IN THE
SUPREME COURT OF MISSOURI

No. SC86332

HALLMARK CARDS, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

RESPONDENT'S BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Bar No. 45631

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1800
Facsimile: (573) 751-0774

ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY AUTHORITIES

STATEMENT OF FACTS

The essential facts are succinctly stated by the Administrative Hearing Commission (AHC) in two paragraphs:

> 1. On June 18, 2003, Hallmark [Cards, Inc.] filed a sales tax refund claim of $695,433.87 on food and drink sales in its private dining room for June 2000 through May 2003.
>
> 2. On October 21, 2003, the Director issued a sales tax refund of $553,705.93 (the original amount, reduced by the amount of tax due on Hallmark's purchases of the meal and drink components), but did not pay any interest. . . .

Appendix to Appellant's Brief ("App.") at A-8 – A-9.

On December 11, 2003, Hallmark filed a complaint in the Administrative Hearing Commission ("AHC") challenging the denial of interest. App. A-8. Because there were no disputed facts, the AHC took up the matter on briefs and argument. On August 31, 2004, the AHC affirmed the Director's decision, holding that Hallmark was not entitled to interest. Hallmark then filed a petition for review in this Court.

ARGUMENT

Interest has been payable on tax refunds since the 1980's. *See Utilicorp v. Director of Revenue*, 785 S.W.2d 277 (Mo. banc 1990). Until recently, the payment of interest was governed by § 144.190.2 – which provided for the payment – and § 32.065 – which dictated how and by whom the interest rate was calculated.

That changed with the signing of SB 1248 on June 19, 2002.[1] Sections 32.068 and 32.069 now combine with § 144.190.2 to regulate interest payments on refunds by the Director of Revenue. Included in the new scheme is a grace period (§ 32.069); the Director does not pay interest if she pays a refund within 120 days of when it is requested.

In SB 1248, the General Assembly expressly deferred application of § 32.068 for more than six months, until January 1, 2003. And the General Assembly cross-referenced § 32.068 in § 32.069.

Whether the grace period applied immediately upon enactment of § 32.069, or only applied after § 32.068 became effective on

---

[1] Because SB 1248 contained an emergency clause, it became law immediately when signed by the governor.

January 1, 2003, is not a question that Hallmark can properly raise. Hallmark did not seek a refund during the six-month deferral period; it filed its request 364 days after the statute changed. The only question here, then, is whether the Director must pay interest on a refund request made after the point at which there is no argument that § 32.069 had become effective.

The answer is not dependent on whether the right to interest was "vested," for the legislature had authority to shorten the period for seeking a refund to which interest would be attached. As interpreted and applied by the Director, the legislature gave Hallmark six months – certainly "a reasonable time in which to file." *North Supply Co. v. Director of Revenue,* 29 S.W.3d 378, 380 (Mo. banc 2000).

A. Since January 1, 2003, Sections 32.068 and 32.069 have given the Director a 120-day grace period in which to issue refunds without paying interest.

1. Pre-2002 statutes.

At the time Hallmark paid the taxes that have since been refunded, its entitlement to a refund and interest on that refund were dictated by §§ 144.190.2 and 32.065. Section 144.190.2, RSMo. 2000 created the interest rate, cross-referenced § 32.065 regarding the interest rate, and established a three-year limitations period:

> If any tax . . . has been erroneously or illegally collected . . . or computed, such sum shall be credited in any taxes then due from the person legally obligated to remit the tax . . ., and the balance, with interest as determined by section 32.065, RSMo, 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.

Section 32.065, RSMo. 2000, in turn, required that the Director "establish an adjusted rate of interest," based on the prime rate, to be adjusted annually. That section did not itself address when interest was due; it only set out the manner in which the Director was to calculate the rate. Thus when a taxpayer received a refund under § 144.190, the Director was obligated by § 144.190.2 to pay interest on the full amount at the rate calculated as per § 32.065.

2. Current statutes.

The 2002 General Assembly modified that statutory scheme, changing both the manner in which the interest rate was calculated and the State's obligation to pay interest at any rate. Though sections 144.190.2 and 32.065 remained unchanged, the legislature added two

new sections, prospectively modifying the Director's obligations and the manner in which interest would be calculated.

