IN THE
SUPREME COURT OF MISSOURI

_____

No. 83324

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THE MARY S. RIETHMANN TRUST AND LOUIS W. RIETHMANN, JR. AND JOHN D. SCHAPERKOTTER, TRUSTEES OF THE MARY S. RIETHMANN TRUST AND STATUTORY PERSONAL REPRESENTATIVES OF THE ESTATE OF MARY S. RIETHMANN, DECEASED,

APPELLANTS,

v.

DIRECTOR OF REVENUE,

RESPONDENT.

_____

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

REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

The material facts in this case are not in dispute and, with one exception, the Director does not object to the Statement of Facts in the Estate's opening brief.[1]

The Director's Statement of Facts is objectionable in that it includes argument. Missouri Supreme Court Rule 84.04(c). Specifically, the Director's discussion of the procedure to be used in completing federal estate tax returns presupposes that the Estate owes Missouri estate tax, the precise issue before this Court (Dir. Br. 8-10).

[1] The Director notes that the Estate apparently misread the Fiscal Note to Senate Bill 539 as projecting a decrease of $6 million in revenue the first year as opposed to a projected increase (Dir. Br. 11). However, one of the fiscal notes attached to the Director's brief projects a decrease of $6 million in revenue for the first year.

POINT RELIED ON

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICE OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT SECTION 145.011 DOES NOT IMPOSE MISSOURI ESTATE TAX UPON ESTATES THAT DO NOT OTHERWISE OWE FEDERAL ESTATE TAX.

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L & R Distributing, Inc. v. Department of Revenue, 529 S.W.2d 375, 376 (Mo. 1975);

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State ex rel. Helujon, Ltd. V. Jefferson County, 964 S.W.2d 531, 539 (Mo. App. E.D. 1998);

26 U.S.C. § 2011 (1986);

26 U.S.C. § 2011(a) (1986);

26 U.S.C. § 2011(b) (1986);

Mo. Rev. Stat. § 143.121.1;

Mo. Rev. Stat. § 145.011;

Mo. Rev. Stat. § 145.995;

Mo. Rev. Stat. § 621.189;

Mo. Rev. Stat. § 621.193;

S.B. 539, 80th Leg., 2nd Reg. Sess. (Mo. 1980);

S.B. 637, 80th Leg. (Mo. 1980);

Fiscal Note to S.B. 539, 80th Leg., 2nd Reg. Sess. (Mo. 1980);

12 CSR 10-8.190;

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IND. CODE § 6-4.1-1-4;

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ARGUMENT

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICE OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT SECTION 145.011 DOES NOT IMPOSE MISSOURI ESTATE TAX UPON ESTATES THAT DO NOT OTHERWISE OWE FEDERAL ESTATE TAX.

Introduction

In 1980, the Missouri legislature determined that Missouri's dual death tax system was overly complex and burdensome, and therefore enacted Senate Bill 539 with the goal of simplifying tax administration and collection. Section 145.011[2] thereof imposes the Missouri estate tax in the amount of:

(1) "… the maximum credit for state death taxes allowed by Internal Revenue Code Section 2011" [3]; or

(2) "the maximum ***credit*** for state death taxes ***allowable to the estate … against the federal estate tax*** …."[4]

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[2] All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

[3] All statutory citations to the "Code" are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

The sole issue before the Court is whether there is any "credit … allowable … against the federal estate tax" when, without regard to the state death tax credit, there is no federal estate tax liability. The clear language of Section 145.011 demonstrates that the phrase "credit … allowable …against the federal estate tax" means that no Missouri estate tax is due unless its payment results in a credit or offset "against" the federal estate tax liability. The Director's construction of the statute does not give the words "credit," "against," or "tax" their plain and ordinary meaning.

Furthermore, the legislative history of Section 145.011 demonstrates that no Missouri estate tax is due unless it offsets a liability for federal estate tax. The Fiscal Note to Senate Bill 539 provides:

> Under this approach, Missouri collects ***only*** those tax dollars from an estate that ***would go to the federal government anyway*** if Missouri does not collect them.

Because the plain language of the statute and its legislative history show that the Estate owes no Missouri estate tax, this Court should reverse the decision of the Commission.

I. The Plain Language of Section 145.011 Demonstrates that No Missouri Estate Tax is Imposed on Estates that Do Not Owe Federal Estate Tax.

