

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC94097**

**MUMTAZ LALANI,**

**Appellant,**

**v.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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

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**APPELLANT'S REPLY BRIEF**

Submitted by:

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**INDEX**

<u>Section</u>	<u>Page</u>
Table of Authorities	pp. 1
Argument	pp. 2-9
 Rebuttal in Support of Point I:	
The Administrative Hearing Commission Erred	
In Finding that Appellant is Responsible for Payment of Taxes	
for OTP to the Department of Revenue under RSMo. Sec. 149.160	
because Appellant was not the First Purchaser of OTP under	
RSMo. Sec. 149.160 and Therefore not Responsible for Payment	
of the Tax under that Statute In that Appellant Purchased the OTP	
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 Equivalent	
to that of a Manufacturer or Wholesaler.....pp. 2-4	
 Rebuttal in Support of Point II:	
Alternatively, the Commission Erred in Enforcing	
RSMo. Sec. 149.160 Against Appellant, and Appellant	
Appeals the Validity of the Statute under Article V, Sec. 3 of	

the Missouri Constitution because RSMo. Sec. 149.160 is  
Unconstitutionally Vague in that its Enforcement would  
Arbitrarily Subject Appellant to Taxation in an Uncertain  
Amount that He had no Right or Ability to Know.....pp. 5-6

Rebuttal in Support of Point 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.....pp. 7

Conclusion ..... pg. 8

**TABLE OF AUTHORITIES**

**I. CASE LAW**

<u>Case</u>	<u>Page</u>
<u>Hyde Park Housing Partnership v. Director of Revenue,</u> 850 S.W.2d 82, 84 (Mo. App. S.C. 1995).....	4

**II. STATUTES**

<u>Statute</u>	<u>Page</u>
RSMo. Sec. 149.160.....	2
RSMo. Sec. 149.011(7).....	2, 3, 4
RSMo. Sec. 149.011(18).....	4

## ARGUMENT

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.

Respondent raises several issues in response to Appellant's first Point Relied On. Primarily, Respondent argues that Appellant is required to pay the OTP tax at issue because he made the "first sale within the state" of OTP per the plain language of RSMo. Sec. 149.160 and RSMo. 149.011(7). Respondent suggests that discussion regarding contextual meaning of words contained in the definition

of "first sale within the state" is inappropriate because the plain language of the definition is clear.

Appellant has argued that under the plain language he cannot be the first seller of OTP (who is responsible for the tax) under RSMo. Sec. 149.011(7) because his job function was not sufficiently similar to that of "manufacturer" or "wholesaler"-- the terms used in the statute to limit and describe the groups of people or entities who may be considered first sellers. Specifically, Appellant has argued that manufacturers and wholesalers are parties to the transaction upon which the OTP tax is calculated, which suggests that that the broader class description of first sellers in RSMo. Sec. 149.011(7) --"other person"-- is similarly limited to people with first-hand knowledge of the invoice amount on which the tax is based.

Respondent argues that the words "manufacturer" and "wholesaler" do not have any limiting effect on the class of possible first sellers because RSMo. Sec. 149.011(7) is facially clear and therefore should not be analyzed under traditional principles of statutory construction such as *eiusdem generis*. However, Respondent does not offer any explanation as to why the words "manufacturer" and "wholesaler" are contained in the statute or what effect they have on its meaning. This is a critical flaw in Respondent's argument, as 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). This basic principle of law holds true regardless of whether any principles of statutory construction are used; in fact, it assists in determining *whether* a statute is vague or ambiguous and therefore in need of interpretation.

In essence, Respondent suggests the terms "manufacturer" and "wholesaler" are superfluous because RSMo. Sec. 149.011(7) is equally clear and consistent in meaning when read as written or with the omission of those terms. The logic of that argument is circular and invalid. Review of the statute as a whole most strongly suggests that the first seller of OTP must be someone with firsthand knowledge of the manufacturer's invoice price.

Respondent also suggests that Appellant was in fact a wholesaler because he describes himself as a "jobber" and "jobbers" can be "wholesalers" under RSMo. Sec. 149.011(18). However, the fact that wholesalers can be jobbers does not mean that jobbers are necessarily wholesalers. Appellant has shown that he is not a wholesaler, as defined under the law, because his business did not primarily consist of buying or selling tobacco products and because he does not purchase directly from a manufacturer. Thus, Appellant is not subject to the OTP tax as a wholesaler.

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.

In this case, everyone has a different idea regarding who is responsible for the OTP tax, as Sam's Club and Unique Distributors paid the tax on the OTP sold to Appellant while Rock Bottom Wholesale claimed that Appellant was in fact responsible for payment of the taxes (after it was investigated for failing to pay its own taxes). However, Respondent argues that RSMo. Chap. 149 clearly allows citizens to know their legal rights and responsibilities, and Appellant was simply wilfully ignorant of his obligations.

Respondent claims that a statute sufficiently puts citizens on notice of their duties and obligations because the citizen may ask a third party for information necessary to comply with those duties and obligations. Respondent does not even contend that the law gives citizens a right to obtain this information from any particular party. Respondent simply suggests that Missouri citizens trust in the truthfulness and accuracy of information from strangers. Respondent contends that

no confusion could reasonably result from this requirement; that it would afford Missouri citizens adequate guidance to avoid governmental scrutiny and punishment.

Missourians cannot be required to **ask** each other for information on transactions to which they were not a party, especially since there is no law requiring the third parties to willingly and accurately share their information. The “just ask somebody” requirement would leave Missourians in the dark and would allow for arbitrary government action.

Should the Court find that the plain language of the controlling statutes clearly requires Appellant to pay the OTP tax, the statute itself is unconstitutional. Should recognition of the statutes’ unconstitutionality allow for a loophole whereby some OTP transactions may escape transaction, it is up to the legislature alone to take appropriate corrective action.

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.

Respondent lastly contends that Appellant cheated on his taxes and had no intention to follow the law despite his attempts to reach out to the government for help in complying with the law. However, the uncontroverted facts show that Appellant complied with Respondent's instructions, right down to filling out his tobacco tax statements with zeros. Respondent had the opportunity to produce other evidence and attempt to discredit Appellant's testimony; however, it did not do so. The undisputed facts show Appellant bent over backwards to comply with Respondent's rules, but Respondent changed the rules when it could not collect taxes from Rock Bottom Wholesale.

## 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.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Jeffrey S. Damerall, certify that Appellant's Reply Brief is virus-free and in compliance with Rule 84.06. I further certify that this document has 1,585 words.

/s/Jeffrey S. Damerall

CERTIFICATE OF SERVICE

I, Jeffrey S. Damerall, certify that a copy of Appellant's Reply Brief was sent via electronic mail on this day of August 22, 2014 to:

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