IN THE
SUPREME COURT OF MISSOURI

No. 83324

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 from the
Missouri Administrative Hearing Commission
Hon. Willard C. Reine, Commissioner

BRIEF OF RESPONDENT DIRECTOR OF REVENUE

JEREMIAH W. (JAY) NIXON
Attorney General

Erwin O. Switzer, #29653
Special Chief Counsel
Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, MO 63101
(314) 340-6816 telephone
(314) 340-7957 facsimile
Attorney for Respondent
Director of Revenue

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INTRODUCTION AND SUMMARY

Missouri's estate tax system measures the state tax owed in two alternative ways: the amount of the federal estate tax credit "allowed" by the Internal Revenue Service (that is, the amount that was actually and legally taken by the taxpayer), or the amount "allowable" (the amount that could have been legally taken). The Estate did not use the first measure; it did not take the credit for state estate taxes that the federal government would have permitted. Had it done so, the Estate would have shown on its federal and state tax returns a state tax due of more than $3 million. The Estate instead chose to take no state tax credit. It then reached zero federal estate tax liability by use of the prior transfer credit. The Estate claims to be exempt from the second, "allowable," measure of state tax.

The issue here is whether the state estate tax law implicitly absolves an estate of state tax whenever an estate owes no federal estate tax. That is, is the credit not "allowable" when an estate can reduce its federal liability to zero without the use of the state estate tax credit?

The Administrative Hearing Commission correctly concluded that there is no such implied absolution in the Missouri estate tax statute (Respondent's Appendix A1-A14). The Missouri General Assembly used two different words in the estate tax statute ("allowed" and "allowable") because it intended that there be two different meanings. Under the plain language of Section 145.011, the state tax is based on the amount of the federal credit that **could** have been taken, even if it is not taken. If the legislature wanted to refrain from taxing every estate that owed no federal tax, or if the legislature wanted to adopt a prior transfer credit, it could easily have expressed that intent. The Director asks this Court not to infer such an intent.

The Estate's central argument is based on an incorrect factual assumption concerning the method of preparing a federal estate tax return. The credit for state death taxes is taken first, before the prior transfer credit is taken. The Estate's position is based on the assumption that the prior transfer credit is

taken first, which the Estate contends negates not only the motivation to take the state death tax credit, but even the ability to legally take the credit.

But the prior transfer credit could wipe out ability to take the estate tax credit only if the return is completed from the bottom up! When the return is completed from the top down, the state death tax has to be calculated before the prior transfer credit. Federal law explicitly requires that the prior transfer credit be calculated **after** the state death tax credit is taken. Thus, the Estate's position is premised on completing the federal tax return in a way contrary to the federal law. The Administrative Hearing Commission's decision to reject that novel approach was legally sound and mandated by the plain language of Section 145.011, and it should be affirmed.

JURISDICTIONAL STATEMENT

Respondent agrees with Appellant that this Court has jurisdiction over this appeal.

STATEMENT OF FACTS

This case was presented to the Administrative Hearing Commission on stipulated facts (L.F. 487-553). Accordingly, there is no dispute as to the calculation of the tax due. If the Commission decision is affirmed, the amount due on the $30 million estate is $3,149,934.18, plus interest. Appellant ("the Estate") contends that nothing is due. The Director of Revenue does not dispute the first five paragraphs in the Estate's Statement of Facts describing some of the facts relating to the Reichmann estate tax return and notices of deficiency.

There are additional relevant facts regarding the way federal and state estate taxes (sometimes called death taxes) are calculated. The Estate prepared its federal return, Form 706 (L.F. 20, Respondent's Appendix ["Resp. App."] A15). The return includes the estate value on line 1 ($30,857,969.97), the gross estate tax on line 10, and the gross estate tax after being reduced for the unified credit on line 14 ($13,064,249.00).

When the taxpayer reaches line 15, the taxpayer is asked to fill in the amount of the state death tax credit, which is the amount paid to the state. To ascertain that amount, the taxpayer turns to federal law, which in turn incorporates another federal law. The amount paid to the state is based on Section 145.011, RSMo (Resp. App. A32), which directs the taxpayer to 26 U.S.C. § 2011(b) (Resp. App. A16-A18). The formula for estates with a value more than $10,040,000 is $1,082,000 plus 16% of the amount over $10,040,000 (Resp. App. A17). That amount would be placed on line 1 of the state return (L.F. 12-13, Resp. App. A19-A20). In this case the amount derived from the federal formula would be $3,171,308.80. That amount would be adjusted slightly downward to account for non-Missouri property

(multiply by 99.326%) (L.F. 13, Resp. App. 20). This calculation results in the $3,149,934.18 referenced above.