A. The Estate Has No State Death Tax "Credit Allowable Against the Federal Estate Tax" Because the Estate Owed No Federal Estate Tax.

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[4] Emphasis added here and throughout unless otherwise noted.

The parties agree that this Court should limit its analysis to the statute's express terms if those terms are unambiguous. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998); *Blue Springs Bowl v. Spradlin*, 551 S.W.2d 596, 599-600 (Mo. banc 1977). The Director concedes that the Estate owes no federal estate tax whether or not it pays a Missouri estate tax (Dir. Br. 19). To avoid the obvious implication of this fact, the Director argues that the phrase "credit … against the federal estate tax" should be interpreted to mean ***against the gross estate tax determined part of the way through the completion of the federal estate tax return and without regard to whether any federal estate tax is ultimately due***. The ordinary, everyday meaning of the words "credit," "against" and "tax" demonstrate that the Director's position is incorrect.

This Court has consistently given words—including those in revenue statutes—their plain and ordinary meaning as found in the dictionary. *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993). In this context, "credit" means "a deduction from an amount otherwise due;" "against" means "as a defense or protection from;" and "tax" means "a charge usu[ally] of money imposed by authority on persons or property for public purposes." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 272, 21, 1208 (10th ed. 1997). The Director ignores the dictionary definitions of all three terms.

The fact that the Director consumes nearly four pages of her brief to explain that "credit … against the federal estate tax," actually means something contrary to the plain meaning of the words "credit;" "tax;" and "against" exemplifies the fact that her proposed definition of the phrase is not consistent with the "ordinary, everyday sense" of "credit …

against the federal estate tax." Because, in this case, the "bottom line" federal estate tax liability is zero (Dir. Br. 19), there can be no credit allowable against the federal estate tax; and because there is no credit allowable against the Estate's federal estate tax, Section 145.011 imposes no Missouri estate tax.

B. The Distinction Between "*Allowed*" and "*Allowable*" Does Not Support The Director's Position.

The Director errnoeously concludes that the Estate's construction of Section 145.011, by giving meaning to the words "against the federal estate tax," fails to recognize the different meanings of the words "allowed" and "allowable" (Dir. Br. 16). As set forth in the Estate's opening brief, an interpretation of all the words of Section 145.011 (*i.e.*, "credit … against the federal estate tax") demonstrates that the purpose of the second clause of Section 145.011 was to protect Missouri's estate tax by insuring that an estate cannot divert money from Missouri to the federal government by electing to pay more federal estate tax and less Missouri estate tax by failing to elect a state death tax credit, a position the Director apparently concedes (Dir. Br. 20). Yet, the Director contends that in addition to preventing such redirection of tax revenues, the "allowable" "credit" language authorizes Missouri to impose tax when there is no federal liability against which to take the credit for Missouri tax (Dir. Br. 20). The Director reaches this result by ignoring the phrase "against the federal estate tax." Thus, it is the Director, and not the Estate as implied in the Director's brief (Dir. Br. 22), who attempts to violate this Court's oft-stated rule that every word or clause of a statute is presumed to have effect. *See Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1999). Only the

Estate's construction gives meaning to all the words, including "credit," "allowable," "tax" and "against."

Indeed, the fallacy of the Director's argument is demonstrated by her assertion that the General Assembly "could have" clearly expressed the rule that only estates owing federal estate tax would be subject to Missouri tax (Dir. Br. 21). Specifically, she states that the legislature could have included a clause "on which a federal estate tax is due." The Estate is at a loss to determine any substantive distinction between the Director's proposed language and the legislature's actual use of the phrase against the federal estate tax. Since (1) the two phrases are synonymous, and (2) the Director concedes that one of the phrases demonstrates legislative intent that no Missouri tax is due from those estates owing no federal tax, there can be no doubt that the express language of Section 145.011 imposes no Missouri estate tax on the Estate under the second circumstance. In effect, the Director effectively deletes the phrase "against the federal estate tax," and replaces it with language such as "for federal estate tax purposes" (Dir. Br. 21).

