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

BRIEF OF APPELLANT DIRECTOR OF REVENUE

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INTRODUCTION AND SUMMARY

The issue in this case is whether a taxpayer can extend the limitations period for seeking a refund on some taxes by failing to pay other taxes on time.

In November 1999, the taxpayer–Ford Motor Company–sought a refund of use taxes it paid in 1992 through 1995. The statute of limitations for seeking a refund is three years from the date of overpayment. Ford's refund request was made more than three years after the returns were filed and payments made for those years, and more than a year after the expiration of an extension of the limitations period granted by the Department of Revenue.

Ford nevertheless claims that it should be allowed to obtain the refund. Ford argued to the Administrative Hearing Commission, successfully, that even though the limitations period and extensions had expired, the three-year limitations period was restarted when Ford made a late, post-audit payment in February 1998 on other taxable purchases made by Ford during the 1992-95 period. This late payment was made because a Department of Revenue audit showed that Ford failed to pay use taxes on $17 million in purchases during 1992-95 that were subject to the use tax.

Ford is asserting the inequitable position that taxpayers who do not pay their taxes on time receive preferential treatment: the three-year clock for filing a refund claim for a tax year can be restarted by making a late payment for taxes owed on unrelated transactions for the same tax year. A construction of the limitations statute that provides special benefits to persons who do not pay their taxes on time is contrary to public policy, the plain language of the refund statutes, and the legislative intent.

The Administrative Hearing Commission erred in holding that the statute of limitations for seeking refunds is **not** tied to the date a taxpayer makes payments on nontaxable transactions, but is tied to when the taxpayer makes late payments on unrelated, taxable purchases. Because that ruling has serious consequences in this case and in the case of other late-paying taxpayers, this Court should reverse the Commission's ruling.

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JURISDICTIONAL STATEMENT

This case involves the interpretation of the limitations period for seeking a tax refund set out in Section 144.190.2, Revised Statutes of Missouri.[1] Thus, this Court's review will necessarily involve the construction of that section, which is a revenue law of the State of Missouri. This Court has exclusive appellate jurisdiction over such issues pursuant to Article V, Section 3 of the Missouri Constitution.

[1] All citations to the Revised Statutes of Missouri refer to the 2000 Edition, as amended, unless otherwise noted.

STATEMENT OF FACTS

The facts relevant to this appeal are largely or entirely undisputed.

Ford Motor Company ("Ford") manufactures motor vehicles. This dispute involves Ford's Kansas City plant operations, which are sometimes referred to in Department of Revenue records as "American Road" (App. A2, L.F. 20, Tr. 35, 76-77).[2]

This case involves use taxes. A use tax is a tax imposed on products used within the state but purchased outside the state. Mo. Rev. Stat. § 144.610 (App. A10). Sales and use taxes are complementary schemes designed to ensure that purchases of personal property by a Missouri purchaser receive identical treatment, no matter what the geographic location of the seller. *Olin Corp. v. Director of Revenue*, 945 S.W.2d 442, 443 (Mo. banc 1997). It removes an incentive to purchase goods from out-of-state sellers to avoid the sales tax. *King v. L & L Marine Service, Inc.*, 647 S.W.2d 524, 526 (Mo. banc 1983). Ford was a "direct pay" taxpayer, meaning that the taxpayer is

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[2] "App." refers to the Appendix to this brief. "L.F." refers to the Legal File. "Tr." refers to the transcript of the hearing before the Administrative Hearing Commission on October 30, 2001.

able to buy the product without paying a sales or use tax to the seller and the Missouri taxpayer is to pay the use tax directly to the Department of Revenue. 12 CSR § 10-4.626 (Tr. 26-27, 71-72, 79-80). The "direct pay" status is available to larger corporations with at least $750,000 in purchases (Tr. 28-29).

Beginning in 1996, the Department of Revenue ("the Department") conducted an audit of Ford's sales tax and use tax payments for the period October 1992 through September 1995 (App. A2, L.F. 20, Ex. 6A at D1). The Department auditors reviewed purchases by Ford on which it had not paid a use tax to determine if it should have paid a use tax on those purchases (App. A2, L.F. 20, Tr. 89). The auditors assumed that payments Ford made on other transactions were proper, although the auditors would have considered claims by Ford that it had paid taxes on nontaxable transactions if such information were presented by Ford to the auditors (App. A3; L.F. 21, Tr. 34-35, 93-99, 111-15, 132-33). It is undisputed that at no time during the course of the audit did Ford contend that any taxes it had previously paid for the 1992-95 time period were improper or overpayments, although it could have done so. In

fact, during Ford's 1995-98 audit, Ford did bring to the Department's attention refund claims (Tr. 34-35, 47-48, 81-84).