Under the new scheme, the interest rate is calculated not by the Director of Revenue, but by the State Treasurer. § 32.068.1, RSMo. Supp. 2003. It is calculated quarterly instead of annually, and not according to the prime rate, but according to the rate of interest being earned by the State on its deposits (hence assignment of the task to the Treasurer, who deposits state funds). § 32.068.2.

Because the General Assembly included an emergency clause, SB 1248 became law immediately when Governor Holden signed it on June 19, 2002. But the changes in interest calculation did not apply immediately; the legislature included a deferral period. Thus the Director was to continue to follow the mandate of §§ 144.190 and 32.065 for more than six months: "Beginning January 1, 2003, the director of revenue shall apply the calculated rate of interest as determined in this section to all applicable situations." § 32.068.2, RSMo. Supp. 2003.

But altering who calculates the interest rate and on what basis was not the only change made in SB 1248. The General Assembly also created a "grace period"; now, if the Director makes a prompt refund, she has no authority to pay interest:

> Notwithstanding any other provision of law to the contrary, interest shall be allowed and paid on any refund or overpayment at the rate determined by section 32.068 only if the overpayment is not refunded within one hundred twenty days from the latest of [various specific] dates . . . .

§ 32.069.1, RSMo. Supp. 2003.

Under the current scheme, then, since January 1, 2003, the Director has been required to pay interest as calculated by § 32.068 – *not* § 32.065. She lacks authority to pay interest if, as provided by § 32.069, she pays the refund within 120 days. And that grace period is applicable "[n]otwithstand-ing any other provision of law to the contrary" – a phrase that would include §§ 144.190.2 and 32.065.

Hallmark believes that §§ 144.190.2 and 32.065 apply to any refund if the taxes being refunded were paid prior to January 1, 2003, regardless of when the taxpayer filed its refund request or the Director paid the refund. To reach that conclusion, Hallmark must read §§ 144.190.2 and 32.065 to overcome the "notwithstanding any other provision of law to the contrary" clause in § 32.069. That is simply wrong.

Hallmark argues that "[n]othing in section 32.069 instructs the Director to disregard section 32.065's calculated rate of interest for

interest accrued prior to January 1, 2003." Appellant's Brief (App. Br.) at 13-14. That is certainly true – but entirely beside the point. The question here is not the "calculated rate of interest" – the *only* matter addressed in § 32.065. There is no dispute here as to the rate of interest; the only question is whether the Director could pay interest however calculated.

B. Because Hallmark chose to request a refund after January 1, 2003, and the Director paid the refund within 120 days, Hallmark is not entitled to interest.

Hallmark could have sought a refund at any time after making the tax payments. Hallmark could have sought a refund before the legislature amended Chapter 32 on May 17, 2002. Hallmark could have sought a refund after passage but before the Governor signed SB 1248 on June 19, 2002 – *i.e.*, before it became law by virtue of its emergency clause. Hallmark could have sought a refund after the act became law but before § 32.068 became effective on January 1, 2003. But Hallmark did none of those.

Instead, Hallmark delayed until June 18, 2003, to request a refund. That was more than five and one-half months after the statute became effective, 364 days after it became law, and 13

months after it was passed. By delaying its submission, Hallmark was subjecting its refund request to treatment under the new law.

Had Hallmark filed its refund request before June 19, 2002, under § 144.190.2 it would have been entitled to interest, calculated per § 32.065. Had Hallmark filed its refund request between June 19, 2002, and January 1, 2003, the Director would have paid interest under §§ 144.190.2 and 32.065.[2] It was only Hallmark's delay that led to denial of the interest request.

But on January 1, 2003, the Director's authority to calculate interest under § 32.065 disappeared. And her authority to pay interest under § 144.190.2 was limited by § 32.069. The Director could pay interest *only* under § 32.068, and thus *only* if the refund was delayed beyond 120 days – again, "notwithstanding any other provision of law to the contrary." By waiting until the Director's

---

[2] Though the statute could be read to apply the "grace period" immediately, the Director did not take that position – perhaps because of the impact of *North Supply Co. v. Director of Revenue,* 29 S.W.3d 378 (Mo. banc 2000), discussed below – and continued to pay interest on requests made before January 1, 2003.

authority changed, Hallmark missed its opportunity to obtain interest under the pre-2002 law.

