

SC93687

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**IN THE SUPREME COURT OF MISSOURI**

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**CIRCUIT CITY STORES, INC.,**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE,**

**Appellant.**

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**Appeal from the Administrative Hearing Commission of Missouri  
The Honorable Sreenivasa Rao Dandamudi, Commissioner**

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**BRIEF OF APPELLANT**

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## JURISDICTIONAL STATEMENT

This case came before the Commission on a complaint filed by Circuit City, Inc. (“Circuit City”) seeking a refund of sales tax remitted by Circuit City on purchases made by customers who used “Circuit City’s” credit cards when the card provider, long after it had paid Circuit City, “wrote off” as “bad debt.” The question posed by this Petition for Review is whether Circuit City is entitled to a tax refund under §§ 144.190 and 144.696 based upon the “bad debt” of the card provider. Answering that question requires the construction of revenue laws, including §§ 144.010(7) and 144.190. Thus the petition is appropriately filed in this Court. Mo. Const. Art. V, § 3; § 621.189, RSMo.

## STATEMENT OF FACTS

This cases arises from a request by Circuit City Stores, Inc. (“Circuit City”), for the refund of certain sales taxes that Circuit City remitted to the Director of Revenue for the period from January 1, 2007 through April 30, 2010 (“tax period”). Legal File (LF) at 14.

Years before, Circuit City entered into an agreement with a bank to create a Circuit City private label credit card (“Circuit City Card”). *Id.* At the time of the sales at issue, the Circuit City Card was being provided by JP Morgan Chase Bank NA (“Chase Bank”). *Id.* Typically, such a card can only be used at one store and its affiliates. *Id.*

To obtain a Circuit City Card, customers complete and submit an application to Chase Bank. *Id.* Chase Bank then decides whether to approve and issue the Card—and the Bank owns the Card accounts. *Id.*

For the sales at issue here, the customers made the purchases from Circuit City using the Circuit City Card issued by Chase Bank. *Id.* The customers received the merchandise, Chase Bank paid Circuit City, and Circuit City remitted to the Director the sales tax owed on the purchases. *Id.* at 15-16.

Later, some Circuit City Card customers failed to pay Chase Bank. *Id.* at 16. When Chase Bank concluded that it could not collect the amounts owed to it, Chase Bank “wrote off” those amounts, treating them as “bad debt” in

calculating Chase Bank’s federal income tax under 26 USC § 166.2. *Id.* The amounts “written off” were the unpaid amount of what Chase Bank had paid to Circuit City for each customer’s purchase—including the portion that constituted sales tax owed by the purchaser and remitted by Circuit City to the Director. *Id.*

On May 28, 2010, Circuit City asked the Director for a refund of \$145,581.68 based on the amounts written off by Chase Bank. *Id.* at 17. On October 5, 2010, the Director denied Circuit City’s application for a refund. *Id.*

On December 3, 2010, Circuit City filed a complaint with the Administrative Hearing Commission, appealing the Director’s decision. *Id.* at 1, 13. On August 21, 2013, the Commission reversed, allowing Circuit City its refund based on the amounts paid to Circuit City but later “written off” by Chase Bank. *Id.* at 40.

**POINT RELIED ON**

**The Administrative Hearing Commission erred in allowing a sales tax refund to Circuit City Stores, Inc., of sales taxes based on the later write-off by a credit card provider, Chase Bank, of amounts that Circuit City received for purchases made by customers using the card provided to them by Chase Bank because such a refund was not authorized to Circuit City under the limited waiver of sovereign immunity in § 144.190 in that Circuit City, the person who was obligated to and did remit the taxes and thus the only person who could obtain a refund, did not erroneously pay the sales taxes, nor incur “bad debt.”**

§ 144.010(7)

§ 144.190

*Central Cooling & Supply Co. v. Dir. of Revenue,*

648 S.W.2d 546 (Mo. 1982)

*Farish v. Missouri Dept. of Corrections,*

--- S.W.3d ----, 2013 WL 6822231 (Mo. 2013)

