IN THE
SUPREME COURT OF MISSOURI

No. 84523

FORD MOTOR COMPANY, d/b/a AMERICAN ROAD

RESPONDENT,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

APPELLANT.

On Petition for Review from the
Missouri Administrative Hearing Commission
Hon. Willard C. Reine, Commissioner

REPLY BRIEF OF APPELLANT DIRECTOR OF REVENUE

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SUMMARY OF REBUTTAL

Ford=s brief fails to address the Director=s core arguments.

First, Ford does not and cannot dispute the fact that it advocates a construction of the tax refund statute that rewards taxpayers who do not pay their taxes on time by allowing the statute of limitations clock to restart when a late payment is made. If Ford had paid the use taxes on time, even under Ford=s construction of the statute its request for a refund would have come too late. Construing tax statutes to give preferential treatment to those who pay their taxes late is unprecedented and contrary to the legislative intent.

Second, Ford misconstrues our point on the key question of statutory construction. The Aoverpayment@ to which the three-year limitations period applies is the overpayment of the Atax ... erroneously or illegally collected,@ the phrase found in the refund statute. Ford argues that Aoverpayment@ means any payment on any taxes, even if the payment is not for a Atax ... erroneously or illegally collected,@ so long as some other taxes were paid unnecessarily in the past. Ford=s interpretation is contrary to the holding in *Sprint Communications* that a taxpayer has no right to a refund of overpaid taxes unless the taxpayer follows the requirements of the refund statute.

Third, Ford=s arguments rely on the existence of an agreement by or duty on the Department of Revenue to **look for** and find overpayments. Ford admits that but for that alleged agreement, AFord would not be here [seeking a refund]@ (Resp. Br. 42). The Administrative Hearing Commission did **not** find such an agreement was made. To support Ford=s claim, this Court would have to make a factual finding the Commission did not make.

The record B as well as common sense B refute Ford=s allegation of a promise by the Department to look for overpayments by Ford. Ford cites parts of the record indicating that the Department would **consider** overpayments in calculating the amount due, but that was not a promise to look for overpayments. No reasonable taxpayer B especially a multinational, multibillion-dollar company B would assume that a state tax auditor would dig through the taxpayer=s records looking for refund claims. Ford could have hired tax professionals to assist it in locating overpayments, but it chose not to do so until the second audit (which is not the subject of this appeal).

The Commission erred in its statutory construction, and Ford=s claim of a promise to find refunds is unsupported by the record. The Commission decision should be reversed.

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ARGUMENT

Ford relies almost entirely on the incorrect assumption that the Department of Revenue promised or had a duty to **look for** unnecessary tax payments Ford made in 1992-95, rather than merely **consider** such payments if the Department of Revenue learned of them from Ford or by other means. The Administrative Hearing Commission expressly declined to make a finding on that issue (Appellant=s Br. App. A7-A8). Thus, Ford=s citation for the proposition that this Court adopts the factual findings of the Commission is irrelevant (Resp. Br. 21, *citing Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc), *cert. denied*, 122 S. Ct. 2665 (2002)). For this Court to affirm the Commission=s ruling based on an alleged Alook for overpayments@ promise, this Court would have to make a factual finding on the existence of such a promise. We could find no precedent for this to Court to affirm a Commission ruling by making a factual finding. Regardless, the record shows there was no such promise.

If this Court declines to engage in fact-finding, the remaining issue is narrow and hardly discussed by Ford: does the refund statute restart when a taxpayer makes a late payment?

I. Ford=s payment for delinquent taxes in February 1998 was not an Aoverpayment@ restarting the statute of limitations clock because the payment was undisputably for unpaid taxes Ford owed and Ford had not taken any steps to trigger a right to offset that payment with not-yet-discovered excess payments on unrelated purchases.

Ford virtually concedes that it cannot prevail in the absence of a finding that the Department agreed to find overpayments for Ford. Ford admits: A[I]f Ford and the Department had not agreed to specified conditions for the audit . . . , Ford would not be here@ (Resp. Br. 42). But there are a few parts of Ford=s brief attempting to support the Commission ruling independently of the alleged promise to find overpayments, and they are discussed here.[1] Ford=s

[1] The Alook for overpayments@ argument is intertwined in these sections as well, and is addressed below.

arguments either misconstrue the statute or misconstrue the Director=s arguments.

