

IN THE
SUPREME COURT OF MISSOURI

SC88482

KIDDE AMERICA, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

This appeal follows the decision in *Kidde America, Inc. v. Director of Revenue*, 198 S.W.3d 153 (Mo. banc 2006). As a result of that decision, the Director paid Kidde \$7,016,253.51, which included \$1,223,260.51 in interest. Appellant's Appendix ("App.") at A2. The Director calculated interest due through December 31, 2002, pursuant to § 32.065, RSMo 2000, and interest thereafter pursuant to § 32.068, RSMo Supp. 2003. *Id.* Kidde challenged that calculation at the Administrative Hearing Commission, which sustained the Director's calculation. App. at A8.

ARGUMENT

In this appeal, the taxpayer/appellant, Kidde America, Inc., argues that when the legislature said that a new method of calculating the rate of interest paid on tax refunds was to be applied “[n]otwithstanding any other provision of law to the contrary” (§ 32.069¹), it actually meant to exclude perhaps the largest class of tax refunds. That argument fails; the new calculation method does apply to income tax refunds.

1. This appeal brings the Court back to a statute that it addressed a little more than two years ago in *Hallmark Cards, Inc. v. Director of Revenue*, 159 S.W.3d 352 (Mo. banc 2005), a sale and use tax case. There, this Court considered the question of how to construe recent changes in the statutes regarding when the State pays and how it calculates interest – in particular, interest on refunds of overpayment of taxes.

The Court observed that prior to 2002, the method of determining the

¹ This appeal principally involves five sections of the Missouri Revised Statutes. Three existed before 2002, are found in RSMo 2000, and in all pertinent respects remain unchanged: § 32.065, 143.811, and 144.190. All citations to those sections are thus to RSMo 2000. The other two – §§ 32.068 and 32.069 – were enacted in 2002; citations to those sections are to RSMo Supp. 2003. All other citations are to RSMo 2000.

availability and rate of interest on refunds of sales and use taxes was defined by a combination of two statutes, § 144.190.2, which authorized the refunds, and § 32.065, cross-referenced in § 144.190.2, which sets out the method by which the Director of Revenue was to calculate interest rates. As the Court observed, § 32.065 “provides that the director shall establish an interest rate reflecting the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Federal Reserve.” 159 S.W.3d at 353. The Court explained that the Director was to use the § 32.065 rate for sales and use tax refunds, as provided by § 144.190.2. 159 S.W.3d at 353.

In *Hallmark*, the Court answered a question that arose from the 2002 amendment that also creates the issue raised here by Kidde. That amendment did not directly change the language of § 144.190.2, nor of § 32.065. Yet, as the Court explained, it indirectly removed from their scope the availability and rate of interest for new sales and use tax refund requests:

Section 144.190.2 and section 32.065 have, until recently, governed the payment of interest on sales tax refunds. On June 19, 2002, however, the general assembly enacted two statutes altering the availability of interest on sales tax refunds. The first statute, section 32.068, provides that “[b]eginning January 1, 2003, the director of revenue shall apply the calculated rate of interest as determined by this section to all applicable

situations.” Section 32.068.3 RSMo Supp.2003.

The second statute, section 32.069 RSMo Supp.2003, provides in relevant part that:

1. *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 [various possible] dates

159 S.W.3d at 353 (emphasis added by Court).

To determine the impact of this new statute, the Court began with the plain language of the law, for “[i]n determining the meaning of a statute, the starting point is the plain language of the statute itself.” *Id.*, quoting *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1998). The Court then concluded that “the plain language of section 32.068.3 requires the director, beginning January 1, 2003, to pay interest *in all ‘applicable situations’ as calculated by section 32.068*, not section 32.065.” 159 S.W.3d at 354, quoting § 32.069 (emphasis added).

In *Hallmark*, then, the Court held that although the legislature did not make any change to §§ 144.190.2 and 32.065 themselves, those sections were, for refunds sought after January 1, 2003, superseded by §§ 32.068 and 32.069. Thus the Court applied to the Hallmark refund request the provision

of § 32.069 that bars interest if the overpayment is refunded within 120 days of certain events, 159 S.W. 3d at 354, which had superseded the broader interest authorization in § 144.190.2.

Key to the *Hallmark* decision is the Court’s recognition of the rule barring the Director from paying interest absent a statutory authorization to do so: “...interest does not apply to a refund claim unless a statute expressly makes it applicable.” *Id.*, citing *International Business Machines Corp. v. State Tax Comm’n*, 362 S.W.2d 635, 641 (Mo. 1962); *see also* 159 S.W. 3d at 355 (Price, J. dissenting) (“the majority correctly cites [the 1962 *IBM* decision] for the proposition that interest does not apply to a refund claim unless a statute expressly provides for it.”). Since §§ 32.068 and 32.069 had replaced §§ 144.190.2 and 32.065 as the authority for the Director to pay interest on refunds made on or after January 1, 2003, the new statute did not authorize the payment of interest on refunds promptly made, the refund to *Hallmark* was prompt, and thus *Hallmark* was not entitled to a refund.