*Standard Operations, Inc. v. Montague,*

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## ARGUMENT

### *Standard of Review*

“The AHC’s interpretation of revenue laws is reviewed de novo.” *Loren Cook Co. v. Dir. of Revenue*, --- S.W.3d ----, 2013 WL 5989269 \*1 (Mo. 2013). To the extent this petition for review goes beyond questions of law, “[t]he AHC’s decision will be upheld if it is authorized by law, supported by competent and substantial evidence on the whole record, does not violate mandatory procedural safeguards, and it is not clearly contrary to the reasonable expectations of the General Assembly.” *Id.*, citing § 621.193, RSMo 2000, and *Custom Hardware Eng’g & Consulting, Inc. v. Dir. of Revenue*, 358 S.W.3d 54, 56 (Mo. 2012).

### Introduction

As described at length by the Administrative Hearing Commission, LF at 19-25, for more than a decade attorneys representing retailers have traveled the country, trying to persuade tax officials and courts that when a retailer makes a sale to a customer who pays on credit and is paid by the credit provider, if the credit provider later “writes off” that debt the retailer should be able to obtain from the state a “refund” of the amount of sales tax remitted. They have had mixed success.

In this case and *Dillard's, Inc. v. Director of Revenue*, No. SC93711, also being briefed today, that effort reaches a Missouri court for the first time. And despite their success at the Administrative Hearing Commission (AHC), it should be apparent that they are fighting an uphill battle: they are invoking a waiver of sovereign immunity, which must be strictly construed against them. In other words, unless they can identify specific statutory language to which their request strictly conforms, they are not entitled to draw funds out of the State Treasury.

And here, they cannot point to such language, nor demonstrate their compliance with it. As discussed below, the language of the Missouri statutes and the canons of construction used in Missouri courts lead to the conclusion that retailers who do not themselves extend credit cannot obtain a refund for “bad debt” “written off” by someone further down the line. Our law requires us to treat retailers and lenders, including but not limited to those issuing private label credit cards, as separate corporations. Just as the lender does not share the retailer’s legal obligation to remit sales taxes, the lender cannot transfer the status of its “bad debt” to the retailer to enable the retailer to obtain a refund of an amount that the retailer itself did not lose—regardless of whether the lender operates through a card usable only with a particular retailer, or one that can be used generally.

**A. The statute allowing refunds of sales taxes erroneously paid to the person who remitted the tax is a waiver of sovereign immunity that must be strictly construed against the taxpayer.**

Sovereign immunity as a general rule bars suits for payments from the State of Missouri. *Insurance Co. of State of Pa. v. Dir. of Revenue and Dir. of Ins.*, 269 S.W.3d 32, 35-36 (Mo. 2008). The State has, however, enacted some exceptions to that bar. Pertinent here is the exception enacted in § 144.190 for certain refunds of sales taxes. It applies only to taxes “erroneously or illegally collected,” and is available only to “the person legally obligated to remit the tax”:

2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525, and the balance, with interest as determined by section 32.065, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a

claim for refund are filed within three years from  
date of overpayment.

§ 144.190, RSMo.

This Court has unequivocally—and correctly—declared that as a waiver of sovereign immunity, the refund provision is “strictly construed against the taxpayer.” *Insurance Co. of State of Pa.*, 269 S.W.3d at 35. That is consistent with the well-established rule that “when the state consents to be sued, it may prescribe the manner, extent, procedure to be followed, and any other terms and conditions as it sees fit.” *Ford Motor Co. v. Dir. of Revenue*, 97 S.W.3d 458, 461 (Mo. 2003). The question, here, then, is whether the refund request made by respondent Circuit City Stores, Inc., fits precisely within the scope of § 144.190.2.

**B. Pursuant to the Director’s regulations, retailers such as  
Circuit City can obtain refunds for sales taxes remitted  
that they later “write off” as “bad debt.”**

In some respects, there is no dispute as to Circuit City’s compliance with the statute. Circuit City timely filed (at least with regard to the refunds at issue), and did so properly. And for purposes of this and the companion case, there is no dispute that the refund claim is based on “erroneous” payment, a key requirement of the refund statute, § 144.190.2.

