IN THE
SUPREME COURT OF MISSOURI

No. 84523

FORD MOTOR COMPANY, d/b/a AMERICAN ROAD

PETITIONER-RESPONDENT,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI

RESPONDENT-APPELLANT.

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

RESPONDENT'S BRIEF

James C. Owen, #29604
Katherine S. Walsh, #37255
McCarthy, Leonard, Kaemmerer, Owen, Lamkin & McGovern, L.C.
16141 Swingley Ridge Rd., #300
Chesterfield, Missouri 63017
(636) 532-7100
(636) 532-0857 (Facsimile)
Attorneys for Respondent Ford Motor Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Respondent believes that Appellant's Statement of Facts are incomplete and, therefore, provides its own.

I. INTRODUCTION

Respondent Ford Motor Company ("Ford") is a Michigan corporation that is authorized to do business in the State of Missouri. Ford has major automobile manufacturing plants in both St. Louis and Kansas City, Missouri. This action involves the operations at the Kansas City plant.

Prior to June 1993, Ford paid its sales and/or use tax (hereinafter "use tax") on its out-of-state purchases from vendors to the vendor, which remitted the tax to the Missouri Department of Revenue (the "Department"). At the request of the Department, Ford became a "Direct Pay" taxpayer, that is, Ford took on the vendor's responsibility to collect and remit use taxes due to the Department on its purchases. The parties testified that this Direct Pay arrangement benefited both Ford and the Department. (Tr. 28, 71-72)[1]

[1] Ford will cite to the Transcript as "Tr.", the Legal File as "L.F." and to its Exhibits from below as "Petitioner's Ex."

Ford's consultant Jim Laurentius[2] and former plant "operations accounting coordinator" Bob Leytham[3] testified that the new record keeping obligations under the Direct Pay arrangement were a "major undertaking" for Ford because it involved a significant amount of new paperwork than Ford had previously been responsible for when it had the "more simplistic" payment arrangement to its vendors. (*Id.*) After the Direct Pay agreement was in place, the Ford plant in Kansas City turned over the tax reporting duties to its world headquarters on American Road in Dearborn, Michigan. (Tr. 49-50)

II. THE 1992 - 1995 AUDIT

A. The Parties' Agreements Prior To The Audit

In the months prior to December 27, 1995, the Department and Ford agreed that the Department could perform a sales/use tax audit of the Kansas City plant operation for the three-year period of October 1, 1992 through September 30, 1995. A series of discussions ensued in regard to the Department's proposed "Statute of Limitations Waivers," in that the three-year statute of limitations applicable to the Department's

---

[2] Mr. Laurentius is a Certified Public Accountant who began working as an auditor for the Department in 1975. In 1988 he became the Area Manager for the Department's St. Louis office. He subsequently left the Department in 1989. Since then he has been in private practice as a tax consultant. (Tr. 23-24)

[3] Mr. Leytham worked for Ford for over 30 years and is now a consultant to Ford. He has "no auditing experience or background." (Tr. 74)

collection of any tax (§ 144.220, RSMo 1994[4]) was about to expire. (Petitioner's Ex. 16 - Rumsey Depo. at 7-8) On December 27, 1995, Stacey Rumsey, a Department Tax Auditor II,[5] wrote Dan Houlf, Ford's General Counsel, and agreed as follows:

> [Ford's] request to alter the Statute of Limitation Waivers for Sales Tax, Use Tax and Withholding Tax has been granted, however, certain stipulations will apply.
>
> The audit period for sales tax, use tax, and withholding tax will be from October 1, 1992 through September 30, 1995. The Ford Motor Company applied and received a Direct Pay Agreement starting on June 1, 1993. Since the Direct Pay Agreement was not in effect at the beginning of the audit, any overpayments made to supplies before June 1, 1993 would go through **the normal refund process**.
>
> In conclusion, the Statute of Limitation Waivers can be altered to include **overpayments found in the audit.**

---

[4] All references to RSMo will be to RSMo 1994, the applicable statute during the relevant period.

[5] Ms. Rumsey is now a Senior Tax Auditor at the Department. She graduated from Central Missouri State in 1992 with a Bachelor of Science Degree in Business Administration with an emphasis in accounting and immediately went to work for the Department. (Tr. 86)

(Petitioner's Ex. 1; Petitioner's Ex. 16 - Rumsey Depo. 7-8; emphasis added) This letter was authorized by the Department through the chain of command. (Petitioner's Ex. 16 - Rumsey Depo. at 7) Ms. Rumsey testified that, in her eight years, only one or two other taxpayers had ever requested the waiver to include credits to the taxpayer. (Tr. 126)

Pursuant to that letter agreement, the parties executed six separate "Waivers of Statute of Limitations" agreements, one for each of the three years in question for both sales and use taxes. (Petitioner's Ex. 2; Petitioner's Ex. 16 - Rumsey Depo. at 7-8; Tr. 125) The agreements were preprinted form documents but were amended in handwriting to include wording that the Department was also waiving the statute of limitations applicable to Ford for any "overpayments" by Ford or "refunds or credits" due Ford pursuant to the December 27, 1995 promise by the Department. (*Id.*) Although all of the waivers were not signed, the Department admitted that it proceeded as if all of the waivers were signed. (Tr. 124)

The parties also executed an agreement entitled "Sampling of Untaxed Purchases." (Petitioner's Ex. 5) The first two paragraphs of the agreement pertained to "non-inventory" items. The last paragraph was one sentence stating: "The fixed assets were examined 100%." (*Id.*) Mr. Laurentius testified that in his experience, fixed assets are always audited 100%, which he believes means that there is no sampling and both taxed and untaxed items are reviewed. (Tr. 55-57) In her deposition, Ms. Rumsey testified that non-inventory expenses would involve thousands of documents, and a sample of several months will supply a good prediction for other months. However, fixed assets are the type of expenses that may be done once in three years, such as adding on to an existing

plant, and do not provide a reliable prediction for the full period of the audit. (Petitioner's Ex. 16 - Rumsey Depo. at 16-17)

At trial, Ms. Rumsey testified regarding the phrase "fixed assets were examined 100%" and stated:

> Q: What does that mean to you as an employee of the Department of Revenue?
>
> A: As an employee of the Department of Revenue, we would have looked at the untaxed fixed assets and we would have made a determination if the fixed assets that were taxed were hitting the use tax returns.
>
> Commissioner Reine:
>
> Were what?
>
> The Witness:
>
> Sorry. We would look to make sure the fixed assets that were taxed, the amount of tax was flowing through to the use tax returns.
>
> Commissioner Reine:
>
> That means tax paid?
>
> The Witness:
>
> That means tax paid.

(Tr. 111; emphasis added.) In cross-examination, Mr. Rumsey admitted that a taxpayer could not receive a credit or refund if she had only looked at non-taxed items. (Tr. 130-

31) An overpayment or exemption could only be found if the auditors reviewed the fixed asset purchases upon which tax was paid. (*Id*.)

B. <u>The Audit Process</u>

(i) <u>Information That Was Reviewed</u>

The 1992-1995 audit began in 1996 and continued through February 1998. Ms. Rumsey stated that "we wanted to determine if tax was paid <u>and if tax should have been paid</u>." (Tr. 88; emphasis added.)[6] At trial, Ms. Rumsey testified that "we looked at a journal that contained taxed and untaxed items." (Tr. 88-89; *see also* Petitioner's Ex. 6C) Her testimony was that, in looking at both taxed and untaxed items, the auditors performed different functions. For taxed items she reviewed the list but did not look behind the transactions to see if they were properly taxed. Untaxed items, on the other hand, were reviewed and the auditors did look behind the transactions so that they could be taxed if tax needed to be paid. (*Id.*)

Mr. Leytham stated that he supplied the auditors with a "Purchase Summary" for the three-year period at issue that listed all purchases, taxed and untaxed (Tr. 74-75), and that the back-up documentation for the taxed purchases was available. (Tr. 78) Mr. Laurentius verified the fact that the auditors had been shown a "payable distributions journal" that showed all purchases, taxed and untaxed. (Tr. 63) He stated that he

---

[6] Ford interprets this to mean that the Department should have reviewed the purchase transactions on which tax was previously paid to see if there were overpayments, which the Department did not do.

believed it was a simple process for the auditors to review the back up for the taxed items. (*Id.*)

The auditors took the complete list of taxed and untaxed items and created a list of only those items or purchases where Ford had not paid tax, *i.e.* the untaxed purchase invoices. (Tr. 89-90; Petitioner's Exs. 6 and 6D) The auditors then traveled to Detroit, where the staff responsible for Ford's tax oversight was located. Again, the auditors only reviewed invoices on the untaxed items. (Tr. 91) The auditors performed two tasks when reviewing the list of untaxed items. First, they verified that the line item purchases were exempt. Second, they asked Mr. Leytham for information to explain why no taxes were paid on the purchases the auditors believed were taxable. If Mr. Leytham could not provide documentation to support a finding that the items were exempt or that tax had already been paid, the auditors recorded them as additional tax due from Ford. (Tr. 91-101) These transactions are shown on Petitioner's Exs. 6 and 6D as line items where there is no code in the "CD" column.