The auditors determined that Ford failed to pay use tax during the 1992-95 time period on more than $17 million in purchases on which use taxes should have been paid. The total tax due on those purchases was $755,284.11. Interest on that amount totaled $275,717.11, leaving an amount due to the Department of Revenue of $1,031.011.22 (App. A3, L.F. 21; Exs. 6A at D1, 8). Ford did not contest the audit findings and paid the $1,031,011.22 in February 1998 (Exs. 6A at D1, 9).

The Department of Revenue then conducted an audit for the subsequent three years: October 1995 through December 1998. That audit is not the subject of this appeal. But for that audit Ford hired a tax consultant (Tr. 24-25). The consultant found that Ford paid use tax on exempt transactions during the 1995-98 time period, and the Department allowed credits for those payments during the course of its audit (App. A4, L.F. 22, Tr. 34-35, 115-20). More important, the consultant concluded that Ford had paid use taxes on exempt transactions during the 1992-95 time period as well, such as labor or service charges (App. A4, L.F. 22, Tr. 31-32, Exs. 10, 10A, 10B). Ford filed

a refund claim for the 1992-95 time period on November 17, 1999. None of the transactions for which Ford claimed refunds were transactions on which it paid the post-audit tax in February 1998 (Tr. 103-05).

The parties stipulated that if Ford's claim for a refund is not barred by the statute of limitations, Ford is entitled to a refund of $1,031.011.22, plus interest from February 23, 1993, the date of receipt of the payment (App. A5, L.F. 23, Ex. 16 at 64-67).

The Director rejected the refund request on the basis that it was made outside the limitations period (App. A4; L.F. 22; Ex. 12, 17). The taxes on those transactions were originally paid with returns filed between February 1993 and October 31, 1995 (Ex. 10A, pages 9-20), so that the three-year period would have expired on the last return on October 31, 1998. The Department and Ford had executed a series of limitations-waiver letters, with the last extension being a one-year extension signed on November 10, 1997, expiring November 10, 1998, approximately one year before Ford filed the refund application (App. A7, A11-A20; L.F. 25, Exs. 1-2).

The Administrative Hearing Commission upheld Ford's claim in a May 7, 2002, decision (App. A1-A8; L.F. 19-26). This appeal followed.

POINTS RELIED ON

I. The Administrative Hearing Commission erred in permitting Ford's use tax refund claim because that claim was barred by the three-year statute of limitations in Section 144.190.2 in that the refund claim was made in November 1999 for taxes paid in 1995 or earlier, and the three years is measured from the date of overpayment of the tax *on transactions for which the refund is sought*, rather than three years from the date of tax payments on other transactions that were paid late and only after an audit.

Mo. Rev. Stat. § 144.190.2

Mo. Rev. Stat. § 144.610.1

Sprint Communications Co., L.P. v. Director of Revenue, 64 S.W.3d 832 (Mo. banc 2002)

II. Ford's additional arguments for a refund not addressed by the Commission cannot support the award of refund.[3]

A. The Department of Revenue's decision rejecting Ford's claim was not an "incorrectly computed ... clerical error or mistake," for which there is allegedly no statute of limitations, because that phrase refers to a narrow category of technical errors, and the decision not to give Ford a credit before it was requested was not such an error.

Mo. Rev. Stat. § 144.190.2

Sprint Communications Co., L.P. v. Director of Revenue, 64 S.W.3d 832 (Mo. banc 2002)

Wollard v. City of Kansas City, 831 S.W.2d 200 (Mo. banc 1992)

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[3] This "Point Relied On" and its subparts are not in the format set forth in Rule 84.04(d) because in Point II the Attorney General is not objecting to the ruling of the Commission. This Point and corresponding argument are included in this brief in anticipation of an argument by Respondent Ford that there are alternative grounds for upholding the Commission decision.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1996)

B. The Department's failure to discover Ford's overpayments did not constitute a "failure of consideration" for Ford's agreement to allow the Department more time to make a demand on Ford for additional tax payments because the Department never promised to find any overpayments, Ford obtained an extension of time for making refund claims, and as a matter of law a taxpayer obtains consideration for a limitations waiver because the waiver helps to ensure that there is not a "hasty" assessment against the taxpayer.