That the taxes Circuit City seeks to recover were “erroneously” paid is not immediately evident. After all, there is not even a hint in the record below that the payments remitted by Circuit City were erroneous at the time they were made. The sales for which the taxes remitted are sought to be refunded were, at the time of sale and at the time Circuit City remitted the tax, no different from any other sale made to any customer who paid by using any credit card. Circuit City charged the customer for the merchandise and for tax based on the price paid. Then or shortly thereafter, Circuit City received payment from the card carrier. It appears, then, that the taxes timely remitted from those payments were correct when made.

But for now, the Director has waived the argument that the refund is not available merely because the tax remittances were correct at the time they were made. The Director of Revenue has, by regulation, defined the scope of taxes “erroneously... made” to include “bad debts”—*i.e.*, to cover taxes that were remitted based on amounts that were supposed to be, but ultimately were not, paid to the retailer. 12 CSR 10-102.100. The Director defines “bad debt” as “a sale that has been written off for state or federal income tax purposes,” but only if the sale was “previously reported as taxable.” *Id.* at 102.100.2(A).

Demonstrating the way in which the regulation applies to retailers, in his regulation the Director provides two examples:

(A) A retailer reports and pays sales tax on the accrual or gross sales method. The retailer determines some sales to customers are not collectible and writes them off as bad debts for income tax purposes. The retailer requests a credit or refund from the state within the three-year statute of limitations. The credit or refund would be granted.

(B) A retailer reports and pays sales tax on the accrual or gross sales method. The retailer determines some sales to customers are not collectible and writes them off as bad debts for income tax purposes. The retailer requests a credit or refund from the state four years after the sale was reported and the tax was remitted to the state. The credit or refund would be denied.

Here, there is no dispute that the amounts at issue were “written off for state or federal income tax purposes.” So there is no dispute that by applying the regulation, when Circuit City, the “retailer,” itself “writes off” for purposes of its income taxes as “bad debt” amounts it had remitted as sales tax, the Director allows a refund. But Circuit City did not write off anything as “bad debt.” Chase Bank paid Circuit City the amount of tax owed on the

purchases and Circuit City remitted that amount. The question posed here is whether the statute allows a retailer to obtain a “bad debt” refund even when the retailer itself successfully completed a sale—*i.e.*, the retailer was paid for the goods and the associated tax, the customer took the goods, and the retailer remitted the tax paid to it on the transaction.

**C. The regulation, though it does not expressly restrict “bad debt” to debt written off by Circuit City as the seller, does not and cannot expand the statute to allow a refund to Circuit City based on someone else later writing off credit card debt.**

There are two theories under which Circuit City could obtain a refund of taxes on an amount that it received but that later became someone else’s “bad debt.” The first (addressed here) is based on the general language used in the regulation: a theory that the regulation allows “bad debt” anywhere in a chain of financial transactions that begin with a sale to transform what was a timely, accurate remittance payment into an “erroneous” one for the retailer who remitted the tax. The second (addressed in part D below) is that where the first person beyond the retailer in the financial chain is a private label credit card, the retailer and the credit card provider can be collapsed

into a single “person” who remitted the tax and can obtain a refund. Neither theory works.

Again, the first theory is that Circuit City can obtain a refund when someone else—here, Chase Bank, the credit card provider—is the one who wrote of the debts because the Director’s regulation speaks of the debts having been “written off,” without saying specifically that the person who remitted the tax must have “written them off.” But the regulation doesn’t say that. It doesn’t address in any respect who can obtain a refund, only how a remittance that was correct when made can later become “erroneous.” It does not purport to expand the universe of those who can obtain refunds.