When the auditors verified that a great number of the untaxed purchases were in fact not taxable, they noted this on Exhibit 5 with a code (*e.g.* FR, LR and ME). This means that the auditors had confirmed that the purchases were exempt transactions (*e.g.* as freight, labor or machinery). They also found other purchases where the tax was in fact accrued or paid (using code TA and TP). (Tr. 46, 49-51) Mr. Laurentius testified that the auditors used the same process for confirming that the untaxed purchases were exempt as they could have used to ensure that the purchases on which Ford had paid tax were exempt. (Tr. 62-63) If the auditors had used the same process as they did on the

taxed purchases, Ford would have been entitled to a credit as an overpayment. However, since the auditors never looked at any of the purchases on which Ford paid tax, they never allowed Ford even one credit in the entire audit. (Tr. 31, 115, 123) Ms. Rumsey admitted that, had she reviewed a purchase order behind one of the "taxed" items and seen that it was for "labor," she would have allowed it as a credit. (Tr. 123)

(ii) The Alleged "Compliance" Audit

Ms. Rumsey testified that she believed that the auditors performed a "compliance audit" for the 1995-1998 period, which she agreed meant that they made sure that the taxpayer complied with Missouri laws on taxable transactions as well as exempt transactions. (Tr. 111-112; Petitioner's Ex. 3) However, she said that they conducted the audit under an assumption that, if the taxpayer paid tax on a purchase, "we feel like it is deemed correct." (Tr. 112) This was the only reason she proffered for why the auditors did not review any of the back-up data for the taxed items where Ford may have overpaid tax (double payment or payment on an exempt item).

Thus, for items coded 13 or 14 by Ford (codes indicating that tax was paid; *see* Petitioner's Ex. 6C), Ms. Rumsey stated that: "To the best of our ability, we verified that those were hitting or flowing through the use tax returns." They assumed the taxpayer made "zero mistakes" and "complied with the law" on items where Ford paid tax, but they assumed the taxpayer did not comply with the law and made all mistakes on every single item on which Ford paid no tax. (Tr. 119-120, 124) Ms. Rumsey testified that in her eight years at the Department she only reviewed untaxed purchases "unless otherwise

instructed." (Tr. 132)[7] Ms. Rumsey confirmed the Department's position in its Interrogatory answers that the auditors would "take into account credits due a taxpayer during an audit," but only if the taxpayer brought it to the auditors attention. (Petitioner's Ex. 13, Interrogatory Answer No. 6; Tr. 133)

C. The First Audit Results - Ford Pays State $1 Million

After completion of the 1992-1995 audit, the Department sent two letters to Ford, both of which were dated February 6, 1998. The first letter was a one page form that stated that the "tax compliance audit" was completed and asked Ford to sign off on the findings that Ford owed an additional $1,031,001.22 in use tax. (Petitioner's Ex. 8) The second letter attached numerous forms and exhibits from the audit and stated that the million-dollar payment was due "by February 27, 1998 [three weeks later]." (Petitioner's Ex. 7) On February 9, 1998, Mr. Leytham signed-off on a check requisition and attached it to the Department's list of detailed purchases where the auditors found that additional tax was due. The attachments broke down the $1,031,001.22 in additional tax as $755,284.11 in tax and $275,717.11 in interest. (Petitioner's Ex. 9)

The Department then proceeded to begin the next audit for the period October 1, 1995 through September 30, 1998. This time, Ford hired a consultant, Jim Laurentius, to review the findings of the 1992-1995 audit and to oversee the 1995-1998 audit. (Tr. 24-

---

[7] Ford contends that the December 27, 1995 letter agreement and handwritten changes on the waivers (to provide Ford credits for overpayments) fit the test for "otherwise instructed."

25). In preparing for the second audit, Mr. Laurentius found that the auditors had made numerous errors during the first audit that totaled over $1.5 million in refunds to Ford. (Tr. 31, 34-35; Petitioner's Ex. 10B) On November 17, 1999, less than two years after it paid the $1,031,001.22 in additional tax, Ford filed an "Application for Tax Refund/Credit" with the Department, requesting over $1.5 million in refunds arising out of the first audit. (Petitioner's Ex. 10) The categories of the audit were broken down in five columns on a spreadsheet (*Id.*) as follows:

Column 1 - Non-inventory (expense)		
Samples Credits	=	$446,446.68
Column 2 - Fixed Assets, Audit Error	=	$72,083.36
Column 3 - Fixed Assets, Exempt 13, 14	=	$468,931.13
Column 4 - Fixed Assets, Tax Paid Twice	=	$404,497.11
Column 5 - Fixed Assets, Exempt VA 60	=	$468,931.13
TOTAL REFUND	=	$1,505,272.23

The Department denied Ford's refund application, stating only that: "Based on the information presented, your application is denied." (Petitioner's Ex. 12) Ford then filed its Complaint in the Administrative Hearing Commission ("AHC"). In its Answer, and in response to Petitioner's Interrogatory No. 12, the Department stated that its only defense was that the three-year statute of limitations had expired. (L.F. 8-9, Petitioner's Ex. 13).

D. The Second Audit - The State Pays Ford $2.8 Million

During the 1995-1998 audit, Mr. Laurentius worked with the Department's auditors and showed them the back-up documentation that clearly demonstrated that Ford had paid taxes on exempt transactions and, therefore, Ford had overpaid its taxes on the second three-year period. The parties agreed that Ford owed approximately $750,000 on purchases where it had previously not paid taxes (approximately the same amount of the tax from the first audit). They also agreed that Ford was entitled to approximately $3.5 million in credits for exempt transactions. (Tr. 116) Mr. Laurentius testified that the exempt transactions from the second audit were essentially the same type of transactions as the ones involved in the first audit. (Tr. 34-35) The Department eventually issued a check to Ford, arising out of the second audit, in the amount of $2.8 million. (Tr. 116; Petitioner's Ex. 14) The parties both testified that the second audit was also a "compliance audit." (Tr. 38, 112)

E. Stipulations.

The parties agreed to the following stipulations of fact: 1) if the overpayments and exemptions set out in Petitioner's Ex. 10B had been brought to the attention of the auditors during the first audit, Ford would have received credits at least equal to the $755,284 that it paid in February 1998; 2) if Ford is successful on the statute of limitations issue, the Department will pay Ford the $1,031,001.22 that was paid at the end of the first audit plus statutory interest starting on the date payment was received at the Department (February 23, 1998); 3) in any case, the Department will at least pay Ford the

$72,000 that, in Ms. Rumsey's words, Ford "paid on the original return, and was also held in the audit findings when the audit was made."[8] (Petitioner's Ex. 16 - Rumsey Depo. pgs. 64-67, Petitioner's Ex. 10B - Column B (rounded off))

On May 7, 2002, the AHC, Hon. Willard C. Reine, issued its Findings of Fact and Conclusions of Law which held in favor of Ford and awarded it $1,031,001.22, plus interest accruing from February 23, 1998.

---

[8] In other words, the Department will pay Ford the $72,000 based on an admitted mistake in the audit.

POINTS RELIED ON

POINT I

(Responsive to Appellant's Point Relied On I.)