Ford begins its argument with the incorrect statement that it is Aundisputed@ that Ford=s $1,031,011.22 payment in February 1998 was an Aoverpayment@ (Resp. Br. 24). In fact, that is the core issue in dispute. We assume that Ford means that it is undisputed that Ford paid use taxes on transactions for the October 1992 to September 1995 years that were not subject to the use tax. But it is also undisputed that the three-year period on those payments expired no later than October 1998, and the statute-of-limitations extensions expired by November 10, 1998, one year before Ford filed its refund application (Ex. 10A, pages 9-20; Appellant=s Br. App. A7, A11-20; L.F. 25, Exs. 1-2). It is further undisputed that the million-dollar February 1998 payment was based on Ford=s failure to pay tax on transactions subject to the use tax (Appellant=s Br. App. A3, Ex. 6A at D1). The issue is whether Ford=s payment for unpaid taxes in February 1998 was an Aoverpayment@ because there was a potential claim, not yet made or even discovered, for a refund on other, unrelated transactions.

One of Ford=s key arguments is based on a misunderstanding of the Director=s position. Ford argues that the Director incorrectly tries to tie the three-year clock to the date the original tax return is filed, and that is unfair because the taxpayer should have three years from the date of payment to seek a refund (Resp. Br. 24, 29-31, 34-35). But that is not the Director=s position. The Director agrees that the three-year period is not tied to the date of the filing of the original return, but to the date of overpayment. The Director=s point is that the three-year clock runs from the date the Atax ... erroneously or illegally collected@ is paid, rather than when other taxes, properly due and owing, are paid.

Thus, Ford had three years from February 1998 to apply for a refund of the tax on the $17 million in purchases that caused the $1 million payment. That is exactly the point made by the AFrequently Asked Questions@ cited by Ford (Resp. Br. 29, *referring to* Ex. 4, 4-5). Ford is simply wrong in contending that the Director would allow Ford only three weeks to determine if the $1 million assessment was incorrect (Resp. Br. 29). Likewise, Ford is wrong is contending that the Director asserts that Ford could not make a claim for a refund for Aadditional new tax@ arising from the audit (Resp. Br. 32).

Ford had three years to challenge the assessment of the Anew tax@ paid in February 1998. The Director=s point for this appeal is that the February 1998 payment B which undisputedly was for taxes that were owed B was not an overpayment of a tax Aerroneously or illegally collected.@

In a related vein, Ford argues that the February 1998 payment was an Aoverpayment@ because Ford paid more than what was due. According to Ford, nothing was due to the Department of Revenue in February 1998 because a refund was due from the Department of Revenue to Ford at that time (Resp. Br. 28, 32). Ford argues that this is the Aplain reading@ of the refund statute (Resp. Br. 31). But Ford=s argument presupposes that the Department of Revenue owed Ford a refund in February 1998. Ford does not and cannot cite to any law to support that supposition.[2]

[2] The only justification Ford offers is the Alook for@ promise. The invalidity of that claim is discussed below.

In fact, there was nothing Adue@ to Ford to offset or Anet@ against Ford=s February 1998 payment. Because of the State=s sovereign immunity, the State need not refund any taxes voluntarily paid (such as a part of the tax Ford paid with its original 1992-95 returns), except in accordance with the State=s sovereign immunity waiver. *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc), *cert. denied*, 122 S. Ct. 2665 (2002) [Appellant=s Br. A25]. The State has waived its immunity for tax refund claims in a limited way: the State=s duty to pay a refund requires a refund request to be filed within three years of the voluntary overpayment. Mo. Rev. Stat. ' 144.190.2; *Sprint Communications*, 64 S.W.3d at 834-35.

Ford had not filed a refund request by February 1998, so the amount Ford overpaid in 1992-95 was not Adue@ to Ford. As a result, the February 1998 payment on $17 million in purchases for which no tax had been paid was the amount Ford owed at that time, and was not an Aoverpayment.@

Finally, Ford argues that the rule requiring strict construction of sovereign immunity waiver statutes should be Atempered@ or Aovercome@ by the Arule@ requiring that ambiguities in taxing statutes be construed in favor of the taxpayer (Resp. Br. 34). In fact, the rule in the case Ford cites is that an

ambiguous statute that Aimposes@ a tax is to be construed more favorably to the taxpayer. *Mary S. Reithmann Trust v. Director of Revenue*, 62 S.W.3d 46, 48 (Mo. banc 2001). The refund statute at issue does not Aimpose@ a tax. Ford also cites non-Missouri cases for the proposition that refund statutes should not be strictly construed (Resp. Br. 34). But regardless of what courts of other states may do, this Court has never wavered from the rule that tax refund statutes (like other sovereign immunity waivers) are strictly construed. *Sprint Communications*, 64 S.W.3d at 834; *Community Federal Savings & Loan Ass=n v. Director of Revenue*, 796 S.W.2d 883, 885 (Mo. banc 1990).