2. Where *Hallmark* involved overpayment of sales and use taxes, this appeal arises from the overpayment of income taxes. Prior to 2003, interest on refunds of such overpayments was handled in a fashion parallel to the one described for sales and use tax refunds in *Hallmark*. Section 143.811.1, like § 144.190.2, authorized the payment of interest and cross-referenced § 32.065 as the source for the interest rate: “interest shall be allowed and paid at the

rate determined by section 32.065.” § 143.811.1, RSMo 2000; compare § 144.190.2, RSMo 2000 (“with interest as determined by section 32.065”). So regardless of whether the overpayment was of sales, use, or income tax, interest was calculated pursuant to § 32.065, RSMo 2000. But as the Court recognized in *Hallmark*, on January 1, 2003 the references to § 32.065 were superseded.

Kidde’s goal is to avoid the application of that ruling to this and other cases involving overpayment of income taxes.

Kidde does not point to anything in § 32.069 that differentiates between refunds of sales and use taxes, addressed in *Hallmark*, and refunds of income taxes. Indeed, § 32.069 leaves no room for such a distinction; it “allows” the Director to pay interest “on *any* refund or overpayment.” § 32.069.1 (emphasis added). The only language in the new statute that could give Kidde room to argue is in § 32.068 – which, again, does not authorize the payment of interest, but establishes that whatever interest is paid is to be at a rate established by the State Treasurer, based on the rate earned by her investment of state funds. That rate is not to be applied by the Director every time she calculates interest for whatever purpose, but only “to all applicable situations.” § 32.068.3.

3. In *Hallmark*, the taxpayer “concede[d] that a [sales tax] refund is an ‘applicable situation’” where § 32.069 would apply. *Id.* (Hallmark did not

challenge the premise that the new statute would apply but for the fact that the overpayment was made before the statute changed.) But Kidde argues that income tax refunds are not “applicable situations.” Thus Kidde argues that despite the broad “notwithstanding any other provision” language in § 32.069.1, the legislature left income tax refunds out of the scope of § 32.068.²

The statute does not define the term, “applicable situation.” But it seems apparent that at least until the legislature makes an exception, it means any instance in which the Director applies an interest rate pursuant to a statute that references § 32.068. It would not include situations in which interest is to be paid or collected pursuant to a statute that incorporates some other rate calculation – such as a statute that still directs the payor to § 32.065. Thus the new interest rate calculation does not apply to interest on unpaid taxes; interest on unpaid sales, use, and even income taxes is still calculated by the old method, *see* §§ 143.731, 144.170, RSMo 2000 (interest is

² Indeed, Kidde suggests that the sole purpose of § 32.069 is “to provide a safe harbor to relieve the Director from paying interest under certain circumstances.” App. Br. at 16. But the requirement there that the Director now look to “the rate determined by section 32.068” rather than § 32.065 proves otherwise.

owed “at the rate determined by section 32.065”). Nothing in the 2002 statute made the new calculation method “applicable” to underpayments and deficiencies.

Kidde points out, correctly, that when the Director makes a payment within the 120-day period allowed by § 32.069, the Director need not pay interest (App. Br. at 18) – the obvious result of the statutory change, and the rule underlying the retroactivity issue resolved in *Hallmark*. But Kidde’s suggestion that such a prompt payment removes a refund from the “applicable situations” in § 32.069 – and that the 120-day exclusion is “the only ‘applicable situation’ that could possibly have been meant” (App. Br. at 18) – ignores the structure of the statute. Section 32.068 dictates the rate to be applied; it does not address when interest is payable. Thus when it speaks of “applicable situations,” it is logically speaking of where the rate it specifies is to be applied, and not where the rate is made irrelevant by § 32.069 or some other statute that removes the obligation to pay interest.

To determine whether refunds are “applicable situations” requires reference to § 32.069. And that section is unequivocal: the new method sets the interest rate for all refunds and overpayments, “[n]otwithstanding any other provision of law to the contrary.”

4. To support its assertion that overpayments of income taxes are nonetheless still subject to § 32.065 – *i.e.*, that income tax refunds are not an

“applicable situation” under § 32.068 despite the broad “notwithstanding” language and the new interest payment authority of § 32.069 – Kidde cites the old statute, § 143.811.1.

Kidde does not claim that the mere continued presence of § 143.811 in the Code is enough to remove it from the scope of the “[n]otwithstanding” provision. Indeed, were that enough, the result would have been different in *Hallmark*, for § 144.190.2 would remove sales and use tax refunds from the scope of §§ 32.068 and 32.069 just as Kidde claims § 143.811 does for income tax refunds – leaving the authority for paying interest on “any refund or overpayment” in § 32.069 with little significance.

Thus Kidde argues that § 143.811 removes income tax refunds from those to which §§ 32.068 and 32.069 are “applicable,” while § 144.190.2 does not, because of what the legislature did to § 143.811.1 but not to § 144.190.2 in enacting S.B. 1248. One of Kidde’s arguments is based on the content of S.B. 1248; the other is based on the bill’s history. But neither is sufficient to overcome the legislative intent expressed in the words of § 32.069.