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN CONCLUDING THAT FORD'S REFUND APPLICATION WAS FILED "WITHIN THREE YEARS OF THE DATE OF OVERPAYMENT" IN THAT, AFTER THE DEPARTMENT OF REVENUE'S THREE-YEAR AUDIT, FORD PAID MORE USE TAXES THAN IT OWED AT THAT TIME AND THEN FILED A REFUND APPLICATION WITHIN THREE YEARS OF THAT PAYMENT DATE.

American Healthcare Management, Inc. v. Director of Revenue, 984 S.W.2d 496 (Mo. banc 1999)

Hern v. Carpenter, 312 S.W.2d 823 (Mo. 1958)

Brandon v. Nolan, 46 S.W.3d 94 (Mo. App. 2001)

Mary S. Riethmann Trust v. Director of Revenue, 62 S.W.3d 46 (Mo. banc 2001)

Dean Machinery Co. v. Director of Revenue, 918 S.W.2d 244 (Mo. banc 1996)

Cosky v. Vandalia Bus Lines, 970 S.W.2d 861 (Mo. App. 1998)

Tuttle v. Muenks, 21 S.W.3d 6 (Mo. App. 2000)

Staley v. Missouri Director of Revenue, 623 S.W.2d 246 (Mo. banc 1981)

§ 144.190.2, RSMo 1994

POINT II

(Responsive to Appellant's Point Relied On II A.)

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN RULING THAT FORD WAS ENTITLED TO A REFUND IN THAT THIS COURT COULD AFFIRM ON THE GROUNDS THAT FORD'S PAYMENT WAS THE RESULT OF A "MISTAKE" BY THE DEPARTMENT, FOR WHICH THE REFUND STATUTE DOES NOT HAVE A STATUTE OF LIMITATIONS.

American Healthcare Mgmt. Inc. v. Director of Revenue, 984 S.W.2d at 496 (Mo. banc 1999)

Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 449 (Mo. banc 1998)

§ 144.190.1, RSMo 1994

Rule 84.14

POINT III

(Responsive to Appellant's Point Relied On III B.)

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN RULING THAT FORD WAS ENTITLED TO A REFUND IN THAT THIS COURT COULD AFFIRM ON THE GROUNDS THAT THE DEPARTMENT FAILED TO PROVIDE VALID CONSIDERATION FOR FORD'S WAIVER OF THE STATUTE OF LIMITATIONS AND, THEREFORE, THE DEPARMENT'S IMPOSITION OF A TAX DUE WITHOUT CONSIDERING THE OVERPAYMENTS WAS VOID AS BEYOND THE STATUTE OF LIMITATIONS FOR COLLECTION OF TAXES.

Allison v. Agribank, FCB, 949 S.W.2d 182 (Mo. App. 1997)

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

Atlas Reserve Temporaries, Inc. v. Vanliner Ins. Co., 51 S.W.3d 83 (Mo. App. 2001)

§ 144.220, RSMo 1994

ARGUMENT

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

Interpretations of state revenue laws by the Administrative Hearing Commission are reviewed *de novo* and are upheld when authorized by the evidence and supported by competent and substantial evidence upon the record as a whole unless clearly contrary to the reasonable expectations of the General Assembly. *Sprint Communications Co. v. Director of Revenue,* 64 S.W.3d 832, 834 (Mo. banc 2002). "This Court considers only the evidence most favorable to the agency's decision, and essentially adopts the factual findings of the AHC." *Id., citing Hermann v. Director of Revenue,* 47 S.W.3d 362, 364 (Mo. banc 2001). In the case at bar, Ford contends that the AHC's reversal of the Department's denial of its refund application was based on the correct application of its findings of facts to § 144.190 and should be affirmed for three reasons.

First, Ford's November 17, 1999 refund application was filed within three years of its "overpayment" of the $1,031,001.22 in tax and interest paid in February 1998, pursuant to §144.190.2. (See Appendix A1 for full statute.) Ford's payment of the $755,584.11 in tax and $275,717.11 in interest clearly "overpaid" what rightly should have been its tax obligation to the State of Missouri at that time. If the Department had conducted a true "compliance audit" as promised at the beginning of the audit and as required by its own Audit Manual (and basic equity and fair government), the Department should have actually paid Ford approximately $750,000 (the $1,505,272 in exemptions and double payments less the $755,584 in additional taxes owed). Instead,

Ford paid $1,031,001.22 when it did not owe any taxes at that time.[9]

Second, Ford's payment of the $1,031,001.22 was a result of a "mistake," for which there is no statute of limitations. *See* § 144.190.1. The audit was conducted based on a mistake in the clerical procedures, i.e. a mistaken assumption by the auditors that they did not need to review Ford's "taxed" purchases, but only the "untaxed" purchases, in the audit. This was a mistaken interpretation of both the Department's own Audit Manual and of the basic accounting definition of a "compliance audit."

Third, the Department failed in its specific promise of consideration to support Ford's agreement to waive the statute of limitations applicable to the Department. Therefore, the Department should not have been able to enforce any of the waiver agreements whereby Ford waived the three-year statute of limitations imposed on the Department under § 144.220. Accordingly, the Department had no right to collect the $755,584.11 in tax and $275,717.11 in interest from Ford arising from the first audit and, therefore, the collection was both an overpayment and a mistake.

Ford believes that the conduct of the Department in this case and others is one of the reasons that major businesses continue to flee the State of Missouri. The state "cuts off its nose to spite its face" when it fails to treat major taxpayers in an evenhanded, equitable fashion that will generate far more revenue to the state in the long run, i.e. if the businesses stay in the state.

---

[9] The waiver period was still in effect at this time such that Ford was not time-barred from recovering any overpayments.

POINT RELIED ON I

(Responsive to Appellant's Point Relied On I.)

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN CONCLUDING THAT FORD'S REFUND APPLICATION WAS FILED "WITHIN THREE YEARS OF THE DATE OF OVERPAYMENT" IN THAT, AFTER THE DEPARTMENT OF REVENUE'S THREE-YEAR AUDIT, FORD PAID MORE USE TAXES THAN IT OWED AT THAT TIME AND THEN FILED A REFUND APPLICATION WITHIN THREE YEARS OF THAT PAYMENT DATE.

A. The Governing Statute

If Ford's refund application was filed within three years of an "overpayment," of "any tax," then the decision of the AHC should be affirmed. Ford relies on § 144.190.2, which provides:

> If **any tax**, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.010 to 144.510, 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 of the date of overpayment**. (Emphasis added.)

Ford's payment of the $755,584.11 in tax and $275,717.11 in interest on February 23, 1998 was for additional use tax on previously untaxed purchase items for the 1992-1995 audit period. Ford filed its application for refund in November 1999, well within

three years from that date. This was an undisputed "overpayment" of its tax liability for that same period, based on over $1.5 million in exemptions and overpayments on previously taxed purchase items. The Department has stipulated to the fact that there was an overpayment of taxes if the statute of limitations did not expire by the date of Ford's refund application. (Petitioner's Ex. 16; Rumsey Depo. at 64) The tax that Ford overpaid was "any tax" that was "erroneously or illegally computed," as it was based on an improper review of only untaxed items, i.e. a flawed "compliance audit." Moreover, the Department "erroneously or illegally collected" the tax in those circumstances. Thus, Ford's refund application should have been granted summarily.

As discussed *infra* at pp. 34-35, the Missouri legislature did not follow the more common state and federal tax refund provisions in which the statute accrues three years from the date **the tax return is filed**. Rather, the statute accrues three years from the date of **overpayment**. However, the Department wants to substitute the latter words into the statute such that the statute of limitation begins on the date the tax return is filed, not the date of overpayment. The AHC decision agreed with Ford's contention that, if Ford made an "overpayment" of "any tax," it had three years to claim the refund. It is fair to assume that the Missouri legislature chose the language in the refund statute to allow taxpayers to obtain refunds for overpayments arising from audits that are performed long after the tax returns are filed.

