP to retailers at a low profit-margin, between 2 and 3 percent. (Tr. 20-21, 31).

Now, Respondent claims that Appellant in fact owes taxes, with interest and penalties, for the sales he made in compliance with Respondent's own instructions. Respondent makes claim to these sums because the first seller of OTP, Rock Bottom Wholesale, failed to pay its own taxes on the items it sold to Appellant. (Tr. 8). Respondent does not claim back taxes for sales of OTP following Appellants purchases from wholesalers who paid their taxes. (Tr. 26-28). In essence, Respondent is trying to get a second bite at the apple after Rock Bottom Wholesale failed to comply with its obligations. Respondent's assessments against Appellant are thereby arbitrary and capricious, and would result in substantial profit losses and due process violations.

The elements of an estoppel claim against the government are (1) a statement or act by the government entity inconsistent with the subsequent government act; (2) the

citizen relied on the statement; and (3) injury to the citizen. In addition, the governmental conduct complained of must amount to affirmative misconduct. Costal Mart, Inc. v. Dept of Natural Resources, 933 S.W.2d 947, 956 (Mo.App. W.D. 1996). However, no definition of estoppel is completely satisfactory; the facts and circumstances of the particular case are necessary to determine whether estoppel is appropriate. Id. The party asserting estoppel bears the burden of proving all the essential elements by “clear and satisfactory evidence.” Id.

All elements of estoppel exist in this case, and the facts supporting each element are uncontroverted. Respondent (a government agency) affirmatively provided oral and written instructions to Appellant with respect to his rights and responsibilities. Appellant relied on the government’s statements to conduct his business in a lawful and predictable manner. He was reasonable in doing so because the very purpose of his discussions with Respondent’s representatives was to determine how best to comply with Respondent’s own rules. Based on his reliance, he made profit calculations, purchases and sales of OTP. He sold OTP at a low profit margin, reasonably believing that he had accounted for his tax liabilities. Requiring Appellant to pay an additional tax of 10% would result in losses between 7 and 8 percent per unit sold, and would hinder his ability to conduct business in a reliable and predictable manner.

Appellant acknowledges his high burden of proof, but again points out that all facts giving rise to his claim are uncontroverted and substantiated in part by written

documentation from Respondent's representative. *See* Exhibit B. Respondent did not silently allow Appellant to reach erroneous conclusions about his tax liabilities but rather took affirmative steps to provide him with instructions and guidance.

Respondent's subsequent demand for taxes and penalties amounts to manifest injustice, subjecting Appellant to the arbitrary whims of the government. Therefore, even if Respondent's new interpretation of the law (which apparently differs from the interpretation on which it relied to instruct Appellant) were correct, it cannot be applied in this instance. Estoppel is necessary to protect Appellant's due process rights.

CONCLUSION

For the above reasons, the Commission's decision subjecting Appellant to taxation is erroneous and contrary to the laws of Missouri and the United States. Appellant therefore petitions this court to reverse the Commission's decision and hold that Appellant is not liable for the taxes, interest and penalties claimed by the Respondent for the reasons set forth herein.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Jeffrey S. Damerall, certify that Appellant's Brief is virus-free and in compliance with Rule 84.06. I further certify that 5,889 words.

/s/Jeffrey S. Damerall

CERTIFICATE OF SERVICE

I, Jeffrey S. Damerall, certify that a copy of Appellant's Brief (including Attached Appendix) was sent via electronic mail in PDF and writable format on this day of June 24, 2014 to:

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