The taxpayer would carry the $3,149,934.18 figure to line 15 of the federal return.[1] The taxpayer would then subtract the state credit ($3,149,934.18) from the gross tax due on line 14. The taxpayer would then proceed with the rest of the federal return, and reach the "prior transfer credit" on line 19.

The prior transfer credit formula is found in 26 U.S.C. § 2013. The credit is defined in a way so that there is no surplus credit (that is, it is limited to the amount of the tax after deducting the state death tax credit and other taxes). 26 U.S.C. § 2013(c)(1)(A)(Resp. App. A21-22). Thus, if the Estate had taken the state death tax credit, the amount of the prior transfer credit would have been reduced, but would have equaled the tax liability, and therefore the federal tax liability would be zero (line 21).

Here, the Estate deviated from that course when it reached line 15. The Estate chose not to take a state death tax credit on line 15, and put "0" on line 15 of the federal return. That left room for a higher prior transfer credit than would have been allowed if a state death tax credit were taken. But the result still would have been no federal taxes.

[1] The effect, if any, of the other state's credits is ignored for these purposes and has no impact on the tax due to Missouri.

The Estate then claimed that because there was a way to get to zero federal taxes without taking the state death taxes credit on its federal return, the Estate was not obligated to pay any state taxes. These proceedings followed, and the Administrative Hearing Commission rejected the Estate's contention (Resp. App. A1-A14).[2]

The Estate also includes in its Statement of Facts a discussion of legislative history. Specifically, the Estate discusses what it calls "the" fiscal note for Section 145.011, and includes that fiscal note in the Appendix of Appellant's Brief. That note includes language indicating that the effect of the estate tax legislation is that the state would only receive amounts that would otherwise go to the federal government. The fiscal note is not in the Legal File and was not referenced by the Estate before the Administrative Hearing Commission. The propriety of appending this new material and its relevance is discussed in the Argument section of this brief. But it should be noted here that it is inaccurate to call the appended material "the" fiscal note. At best it is one of four fiscal notes, and it is not the one published in the Senate Journal. The other fiscal notes (the fiscal notes in the State Archives) do not include the language cited in the Estate's Statement of Facts.

Also, the Estate's Statement of Facts misquotes what it calls "the" fiscal note, stating that the fiscal note projected a $23 million decrease in revenue for Missouri from the change in the law, whereas the cited document itself indicates a net decrease of only $11 million. (The note projected a $6 million

[2] The Commission decision is found in Respondent's Appendix because it was not included in Appellant's Appendix. Mo. S. Ct. R. 84(h).

increase in one year and a $17 million decrease in two subsequent years. Apparently the Estate treated the $6 million projected increase as a projected decrease.) (Appellant's Appendix at A1).

There are additional legislative history matters not addressed in the Estate's Statement of Facts. For instance, in 1985, the Department of Revenue published a five-page article on the estate tax provision at issue in the Department's *Missouri Tax Review*. The article points out that there is an additional tax burden when other federal credits (such as the prior transfer credit) reduce the federal tax to zero (L.F. 627-632, especially 628).[3] In 1988, the Director of Revenue promulgated a regulation on this subject, specifically noting the prior transfer credit does not figure in the calculation of the Missouri estate tax. 12 CSR § 10-8.190 (L.F. 552).

Finally, in 1987, two years after the publication of the above article, Representative Charles Graham introduced a bill that would have given Missourians the result the Estate seeks here: the benefit of a prior transfer credit. The bill failed, not being reported out of the Ways and Means Committee (L.F. 634-37).

[3] The Commission ruled that the article could be considered authority similar to any other legal publication, but not evidence (L.F. 638).

STATEMENT OF THE ISSUE

Section 145.011 mandates the payment of a Missouri estate tax in an amount equal to a federal credit that could have been taken, even if the estate chooses not to take the credit. Does Section 145.011 implicitly bar collection of that mandated amount if there is no federal estate tax due?

RESPONSE TO APPELLANT'S POINT RELIED ON

The Administrative Hearing Commission properly upheld the Director of Revenue's Notice of Deficiency because the decision is authorized by law in that Section 145.011 authorizes the imposition of a tax if a state estate tax credit is allowable, whether or not it is taken and whether or not other credits reduce the federal estate tax to zero.

Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 599-600 (Mo. banc1977)

L & R Distributing, Inc. v. Dept. of Revenue, 529 S.W.2d 375, 378-79 (Mo. 1975)

City of St. Louis v. Carpenter, 341 S.W.2d 786, 788-89 (Mo. 1961)

Indiana Dept. of Revenue v. Eberbach, 535 N.E.2d 1194 (Ind. 1989)

Mo. Rev. Stat. § 145.011 (2000)

26 U.S.C. § 2011

26 U.S.C. § 2013

12 CSR § 10-8.190

ARGUMENT

The Administrative Hearing Commission properly upheld the Director of Revenue's Notice of Deficiency because the decision is authorized by law in that Section 145.011 authorizes the imposition of a tax if a state estate tax credit is allowable, whether or not it is taken and whether or not other credits reduce the federal estate tax to zero.

I. The Plain Language of Section 145.011 Requires That State Death Taxes Be Based on the Federal Credit That Is "Allowable," Even If It Is Not Actually Taken.

As the Estate correctly notes, the Court should limit its analysis in determining the meaning of a statute to the statute itself if it is unambiguous. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998); *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599-600 (Mo. banc 1977). That is the case here.

A. The Missouri estate tax is based on the "allowable" amount of a credit, whether or not the credit is actually taken.

[Response to Appellant's Brief Sections I.A. and I.B.]

The Missouri estate tax is calculated in one of two ways: (1) the amount of a credit "allowed" or (2) the amount "allowable." Section 145.011 reads as follows:

> A tax is imposed on the transfer of every decedent's estate which consists in whole or in part of property having a tax situs within the state of Missouri. The Missouri estate tax shall be the maximum credit for state death taxes allowed by Internal Revenue Code Section 2011 but not less than the maximum credit for state death taxes **allowable to the estate** of a decedent against the federal estate tax by Section 2011 or any other provision of the laws of the United States.

Mo. Rev. Stat. § 145.011 (emphasis added)(Resp. App. A32).

The Administrative Hearing Commission correctly recognized that the clause covering "allowable" credits was intended to be different and broader than the phrase covering "allowed" credits. The first clause applies to credits taken, whereas an "allowable" credit is one that could have been taken.[4] Allowable means "permissible: not forbidden: not unlawful or improper" (AHC Opinion, Resp. App. at A6, L.F. 648, citing Webster's Third New International Dictionary 58 (unabr.1986)). The Estate does not seem to contest the distinction between these words, but interprets the effect of the "against the federal estate tax" language to make them virtually synonymous.

B. There is a credit allowable *against* the federal tax because the state death tax is taken before the prior transfer credit.

[Response to Appellant's Brief Sections I.B. and I.C.]

[4] It is not disputed that no credit was "allowed" because none was taken, so the Director does not dispute the argument in Section I.A. of Appellant's Brief. The Director's position here rests on the credit "allowable" by Section 2011 of the Internal Revenue Code.

The Estate's "plain language" argument is premised on the notion that the state death tax credit cannot be applied **against** the federal tax because the Estate eventually winds up owing no taxes without taking the state tax credit. But the Estate's premise is wrong. The state death tax credit is applied "**against** the federal estate tax." The Estate's error comes from working the return backwards.

When the Estate completed its federal return, it ignored the state death tax credit on line 15, and worked down to line 21 to come up with zero federal liability (Resp. App. A15). The Estate's approach requires it to move backward to line 15 from line 21 and declare that there is no tax against which the credit could be applied because line 21 is "zero."

The fallacy in the Estate's analysis can be seen by walking through the steps necessary to fill out the federal return (Resp. App. A15). The Estate's federal return shows a gross estate tax due (less the unified credit) on line 14 in the amount of $13,064,249.00. The state death tax credit line is on the next line, line 15. Here, the taxpayer needs to calculate the amount of state death tax credit, that is, a credit for the amount of the state death tax paid. Pursuant to Section 145.011, the Estate should have looked to the formula in 26 U.S.C. § 2011 (Resp. App. A17-18). The formula permits a credit for this Estate in the amount of $3,149,934.18, after adjusting for the small non-Missouri portion of the Estate's value.

Had the Estate followed these steps, the Estate would have placed the figure $3,149,934.18 on line 1 of its Missouri return (L.F. 619). The Estate then would have put that same amount on line 15 of its federal return. That credit would have been "allowed" by the IRS. The only reason it was not "allowed" by the IRS was that the Estate did not take the credit and pay the Missouri tax. Thus, the credit was "allowable."