B. The State Will Benefit $750,000 Even if Ford Wins This Appeal

The Department also ignores the fact that, even if Ford is successful on this appeal, it will still have only recovered half of the amount of use taxes that it should not

have originally paid the State of Missouri.[10] If the Department had kept its agreement and given Ford credit for "overpayments found in the audit," Ford would have received approximately $750,000 as a credit after the audit. Instead, it received a bill for $755,584.11 more in taxes, plus interest. Ford acknowledges that it can no longer recover the full $1.5 million in overpayments that it made during the 1992-1995 audit period, but Ford emphasizes that, even if the AHC decision is affirmed and Ford recovers the $755,584.11 in taxes (and $275,717.11 in interest), Ford greatly overpaid its tax obligation in February 1998 and the State of Missouri will have recovered $750,000 more in use taxes than it was actually due.

C. The "Tax Compliance Audit"

The Department misunderstands Ford's argument on the "tax compliance audit" that Ford contends was required.[11] This type of an audit looks for the *correct* amount of tax due from a taxpayer under all of the applicable statutes. This means that the laws on tax exempt transactions as well as taxable transactions must be taken into consideration. This "two-way" audit was not only required by the parties' express agreements in the December 27, 1995 letter and ensuing waivers, but it was required by the Department's

---

[10] As noted in the Statement of Facts, the most significant reason for this overpayment was Ford's agreeing to the Department's request to "Direct Pay" its use tax, the accounting for which it was ill-prepared to handle.

[11] This argument is addressed in more detail in Point Relied on II, but is essential to this Point as well.

own Audit Manual and, according to all of the testimony presented to the AHC, by general accounting principles. It is, in fact, the way audits are performed in other states and with both Missouri and federal income tax audits. (Tr. 36; Petitioner's Ex. 18, pp. 5-6.)

The Department's only excuse for the auditors not checking out whether Ford was complying with the laws on exemptions as well as the laws on taxes due, is that Ford did not bring the records with possible credits to the auditors' attention. Setting aside the fact that this requirement is not supported by any document in the record or expert testimony,[12] it is contrary to the letter agreement that gave rise to Ford agreeing to the audit. If the Department was not going to conduct an audit wherein it could find possible credits without Ford's "bringing the documents to the auditor's attention," the December 27, 1995 letter (Petitioner's Ex. 1) should have been written to say that the waiver would be altered to include "overpayments, but only if Ford brings proof of credits or exemptions to the auditor's attention." Instead, the actual language said that the waiver can be altered to include "overpayments found in the audit," which clearly indicates that the auditors would be looking for the same.

The Department has admitted that Ford's interpretation of § 144.190.2 is correct in the context of an audit. Prior to and after the audit in question, the Department published

---

[12] Ford presented testimony and documents to show that it was the auditor's job to review documents that would ensure that the taxpayer was complying with all the tax laws. *See* Tr. 111-112; Petitioner's Ex. 3; Petitioner's Ex. 3A (Audit Manual); Tr. 36, Tr. 135-136; Petitioner's Ex. 16 - Rumsey depo. p. 28.

information for the benefit of taxpayers titled "Frequently Asked Questions About an Audit" ("FAQs"). *See* Petitioner's Exhibit 4.[13] The following question and answer are set forward in the FAQs:

> Q. How do I apply for a refund of tax for an audited period after the audit is complete?
>
> A. If additional documentation is obtained after a sales/use tax audit is completed that supports an exemption you may apply for a refund for up to three years after the tax was paid.[14] (Emphasis added.)

Ford reads the Department's FAQ answer (which was issued for the benefit of taxpayers outside the context of litigation) as consistent with Ford's interpretation of § 144.190.2. It is stipulated that the audit supported at least $755,584 in exemptions and overpayments (and Ford's evidence supported $1.5 million in such credits). Ford overpaid its taxes when it paid $755,584.11 at a time when a true compliance audit would have supported $1.5 million in credits and, therefore, a refund to Ford of almost $750,000. The Department initiated the audit, and obtained the waiver of the statute of limitations

---

[13] Out of an abundance of caution, Ford took the deposition of John Feldmann, the Department's Bureau Administrator of Field Audits. (Petitioner's Ex. 18) He verified that the Department's positions set out in Petitioner's Exs. 3, 4 and 13 were also true during the years 1995 through 1998.

[14] The FAQ answer also requires a refund application and amended return, both of which were filed by Ford.

applicable to its collection actions pursuant to § 144.220, based on an agreement to give Ford credit for the overpayments or other credits (exemptions). The Department simply did not keep its word.

D. Statutory Construction Rules Support Ford

When considering the meaning of a statute, the primary rule is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning. *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999). "Absent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary." *Id.* Only when a statute is ambiguous or if its plain meaning would lead to an illogical result should a court look past the plain and ordinary meaning. *Pierce v. Director of Revenue*, 51 S.W.3d 888, 890 (Mo. App. 2001). Ford contends that the plain and ordinary language of §144.190.2 clearly states that when "any tax" has been erroneously or illegally collected or computed, the taxpayer has three years from "the date of overpayment" to file a claim for refund. Ford's payment was made on February 23, 1998 and the refund application was filed on November 17, 1999, well within the three-year period.

Webster's Third New International Dictionary (1993) defines "overpayment" as follows: "payment in excess of what is due." If the words "what is due" are viewed objectively, Ford was actually due approximately $750,000 after the first audit, because when Ford paid $755,000 in additional taxes, it was due $1.5 million in credits. The payment of $755,000 plus interest was clearly an "overpayment" under this definition.

The above dictionary definition of "overpayment" would have to be tortured and twisted beyond recognition to be construed consistent with the Department's arguments. The Department clearly admitted to the public in its FAQ that the term "overpayment" in § 144.190.2 is sufficiently broad to include an interpretation that, if a taxpayer pays any tax within three years of a payment arising from an audit, the taxpayer can recover "any tax… erroneously collected … within three years of the date of overpayment."

Nonetheless, the Department argues that Ford overpaid its use taxes during the period 1992 to 1995 and, therefore, the refund was beyond the statute of limitations. However, this completely ignores the plain and ordinary meaning of the statutory language which does not refer to the date of the tax return but only the overpayment. It also ignores the fact that there was an audit and promises made concurrent with that audit. The Department's argument begs the question - - why 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? After the audit, the Department only gave Ford three weeks to pay the erroneously calculated taxes and interest. The only fair interpretation of the law in these circumstances is to permit Ford three years to determine whether the tax it paid after the audit was indeed an overpayment. This interpretation is clearly supported by the plain and ordinary meaning of the statute which permits refund claims three years "from the date of overpayment."

The Department also made an acknowledgment to Ford that the "normal refund process" did not apply to overpayments arising from audits. Specifically, the Department's December 27, 1995 letter to Ford's General Counsel stated that "any

overpayments made to supplies before June 1, 1993 would go through the normal refund process." It is obvious that the payments after June 1, 1993 (the ones in question here), would **not** go through "the normal refund process" because the overpayment could arise from an audit that could take several years. In short, the three-year limitations period for overpayments resulting from an audit could only begin once any post-audit payment was made.

Again, the Department's answer to a simple and straightforward FAQ agrees with Ford's interpretation. In fact, any other interpretation of the FAQ would make the Department's answer meaningless, in that audits are always after-the-fact.[15] In other words, a three-year audit does not even begin until the first year of the three-year period subject to the audit has run out of statute (e.g. the limitations period on the 1992 year was beginning to expire when the audit was begun in January 1996.) The only reasonable interpretation of § 144.190.2 is that, if the audit caused an overpayment by reason of the taxpayer paying additional tax, and payment of that additional tax was erroneous, the

---

[15] The Department apparently misunderstood the importance of the FAQ exhibit at trial, as it questioned whether anyone at Ford actually saw and relied on Petitioner's Exhibit 4. However, Ford does not offer the Department's FAQ answer to show that Ford relied on the same, but as an admission by the Department as to how the language on the three-year period for overpayments should be interpreted after the Department performs an audit.

taxpayer should still have three years from the date of that overpayment in which to file for a refund.

The Department further argues that the only time frame in which Ford's February 1998 payment could be considered an "overpayment' was the time remaining on the last waiver of the statute of limitations, which expired in December 1998. (Petitioner's Ex. 2) However, this argument presupposes that Ford completely disregarded the following, uncontested facts when it made the February 1998 payment:

1) The plain reading of the refund statute that entitled Ford to seek an "overpayment" within three years of the payment of "any tax" that has been "paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed";

2) The Department's December 27, 1985 letter (Petitioner's Ex. 1) and the ensuing waivers, which clearly indicated that overpayments would be considered;

3) The Department's letter of February 6, 1998 (Petitioner's Ex. 8), which indicated that "the tax compliance audit" was completed, which further supported the fact that a true "compliance audit" had been performed.