Mo. Rev. Stat. § 144.190.2

St. Louis Country Club v. Administrative Hearing Comm'n, 657 S.W.2d 614 (Mo. banc 1983)

STANDARD OF REVIEW

The Administrative Hearing Commission decision was based solely on an interpretation of a revenue law, and not on the resolution of disputed facts. Therefore, this Court reviews the Commission decision de novo, exercising its independent judgment. *Sprint Communications Co., L.P. v. Director of Revenue*, 64 S.W.3d 832, 834 (Mo. banc 2002)[App. 23-A27]; *Hermann v. Director of Revenue*, 47 S.W.3d 362, 364 (Mo. banc 2001).

ARGUMENT

I. The Administrative Hearing Commission erred in permitting Ford's use tax refund claim because that claim was barred by the three-year statute of limitations in Section 144.190.2 in that the refund claim was made in November 1999 for taxes paid in 1995 or earlier, and the three years is measured from the date of overpayment of the tax *on transactions for which the refund is sought*, rather than three years from the date of tax payments on other transactions that were paid late and only after an audit.

The Administrative Hearing Commission erred in interpreting the three-year statute of limitations on refund claims in a way that rewards taxpayers who fail to pay their taxes on time. The plain language of the statute and public policy make clear that the legislature did not intend such a result.

The limitations statute precludes refunds sought more than three years after payment:

> If any tax ... has been ... illegally collected ... such sum ... shall be refunded to the person legally obligated to remit the tax, but no such ... refund shall be allowed unless ... a claim for refund [is] filed within three years from the date of overpayment.

Mo. Rev. Stat. § 144.190.2. (The full text of the statute is found in the Appendix at page A9.) This limitations section applies to use tax refund claims. Mo. Rev. Stat. § 144.696.

It is undisputed that the limitations period had expired, even with the benefit of extensions, more than one year Ford filed its November 1999 refund application. The issue Ford raises is whether the three-year clock that otherwise would have expired by November 1998 (even with the benefit of extensions) restarted when Ford made its February 1998 payment for taxes it had failed to pay when the 1992-95 returns were filed.

A. The statute establishing a three-year limitations period for seeking refunds is a sovereign immunity waiver statute that should be narrowly construed.

This Court recently explained that tax refund statutes are sovereign immunity statutes that should be narrowly construed:

> As a general rule the sovereign need not refund taxes voluntarily paid even if illegally collected. Section 144.190, however, provides a limited waiver of sovereign immunity to allow the recovery of taxes, penalties, or interest paid that have been illegally or erroneously computed or collected. Statutory provisions waiving sovereign immunity are strictly construed, and when the state consents to be sued, it may prescribe the manner, extent, and procedure to be followed, and any other "terms and conditions as it sees fit."

Sprint Communications Co., L.P. v. Director of Revenue, 64 S.W.3d 832, 834 (Mo. banc 2002)(citations omitted)(App. A25).

Even without a rule of strict construction, it is evident that the legislature did not intend to reward persons who violate the tax laws. When the strict

construction rule is applied, it is clear that Ford has not met the terms and conditions for obtaining a refund that the legislature imposed.

B. The tax refund statute was not designed to reward taxpayers who fail to pay their taxes or pay them late.

The inequity of Ford's position is perhaps best demonstrated by considering what would have happened if Ford had paid use taxes on the $17 million in transactions on which it failed to pay taxes during the 1992-95 period. If Ford had complied with the law and paid use taxes on all of its purchases subject to the use tax, the Department of Revenue would not have made its million-dollar assessment in February 1998. And without that assessment, even Ford would admit that there was nothing to restart the three-year limitations clock and it would have no right to a refund. Pursuant to *Sprint Communications*, if the statute of limitations has expired, the Department would be immune from a refund claim for Ford's voluntary payment of use taxes on exempt transactions, even if illegally collected.

Ford argues that it obtained a second bite at the apple because of its own illegal conduct in failing to pay use taxes on transactions that were subject to the use tax. In other words, Ford argues that by violating the tax laws it

received a benefit (a restarting of the statute of limitations clock) that it would not have received if it had paid its taxes when due. Our research has failed to find any other instance in Missouri tax law or in the tax law of any other jurisdiction in the United States in which taxpayers who do not pay their taxes on time obtain an advantage over law-abiding taxpayers.