Kidde’s first argument is based on the fact that besides adding new § 32.069, S.B. 1248 repealed and reenacted § 143.811 (notably, with an additional subsection). In Kidde’s view, by reenacting a revised version of § 143.811, the legislature indicated its intent to retain the full scope of application of that section. In other words, the legislature intended to move

sales and use tax refunds to the new interest calculation (since S.B. 1248 did not include § 144.190), but leave income tax refunds under the old one (hence the reenactment of § 143.811). That conclusion cannot be reconciled with the legislature’s decision to use language in § 32.069.1 that makes it eminently clear that the legislature was moving all refund interest calculations to the new system.

To conclude otherwise, Kidde quotes this Court’s declaration that “[w]hen a statute is amended in part, ‘it is presumed that the Legislature *intended the unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the amendatory act.*’” App. Br. at 14, quoting *Citizens Bank and Trust Co. v. Director of Revenue*, 639 S.W.2d 833, 835 (Mo. banc 1982) (emphasis added by Appellant). But the broad declaration in *Citizens Bank* simply does not answer the question that Kidde poses. Yes, the legislature intended to leave § 143.811 in place – but likely for a reason that Kidde ignores: that although S.B. 1248 became effective in August 2002, use of the new interest calculation pursuant to §§ 32.068 and 32.069 did not.

Section 32.068 requires the State Treasurer to calculate an interest rate quarterly, based on “the previous twelve-month annualized average rate of return on all funds invested by the state treasurer.” § 32.068.2. The Treasurer provides that figure to the Director of Revenue “not later than

thirty days prior to the end of each calendar quarter.” *Id.* The Director then applies that rate “during the next calendar quarter.” *Id.* That process would take a few months to implement. Hence the Director of Revenue was to apply the rate calculated using the new approach only “beginning January 1, 2003.” *Id.* § 32.068.3. Regardless of precisely when and how the new scheme might apply to claims for refunds of overpayments already made (as in *Hallmark*), it was apparent that it would not apply immediately.

If in S.B. 1248 the General Assembly had simply repealed § 143.811 (or § 144.190.2), the Director would have been left temporarily without authority to pay interest at all, since that authority, until January 1, 2003, was found in § 143.811.1. And even if authority to continue paying interest could be presumed despite the gap, the Director would be left without instruction as to the rate calculation, since the instruction to use § 32.065 would disappear months before the § 32.068 calculation would become available. Leaving § 143.811 intact meant that the existing regime – both authorizing interest and identifying § 32.065 as the statute under which to calculate interest – remained entirely in place until replaced on January 1, 2003.

This is not an instance in which two statutes conflict and the specific is taken over the general, as Kidde asserts. Rather, it is an instance in which two statutes overlap and the legislature’s intent – that one apply through the end of calendar year 2002 and the other apply thereafter – is evident in the

plain language the legislature passed. Kidde’s claim that its reading of the meaning of retaining § 143.811 is “[t]he only logical way to resolve the inherent conflict between §§ 32.068 and 32.069 and 143.811.1” is simply wrong. Indeed, its claim that the legislature simultaneously adopted a new scheme “notwithstanding” all other statutes and carved out one of the two principal pertinent statutes is *i*llogical.

Kidde then turns from the language of the statute that was actually passed to the language that was originally proposed. In that version of S.B. 1248, the references in §§ 143.811 and 144.190 to interest rate calculations under § 32.065 were simply replaced by references to §§ 32.068 and 32.069. Again, that would have meant that the Director’s authority to calculate interest on refunds under § 32.065 would have disappeared in August, and the new rate calculation scheme, assigning responsibility to the Treasurer, would not go into effect until January, leaving a gap. That neither the House nor the Senate returned to the original version is a logical result of the problem that passage of that language would have created.

Moreover, Kidde’s suggestion (an incorrect one, given the gap issue) that the General Assembly rejected in the original version of the bill language that would have done precisely what the Director says the final version did do (*see* App. Br. at 12) ignores what the two legislative bodies actually considered. Kidde juxtaposes the original bill with the final version.

But there were two versions between. When the original bill came to the Senate floor, it was replaced by a Senate Substitute that omitted the interest calculation changes entirely. *See* S.S. S.B. 1248 (2002). In other words, the Senate at that point voted not for something that would support Kidde’s reading of the new law, but for retaining the old interest calculation. And there is nothing in Kidde’s recitation of the legislative history to support the implicit claim that the House ever saw, much less that it rejected, the original S.B. 1248.

* * *

But again, the key to this case is not found in the history of S.B. 1248. It is found in the legislature’s declaration that a new method is to be used to calculate interest on refunds “[n]otwithstanding any other provision of law to the contrary.” § 32.069.1. Our ultimate goal must be to determine and effectuate the legislature’s intent, looking first to what the legislature actually said. Where, as here, that intent is express and unequivocal, to resort to canons of construction and the vagaries of legislative history is neither necessary nor appropriate.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,938 words.

The undersigned further certifies that the labeled disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.

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