Ford does cite authority for the proposition that courts may look outside the plain meaning of the statute when the plain meaning would lead to Aan illogical result defeating the purpose of the legislature@ (Resp. Br. 34, *citing Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998)). Here, it is Ford=s construction that rewards delinquent taxpayers that leads to an illogical result.

Ford=s $1 million payment in February 1998 was not an Aoverpayment.@ Its failure to pay use taxes on $17 million in purchases when those taxes were due should not be rewarded.

II. Ford=s additional arguments for a refund not addressed by the Commission cannot support the award of a refund.

The remaining portion of this brief need be considered only if this Court is inclined to address Ford=s alternative arguments. This Court can determine from the record that Ford=s alternative arguments cannot sustain the award of a refund. In the interests of judicial economy and the efficiencies of the Administrative Hearing Commission, the Director respectfully suggests that this Court could advise the Commission that Ford=s alternative arguments are unpersuasive.

Ford argues, on the other hand, that the Commission ruling can be sustained on these other grounds. But Ford cites no authority for the Court=s power to do so in a case like this. There is a general proposition that a court can affirm a bench-tried judgment on any grounds supported by the record. *Holdener v. Fieser*, 971 S.W.2d 946, 950 (Mo. App. E.D. 1998). But we have not found any case in which this Court sustained an Administrative Hearing Commission ruling by making a finding on a disputed issue of fact not addressed by the Commission. In the federal system, for instance, the rule that appellate courts may affirm a district court judgment on any basis

disclosed in the record does not extend to review of administrative agency decisions. If an agency decides a case on a ground believed by an appellate court to be wrong, the case has to be remanded to the agency. *Palavra v. Immigration and Naturalization Service*, 287 F.3d 690, 693 (8th Cir. 2002). The only authority Ford cites for this Court=s ability to affirm the Commission decision on other grounds is Rule 84.14, but that Rule merely states that the court should Agive such judgment as the court ought to give.@ Regardless, Ford=s alternative arguments, if considered, should be rejected.[3]

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[3] Ford incorrectly states that the Director Aconcedes@ that the Commission decision should be affirmed if Ford is entitled to relief on any ground (Resp. Br. 37). In fact, we merely addressed the arguments in the event Ford were to make that contention (Appellant=s Br. 26), an anticipation

that proved correct.

A. There was no promise or duty by the Department of Revenue to *look for* refunds for Ford.

Ford=s alternative arguments as well as much of its argument in response to Point I rely on the existence of a promise by the Department of Revenue to examine Ford=s records and look for overpayments during the course of the Department=s audit of Ford. We do not dispute that the auditor did not search for overpayments. A reasonable individual taxpayer would not think that when the auditor comes, the taxpayer can simply dump receipts in front of the auditor and be assured that any overlooked deductions will be found. Ford=s claim that it should have been able to do essentially the same is baseless.

The fundamental problem with Ford=s position is that Ford equates a willingness by the Department of Revenue to **consider** refund claims to a duty to **look for** and find valid refund claims. There is no evidence to support that leap. Ford found itself in this situation because, as Ford admits, it was Aill-prepared to handle@ its use tax obligations (Resp. Br. 25, n.10). Ford hired a tax consultant for the second audit and was in a better situation to make its case. The Department of Revenue followed the same standards in the second

audit **B** it did not look for refund claims but would consider those it found (Ex. 13, pages 2-3; Tr. 132-33). But Ford=s consultant and employees did look for overpayments during the second audit, and as a result Ford received a refund (Resp. Br. 15-16). That Ford was Aill-prepared@ during the first audit should not lead to a $1 million liability for the State.

Below we point out Ford=s key factual assertions on the Department=s alleged promise or duty to find overpayments for Ford, followed by the explanation as to why the point is not persuasive.