The Director also cites Section 145.995 as evidence that the General Assembly "knew how to use the word 'allowed' without also using the word 'allowable' when it wanted to do so" (Dir. Br. 21). The Estate does not dispute that the words "allowed" and "allowable" have distinct and separate meanings. However, the phrase "against the federal estate tax" also has a distinct meaning that must be recognized when interpreting Section

145.011. Therefore, no tax is due under either word ("allowed" or "allowable") when there is no federal liability.[5]

C. The Preparation of Federal Estate Tax Returns Does Not Alter the Unambiguous Language of Section 145.011.

The Director offers a laborious description of how the Estate "should have" completed its federal estate tax return (Dir. 35-40). Her arguments on this point are both factually incorrect and legally irrelevant.

In the first place, as conceded in her Statement of Facts (Dir. Br. 8), the Internal Revenue Service accepted the Estate's return as filed. That return showed exactly what the Estate is arguing in this case: that the Estate owed no federal estate tax and had a state death tax credit of zero. More importantly, it is the interpretation of Section 145.011 that is

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[5] The Director contends in her final argument that her construction preserves the "historical relationship of state and federal taxes," preserves the notion that the federal government "should not decrease state death tax revenues," and that the Estate's construction of Section 145.011 undermines the word "allowable"(Dir. Br. 20). The Director's incompletely explained normative hornbook argument is incorrect as demonstrated by the enactment of The Economic Growth and Revenue Reconciliation Act of 2001 which not only phases out the federal estate tax over time, thereby reducing the state death tax revenues under "pick-up" statutes to all states, including Missouri, but also phases out the state death tax credit years before the federal estate tax is eliminated.

before this Court. The preparation of the federal estate tax return does not assist in deciding the meaning of the Missouri statute.

D. Summary

The express, unambiguous language of Section 145.011 provides that the Missouri tax is based on the maximum state death tax credit allowable against the federal estate tax. The Estate owed no federal estate tax under either construction of Section 145.011. Therefore, the maximum credit allowable against the Estate's federal estate tax, by definition, was zero. The Commission's decision interpreting Section 145.011 to impose Missouri estate tax is inconsistent with the plain language of the statute and should be reversed by this Court.

II. Even if Section 145.011 were Ambiguous, That Provision Imposes No Missouri Estate Tax on Estates that Do Not Owe Federal Estate Tax.

The Estate contends that the clear, unambiguous language of Section 145.011 imposes no Missouri estate tax under the circumstances of this case. However, even if the statute were ambiguous, it is a taxing statute, and any ambiguity must be resolved strictly in favor of the Estate and against the Director. *Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874, 881 (Mo. banc 1983).

A. The Fiscal Note, Properly Before this Court, Demonstrates that Section 145.011 Was Not Intended to Impose Missouri Estate Tax on Estates that Do Not Owe Federal Estate Tax.

1. The Fiscal Note Is Properly Before this Court.

The Director contends that this Court should treat the Fiscal Note[6] as if it never existed, and she claims that it is not properly before this Court. The Director's arguments on this point are meritless.

The Director mistakenly argues that the Estate is attempting to raise a new issue on appeal before this Court. Nothing could be further from the truth, particularly since the only issue in this case has been, and continues to be, the statutory construction of Section 145.011. The Fiscal Note is authority in support of the construction of the relevant statute. The cases cited by the Director in support of her proposition simply demonstrate the error of her position (Dir. Br. 35-36). In all three cases, *Seitz v. Lemay Bank and Trust Company*, 959 S.W.2d 458, 462 (Mo. banc 1998), *Artman v. State Board of Registration for the Healing Arts*, 918 S.W.2d 247, 252 (Mo. banc 1996), and *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 539 (Mo. App. E.D. 1998), this Court (and the Court of Appeals in *Helujon*) refused to consider an alternate theory because it had not been raised in the court below. In this case, the Estate's theory of the case has remained the same.

The Director mistakenly insinuates that the Estate attempts to present new evidence, rather than authority, by placing the Fiscal Note in an appendix to its brief. This Court,

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[6] The Fiscal Note was obtained from the Missouri Senate's legislative library by the Missouri Legislative Service in the volume of Senate Bills, 80th General Assembly, 2nd Regular Session.

however, can take judicial notice of fiscal notes. In *L & R Distributing, Inc. v. Department of Revenue*, 529 S.W.2d 375, 376 (Mo. 1975), this Court stated its inherent authority to take judicial notice:

> In the stipulation there are statements also concerning certain legislative bills which were introduced in 1939 and 1941. ***We prefer to discuss these in more detail later from our own examination of the legislative files***. The parties stipulated that we may take judicial notice of the legislative history, ***which, of course, we might do anyway.***

This Court has previously considered fiscal notes relating to legislative bills. *See, e.g., C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000). In the same manner, this Court may and should consider the Fiscal Note in determining the meaning of Section 145.011.

