SC93711

IN THE SUPREME COURT OF MISSOURI

DILLARD'S, INC.,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

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

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This case came before the Commission on a complaint filed by Dillard's, Inc. ("Dillard's") seeking a refund of sales tax remitted by Dillard's on purchases made by customers who used "Dillard's" credit cards when the card provider, long after it had paid Dillard's, "wrote off" as "bad debt." The question posed by this Petition for Review is whether Dillard's 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

Dillard's, Inc. ("Dillard's"), is an Arkansas corporation that sells merchandise in Missouri—and that remits sales tax to the Director of Revenue on taxable sales of merchandise sold in Missouri. Legal File ("LF") 9. This case arises from sales tax remitted by Dillard's from January 1 to June 30, 2010. *Id*.

In 2004, Dillard's and GE Capital Consumer Card Company ("GE Capital") agreed to create a Dillard's private label credit card ("Dillard's Card"). *Id.* Such cards usually can be used only at one store and its affiliates. *Id.* To get Dillard's Cards, customers applied with GE Capital. *Id.* GE Capital then issued cards to those applicants who GE Capital approved. *Id.* GE Capital, not Dillard's, owns the Dillard's Card accounts. *Id.*

Each time a customer made a purchase from Dillard's using the Dillard's Card, three things happen: the customer receives the merchandise; GE Capital pays Dillard's the purchase price and applicable sales tax, and Dillard's remits to the Director of Revenue the sales tax due on the sale. *Id.* at 10.

During the period at issue, after those three things had happened, some Dillard's Card holders defaulted on their payment obligations to GE Capital. *Id.* And when GE Capital found it was unable to collect on past due accounts, it wrote them off as bad debts and deducted those bad debts from the federal income tax otherwise owned by GE Capital. *Id.*

On December 23, 2010, Dillard's submitted to the Director of Revenue an application for a refund of sales tax "erroneously or illegally collected, or … erroneously or illegally computed" (§ 144.190), based on the amounts written off by GE Capital. LF 10. Making a calculation based on the actual sale amounts for the transactions where the credit card carriers failed to pay GE Capital, Dillard's claimed a refund of $ 206,543. *Id.*; LF 3-5. The Director denied the request on January 4, 2011. LF 2, 11.

On March 11, 2011, the Administrative Hearing Commission received Dillard's March 2, 2011 letter appealing from the Director's decision. LF 1. On October 4, 2013, the Commission issued its amended decision, reversing the Director's decision. LF 8-34.

POINT RELIED ON

The Administrative Hearing Commission erred in allowing a sales tax refund to Dillard's Inc., of sales taxes based on the later write-off by a credit card provider, GE Capital, of amounts that Dillard's received for purchases made by customers using the card provided to them by GE Capital because such a refund was not authorized to Dillard's under the limited waiver of sovereign immunity in § 144.190 in that Dillard's, 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,

758 S.W.2d 442, 444 (Mo. 1988)

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 8-13, 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 *Circuit City v. Director of Revenue*, No. SC93687, 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 Dillard's, Inc., fits precisely within the scope of § 144.190.2.

B. Pursuant to the Director's regulations, retailers such as Dillard's can obtain refunds for sales taxes remitted that they later "write off" as "bad debt."

In some respects, there is no dispute as to Dillard's compliance with the statute. Dillard's 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 Dillard's 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 Dillard's 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 Dillard's remitted the tax, no different from any other sale made to any customer who paid by using any credit card. Dillard's charged the customer for the merchandise and for tax based on the price paid. Then or shortly thereafter, Dillard's 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.
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> (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 Dillard's, 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 Dillard's did not write off anything as "bad debt." GE Capital paid Dillard's the amount of tax owed on the purchases and

Dillard's 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 Dillard's as the seller, does not and cannot expand the statute to allow a refund to Dillard's based on someone else later writing off credit card debt.

There are two theories under which Dillard's 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 Dillard's can obtain a refund when someone else—here, GE Capital, 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 Dillard's, not GE Capital, was legally obligated to remit tax on the sales made by Dillard's, regardless of whether the customer was financed by GE Capital or some other credit card provider. No statute allows GE Capital, or any other lender who facilitates purchases from Dillard's to "write off" debt and thus reduce their own payment of income taxes, to then somehow transfer to Dillard's the ability to obtain the "bad debt" benefit under the sales tax law. And absent such a statute, a refund is not available to Dillard's, regardless of what broad wording in any regulation might be construed to allow.

D. Section 144.010(7) does not allow two corporations, Dillard's as the retailer and GE Capital as the credit card provider, to be consolidated for purposes of obtaining refunds.

The second theory is that Dillard's and GE Capital 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.[1]

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[1] 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, GE

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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Capital did not appear before the AHC to address the obligation that the logic of Dillard's argument places on GE Capital 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, Dillard's 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, Dillard's and GE Capital 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, Dillard's is a single "unit," and the sole "person legally obligated to remit the tax." And because Dillard's wrote off nothing and thus had no "bad debt" as defined in the regulation, Dillard's could not obtain a refund on the premise that GE Capital's write-off made the amount that Dillard's 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. Dillard's, Inc., fits precisely within the statute as a corporation that sells goods and remits taxes. The statute and the regulation thus allow Dillard's to obtain a refund of taxes remitted when Dillard's 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 Dillard's to obtain a refund for taxes paid on amounts that Dillard's received but were later written off by someone else—not even a credit card provider operating under an agreement with Dillard's.

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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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,243 words.

/s/ *James R. Layton*
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