1. <u>The statute of limitation waiver letters contained a promise to find overpayments</u> (throughout Respondent=s Brief): None of waiver letters say that the Department will look for refunds for Ford (Appellant=s Br. App. A11-A20). Ford=s consultant (Jim Laurentius) admitted that fact (Tr. 40). They merely extend Ford=s three-year limitations period concurrently with the extension of the Department of Revenue=s three-year limitations period. Mo. Rev. Stat. ' 144.220. A reference in a waiver letter to overpayments Afound in the audit@ does not, as Ford argues, mean that the auditor will be looking overpayments (Resp. Br. 26). The overpayments could be found by happenstance or by the party with the greatest incentive to find any

overpayments (Ford). The phrase Afound in the audit@ does not imply that any overpayments would be necessarily be found. Ford creates this reading out of whole cloth.

2. Ford=s consultant believed that taxed items would be Areviewed@ during the first audit (Resp. Br. 9): The belief of Ford=s hired consultant is not relevant. He was not even hired by Ford until after the first audit was completed (Tr. 58). In any event, taxed items (purchases on which taxes were paid) would have been reviewed if they were brought to the auditor=s attention.

3. The auditor only Alooked at@ untaxed items (Resp. Br. 10): That is true because in the first audit Ford did not present information to support a claim for a refund on taxed items, and the auditor did not find overpayments independently. The Department of Revenue was willing to look at taxed items, as it did when Ford=s consultant brought overpayments on taxed items to the Department=s attention during the second audit (Resp. Br. 16).

4. The auditor stated she wanted to determine Aif tax should have been paid,@ creating a promise to look for overpayments (Resp. Br. 11, 11 n.6). Ford states it interprets the quoted phrase to mean the auditor should

have tried to determine if tax that was paid should not have been paid. The more logical reading is that the auditor wanted to determine if tax should have been paid that had **not** been paid, which is consistent with Ford=s contention (which the Department admits) that the Department did not set out to look for and find overpayments by Ford.

5. The auditor failed to conduct a Acompliance audit@ which would have required looking for taxes paid on exempt transactions (Resp. Br. 13-14, 24-25, 31, 38, 40): In the view of the Department of Revenue, a Acompliance audit@ does not include a duty on the auditor to find credits for the taxpayer (Tr. 132-33). This is not surprising because a taxpayer who overpays is not violating the law, meaning a taxpayer who overpays is Ain compliance@ with the tax laws. The only evidence that a Acompliance audit@ includes a duty to find credits for the taxpayer came from Ford=s consultant, and even that testimony was equivocal. He indicated that auditor should look at overpayments to reach the net tax liability, but he did not say whether the overpayments would be brought to the auditor=s attention by the taxpayer or found by the auditor independently (Tr. 36).

6. A Atwo-way@ audit requiring the Department to look for payments on exempt transactions is required by the Department=s audit manual to ensure that the audit is Abeneficial@ to the taxpayer (Resp. Br. 26, 38, 41-43): The audit manual merely has general language that Athe department=s goal to assist the taxpayer and simplify compliance ... and make the audit process as educational and beneficial to the taxpayer as possible@ (Appellant=s Br. A21, Ex. 3). That is not a promise to find refunds for a taxpayer. Contrary to Ford=s assertion, by learning what is required in terms of taxes that must be paid, a taxpayer benefits from an audit that discovers only underpayments so that interest and penalties for nonpayment can be avoided in the future. Also, the testimony Ford cites regarding a Atwo-way@ audit merely defines a two-way audit as allowing overpayments and underpayments to be netted out, rather than stating that there was a duty to seek out and find overpayments (Tr. 36, Ex. 18 at 5-6, cited at Resp. Br. 41, 43 n.19).

7. AAll@ of the testimony showed that the audit was supposed to uncover overpayments (Resp. Br. 26, 26 n.12, 41): Ford itself contradicts this assertion throughout other parts of its brief by complaining that the auditor did not consider it her duty to look for and discover overpayments (Resp. Br. 13-

14, 25-26; Tr. 132-33). Ford=s consultant admitted that his view of a Acompliance audit@ was different than that of the auditor (Tr. 135), and clearly the auditor is a better spokesperson for Department of Revenue policy than Ford=s consultant. He merely testified that when **his firm** conducted Acompliance audits@ in **other** states, the auditor (presumably from the consultant=s firm) looked at transactions on which tax was paid as well as not paid (Tr. 135-36). That testimony does not show that the Missouri Department of Revenue auditors had a duty to look for overpayments.

8. AWhy would Ford have filed for a refund when the government was telling the taxpayer that it would consider any overpayments, exemptions or credits in the audit?@ (Resp. Br. 29): Ford asks this rhetorical question to try to explain why it did not file a timely refund request. But there is an answer to the question: simply knowing that the government would Aconsider@ overpayments does not indicate whether the government would find overpayments to consider. Ford could have done what it did in the second audit: bring overpayments to the auditor=s attention (Resp. Br. 16).