2. The Fiscal Note Demonstrates the Legislature's Intent that Section 145.011 Was Not Intended to Impose Missouri Estate Tax upon Estates that Do Not Owe Federal Estate Tax.

The Fiscal Note set forth as Appendix A to the Estate's opening brief states as follows:

> Under this approach, Missouri collects ***only*** those tax dollars from an estate that ***would go to the federal government anyway*** if Missouri does not collect them.

The Director never disputes the import of the above-quoted language that Section 145.011 was not intended to impose Missouri estate tax upon estates that owed no federal estate tax—presumably because no argument could reconcile the language of the Fiscal Note with the Director's position. Instead, the Director merely asks this Court to ignore such reliable and probative authority for several erroneous reasons.

First, while recognizing that the Committee on Legislative Research has authority under the Revised Statutes of Missouri of 1980 to collect, catalogue and keep an index or digest regarding bills, the Director asserts that the Fiscal Note should be disregarded because "there was not a statutory reference to fiscal notes" and "[t]he part of the fiscal note on which the Estate relies is not the fiscal analysis, but is the bill summary in the fiscal note document" (Dir. Br. 38). The Director's assertion is made without supporting authority. More importantly, the Director does not pretend to disagree that the Fiscal Note is relevant to Section 145.011.

The Director suggests that the absence of an indication of legislative intent in other fiscal notes somehow contradicts the clear statement of legislative intent in the Fiscal Note the Estate cites. Nothing in the three fiscal notes in the appendix to the Director's brief, however, contradicts the statement that "Missouri collects only those tax dollars from an estate that would go to the federal government anyway…. (Dir. Br. A27-A29). The other fiscal notes are simply silent in that regard. Nothing requires that every fiscal note contain identical language.

The Director then argues that the Fiscal Note is not similar to an "official explanation" drafted by the Attorney General of the State of Washington with respect to the initiative petition addressed in *Estate of Turner v. Washington Department of Revenue*, 724 P.2d 1013 (Wash. 1986). In *Turner*, the court was charged with determining the voters' intent in the initiative election, and the explanation was "specifically intended to advise the voters accurately of the meaning of the proposed law" (Dir. Br. 39). The purpose of the "Bill Summary" in the Fiscal Note was likewise to inform the legislators accurately of the meaning of Senate Bill 539. If the Director believes there could be any other purpose of a bill summary, she has not demonstrated what such purpose would be, nor has she demonstrated by anything other than a conclusory statement that the Fiscal Note is different than the "official explanation" in *Turner*.

The Director states that "under no circumstances can a fiscal note or bill summary override the language of a statute" (Dir. Br. 39). While true, this axiom does not support the Director's position. As noted above, the unambiguous language of Section 145.011 imposes the tax only in the amount of the maximum credit allowable against the federal

estate tax. The language of the Fiscal Note is consistent with this unambiguous language, and, therefore, does not attempt to "override the language of the statute." Further, even if Section 145.011 were ambiguous, the language of the Fiscal Note would be used to resolve such ambiguity because the goal of statutory construction is to ascertain the legislature's intent. *Gott v. Director of Revenue,* 5 S.W.3d 155, 159 (Mo. banc 1999).

The Director's final argument against the Fiscal Note is that even though the Missouri tax is "based on federal estate tax provisions," there can be Missouri estate tax in the absence of federal estate tax because, "[p]ursuant to the Director's interpretation here," the state tax is based on federal estate tax return provisions (Dir. Br. 39). As noted above, the "Director's interpretation here" is inconsistent with the express language of Section 145.011—specifically the phrase "allowable against the federal estate tax," and should be rejected for the same reason. Additionally, as noted above, the Director has provided absolutely no contemporaneous authority for her position that Section 145.011 imposes Missouri estate tax upon estates that do not owe federal estate tax other than her strained "interpretation here." In short, the intent of the legislature when it enacted Senate Bill 539 in 1980, as demonstrated by the Fiscal Note, was that the Missouri estate tax was intended only to permit Missouri to share tax dollars that would otherwise go to the federal government as federal estate taxes if Missouri did not collect them.