Importantly, and contrary to the Estate's argument, the $3,149,934.18 would have been allowed **against** the federal estate tax. The next line of the federal return after the credit is written down (line 16) directs the taxpayer to subtract the credit (line 15) from the gross tax (line 14). When the credit is

subtracted from the gross tax, the credit is being applied **against** the federal tax. That is how virtually every tax deduction or credit is taken "against" the tax.

The prior transfer credit is not taken until line 19. The statute creating that credit requires that it be calculated after the state death tax credit is calculated, and it cannot exceed the amount of the federal tax owed after the other credits are taken. 26 U.S.C. § 2013(c)(1)(A) (Resp. App. A21). Thus, the prior transfer credit is smaller when the state credit is taken. In either case, the federal liability can reach zero, but cannot be a negative number.

The application of these principals to the federal estate tax return is shown in the following table, which compares the way the Estate completed the return, and the way it would have completed the return had it taken the allowable state death tax credit.

Relevant Parts of Federal Return	**Federal Estate Tax Return as filed**	**Federal Estate Tax Return using allowable state death tax credit**
Line 1 (Gross Estate)	$30,857,969.97	$30,857,969.97
Line 10 (Gross Estate Tax)	$13,257,049.00	$13,257,049.00
Line 14 (Gross Estate Tax adjusted for unified credit)	$13,064,249.00	$13,064,249.00
Line 15 (state death tax credit)	-0-	$3,149,934.18
Line 16 (line 14 minus line 15)	$13,064,249.00	$9,914,315.00
Line 19 (credit on prior transfers)	$13,064,249.00	$9,914,315.00
Line 21 (net estate tax)	-0-	-0-

When the Estate tries to calculate the state death tax credit on line 15 **after** calculating the prior transfer credit on line 19, the Estate is not completing the federal return consistently with federal structure for Section 2011 of the Internal Revenue Code (referenced in Section 145.011), which states that the prior

transfer credit is calculated “after deducting the credits provided for in sections ... 2011.” 26 U.S.C. § 2013(c)(1)(A) (Resp. App. A21). Although the federal government may not care whether the death tax credit was taken (since federal liability is zero either way), that does not change the fact that a state death tax credit was “allowable” and, if taken, would have been used to change the Estate’s prior transfer credit.

This case exemplifies why the Missouri General Assembly included both an "allowed" and “allowable” clause in Section 145.011. If only “allowed” credits were the basis for the tax, the taxpayer could avoid paying a tax by not taking an “allowable” credit. The "allowable" clause deprives the taxpayer of the ability to legally avoid paying a state estate tax simply by not paying a state tax.

The “allowable” clause thereby also preserves the historical relationship of state and federal estate taxes. State death taxes were in place long before federal estate taxes. The state death tax credit recognizes that the federal government should not decrease the state death tax revenues. Hellerstein and Hellerstein, *State Taxation* ¶21.01[1] (3d ed. 2000). If the meaning of “allowable” is undermined, the federal tax system can be used by the taxpayer to reduce the state tax revenues. That threat exists whether or not the federal government benefits from the loss of state revenues.

The Estate argues that the allowed/allowable distinction is intended to cover the situation in which a taxpayer wants to deprive the state of money and fails to take the credit even though that failure does not save the taxpayer money (Appellant’s Br. 23). Although the statute does cover that situation, there is nothing in the statute or implicit in the word “allowable” to limit the "allowable" clause to situations in which there is no tax savings by failing to take a credit. This Court should decline the Estate’s invitation to add language to the statute to make the “allowable” clause effective only when there is no net change in the tax burden. The language necessary to create such a distinction is simply absent from the statute.

If the General Assembly intended there to be a simple, bright line rule–that only estates with federal tax liability are subject to a state tax–there would have been numerous ways for the legislature to clearly express such a rule. For instance, the first clause of Section 145.011 could have read: "A tax is imposed on the transfer of every decedent's estate *on which a federal estate tax is due and* which consists in whole or in part of property having a tax situs within the state of Missouri." Without the italicized phrase, there can be a state liability in the absence of federal liability so long as there is a credit "allowable."

To rule for the Estate, this Court would have to, in effect, amend the statute to add the italicized phrase. But any such amendment should be left in the province of the legislative branch.

Moreover, the General Assembly knew how to use the word "allowed" without also using the word "allowable" when it wanted to do so. When the legislature passed Senate Bill 539 in 1980, there were two sections of the bill imposing a tax with a link to a federal credit. The part of the bill now codified at Section 145.995, the "Generation-skipping credit tax," is worded very similarly to Section 145.011 **except** that it bases the credit only on the amount of the credit "allowed," and has no reference to an "allowable" credit. Section 145.995 reads:

> A generation-skipping credit tax is imposed on every generation-skipping transfer which consists in whole or part of property having a tax situs within the state of Missouri. The Missouri generation-skipping credit tax shall be the maximum credit for state death taxes allowed by Internal Revenue Code section 2604.