9. The Asampling agreement@ did not apprize Ford that the Department would not look for unnecessary payments on taxed purchases

(Resp. Br. 35-36): In our opening brief we referred to the agreement entitled ASampling of Untaxed Purchases@ as an additional piece of evidence showing Ford=s awareness of the fact that the auditor=s focus was on untaxed purchases. The document recites that purchases will be examined for a limited time frame to create an Aerror@ factor to be applied to other months (Appellant=s Br. 34, Ex. 5). Ford argues that this evidence is not persuasive because the ASampling of Untaxed Purchases@ document also stated that Afixed assets were examined 100%.@ The auditor who prepared the agreement testified that the A100%@ meant all fixed asset purchases would be examined, and not just fixed asset purchases from the Asample@ time frame (Tr. 111). Ford=s consultant **B** who was not involved in the first audit when the sampling agreement was executed by the parties **B** testified he would have read it to mean **taxed** Afixed assets@ were examined as well untaxed fixed assets (Tr. 53-58). The interpretation of Ford=s hired consultant who was not involved in drafting or executing the document is not compelling evidence of the document=s meaning.

10. <u>It is impossible for an overpayment to be discovered from a review of only untaxed transactions</u> (Resp. Br. 36, 50-52): Ford=s contention

B which it calls Aobvious@ **B** is not true and is refuted by Ford=s own experience here. The Department approached the first and second audits of Ford in the same way **B** it was not looking for overpayments (Ex. 13, pages 2-3; Tr. 132-33). But on the second audit Ford had its consultant provide information to the auditor. As a result Ford received a refund (Resp. Br. 16, 40). Ford simply missed out on potential refund claims because it admittedly was Aill-prepared.@

There is no basis for Ford=s claim that a Alook for overpayments@ agreement existed.

B. The Department of Revenue=s failure to look for overpayments was not an act of Aincorrectly computing@ Ford=s tax liability, making Section 144.190.1 inapplicable. [Corresponding to Appellant=s Point II.A. and Respondent=s Point II]

Ford argues that there was a Amistake@ in the first audit, and that there is no statute of limitations on a tax imposed by mistake. Therefore, Ford argues, its refund request was timely because it could never become untimely. The alleged Amistake@ was in the Department of Revenue failing to look for overpayments by Ford after promising to do so (Resp. Br. 38).

As explained above, the premise that there was a promise to look for overpayments is incorrect. Moreover, assuming *arguendo* such an agreement was made and was valid and enforceable, the tax assessment would not be covered by Section 144.190.1.

Ford ignores the key word in Section 144.190.1: Acomputed.@ The statute reads: AIf a tax has been incorrectly computed by reason of ... mistake ... the balance shall be refunded.@ The provision requires a mistake in computation, not methodology. To compute means to Adetermine by

mathematics, especially by numerical methods: *computed the tax due*.@ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1996)(italics in original). There is no allegation of an error in mathematics here. Under Ford=s view of Section 144.190.1, it is hard to imagine any tax assessment that would not qualify as a Amistake.@ Ford=s interpretation would undercut the limitations period in Section 144.190.2.

The mistake-in-computation provision has no application here.

C. The Department of Revenue=s failure to look for overpayments did not cause a Afailure of consideration@ of the statute of limitations extension because as a matter of law there was consideration for the extension, and the remedy Ford seeks is not available for a Afailure of consideration@ claim.

[Corresponding to Appellant=s Point II.B. and Respondent=s Point III]

Ford argues that because the Department of Revenue did not look for overpayments, there was a Afailure of consideration@ for the extension Ford granted to Department, invalidating Ford=s right to collect any tax payment from Ford for 1992-95 (Resp. Br. 48).

Again, this argument is premised on the assumption that there was an agreement to look for overpayments, an assumption not warranted.

Although Ford frames this argument as a Afailure of consideration,@ it does not cite failure-of-consideration cases.[4] As this Court made clear in *St.*

[4] Only one of the cases Ford cites in its Point III deals with

Louis Country Club v. Administrative Hearing Comm=n, 657 S.W.2d 614, 616-17 (Mo. banc 1983), there is consideration for a one-way waiver of the Department=s statute of limitations, and there is no contention that consideration Afailed@ here. Ford is actually arguing there is a partial failure of consideration: the alleged Aadditional consideration@ in the form of the alleged obligation to look for overpayments. But a contract is not voidable for a partial failure of consideration. So long as there is substantial consideration left, that remaining consideration will be sufficient to sustain the contract. *Empire Gas Corp. v. Small=s LP Gas Co.*, 637 S.W.2d 239, 246 (Mo. App.