B. The Director's Contemporaneous and Practical Construction of Section 145.011 Demonstrates That Those Estates that Do Not Owe Federal Estate Tax are Not Subject to Missouri Estate Tax.

As noted in the Estate's opening brief, and not contradicted in the Director's brief, when considering two alternate interpretations of an ambiguous statute, courts are encouraged to place great weight on contemporaneous and practical constructions of the statute by the administrative agencies charged with their administration. *See Lemasters v. Willman*, 281 S.W.2d 580 (Mo. App. E.D. 1955) (Est. Br. 26). Likewise, the Director did not contest the Estate's opening brief's discussion of the holding in *L & R Distributing, Inc. v. Department of Revenue*, 529 S.W.2d 375 (Mo. 1975), that the Director's earlier interpretation of a statute is a better indicator of the legislature's intent when a statute is enacted than a subsequent, inconsistent interpretation (Est. Br. 27).

The Director also does not dispute publication of a Booklet in 1981 that contained specific language that would resolve this case in favor of the Estate: "Thus, the Missouri estate tax is an amount that would otherwise be paid in federal estate taxes."[7]

Instead, the Director disregards the Department's 1981 analysis of the statute, and states "that there has been only one, consistent interpretation [of Section 145.011] since at least 1985," and that this consistent position is that "the Missouri estate tax may be an amount in addition to the amount that would otherwise be paid in federal estate taxes" (Dir. Br. 30). The Director effectively disavows the Booklet and invites this Court to do the

[7] The Director claims "the Estate felt compelled to 'paraphrase' the language in the booklet with an entirely different phrase" (Dir. Br. 31). Yet, at page 27 of its opening brief, the Estate set forth the exact language of the Booklet.

same or to rewrite her own contemporaneous interpretation of the statute. The Director attempts to obscure the language of the Booklet by quoting hypothetical language the Director could have used to express the same intent (Dir. Br. 30-31) ("The Missouri estate tax is only an amount that would otherwise be paid in federal estate taxes;" "The Missouri estate tax is limited to that which would otherwise be paid in federal estate taxes;" and "An estate that does not owe federal tax is not subject to Missouri estate tax"). Meanwhile, the Estate focuses on the actual language used in the booklet.

C. The Director's "*Legislative History*" Does Not Assist in Ascertaining Legislature's Intent in Enacting Senate Bill 539.

As noted above, the Director complains that the Estate omitted "additional legislative history" in its Statement of Facts (Dir. Br. 11). In the first instance, she states that her internally published *Missouri Tax Review* article, as well as her regulation 12 CSR 10-8.190, constitute "legislative history." Once again, the Director provides no authority for the proposition that her administrative promulgations constitute "legislative history," and, in fact, it is clear that such promulgations are not legislative history. *See*, *e.g.*, *L & R Distributing Company, Inc. v. Department of Revenue*, 648 S.W.2d 91, 94, n.4 (Mo. 1983) (distinguishing between administrative and legislative history). The Director, furthermore, has provided no authority for the proposition that her subsequent interpretation of a statute is to be given greater weight than her initial interpretation. Her statement that "deference to the Director's view is warranted" (Dir. Br. 28) is, in fact, contrary to *L & R Distributing*.

The Director's other proposed piece of "legislative history" is the failure of the bill introduced in 1987 by Representative Charles Graham; it was not voted out of the Ways and Means Committee. The Director asserts that the failure of this bill should be attributed to the legislature's intent "not to overrule previous, public[8] statements of the Department of Revenue" (Dir. Br. 33, n.7). In support of this assertion, the Director cites a hornbook and an Illinois decision providing that where the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of legislative intent. The Director's failure to cite Missouri precedent for this proposition is understandable in light of this Court's statements in *Blue Springs Bowl v. Spradlin*, 551 S.W.2d 596, 601 (Mo. banc 1997):

> While it is not unreasonable to assume that the legislature would be aware of such judicial construction by the court of last resort, the same is not necessarily so of administrative rulings by various departments. ***We are unaware of any Missouri case which has extended to such situations the doctrine that by legislative***

[8] In 1987, the Director had not yet promulgated her regulation 12 CSR 10-8.190. Thus, the only publication expressing her view was the opinion of her Assistant General Counsel in a tax bulletin. By contrast, her Booklet is concededly published for "public convenience" (Dir. Br. 30), and presumably for general public consumption.