Ford had no reason and no opportunity to do its own audit of the Department's audit to determine whether overpayments had truly been considered as the Department had agreed to do. The Department's letter demanded payment within twenty-one days after a two-year long, exhaustive audit by the Department. In short, the fact that there was still time remaining on the waiver period does not and could not supercede the three year statutory period for overpayments. Further, not only could the waivers never legally

supercede the statutory time frame, the Department should not now be permitted to rely on the waivers, when the Department completely disregarded those same waivers with respect to the Department's own agreement to consider overpayments. In fact, if the Department had complied with its own letter committing it to consider taxes paid for credit against tax due and waivers, there never would have been tax due.

Further, since the point of any statute is to apprise the public of the law, the plain reading of § 144.190.2, in the context of an audit, permits the taxpayer to recover "**any** tax" wrongly collected or computed "within three years of the date of overpayment." The Department ignores the word "any" in its argument that the word "tax" could not include the additional new tax arising from the audit. Every word of a legislative enactment must be given meaning. *Staley v. Missouri Director of Revenue,* 623 S.W.2d 246, 250 (Mo. banc 1981). Ford contends that the ordinary person would read the plain language of § 144.190.2 to consider "any tax" a tax previously paid which, combined with the payment of the tax resulting from the audit, made the payment of "any tax" an overpayment.

E. Strict Construction of Refund Statues Not Applicable if Department's Interpretation of Statute Creates Ambiguity

The Department relies almost entirely on the rule of statutory construction that refund provisions are strictly construed against the taxpayer. *Sprint Communications, supra.* As the Court stated in *Hern v. Carpenter,* 312 S.W.2d 823 (Mo. 1958), "[s]uch rule of construction, however, should not force a conclusion that the legislative intent was

other than a reasonable construction of language used in the circumstances shows it to be." *Id.* at 826, *citing American Bridge Co. v. Smith,* 179 S.W.2d 12, 16 (Mo. 1944).

Further, the primary rule of statutory construction is to determine the intent of the legislature. *American Healthcare, supra*. The primary purpose of §144.190.2 is to waive sovereign immunity and permit refunds for certain overpayments of taxes.

The secondary purpose of §144.190 is to impose a statute of limitations upon those refund actions. There is no question that the refunds in question are owed unless barred by the statute of limitations. "[S]tatutes of limitations are shields, 'primarily designed to assure fairness to defendants by prohibiting stale claims, those where evidence may no longer be in existence and witnesses are harder to find, all of which tends to undermine the truth-finding process.'" *Brandon v. Nolan,* 46 S.W.3d 94, 97 (Mo. App. 2001). None of the reasons for the "shield" of the limitations period in question is furthered by the Department's interpretation of § 144.190.2 in this instance.

The Department has been auditing Ford with three-year audits non-stop since 1992. At no time has Ford failed to cooperate, as it has signed waivers, made all records and staff available and paid all taxes due (and more). There has never been any concern under these circumstances about stale claims, much less missing witnesses or evidence. Most importantly, the element of "fairness" is solely one that Ford can claim, as it unequivocally overpaid its taxes and the Department, at best, misinformed Ford as to the nature of the audit.

Additionally, the Department seeks to invoke this principle of strict statutory construction based on a reading of the statute that makes the word "overpayment"

ambiguous at best, i.e. it wants the term "overpayment" to be tied to the date that the return was filed. Ford does not deny the general rule on strict construction on exemption and refund provisions. However, if the Department wants to read the statute such that the wording is ambiguous, then this rule is tempered, if not overcome, by the rule of statutory construction that requires ambiguities in taxing statutes to be construed in favor of the taxpayer and against the taxing authority. *Mary S. Riethmann Trust v. Director of Revenue,* 62 S.W.3d 46, 48 (Mo. banc 2001). *See also, Spradlin v. City of Fulton,* 982 S.W.2d 255, 258 (Mo. banc 1998)(courts may look outside the plain meaning of the statute "when the language would lead to an illogical result."). *See also Conoco, Inc. v. Iowa Dept. of Revenue and Finance,* 477 N.W.2d 377, 379 -381 (Iowa 1991)(the Iowa Supreme Court found that its refund statute was ambiguous with respect to the timing of the refund claim and stated that "we give the statute of limitations provision in section 422.73(2) an interpretation favorable to the corporate taxpayers.").

Basically, the Department wants this court to read words into the Missouri refund statute that are not present, i.e. that the claim for refund must be made "within three years *after the return upon which a refund or credit claimed became due.*"[16] Again, this is not

---

[16] This is the language in the Iowa statute in the *Conoco* case. It is virtually identical to the language in 26 U.S.C. § 6511(a) governing federal income tax refunds. *See also* Maryland Code Art. 81, § 310(b). Even with this more restrictive language governing refunds, the Iowa court in *Conoco* and the Maryland court in *Comptroller of Treasury,*

the language contained in the Missouri statute. This type of refund statute of limitations provision hinges on the date that the tax return is filed, unlike the Missouri statute. The Missouri General Assembly chose a different approach; it chose to ignore any mention of the filing of the return and instead concentrated solely on the date of an "overpayment." The term "overpayment" is not tied to any event except the paying of the overpayment, and definitely not on the filing of the return. This Court "must be guided by what the legislature said, not by what the court thinks that it meant to say." *Metro Auto Auctions v. Director of Revenue,* 707 S.W.2d 397, 410 (Mo. banc 1986). The court may not add words to a statute that is clear and unambiguous. *Dean Machinery Co. v. Director of Revenue,* 918 S.W.2d 244 (Mo. banc 1996); *Asbury v. Lombardi,* 846 S.W.2d 196, 198 (Mo. banc 1993).

F. Sampling Agreement

A final issue to resolve is the Department's reliance on Petitioner's Exhibit 5, the Sampling Agreement. The Department interprets the words "fixed assets were examined 100%" to mean that Ford could not expect the auditors to review any taxed purchases. First, this is contrary to the auditor's own testimony. (Tr. 111) It is undisputed that the auditors were shown lists of all purchases, taxed and untaxed. (Tr. 63-64, 78, 88-89, 105, 111) Second, the Department's interpretation of the Sample Agreement is wholly inconsistent with the contemporaneous, December 27, 1995 letter from the Department to

---

Income Tax Division v. Diebold, Inc., 369 A.2d 77, 81 (Md. 1977), read the refund statutes liberally in favor of the taxpayer.

Ford (and waivers) where the Department agreed to consider "overpayments." This is contrary to the rule that contemporaneous agreements should be read together to seek intent of parties. *Forty-Three-O-Six Duncan Corp. v. Security Trust Co.*, 372 S.W.2d 16, 23 (Mo. 1963). Moreover, if the auditors only considered the taxed fixed asset purchases, the letter agreement and the waivers (Petitioner's Exs. 1 and 2) were meaningless. This is again contrary to the rule that even seemingly contradictory provisions of agreements must be harmonized and the court should avoid a meaningless construction. *Cosky v. Vandalia Bus Lines*, 970 S.W.2d 861, 865 (Mo. App. 1998); *JEP Enterprises, Inc. v. Wehrenberg, Inc.*, 42 S.W.3d 773, 776 (Mo. App. 2001).

In order to harmonize the various agreements initially executed by the parties, it must be assumed that an overpayment or exemption could only be found if the auditors reviewed the fixed asset purchases upon which tax was paid, i.e. the "taxed transactions." The Department's interpretation not only renders the letter and waivers meaningless but it assumes that Ford intended a nullity. People are presumed not to intend a nullity. *Tuttle v. Muenks*, 21 S.W.3d 6, 9 (Mo. App. 2000). It is impossible for an overpayment to be discovered from a review of only the untaxed transactions, since, by definition, no tax was ever paid, much less overpaid. Thus, the Sampling Agreement's language could not reasonably be interpreted to mean that there would not be a review of taxed purchases of fixed assets.

For all of the above reasons, Ford's use tax payment in February 1998 was an "overpayment" of "any tax " and the refund application filed in November 1999 was not barred by the statute of limitations.