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consideration. In that case the issue was whether there was a lack of consideration at the outset, rather than a failure of consideration. *Allison v. Agribank, FCB*, 949 S.W.2d 182 (Mo. App. S.D. 1997).

S.D. 1982), *citing* 17 C.J.S. Contracts '' 129-30. The holding in *St. Louis Country Club* establishes as a matter of law that there was substantial consideration B a non-hasty assessment.[5]

Moreover, assuming *arguendo* that there was a failure of consideration, Ford no longer has a remedy for such a claim. AIf one makes an executory contract which lacks a consideration, he may avoid it when called upon for performance. But if he chooses to execute the contract by performance, there is nothing to hinder his doing so, and he cannot turn round and seek to undo his voluntary act.@ *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522, 533 (Mo. 1964). Here, Ford already received the benefit of a non-hasty assessment and paid the tax assessed. As a matter of law, Ford has no Afailure of consideration@ claim.

[5] The concept of Asubstantial consideration@ is distinct from Asubstantial compliance.@ Ford only addresses the latter (Resp. Br. 51).

If Ford would try to make a breach of contract claim now, it would be a new issue raised for the first time on appeal and could not be considered. *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 462 (Mo. banc 1998). Furthermore, a refund claim couched in terms of a breach of contract claim would face the sovereign immunity bar described in *Sprint Communications.* 64 S.W.3d at 834.

Ford=s Afailure of consideration@ claim should be rejected.

D. Other Issues

Ford makes two arguments that do not fit within other legal analyses, and are discussed in this subsection. First, Ford argues that businesses will Aflee the state@ if they do not get better or Aevenhanded@ treatment from the Department of Revenue (Resp. Br. 22, 54). It is actually the Director seeking Aevenhanded@ treatment. The Director is asking this Court to construe the refund statute the same for persons who pay their use taxes on time as those (like Ford) that did not. More important, if Ford is suggesting that this Court should construe the statute to allow it a $1 million refund to induce it not to flee the state, Ford is improperly asking this Court to make decisions that are the responsibility of the executive and legislative branches. Those branches are in the best position to decide what inducements are appropriate for Ford or other businesses to do business in this state, and also what conditions should exist in the granting of such inducements.

Second, Ford argues that even if it wins, it will still have lost out on $750,000 in overpayments for 1992-95 that exceeded the amount it paid in February 1998 (Resp. Br. 24-25). But the amount of taxes Ford paid voluntarily is not relevant to the interpretation of the refund statute.

CONCLUSION

Ford does not and cannot address the lack of logic behind a statutory construction of the refund statute that rewards taxpayers who do not pay their taxes until caught by an auditor. Ford did not seek a refund for voluntary tax payments it made in 1992-95 until after the three-year limitations and the extended limitations periods expired. A taxpayer cannot restart the limitations period. Also, there was no promise to look for overpayments Ford made, so that Ford=s alternative arguments must fail.

Therefore, the Administrative Hearing Commission decision should be reversed, and the case remanded to the Commission with directions to deny Ford=s refund claim. Alternatively, the Commission decision should be reversed and the case remanded for further proceedings consistent with a holding that the statute of limitations on Ford=s refund claim was not restarted by Ford=s February 1998 payment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the Reply Brief of Appellant, and one disk containing the same, were mailed first class, postage prepaid, this 1st day November, 2002, to counsel for Respondent, James C. Owen, McCarthy, Leonard, Kaemmerer, Owen, Lamkin & McGovern, L.C., 16141 Swingley Ridge Rd., #300, Chesterfield, MO 63017.

CERTIFICATE REQUIRED BY 84.06(c)

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned certifies that this Reply Brief of Appellant complies with the limitations of Rule 84.06(b) in that the number of words is no more than 5,600 [less than the 7,750 word limit in the rule], excluding the cover, certificate of service, this certificate required by Rule 84.06(c), the signature block, and appendix. Also served and filed with this Appellant=s Brief is a floppy disk containing the brief, which is double-sided, high density, IBM-PC compatible 1.44MB, 3.5 inch size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format (Wordperfect 9.0). The disk has been scanned for viruses and it is virus-free.

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