

SC93687

IN THE SUPREME COURT OF MISSOURI

CIRCUIT CITY STORES, INC.,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Circuit City summarizes its argument and then begins its analysis not with the pertinent statute—the *only* authority by which the Director can pay refunds—but with the Director’s regulation. This Court has recently emphasized the need to begin with the statutes:

While administrative regulations are “entitled to a presumption of validity and may ‘not be overruled except for weighty reasons,’” ... “[t]he rules or regulations of a state agency are invalid if they are beyond the scope of authority conferred upon the agency, or if they attempt to expand or modify statutes.” ... If a regulation is inconsistent with the statute, it is the statute, not the regulation, that this Court will apply. ...

Union Elec. Co. v. Director of Revenue, --- S.W.3d ----, 2014 WL 946849 at *5 (Mo. 2014) (*Union Electric*) (citations and footnote omitted).

Eventually, Circuit City reaches the statutory issue, defining a clear difference with the Director’s statutory interpretation. The question the Court must answer is the meaning of the words, “any other group or combination acting as a unit,” in § 144.010.1(7). Without citing a dictionary, comparable Missouri statutes, or Missouri caselaw dealing with any

analogous statutory language, Circuit City argues for a very broad meaning. But Circuit City does not and cannot definitively say the Director’s contrary reading is wrong, making the meaning at worst unclear—which would be insufficient to give Circuit City relief, given that those words must be construed against the taxpayer (*see* Appellant’s Brief at 8).

Logically read, “any other group or combination acting as a unit” is a catchall to ensure that “person” includes not just the most common forms of organization—*i.e.*, those the legislature listed—but also those not yet thought of or not yet in existence. That reading fits the classic canon, *ejusdem generis*. *See, e.g., Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444-445 (Mo. 1988). And it is consistent with a related canon, “noscitur a sociis—a word is known by the company it keeps.” *Union Electric*, 2014 WL 946849 at *3. Looking at the list in § 144.010.1(7) in light of both canons leads to the Director’s reading of the last entry, “any other group or combination acting as a unit,” as another in a list of entities that sell goods and must remit tax. To give that language an expansive reading that allows those on the list to associate with anyone and everyone else to expand the scope of available tax refunds is inconsistent with both canons—and, ultimately, lacks a comprehensible justification in any ascertainable legislative intent.

Despite what may be implied by Circuit City’s focus on the regulation, the regulation does not answer—or even help answer—the statutory

question. The regulation uses the word “seller” without explanation or definition. 12 CSR 10-102.100. The regulation goes solely to what constitutes a taxable “sale” by such a “seller”: specifically, which taxable “sales” can be transformed after the fact into transactions on which tax was not owed, making the tax paid “erroneous.”

That Circuit City alone is the “seller” to which the regulation applies seems painfully obvious. A “sale” is the transfer of the ownership of or title to tangible personal property. § 144.010.1(10). Here, Circuit City, not Bank One (*see* Respondent’s Brief at 2 n. 1) nor any combination of Circuit City and Bank One, transferred ownership of or title to tangible personal property to the purchaser. And Circuit City received payment on the sale of property—yes, through a credit arrangement involving the purchaser’s use of Bank One, but sales on credit are still taxable sales. *Id.*

Indeed, for all the facts that Circuit City cites to claim that it has retained some role in financing, Circuit City points to nothing that would suggest that Bank One, in turn, was given some role in “selling.” Thus Circuit City does not even suggest that the “combination” of Circuit City and Bank One “procure[d] a retail sales license” as sellers must do, § 144.083.1, or that Bank One has done anything at all that would permit the Director to pursue collection of sales tax from Bank One, *see* § 144.190.3. Really, there is no dispute that only Circuit City, not some “combination” of Circuit City and

Bank One, was the “seller” that was obligated to and did collect and remit the tax at issue. And again, the regulation seeks only to benefit “sellers.”

Ultimately, Circuit City could have continued to operate its own credit card program. *See* Respondent’s Brief at 2. It was Circuit City’s choice to follow what Circuit City claims became the common business model (Respondent’s Brief at 22) after the regulation was promulgated and long after the statute was written. By making that choice—by selling the financing role to another corporation—Circuit City forfeited the opportunity to transform some of its own future sales into transactions that are retroactively declared to have been erroneously taxed. Circuit City simply does not have a statutory right to demand withdrawal from the State Treasury of amounts that Circuit City did not “write off,” but was in fact paid by Bank One.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet on April 10, 2014, to:

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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 925 words.

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