POINT RELIED ON II

(Responsive to Appellant's Point Relied On II A.)

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN RULING THAT FORD WAS ENTITLED TO A REFUND IN THAT THIS COURT COULD AFFIRM ON THE GROUNDS THAT FORD'S PAYMENT WAS THE RESULT OF A "MISTAKE" BY THE DEPARTMENT, FOR WHICH THE REFUND STATUTE DOES NOT HAVE A STATUTE OF LIMITATIONS.

As the Department's brief concedes, the AHC's decision should be affirmed if Ford is entitled to relief on any ground. Rule 84.14. Thus, the next two Points Relied On address arguments that were made to the AHC but which were not reached because of its ruling in favor of Ford on the overpayment issue.

Section 144.190.1 provides that "[i]f a tax has been incorrectly computed by reason of a clerical error or mistake on the part of the director … the balance shall be refunded to the person legally obligated to remit the tax…." There is no limitations period in this subsection, three years or otherwise. The word "mistake" must be interpreted in its plain and ordinary, dictionary definition. *American Healthcare Mgmt. Inc. v. Director of Revenue*, 984 S.W.2d at 498. The dictionary definition of "mistake" includes "1. a misunderstanding of the meaning or implication of something…; 2. a wrong action or statement proceeding from faulty judgment…; 3. an erroneous belief…." *Webster's Third New International Dictionary*, p. 1446 (1993). The auditors' attempt to perform a compliance audit or even to comply with the promise made to Ford in

December 1995 was clearly and unequivocally a "mistake" under all three subparts of this definition.

Ford contends that the Department's interpretation of the term "Compliance Audit" was "mistakenly" applied by the Department's auditors in this case, which would mean that there was no statute of limitations applicable and Ford's refund application must be allowed. The Department's letter demanding the $1,031,001.22 in taxes stated that it had completed its "tax compliance audit." (Petitioner's Ex. 8) Yet this was not the type of audit that was performed in the first audit.

The Department's own "Audit Manual," Chapter VI, titled "Audit Process," provides that:

> It is the duty of the department's tax auditors to conduct compliance audits in the areas of sales, use and withholding tax. These audits serve the purpose of **bringing as many taxpayers as possible into compliance with the tax laws of Missouri**. It is a straightforward process that the department attempts to make as simple as possible.
>
> * * *
>
> It is the department's goal to assist the taxpayer and simplify compliance with Missouri tax laws. At part of this goal is a desire **to make the audit process as educational and beneficial to the taxpayer as possible**. (Emphasis added.)

(Petitioner's Ex. 3A) This definition of "compliance audit" provides that the auditor should ensure that the taxpayer is in compliance with the exemption, as well as the assessment, statutes.

Before Ms. Rumsey had any idea that Ford was going to argue the meaning of "compliance audit," she admitted that "compliance with the tax laws of Missouri" include the statutes on tax assessments as well as exemptions. (Petitioner's Ex. 16 - Rumsey Depo. at 28)[17] When asked what she believed a "compliance audit" was, she stated:

> A. We look at -- we look at items that are untaxed, and we also -- we look at items that are untaxed. **If we see something that is taxed that shouldn't be taxed, we make the taxpayer aware of it**. But if there are items that the company taxes, because they know their company better then we know their company, we do not question it, every taxed item.
>
> Q. And that's your understanding of the compliance audit?
>
> A. Right. **But if we see something that is taxed that shouldn't be, we point that out to the taxpayer**. We look at untaxed items, of course, to see why tax wasn't paid.

(Petitioner's Ex. 16 - Rumsey Depo. at 27; emphasis added.)

---

[17] The deposition transcript says "expenses and overpayments." It should read "exemptions and overpayments," as this is what was actually stated by Petitioner's counsel.

Unfortunately, Ms. Rumsey and her staff did not "point out" any exemptions to Ford, even though the auditors clearly had the list of all purchases, taxed and untaxed. This is hardly excusable because the auditors were easily able to find the support for exemptions on the untaxed purchases. (*See* Petitioner's Exs. 6 and 6D) It is simply unconscionable for the auditors to have the means to easily review the "taxed" purchases using the same methodology that they used for the untaxed purchases and yet do nothing to review those taxed purchases. In fact, they easily performed this same, exact task when they performed the second audit, where the same auditors allowed Ford approximately $3.5 million in exemptions and other overpayments above the $750,000 in new tax due on previously untaxed purchases, resulting in the $2.8 million refund paid to Ford.[18]

Ford's tax consultant and trial expert, Mr. Laurentius, defined a "compliance audit" as follows:

> I believe a compliance audit is meant to insure that a taxpayer complies with the laws in respect to his total tax liability. Compliance with the law would mean that the taxpayer would be complying with the taxing statutes as well as the exemption statutes. (Tr. 36)

---

[18] Particularly troublesome is the auditor's testimony that they looked at the taxed transactions "to the best of our ability" to see if they were "hitting the returns." (Tr. 199-120) Apparently, the best of their ability was an extremely cursory review.

Both Mr. Laurentius and the Department's supervisor, John Feldmann, agreed that the Department's income tax division's audits were two-way audits, i.e. exemptions or overpayments were reviewed and allowed to the taxpayers as part of the audit. (Tr. 36, 2 Petitioner's Ex. 18, Feldmann Depo. p. 5-6.) Mr. Laurentius further testified that, in his experience as a tax accountant and consultant he has found that the IRS and the departments of revenue in the other states in which he has worked, Kentucky and Illinois, perform audits under his definition of compliance audit - - and there is no requirement that the only credits allowed by the auditor are those that the taxpayer "brings to the attention of the auditor." (Tr. 135-136)

Mr. Laurentius flatly disagreed with the Department's interpretation of the term compliance audit for purposes of this one audit. *Id.* His definition was, however, essentially the same as the definition in the Department's Audit Manual, as that manual required a "two way" audit, i.e. it required compliance with all laws of Missouri so as **"to make the audit process as educational and beneficial to the taxpayer as possible."** (Petitioner's Ex. 3; emphasis added.) A "one-way" audit cannot, by definition, be beneficial to the taxpayer and it certainly is not educational if it does not teach the taxpayer how the exemption laws work, especially when the Department knew that Ford was doing Direct Pay for the first time.

Mr. Laurentius further provided expert testimony that "the most educated person [in the audit] is most likely the auditor" and it is part of their duty to determine "how the manufacturer is operating." (Tr. 43) The testimony of both Mr. Leytham and Ms. Rumsey shows that the parties did get together during the first audit to go over the

operations of the Ford plant. (Tr. 70-71) The problem is that the auditor's knowledge of those operations was only used for the purpose of assessing additional taxes owed against Ford and not to find any exemptions or overpayments.

The Department's version of a compliance audit simply fails to accomplish the goal set out in its own Audit Manual - - "to make the audit process as educational and beneficial to the taxpayer as possible." If the Department would have looked at some of the taxed purchases and found that Ford was paying taxes twice or on exempt transactions, the auditors could have truly "educated" the taxpayer and made the audit "beneficial" to Ford in the manner that the Audit Manual dictates should be done. In fact, it would likely have avoided the same mistakes that led to Ford overpaying again over the next three years. Indeed, Ford again had to pay almost the same amount of additional tax in the second audit as it did in the first audit, approximately $750,000. A true compliance audit the first time could have helped the Department avoid having this happen and it would have avoided the Department having to pay Ford at least some of the $2.8 million refund after the second audit, as Ford would have not paid tax on exempt items. Ford contends that a taxpayer should not have the burden of hiring a tax consultant such as Mr. Laurentius to ensure that the Department is doing its job.

Ford does not contest the fact that, outside the context of a compliance audit, a taxpayer is assumed to know the law and file for refunds if it overpaid its taxes. In other words, if Ford and the Department had not agreed to specified conditions for the audit, i.e. that the Department would do a tax compliance audit and consider overpayments, Ford would not be here. But this was not the case. Indeed, on December, 27, 1995, Ford

was still within the original three year statute from the date it filed its tax returns and could have performed its own audit, discovered the exemptions and filed for timely refunds. However, the audit agreement and waivers made that unnecessary.