C. Section 144.190 is intended to tie the three-year limitations period on refunds to payment of the tax on transactions for which a refund is sought, rather than payment of taxes on other transactions.

The plain language of the statute, especially when strictly construed, leads to the same conclusion dictated by a policy against rewarding delinquent taxpayers. The key phrase is "from the date of overpayment," Mo. Rev. Stat. § 144.190.2 (App. A9). The key question is "overpayment of what?"

The proper construction is to treat the "overpayment" as overpayment of the tax referenced in the first clause of the statute: "the tax ... illegally collected," that is, the taxes paid on the transactions that were not taxable. Ford apparently contends that "overpayment" refers to overpayments of other

taxes that were **not** illegally collected, that is, taxes on other transactions that are not referenced in Section 144.190.2.

The payments on the exempt transactions for which Ford seeks a refund were made with the original returns for the tax years 1992 through 1995. It is undisputed that Ford's 1998 payment was not based on the same transactions as those in the original 1992-95 returns.

The Commission's error is found in three paragraphs of its ruling. The Commission concluded that the word "overpayment" in Section 144.190.2 refers to an "overpayment" that is the "net result" of adding overpayments and underpayments of amounts owed on multiple transactions, rather than referring to the "overpayment" of the tax illegally collected (App. A6-A7; L.F. 24-25). The Commission's conclusion is incorrect for two reasons.

First, the Commission erred in assuming that there were overpayments to be offset against the 1992-95 nonpayments, thereby allowing a "net result" to be created (AHC Decision, App. A7, L.F. 25). As this Court explained in *Sprint Communications*, the State has no common law duty to refund or provide a credit for taxes voluntarily paid, even if not owed. 64 S.W.3d at 834. The only duty that exists is the one to which the State consents, under

"terms and conditions as it sees fit." *Id., citing Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 879-80 (Mo. banc 1993). One of the "terms and conditions" set by Missouri for obtaining a refund is that the taxpayer has to ask for the refund in the form of filing a claim with the Department of Revenue. Mo. Rev. Stat. § 144.190.2. It is undisputed that Ford had not made any claim that taxes should be offset with prior overpayments when it made its February 1998 payment. Pursuant to *Sprint Communications*, the lack of timely refund request meant that the Department had nothing to "net" Ford's payment against, so the February 1998 payment was not an "overpayment" of taxes for the 1992 through 1995 tax years. Second, the Commission made the erroneous assumption that because taxes can be **paid** on a cumulative basis for a month or quarter, that the tax is **imposed** on a cumulative basis (AHC Decision, App. A7, L.F. 25, *citing* Mo. Rev. Stat. §§ 144.655.1 and 144.660). This assumption led to the Commission's conclusion that there should be some type of "net" calculation. As noted in the preceding paragraph, even if this assumption were correct, the taxpayer had no right to "net" the overpayments it had made with its original

1992 through 1995 tax returns because Ford had not asked for a refund of those payments.

Moreover, the Commission's assumption is incorrect. The Commission did not cite the use tax statute, which states that "[a] tax is imposed for the privilege or storing, using or consuming within this state **any article** of tangible personal property ... in an amount equivalent to the percentage imposed on **the** sales price in the sales tax law." Mo. Rev. Stat. § 144.610.1 (emphasis added) (full text set out at App. A10). The tax is imposed in the singular, on each covered article stored, used, or consumed, and not in a "net" fashion. The Department's regulations also use the singular to describe the imposition of the tax: a vendor is required to collect "the" tax on the selling price of "the commodity," and to separately state the tax on the bill. 12 CSR § 10-4.130. Although checks may be written that take into account credits or offsets, when Ford made its payment in February 1998, it was entirely to compensate for unpaid taxes.

There is nothing in the statute mandating a "net result" when there has not been a timely claim for a refund or credit.

As a result of these erroneous assumptions, the Commission treated the word "overpayment" in Section 144.190.2 as referring to any overpayment (even a hypothetical overpayment for which there was no right to a credit in the absence of a refund claim), rather than referring to the overpayment of the "tax ... illegally collected" that is referenced at the beginning of the sentence. When the use tax statute and sovereign immunity principles are considered, the word "overpayment" must refer to the overpayment on the nontaxable transactions, and both the statutory and extended limitations periods expired before the refund here was sought.

The Commission erred in holding that the limitations period could be revived by the taxpayer's failure to pay taxes on time, and the Commission's ruling should be reversed.