Nor could it. Again, the entitlement to a refund is a waiver of sovereign immunity. And such waivers are strictly construed. The question of who can obtain a refund is purely one of the statute that waives immunity. That statute, § 144.190, allows refunds only to the person legally obligated to remit the tax. And only Circuit City, not Chase Bank, was legally obligated to remit tax on the sales made by Circuit City, regardless of whether the customer was financed by Chase Bank or some other credit card provider. No statute allows Chase Bank, or any other lender who facilitates purchases from Circuit City to “write off” debt and thus reduce their own payment of income taxes, to then somehow transfer to Circuit City the ability to obtain the “bad debt” benefit under the sales tax law. And absent such a statute, a refund is

not available to Circuit City, regardless of what broad wording in any regulation might be construed to allow.

**D. Section 144.010(7) does not allow two corporations, Circuit City as the retailer and Chase Bank as the credit card provider, to be consolidated for purposes of obtaining refunds.**

The second theory is that Circuit City and Chase Bank can be collapsed into a single “person” who can obtain a refund. This theory is based not on the regulation, but on statute—specifically, on the definition of “person” in § 144.010(7). That definition consists of a list of 16 types of entities:

- individual,
- firm,
- copartnership,
- joint adventure,
- association,
- corporation, municipal or private, and whether organized for profit or not,
- state,
- county,
- political subdivision,

- state department, commission, board, bureau or agency, except the state transportation department,
- estate,
- trust,
- business trust,
- receiver or trustee appointed by the state or federal court,
- syndicate, and
- any other group or combination acting as a unit.

The statute does not further define “group or combination acting as a unit,” the final type of entity that qualifies as a “person” under the sales tax law. And neither the phrase “acting as a unit” nor the word “unit” has a statutory definition. But the phrase is common in Missouri statutes. In fact, it appears in the definitions of “person” in six places beyond § 144.010(7): §§ 67.604.7, 92.710.4, 141.220.12, 144.605.4, 256.603.10, and 393.298.6. This Court’s construction of the phrase will presumably apply to all seven “person” definitions.<sup>1</sup>

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<sup>1</sup> And it would apply not just to refunds, but also to the obligation to remit taxes, also defined by § 144.070. Thus if two corporations were consolidated for purposes of obtaining a refund, they would also be consolidated for purposes of remitting the sales tax. Unfortunately, Chase

This Court has never been asked what “acting as a unit” or the word “unit” means in any of those definitions. The closest any Missouri court has come was the Court of Appeals, St. Louis, in *State v. Longstreet*, 536 S.W.2d 185 (Mo. App. St.L. 1976). There the court faced the question of whether a corporate officer was a “person” responsible for remitting taxes, and concluded that he was. *Id.* at 189. But the court did not refer to the “unit” phrase in § 144.010(7) in reaching that conclusion. It was a criminal case, addressing the application of § 144.510, which makes “[a]ny person, officer, agent or employee of any firm, corporation, association, joint adventure, estate, trust, receiver or syndicate” who collects tax responsible for remitting the tax to the Director of Revenue. And the defendant was an “officer ... of [the] firm” legally obligated to collect and remit the tax.

As to § 144.010(7), then, in the absence of statutory definition and judicial construction, we must turn first to dictionary definitions. A “unit” is

a single thing or person or group that is a constituent  
and isolable member of some more inclusive whole : a  
member of an aggregate that is the least part to have  
clearly definable separate existence and that

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Bank did not appear before the AHC to address the obligation that the logic of Circuit City’s argument places on Chase Bank and other credit providers.

normally forms a basic element of organization  
 within the aggregate ....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993), p. 2500. To be a "unit," then, Circuit City and the credit card provider would have to be, together, "a single isolable member of some more inclusive whole." Or "a member of an aggregate [with] a clearly definable separate existence." And using those definitions, they do not qualify. To the contrary, Circuit City and Chase Bank are *two* "isolable members" of the "more inclusive whole" involved in the sales transaction, each with "a clearly definable separate existence." Using the dictionary definitions, Circuit City is a single "unit," and the sole "person legally obligated to remit the tax." And because Circuit City wrote off nothing and thus had no "bad debt" as defined in the regulation, Circuit City could not obtain a refund on the premise that Chase Bank's write-off made the amount that Circuit City received and remitted "erroneous."

