

SC93711

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**IN THE SUPREME COURT OF MISSOURI**

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**DILLARD'S, 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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**REPLY BRIEF OF APPELLANT**

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## ARGUMENT

Dillard’s 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, Dillard’s 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, Dillard’s argues for a very broad meaning. But Dillard’s 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 Dillard’s 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 Dillard’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 Dillard’s 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, Dillard’s, not GE Capital nor any combination of Dillard’s and GE Capital, transferred ownership of or title to tangible personal property to the purchaser. And Dillard’s received payment on the sale of property—yes, through a credit arrangement involving the purchaser’s use of GE Capital, but sales on credit are still taxable sales. *Id.*

Indeed, for all the facts that Dillard’s cites to claim that it has retained some role in financing, Dillard’s points to nothing that would suggest that GE Capital, in turn, was given some role in “selling.” Thus Dillard’s does not even suggest that the “combination” of Dillard’s and GE Capital “procure[d] a retail sales license” as sellers must do, § 144.083.1, or that GE Capital has done anything at all that would permit the Director to pursue collection of sales tax from GE Capital, *see* § 144.190.3. Really, there is no dispute that only Dillard’s, not some “combination” of Dillard’s and GE Capital, 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, Dillard’s could have continued to operate its own credit card program. *See* Respondent’s Brief at 1. It was Dillard’s choice to follow what Dillard’s 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—Dillard’s forfeited the opportunity to transform some of its own future sales into transactions that are retroactively declared to have been erroneously taxed. Dillard’s simply does not have a statutory right to demand withdrawal from the State Treasury of amounts that Dillard’s did not “write off,” but was in fact paid by GE Capital.

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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and that a true and correct copy of the foregoing was mailed, inter-agency, 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 896 words.

/s/ James R. Layton  
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