II. Ford's Additional Arguments for a Refund Not Addressed by the Commission Cannot Support the Award of Refund.

Ford made two additional arguments to support its claim for a refund that were not addressed by the Administrative Hearing Commission because the Commission found the ruling addressed in Point I to be dispositive (App. A7, L.F. 25). If Ford were to contend that these arguments are alternative grounds to support its refund claim, it is mistaken, and the alternative arguments should be rejected. Alternatively, this Court could remand the case to the Administrative Hearing Commission for a ruling in the first instance on the alternative arguments.

A. The Department of Revenue's decision rejecting Ford's claim was not an "incorrectly computed ... clerical error or mistake," for which there is allegedly no statute of limitations, because that phrase refers to a narrow category of technical errors, and the decision not to give Ford a credit before it was requested was not such an error.

Ford argues in the alternative that there was no time limitation on its seeking a refund because its "overpayment" was the result of a "clerical error or mistake" by the Department of Revenue in not finding during the audit the potential refund claims Ford could have made, and Ford claims there is no limitations period on refunds based on a "mistake" (App. A7, L.F. 25).

Ford relies on Section 144.190.1, which states in pertinent part:

> If a tax has been **incorrectly computed** by reason of a clerical error or mistake on the part of the director of revenue, such fact shall be set forth on the records of the director of revenue, and the amount of the overpayment shall be credited on any taxes then due ... and the balance shall be refunded ....

Mo. Rev. Stat. § 144.190.1 (emphasis added)(App. A9).

Ford's argument must fail, even assuming there is no limitations period for refunds covered by Section 144.190.1. Subsection 1 applies to a very limited set of circumstances. It does not apply to every "clerical error or mistake," but only to situations in which the tax has been incorrectly "computed" by reason of that mistake. To compute means to "determine by mathematics, especially by numerical methods: *computed the tax due*." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1996)(italics in original). Moreover, this Court has stated that in the context of the rule on correcting judgments, a "clerical mistake" is a "mistake in writing or copying." *Higher Education Assistance Foundation v. Hensley*, 841 S.W.2d 660, 662 (Mo. banc 1992), *citing Gordon v. Gordon*, 390 S.W.2d 583, 586 (Mo. App. 1965).

The "mistake" about which Ford complains is not a mistake in mathematics, computation, or writing or copying, but a "mistake" in policy or procedure. The Department's decision not to pore over Ford's records looking for potential refunds is not a "mistake," clerical or otherwise, covered by the statute. Not surprisingly, the Department auditors typically do not go out of their way to examine transactions of highly sophisticated taxpayers to

find refunds (although the Department will take into account information that the taxpayer brings to the Department's attention) (Tr. 93-99, 111-15, 132-33). The assessment was not the result of a mistake, but rather a practice of not looking for refunds for taxpayers when the taxpayers do not bring any refund issues to the auditors' attention.

Perhaps most important, if Ford's view of subsection 1 were adopted–that there is a "mistake" if the tax assessed is not the tax that "should have" been assessed–as a practical matter there would be no three-year limitations period on subsection 2 because every failure to find refunds would be a "mistake." The legislature is presumed not to have enacted meaningless provisions. *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). The fact that there is no express limitation period for refunds based on "clerical error or mistake" is indicative of the fact that it is anticipated that such mistakes would be discovered quickly, rather than indicating that refunds for such a reason can be obtained years or decades after the payment is made.

Particularly in light of the requirement that refund statutes must be strictly construed, *Sprint Communications*, 64 S.W.3d at 834, Ford's

alternative contention that Ford was free of *any* limitations period must be rejected.

B. The Department's failure to discover Ford's overpayments did not constitute a "failure of consideration" for Ford's agreement to allow the Department more time to make a demand on Ford for additional tax payments because the Department never promised to find any overpayments, Ford obtained an extension of time for making refund claims, and as a matter of law a taxpayer obtains consideration for a limitations waiver because the waiver helps to ensure that there is not a "hasty" assessment against the taxpayer.

Ford made an additional argument that there was a "failure of consideration" for Ford's agreement to extend the Department's limitations period for making assessments against Ford. Ford's theory is this: (1) the Department of Revenue entered into a contract with Ford promising to find refunds to which Ford was entitled even if Ford did not bring potential refund claims to the Department's attention, (2) that promise was the consideration given by the Department for Ford's agreement to give the Department more

time to find deficiencies by Ford, (3) the Department failed to unilaterally look for refunds, and (4) therefore there was a "failure of consideration" for Ford's extension of the time for the Department to make assessments against Ford, making the assessments against Ford invalid.[4]

Ford's argument is based on incorrect factual and legal assumptions.