> ***reenactment the legislature is presumed to have known of, approved and adopted such administrative interpretation***.

The Director takes her position one step further and asserts, without any authority whatsoever, that not only was the legislature aware of her revised interpretation of the statute, but that the entire General Assembly approved of her interpretation even though the 1987 bill never reached the floor of either House. A better explanation is that the bill was not voted out of the Committee because the members of that Committee found the bill unnecessary based upon the plain language of Section 145.011 and contemporaneous legislative history.

In summary, the Director's proposed "***legislative*** history" is not legislative history at all, and provides no guidance in ascertaining the intent of the legislature when it enacted Senate Bill 539 in 1980.

D. The Contemporaneous Interpretation of Section 145.011 Published by the Missouri Bar Further Demonstrates the Legislature's Intent.

Contemporaneous with the enactment of Senate Bill 539 in 1980, the Missouri Bar published *Missouri Probate Code* (App. A). The Preface to *Missouri Probate Code* states:

> This book has been designed primarily to provide an immediate tool for the Bar to use in handling the interests of their clients under the probate code as amended by Senate Bill No. 637 of the 80th General

> Assembly and under the new estate tax Chapter 145 written into law as Senate Bill 539….
>
> * * *
>
> The practice aids which accompany Chapter 145 were written by Professor Sanford E. Sarasohn of the St. Louis University School of law and are greatly appreciated by The Missouri Bar. Professor Sarasohn was the principal draftsman of the new estate tax law and filled a similar office as regards the Missouri income tax law (Chapter 143, RSMo 1978)[.][9]

Id. at iii.

[9] The revisions of the Missouri income tax law referred to in this booklet were enacted in 1972. Professor Sarasohn was thereafter hired by the Department of Revenue as its principal tax policy advisor (followed in that position by William Campbell, a former commissioner of the Administrative Hearing Commission), and ultimately became the General Counsel of the Department of Revenue prior to enactment of the statute at issue in this case. Both Professor Sarasohn and Mr. Campbell are deceased.

The Editor's Note continues:

> Also included is ***the completely new Chapter 145, Estate Tax*** (formerly Inheritance Tax). The notes, which appear under the sections of the chapter, were prepared by Professor Sanford E. Sarasohn of the St. Louis University School of Law ***and are highly recommended for achieving an understanding of the changes that have taken place in this tax law which has been a concern of many probate judges and lawyers***.

Id. at v. Thus, the *Missouri Probate Code* was intended to assist lawyers and judges in interpreting the newly enacted Missouri estate tax. In describing the change in the law, notes in the *Missouri Probate Code* prepared by Professor Sarasohn provide:

> The old inheritance tax is replaced by a 'pick-up' of the federal credit. Thus, Missouri ***will only receive the amount that would otherwise be paid in federal estate taxes***.

Id. at 187.

It is clear that at the time Senate Bill 539 was enacted, Professor Sarasohn drafted the statute to insure that the Missouri estate tax was imposed only if an estate owed federal estate tax, consistent with the plain language of the statute and its contemporaneous legislative history.

E. Decisions from Other States with Similar Statutes Indicate that the Legislative Intent of Section 145.011 was to Impose Missouri Estate Tax Only Upon Estates Owing Federal Estate Tax.

The Estate stands on its position in its opening brief that the substantial authority from other states further demonstrates that Section 145.011 does not impose Missouri estate tax upon estates that owe no federal estate tax. With one exception, the Director relies on the same authorities, but her interpretation of these cases demonstrates that the cases do not support her interpretation of Section 145.011.

The two New York cases cited in the Director's brief, *In re Thalmann's Estate*, 32 N.Y.S.2d 695 (N.Y. Surr. Ct. 1941) and *In re Zinn's Estate*, 57 N.Y.S.2d 423 (N.Y. Surr. Ct. 1945), are inapposite. As stated in the Estate's opening brief (Est. Br. 33), both cases addressed a New York statute that imposed an additional estate tax in the amount of the "maximum credit ***allowable to the estate of such decedent against the United States estate tax***" in situations where the estates actually owed federal estate taxes. The estates did not claim the maximum possible credit against the federal estate tax, but argued that the statutes imposed additional taxes only when credits were actually allowed. The New York courts rejected this argument stating, as the Estate suggests, that the taxpayers could not avoid the state tax by failing to claim the maximum federal state death tax credit allowable against the federal estate tax.