C. Barring interest on future refund requests, promptly paid, after a six-month deferral period, was neither a retrospective law nor a retrospective application of the law.

Hallmark argues that if SB 1248 applied the 120-day grace period to a refund request filed a year after the bill was passed, but seeking a refund of taxes paid before it was passed, it is "retrospective in its operation," and thus barred by Article I, § 13 of the Missouri Constitution. But it is not retrospective at all.

Hallmark's theory is based on the premise that it had a vested right in the interest, and that the state could not deprive it of that right. But the legislature did not deprive Hallmark of its right to interest – vested or not. The legislature merely shortened – prospectively – the period in which Hallmark could act if it wanted to exercise that right.

Before the passage of SB 1248, the only limit was the three-year period set out in § 144.190.2. If Hallmark filed its request within the three-year period, it obtained both principal (the refund) and interest.

SB 1248 left Hallmark with a three-year limitations period on seeking a refund. But it modified the limitations period as to interest. If Hallmark wanted interest paid out under the pre-SB 1248 law, it had to file its refund request before January 1, 2003.

Hallmark claims that § 32.069, as construed by the AHC, must be impermissibly retrospective because it "takes away Hallmark's vested right to interest that had already accrued under sections 144.190 and 32.065 as of June 19, 2002." App. Br. at 19-20 (emphasis omitted). But Hallmark ignores the intervening cause – its own delay. Hallmark's problem, again, was not that the statute changed, it was that Hallmark did not act within a reasonable time after the statute changed.

Hallmark fails to recognize that the General Assembly is authorized to shorten limitations periods, including the period in which a refund request must be filed. As this Court has held, the only constitutional requirement is that the legislature must leave the taxpayer "a reasonable time in which to file" its request. *North Supply Co. v. Director of Revenue,* 29 S.W.3d 378, 380 (Mo. banc 2000). In SB 1248 (as read and applied by the Director), the legislature left Hallmark more than six months – surely a "reasonable time."

To avoid the conclusion that SB 1248 allowed Hallmark a "reasonable time" in which to file its refund request and still obtain interest, Hallmark must read § 32.069 to be immediately effective, similar to the circumstances in *North Supply*. But Hallmark is not the right party to make that argument. Again, Hallmark waited through the entire six-month deferral period provided by § 32.068. Having failed to file during that period, Hallmark cannot complain about the now-hypothetical possibility that the Director might refuse to pay interest because § 32.069, despite the cross-reference to § 32.068, did not itself contain a deferral clause.

Hallmark cites three precedents in support of its conclusion. But none of them really help make Hallmark's case.

In *Utilicorp*, this Court did, in fact, conclude that in providing for interest, § 144.190 created a "substantive" rather than a "procedural" right. But as discussed above, SB 1248 did not deprive Hallmark of its "substantive" right to interest; it merely required Hallmark to seek interest more quickly. Hallmark waited a year after the statute was passed before it filed its refund claim. The cases in which the legislature made the period too short are easily distinguishable: The Director said that North Supply was already too late despite acting just three days after the statute was enacted with an emergency

clause. 29 S.W.3d at 379. And Utilicorp filed its claim before the effective date of the statute. 785 S.W.2d at 278-79.

Hallmark cites *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W. 2d 523 (Mo. banc 1999), as "instructive." App. Br. at 21. Again, though, the question there was whether a right was vested, the issue for which Hallmark cites *La-Z-Boy*. The Court did not address whether or to what extent the legislature may shorten the period in which a person could assert that right.

And this case is not analogous to *Rees Oil Co. v. Director of Revenue*, 992 S.W.2d 354 (Mo. App. W.D. 1999). That case did not involve the shortening of a limitations period. Nothing there suggests that the legislature cannot demand that refund requests be filed within a reasonable period, nor that the legislature cannot shorten the period to six months.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Administrative Hearing Commission.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Missouri Bar No. 45631
Supreme Court Building
Post Office Box 899
Jefferson City, MO 65102-0899
(573) 751-1800; (573) 751-0774
(facsimile)

ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, on this 9th day of December, 2004, to:

Edward F. Downing
Riverview Office Center
221 Bolivar Street, Suite 101
Jefferson City, MO 65101

_____
James R. Layton

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 2,573 words. The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

_____
James R. Layton