First, even if the factual assumptions were correct, a taxpayer's agreement to give the Department additional time is supported by consideration even without a mutual extension of time for the taxpayer. In *St. Louis Country Club v. Administrative Hearing Comm'n*, 657 S.W.2d 614, 616-17 (Mo. banc 1983), this Court found that a one-way waiver was supported by consideration because the taxpayer benefits in that it otherwise "might fear a hasty and inaccurate assessment if it declined to enter into the waiver agreement." This Court further held that the Department's reliance on the waiver agreement is apparent. *Id.* Thus, even if one were to assume that the Department had promised to find refunds for Ford and had not done so, that

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[4] Ford does not characterize this claim as a breach of contract. Such a claim would fail for many of the same reasons a "failure of consideration" argument fails.

fact would not constitute a "failure of consideration" allegedly invalidating the Department's million-dollar assessment.

Factually, Ford's argument is not valid because no such promise was made, and it hard to believe that any taxpayer, much less a sophisticated corporate taxpayer like Ford, would believe that the Department would try to find refunds for the taxpayer on matters that the taxpayer did not bring to the Department's attention.

The "promise" is supposedly in the letters containing limitations waiver agreements. But those agreements merely provided that the limitations period is extended for both assessments and overpayments (App. A11-A20; Exs. 1, 2). They contain no promise to **look** for refunds, a point that Ford's main witness–the tax consultant–admitted (Tr. 40).

Moreover, Ford did receive additional consideration in the form of additional time to make a refund claim that was concurrent with the Department's extension of time to make an assessment. Ford did not take advantage of that extension, but Ford's failure to act is not a failure of consideration.

Ford also argues that the Department's audit manual contains a promise that the Department will look for or find refunds (App. A21, Ex. 3). This is not the case. The manual merely has general language that "the department's goal to assist the taxpayer and simplify compliance ... and make the audit process as educational and beneficial to the taxpayer as possible" (App. A21, Ex. 3). That phrase is part of a general description of the audit process. No reasonable corporate taxpayer would assume that the phrase meant that the Department would scrutinize all of the taxpayer's records looking for possible refunds for the taxpayer.

Ford offered testimony as to what Ford understood, but the testimony was limited in scope. One Ford witness testified that he had an "understanding" that the audit would "include" overpayments (Tr. 73), but there was no testimony that anyone involved in the 1992-95 audit at Ford believed that "including" overpayments meant that the Department would seek out and try to find overpayments that were not brought to the attention of the Department. The Department agrees that the audit "included" overpayments in that if legitimate overpayments were brought to the Department's attention,

they would have been granted, which is what happened during the 1995-98 audit (Tr. 34-35).

Moreover, the audit reports specifically stated the sampling was of untaxed purchases (Exs. 5, 6A at D2, Tr. 109-11).

Similarly, Ford's tax consultant carefully stopped short of saying that it was ever the policy of the Department of Revenue while he was an auditor to seek out refunds that were not brought to the Department's attention. The most he could say was that there were audits conducted in which credits were found without input from the taxpayer (Tr. 61), but he did not indicate that these occurrences were the result of a Department effort to search for credits, as opposed to coming across them in the course of an audit.

There was consideration for Ford's statute of limitations waiver that extended the Department's time to find deficiencies.

CONCLUSION

Ford failed to pay use taxes it should have paid. It did not follow the terms and conditions, including adhering to time limits, set forth in statutes for seeking a refund. The Administrative Hearing Commission erred in holding that limitations period was revived when the Department of Revenue discovered that Ford illegally failed to pay use taxes on transactions on which such taxes were owed and Ford made a late payment. Although Ford made unnecessary payments, it did not seek a refund for more than three years (and as to the 1992 tax year more than six years) after the payment was made.

Because taxpayers who fail to pay their taxes should not receive preferential treatment compared to taxpayers that adhere to the revenue laws of the state, 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 Brief of Appellant, and one disk containing the same, were mailed first class, postage prepaid, this 17th day September, 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 Appellant's Brief complies with the limitations of Rule 84.06(b) in that the number of words is no more than 6,110 [less than the 31,000 word limit in the rule]. 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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APPENDIX

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