In her brief, the Director does not address the statement that the New York statute imposed the tax in the amount of the "maximum credit ***allowable*** to the estate of such

decedent ***against the United States estate tax***." Instead, the Director attempts to obscure the analysis of the two New York cases by stating that, "The New York law imposed a tax upon the estate 'equal to the maximum credit allowable to the estate" (Dir. Br. 23). In fact, these cases support the Estate's interpretation of the statute since the language in the statute is intended to prevent estates subject to the federal estate tax from diverting revenues away from the State and toward the federal government.

The Director next cites *State Department of Revenue v. Eberbach*, 535 N.E.2d 1194 (Ind. 1989), which determined that the Indiana estate tax was not imposed upon estates owing no federal tax. The Indiana court stated:

> The purpose of the Indiana estate tax is to pick up Revenue that otherwise would go to the federal treasury. In this case, the Eberbach estate took a credit not only for state death taxes paid, but also for a prior transfer thereby avoiding federal estate taxes. No revenue went to the federal treasury.… The purpose of the Indiana estate tax is not furthered by allowing the Department to calculate the estate tax without regard to the actual credit taken.

Id. at 1197. Undeterred by the holding in *Eberbach*, the Director seeks to rely on *dicta* indicating that it might have reached a different decision if the legislature had used the word "allowable" (Dir. Br. 24-25). In discussing hypothetical statutes, the court stated:

> Indiana Code Section 6-4.1-1-4 refers to Section 2011 and not just to Section 2011(b). I.R.C. Section 2011(a) permits an estate to take a credit for state death taxes actually paid. I.R.C. Section 2011(b) limits

> this credit to a scheduled amount. ***If the legislature had intended for the Department to only use the schedule of I.R.C. Section 2011(b) to calculate the Indiana estate tax, it would have referred to I.R.C. Section 2011(b) and not the entire section***.

Id. at 1196-97. Similarly, if the Missouri legislature had intended for the Director to use only the schedule of Code Section 2011(b), it could have done so within the language of Section 145.011. Its failure to do so indicates its intent that the Missouri estate tax not be imposed upon estates owing no federal estate tax.

The Director also attempts to distinguish the cases of *Dickinson v. Mauer*, 229 So.2d 247 (Fla. 1969) and *Estate of Turner v. Washington Department of Revenue*, 724 P.2d 1013 (Wash. 1986). As noted in the Estate's opening brief, the respective courts in both cases construed ambiguous provisions and determined, based upon the history of initiative petitions in both states, that the voters intended not to impose state estate tax upon estates that do not owe federal estate tax. The Director has provided no authority for distinguishing these cases, which used legislative history to ascertain the intent of the enacting body (in these cases the voters), from the present case. Here, the legislative history demonstrates the intent of the enacting body (the General Assembly). Thus, the Director's attempts to distinguish these cases are unavailing.

Finally, the Director notes that the Arizona Department of Revenue Private Letter Ruling LR99-004 (Az. Dept. Rev. 1999) is not a judicial or regulatory construction of Arizona's pick-up statute, and therefore would not be as persuasive as a judicial

construction would be (Dir. Br. 26-27). While true, it is interesting to note that the Director does not dispute the substance of the letter ruling.[10] In any event, the Arizona letter ruling merely buttresses the authority of Missouri's sister states that have previously addressed the situation, and provides additional support that the Missouri legislature did not intend to impose the Missouri estate tax upon estates that owe no federal estate taxes.

The case most favorable to the Director's position is *Estate of Kelly v. Commissioner of Revenue*, Number 5705 (Minn. Tax Ct. 1991). This unappealed Minnesota Tax Court decision held that the Minnesota estate tax should be computed without regard to the credit for prior transfers. The Director ignores the fact that the Minnesota statute imposed the tax on:

> The maximum credit allowable under Section 2011 of the Internal Revenue Code for state death taxes as the Minnesota gross estate bears to the value of the federal gross estate.