It would be one thing if the taxpayers of this state were forewarned that the Department's auditors were only out to get more sales tax, as the case appears here. However, the Audit Manual and the specific promises made by the Department in this case gave Ford just the opposite message, as the letter and waiver agreements, as well as the published information from the Department, lead Ford to believe that the audit would be two-ways, i.e. looking at both taxed and untaxed items so that the audit would be "educational" and "beneficial" for the taxpayer. Ford respectfully submits that it is time for this Court to send a message to the Department that henceforth, it should honestly ensure that the taxpayer is complying with all tax laws, both tax assessment and tax exemptions, and truly make the audits an educational and beneficial experience.[19] There is no question that such an audit procedure will benefit both the state and the businesses in Missouri in the long run.

The Department argues that the term "mistake," while not defined in Chapter 144, should be interpreted to mean a mistake in writing or copying, including an omission to write, the same as the law concerning *nunc pro tunc* orders. The Department cites to *Higher Education Assistance Foundation v. Hensley,* 841 S.W.2d 660, 662-63 (Mo.

---

[19] There is no reason that sales/use tax audits should not be "two-way" audits in the same fashion as the audits by the Department's income tax division.

1992), a case involving a lender's action on a note against a borrower. The trial court heard evidence and sustained the borrower's motion to dismiss at the close of the evidence. Twenty-two days after the entry of the judgment, the lender filed a motion to amend the judgment or, alternatively, for a new trial. Specifically, the lender asked that the court add the words "without prejudice" to the order dismissing the action. The trial court sustained the motion for new trial. The docket entry read: "Court considers plaintiff's motion for new trial and after due consideration the court sustains said motion." The borrower appealed the judgment. The case was transferred from the Missouri Court of Appeals to the Missouri Supreme Court. Following transfer the lender filed a motion for leave to permit the trial court to correct a clerical mistake in the entry of the judgment pursuant to Rule 74.06. The Supreme Court held that Rule 74.06 limits itself to clerical mistakes "arising from oversight or omission." *Id.*

The Department's reliance on the *Hensley* case is misplaced, as the case is obviously not even remotely on point with respect to this use tax refund action. *Hensley* construes Rule 74.06, which is not at issue here, and holds that, in the context of that rule, the term "mistake" has a specific meaning. The term "mistake" in § 144.190.1 must be considered in the context of tax refunds, not actions involving the interpretation of court rules. The *Hensley* case is limited to the very specific body of law concerning *nunc pro tunc* orders modifying prior court orders after the appeal period has passed. The law definitely requires the alleged error to be in writing or, in rare circumstances, where an "omission to write" is clear from the record. In short, the *Hensley* case is not controlling on the statute (or the facts) at issue in the case at bar.

The refund statute does not require the mistake to be "in writing" and the Department cannot imbue the statute with such a requirement. "[W]hen statutory language is clear, courts must give effect to the language as written. Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language." *Emery v. Wal-Mart Stores, Inc.* 976 S.W.2d 439, 449 (Mo. banc 1998). Again, the plain and ordinary meaning of mistake is "1. a misunderstanding of the meaning or implication of something…; 2. a wrong action or statement proceeding from faulty judgment…; 3. an erroneous belief…." *Webster's Third New International Dictionary*, p. 1446 (1993).

The Department has admitted that "[i]f the auditor had been aware of such credits or overpayments and did not take them into account such may have constituted a clerical error." (The Department's AHC brief, p. 14; Appendix A2 – A4) The fact is that the auditors were shown a list of all of the taxed purchases but simply did not write them down when they created their own list of only untaxed purchases. As noted earlier, in one instance, the auditor reviewed a taxed purchase (Code 14) that was an exempt labor transaction and did not look further to allow the exemption. (Petitioner's Ex. 6D; Tr. 32)[20] These failures to consider the taxed transactions at all, especially in light of the promises made, is clearly "a wrong action…proceeding from faulty judgment" and the

---

[20] She admitted that, had she reviewed the back-up documentation, she would have allowed the credit. (Tr. 123)

auditor's belief that they did not need to review any taxed purchases in a compliance audit was an "erroneous belief."

Additionally, the procedures used by the auditors (in the first audit) were simply wrong because they were mistaken in the manner by which they conducted the very basics of any audit of a tax return. The auditors did not ensure that the purchases on which tax was paid "tied into the returns," i.e. the returns properly reflected the taxes due. (*See* Petitioner's Ex. 16, Rumsey Depo. at 12.) The Department's key witness, auditor Stacey Rumsey, admitted that the auditors did not reconcile any of the transactions on which Ford paid tax with the tax returns - -a fundamental of accounting. (Tr. 114-115, 127-128) She admitted that the auditors simply "assumed" that the taxpayer had correctly paid tax on all of the taxed items. (Tr. 119, 127) The auditors "did not individually examine the taxed items" and therefore, allowed absolutely no credits to Ford in the audit. (Tr. 115) The only proper way to conduct a compliance audit is to verify, not just assume, that the taxes on the taxed purchases were actually, not assumedly, "hitting the return," i.e. the taxed items were tying in with the tax return and tax was being properly accounted for.

In the second audit, the auditors did follow the proper procedures and reviewed the taxed items as well as the untaxed items. In so doing, the auditors found $3.5 million in credits due to Ford to offset the $750,000 in additional taxes due from Ford. The sole reason the auditors allowed those credits was because "there were consultants" for Ford at the second audit. (Tr. 116) In other words, if the taxpayer hires an expert to ensure that the auditors are doing a proper compliance audit, these public servants will then and

only then properly perform their job. Ms. Rumsey's testimony in this regard is contrary to her own admission in cross-examination that, "as taxing authority for the State of Missouri, [she] had an obligation to educate the taxpayer regarding which transactions are taxable or exempt." (Tr. 120) (Emphasis added.) In short, the Department's position is that taxpayers cannot trust their own public servants to do an honest or proper audit unless they hire "auditor police."

POINT RELIED ON III

(Responsive to Appellant's Point Relied On III B.)

THE ADMINISTRATIVE HEARING COMMISSION DID NOT ERR IN RULING THAT FORD WAS ENTITLED TO A REFUND IN THAT THIS COURT COULD AFFIRM ON THE GROUNDS THAT THE DEPARTMENT FAILED TO PROVIDE VALID CONSIDERATION FOR FORD'S WAIVER OF THE STATUTE OF LIMITATIONS AND, THEREFORE, THE DEPARMENT'S IMPOSITION OF A TAX DUE WITHOUT CONSIDERING THE OVERPAYMENTS WAS VOID AS BEYOND THE STATUTE OF LIMITATIONS FOR COLLECTION OF TAXES.

At the time the 1992-1995 audit was requested, the three-year statute on the Department's ability to bring an action against Ford for overdue use tax was about to expire. *See* § 144.220. The Department requested that Ford agree to extend the statute of limitations, which it did, based solely on the Department's promise that it would consider both taxes due and overpayments found in the audit. (Petitioner's Ex. 1) In light of the Department's failure to uphold its end of the agreement that supported Ford's waiver, which enabled the Department to collect any tax from Ford, that waiver is void for failure of consideration.

"As a general rule, consideration is a necessary element for establishing the existence of a valid contract." *Allison v. Agribank, FCB*, 949 S.W.2d 182, 188 (Mo. App. 1997). In this case there was failure of consideration because the Department failed to

fully perform its part of the contract when it did not look at any taxed purchases, which are the only transactions that could have resulted in an "overpayment" of tax.

The parties amended the "Waivers of Statutes of Limitations" in this action. (Petitioner's Ex. 2) The Department cites to *St. Louis Country Club v. Administrative Hearing Comm'n*, 657 S.W. 2d 614, 616-17 (Mo. banc 1983), for its holding that the Department's "refraining from issuing an assessment based on an estimate," is sufficient consideration for the waivers. However, in the case at bar, there was additional consideration promised to Ford, as the waivers were amended to provide that the waivers would go two ways - - to "all Statutes of Limitation pertaining to additional assessments and overpayments." (Petitioner's Ex. 2; emphasis added.) (In some of the waivers the words "credits or refunds" were substituted for the word "overpayment.")