That conclusion is consistent with a reading of the statutory list using the common canon, *ejusdem generis*—"of the same kind." "By that precept of construction, specific enumeration is useful in determining the scope and extent of more general words." *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. 1988); *see also Pollard v. Board of Police Com'rs*, 665 S.W.2d 333, 341 (Mo. 1984) (noting that the rule of *ejusdem generis* is an aid

to statutory construction problems such that when general words follow a specific enumeration of things the general words are limited by the specific) (citing *United States v. Turkette*, 452 U.S. 576, 581 (1981) and 2A Sands, SUTHERLAND STATUTORY CONSTRUCTION § 47.17 (4th ed. 1973)).

Using that canon, a “group or combination,” as the last entry in the § 144.010(7) list, is just another type of organization—an alternative to a “corporation,” “copartnership,” or “association.” Including that entry on the list ensures that no group can evade collecting sales tax by declining to organize in a conventional legal structure—nothing more.

Another common canon leads to the same conclusion: the requirement that the court read the statute to give “[e]ach word, clause, sentence, and section of the statute given meaning, and ... not interpret the statute in a way that renders some phrases mere surplusage.” *Farish v. Missouri Dept. of Corrections*, --- S.W.3d ----, 2013 WL 6822231 \*3 (Mo. 2013), citing *Middleton v. Mo. Dep’t of Corr.*, 278 S.W.3d 193, 196 (Mo. 2009). If the last entry on the list is not read as something different from its predecessors, it renders many of them surplusage: from among those on the list, at least “copartnerships,” “associations,” “commissions,” and “boards” are “groups or combinations [of people] acting as a unit.” Properly read, the last entry supplements rather than subsumes those terms.

Moreover, to read the last entry to permit combinations of corporations would be inconsistent with the decisions recognizing that when those organizing businesses choose the corporate form for multiple businesses, they gain some abilities but forfeit others. That distinction is apparent in *Central Cooling & Supply Co. v. Dir. of Revenue*, 648 S.W.2d 546 (Mo. 1982). There, this Court considered whether two “are separate corporate entities” with a single parent were “separate corporate entities for sales and use tax [assessment] purposes.” *Id.* at 547. Despite the fact that the two corporations acted in concert, the Court refused to ignore their separate corporate existence. *Id.* at 548-49. That case did not involve the question of which of the corporations must remit tax, nor which might obtain a refund. But it cited and was based on the definition of “person” in § 144.010(7) that applies to the remittance and refund questions. *See also Ex parte Capital City Asphalt, Inc.*, 437 So.2d 1291 (Ala., 1983) (citing *Central Cooling* to support a holding that corporations, even when acting in concert, cannot qualify as a “group or combination acting as a unit”—language that parallels our § 144.010(7)).

In *Central Cooling*, this Court emphasized that when businesses choose the corporate form, they cannot disregard it at their convenience. It held that for sales and use tax purposes—*i.e.*, the purposes covered by § 144.010(7)—the corporate form matters even when the corporations are affiliated. But the AHC held here that two *unaffiliated* corporations become a single “person”

because of the General Assembly’s decision to include “group or combination acting as a unit” in its list of types of “persons.” The two concepts cannot be reconciled.

Again, read in context, “group or combination acting as a unit” merely ensures that even groups and combinations that have yet to organize as any of the listed types of entities are treated as “persons” for purposes of the sales tax and other laws. Circuit City Stores, Inc., fits precisely within the statute as a corporation that sells goods and remits taxes. The statute and the regulation thus allow Circuit City to obtain a refund of taxes remitted when Circuit City writes off as “bad debt” the obligations of customers to pay the amounts remitted to the Director of Revenue. But the statute, even if modified or explained by the regulation, does not permit Circuit City to obtain a refund for taxes paid on amounts that Circuit City received but were later written off by someone else—not even a credit card provider operating under an agreement with Circuit City.

## CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be reversed and the Director's decision affirmed.

Respectfully submitted,  
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## CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,328 words.

*/s/ James R. Layton*  
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