Nor did the Director address the Minnesota legislature's "declaration of intent" that revealed its intent to tax the maximum credit allowable "under the federal estate tax law,"

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[10] The Director's disparagement of the Arizona private letter ruling which, as the Director notes, is generally available to the public on the Internet, is inconsistent with her elevation of her own *Missouri Tax Review,* which is given limited publication, as the "consistently articulated position" (Dir. Br. 28) of the Director and as "legislative history" (Dir. Br. 11).

rather than the maximum credit allowable against the federal estate tax, and requiring that the statute "shall be liberally construed to effect this purpose." *Id.* at *2. This express canon of statutory construction is directly contrary to the Missouri rule that tax statutes are construed strictly against the tax collector. *Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874, 881 (Mo. banc 1983). Thus, while the Minnesota Tax Court reached the ultimate conclusion desired by the Director, it did so on the basis of a statutory scheme absent in Missouri.

F. The Director's Proposed Interpretation of Section 145.011 Effects a Result That Could Not Have Been Intended by the Legislature.

A hypothetical demonstrates that the Director's interpretation of Section 145.011 could not have been intended by the legislature.

Assume that a family Ann (great-grandmother), Brad (grandfather), Carla (mother) and Daniel (child) are traveling in an automobile and involved in a serious accident. All four are taken to the hospital with serious injuries. Ann is pronounced dead on arrival. Her will leaves her entire estate to Brad. Brad dies after twenty-four hours in intensive care. His will leaves his estate (which consists mostly of property inherited under Ann's will) to Carla. Carla dies a week later due to her severe internal injuries. Her will leaves her estate (most of which consists of property inherited from Brad, who inherited most of his property from Ann) to her only child Daniel. Daniel survives the accident and leaves the hospital six weeks after the accident.

Under federal law, the property in Ann's original estate would be taxed only once. The Director argues, however, that the legislature intended, through the passage of Section 145.011, to impose the Missouri estate tax on the same property three times in eight days.

The Director notes in her brief that it is the General Assembly's function to weigh policy choices, and it is not within the power of the Estate (or this Court) to determine what the law "should be" when the legislature has chosen a different public policy (Dir. Br. 34). *See, e.g., State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker*, 955 S.W.2d 931 (Mo. banc 1997); *In re Estate of Rahn v. Martin*, 316 Mo. 492, 291 S.W. 120, 123 (Mo. 1926), *cert. denied*, 274 U.S. 745 (1927). While the Legislature maintains the prerogative to subject the property in the hypothetical to tax three times in eight days, the result of the Director's interpretation should not be presumed in light of (1) the express language of Section 145.011; (2) the contemporaneous interpretations of the statute by the Fiscal Note, the Missouri Bar publication and the Director herself; (3) the presumption that Missouri taxing statutes are strictly construed against the Director; and (4) most importantly, the absence of any legislative history interpreting Section 145.011 in the manner suggested by the Director. *Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874, 881 (Mo. banc 1983).

The Director argues that Section 145.011 was not intended to conform to federal estate tax law, relying on a section in the Missouri income tax statute, Section 143.121.1, which provides:

> The Missouri adjusted gross income of a resident individual shall be his federal adjusted gross income subject to the modification in this section.

See also Section 143.431.1 (the corporate income tax is based on the "federal taxable income") (Dir. Br. 34).

There is no doubt that the legislature intended to conform Missouri income tax law to federal income tax law in the examples cited by the Director. These provisions, however, do not govern the Missouri estate tax. The fact that provisions in the estate tax statutes are not in the identical form as the income tax statutes does not mean that there is no equivalent relationship between the federal and Missouri estate tax computations. The relationship between the federal and Missouri estate tax is unequivocally demonstrated by the requirement in Section 145.011 that the Missouri tax is determined by the state death tax credit allowed by Section 2011 of the Internal Revenue Code. Thus, there is no doubt that the Director is incorrect in arguing that there is no conformance between the federal and Missouri estate taxes.

CONCLUSION

Based on the foregoing and for the reasons set forth in the Estate's opening brief, the Estate respectfully requests this Court to reverse the decision of the Commission and remand with instructions to enter an Order holding that the Director's Final Decision was erroneous and that the Estate does not owe Missouri estate tax.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this __ day of June 2001 to Erwin O. Switzer, III, Special Chief Counsel, Wainwright State Office Building, 111 North 7th Street, Suite 204, St. Louis, Missouri 63101.

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CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 7,738 words.

The undersigned further certifies that the disk simultaneously filed with the briefs with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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