The Department did not perform its side of the December 27, 1995 agreement because it failed to even look for overpayments or exemptions. While a waiver such as the ones in question can be valid, they are effective "in accordance with their terms." *St. Louis Country Club, supra.* There, St. Louis Country Club argued that a waiver it had signed was invalid and of no effect. The Court held:

> We hold that the waiver executed by this taxpayer is a valid contractual agreement, supported by consideration, and that it is effective in accordance with its terms. The taxpayer might fear a hasty and inaccurate assessment if it declined to enter into a waiver agreement requested by the revenue authorities, or might believe that, by entering into the waiver agreement, it could possibly negotiate a satisfactory resolution of the controversy.… We

> conclude that a waiver entered into in order to permit further examination and possibly negotiation is not forbidden by any provision of law, serves a proper purpose, and should be given effect.

Id. at 617. (Emphasis added.) The key language is that the waiver "is effective in accordance with its terms." In this case, literal compliance was necessary to effectuate the terms of the agreement signed by the parties. However, the Department did not perform the audits in accordance with the terms of the waiver agreements.

In the waiver agreements, as well as in Ms. Rumsey's letter (Petitioner's Ex. 1), the Department agreed to consider overpayments as part of the audit and then failed to even look at entries that indicate whether an overpayment had been made. "The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *Atlas Reserve Temporaries, Inc. v. Vanliner Ins. Co.*, 51 S.W.3d 83, 87 (Mo. App. 2001). The terms of the contract are read as a whole to determine the intention of the parties. *City of Harrisonville v. Public Water Supply Dist. No. 9 of Cass County*, 49 S.W.3d 225, 231 (Mo. App. 2001). "A construction which attributes a reasonable meaning to all the provisions of the agreement is preferred to one which leaves some of the provisions without function or sense." *Id*. Here, the clear intention of the parties was to conduct an audit that considered both untaxed items and items on which taxes had already been paid, in order to determine both if additional taxes were due and if Ford had made any previous overpayments.

Mr. Laurentius testified to the obvious - -it was not possible for Ford to have been given any credits for overpayments or exemptions if the auditors only reviewed untaxed

purchases. Such purchases, by definition, had no tax paid on them and, therefore, meant that the Department's promise to consider "overpayments" (Petitioner's Exs. 1 and 2) or "refunds or credits" (Petitioner's Ex. 2) was completely breached, leaving the Department without any basis for their audit, as it was beyond the statute of limitations applicable to the state's right to demand any assessments after three years. Thus, the Department's demand in February 6, 1998 was far beyond the applicable limitations period on assessments. *See* § 144.220. Without a valid waiver, the Department illegally and erroneously collected the tax and the payment was an overpayment or based on a mistake.

Ford acknowledges that, in some cases, substantial compliance, as opposed to literal compliance, with the terms of an agreement may be sufficient. *Gundaker v. Templar*, 560 S.W.2d 306, 309 (Mo. App. 1977). "A party's performance under a contract is substantial if the deviation from the contract was slight and if the other party received substantially the same benefit it would have from literal performance. *Id.*

Since the determination of whether there has been substantial compliance is made on a case by case basis, it is necessary to examine the various factors courts have considered in making this determination. They are: (1) whether compliance was substantial in a quantitative sense, when compared with the benefits the other party contracted for; (2) whether the extent of performance could be said to meet the requirements of a reasonable person under comparable circumstances; (3) what a party to such an agreement relinquishes in order to perform; and (4) indicia of a good faith effort to fully perform according to the terms of the contract. *In the Estate of English*, 691

S.W.2d 485, 489 (Mo. App. 1985). These factors all suggest that literal compliance was necessary to effect these agreements.

First, in a quantitative sense, the Department's compliance was not substantial when compared with the benefits Ford sought. Since the auditors admittedly only reviewed untaxed purchases, the Department never intended to give Ford the benefits that might accrue if the auditors also considered "overpayments" and/or "refunds" as they promised in Petitioner's Exhibits 1 and 2.

Second, a reasonable person who agreed to consider overpayments and/or refunds in an audit would have actually reviewed documentation to see if any overpayments had been made and/or any refunds were due and owing. The Department's auditor admitted that only untaxed items were reviewed. How would the auditor ever know if there had been an overpayment if she only looked at items that had never been taxed?

Third, the Department should have performed a proper audit but, instead, chose the shorter, easiest way to perform an audit that would maximize payments to the State of Missouri.

Finally, there were no indicia of good faith. It appears that the Department agreed to amend the waivers on the auspice that it would consider "overpayments" and "refunds" solely to obtain Ford's waiver of the Department's statute of limitations. In reality, the audit was performed only to determine if more taxes were owed, not to determine if any overpayments or refunds were due Ford as was promised in the letter and waiver agreements.

All of these factors can only lead to the conclusion that there was a failure of consideration when the Department failed to perform a proper audit. Ford voluntarily entered into these "waiver" agreements with the Department, but Ford was careful to protect itself by including a provision for the Department to consider "overpayments" and "refunds." As the *St. Louis Country Club* decision held, Ford should be able to rely upon "the terms" of the waiver that were agreed to by the parties.

CONCLUSION

Both of the Department's audits of Ford have shown that Ford consistently overpays it tax obligations in Missouri - - a rare corporate citizen. The only difference in the two audits is that the Department's auditors had a Ford consultant who understood Missouri's complex sales tax laws watching over them in the second audit. There should not be a need to consider our own government officials the same as some home repairman, i.e. if you don't hover over them you will get cheated. The only evidence adduced here is that revenue departments in Missouri's surrounding states and even the Missouri Department's own income tax division perform a true "compliance audit," where the tax collector's staff looks at taxes overpaid as well as taxes underpaid. Even the Internal Revenue Service "looks both ways" in audits and issues refund checks if the net taxes due are in favor of the taxpayer.

In the present case, Ford requested and the Department agreed to give Ford credits or even refunds for any overpayments that Ford had made, but proceeded to breach that promise by only looking at untaxed purchases, which made it literally impossible for the auditors to find any overpayments. There is no excuse for a taxpayer's own public

servant to treat it in this fashion. It is little wonder that large corporations such as Ford have to think long and hard about opening plants or doing business in Missouri with its complicated sales/use tax structure and a Department of Revenue that defies all basic rules of accounting.

The Court must understand that, even if Ford is successful in this action, the state will still have profited the $750,000 (plus 4 years interest) that Ford overpaid in the first audit. If the first audit had been conducted the same as the second audit, Ford would have been refunded that $750,000 rather than paying the Department that amount plus interest totaling $1,031,001.22. Unfortunately for Ford, because it only overpaid that $1,031,001.22 within three years of its refund application, it has lost its opportunity to ask for the additional $750,000 plus interest, i.e. almost another $1 million. A fair reading of the law clearly permits Ford to recover the $1,031,001.22 plus interest since February 23, 1998.

McCARTHY, LEONARD, KAEMMERER,
OWEN, LAMKIN & McGOVERN, L.C.

By:_____

James C. Owen, #29604
Katherine S. Walsh, #37255
Attorneys for Respondent Ford
16141 Swingley Ridge Rd., #300
Chesterfield, MO 63017
(636) 532-7100
(636) 532-0857 (Fax)

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned counsel of record hereby certifies that:

1. As required by Rule 55.06, counsel for Respondent are James C. Owen and Katherine S. Walsh, McCarthy, Leonard, et al., 16141 Swingley Ridge Rd., #300, Chesterfield, MO 63017, (636) 532-7100, (636) 532-0857 (Fax).

2. The Brief to which this certificate is attached complies with the limitations contained in Rule 84.06(b).

3. This Brief contains 12,853 words in Microsoft Word 1997 format.

4. Also served and filed with this Respondent's Brief is a floppy disk containing the brief, which is double-sided, high density, IBM-PC compatible 1.44MB, 3 ½-size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format (Microsoft Word 1997). The disk has been scanned for viruses and it is virus-free.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and accurate copies of the foregoing Respondent's Brief, and one disk containing the same, were mailed, postage prepaid, this 18th day of October, 2002 to the following:

Erwin O. Switzer
Missouri Department of Revenue
Wainwright State Office Bldg.
111 North 7th Street, Suite 204
St. Louis, MO 63101
(314) 340-6816
(314) 340-7957 (fax)

k:\FordMotor\pleadings\Appeal\Resp.Brief