(See Resp. App. A23).

It is presumed that every word or clause of a statute has effect. *Hyde Park Housing Partnership v. Director of Revenue,* 850 S.W.2d 82, 84 (Mo. banc 1993). Moreover, individual statutes within a chapter are to be construed consistently with each other. *City of St. Louis v. Carpenter,* 341

S.W.2d 786, 788-89 (Mo. 1961). In ascertaining the legislative intent, it is proper to consider acts passed at the same session of the legislature. *State ex rel. Kemp v. Hodge*, 629 S.W.2d 353, 356 (Mo. banc 1982). Given that the legislature used "allowable" only in Section 145.011 and not in Section 145.995, and both sections were enacted as part of the same bill, the legislature clearly intended "allowable" to have a meaning beyond "allowed."

Pursuant to the plain language of Section 145.011 and the requirements of Internal Revenue Code Sections 2011 and 2013, the allowable credit–and therefore the state tax–was $3,149,934.18.

C. Authorities interpreting similar statutes from other states reject the Estate's position.

[Response to Appellant's Brief Section II.E.]

Although there are numerous states with estate credit statutes, they vary in their language and therefore in their interpretation, and many do not use the word "allowable" in describing the way to calculate the state estate tax. The Administrative Hearing Commission correctly noted that the states with the most similar statues–those using the word "allowable"–have reached the same conclusion asserted by the Director here. For instance, the Minnesota statute states that "the tax shall be the maximum credit **allowable** under section 2011." Minn. Stat. § 291.03.1. The Minnesota Tax Court specifically held that the tax should be computed without regard to the credit for prior transfers. *Estate of Kelly v. Commissioner of Revenue*, No. 5705, 1991 WL 278273, 1991 Minn. Tax LEXIS 223 (Minn. Tax Ct. 1991).

The same analysis was used by New York courts when the New York statute was very similar to Missouri's. The New York law imposed a tax upon the estate "equal to the maximum credit **allowable** to the estate." An estate argued that state tax could be based only on the credit actually taken. *In re the Estate of Thalmann*, 32 N.Y.S.2d 695 (Surr. Ct. 1941). The New York Court specifically held that the

statute was tied to the "allowable," rather than the "allowed" amount. The Court noted that the use of the word "allowable" meant that the legislature "clearly intended to place beyond the power of a taxpayer to avoid the tax by failing to claim the full credit granted by [the federal tax law]." *Id.* at 698. *Accord, In re the Estate of Zinn*, 57 N.Y.S.2d 423 (N.Y. Surr. 1945). Just as the New York taxpayers could not avoid state liability by failing to take a credit, the Estate here should not be able to avoid the state estate tax by failing to take the state death tax credit.

Of the cases we have found which interpreted statutes that pegged the state tax to an "allowable"credit and addressed the issues presented in the instant case, all adopt the reasoning offered by the Director here and none have adopted the Estate's position.

Furthermore, the Indiana Supreme Court adopted the Director's reasoning here on nearly identical facts involving a statute that only used the word "allowed," and not "allowable" in describing the state estate tax calculation. In *Indiana Dept. of Revenue v. Eberbach*, 535 N.E.2d 1194 (Ind. 1989), an estate tried to avoid paying a state estate tax by not claiming the credit. As here, the federal prior transfer credit reduced the estate's federal estate tax liability to zero without the estate taking the state death tax credit. The Indiana Department of Revenue argued that the estate should not be able to avoid the state estate tax simply by not taking the credit. The Indiana Supreme Court agreed with the estate because the Indiana statute, unlike the Missouri statute, stated only that the state tax equaled the federal credit "allowed."

Importantly, the Indiana Court noted that the words "allowed" and "allowable" have different meanings, with "allowed" being the credit actually taken and "allowable" being the credit that could have been taken. The Court found that the Department of Revenue's position had to be rejected because the word "allowable" was not in the Indiana statute. *Id.* at 1196-97. But Missouri law uses the word

"allowable." The Indiana legislature responded to the *Eberbach* decision by changing the word "allowed" to "allowable" in the statute. Burns Ind. Code Ann. § 6-4.1-11-2 (2000).

Just as it would have been improper for the Indiana Court to judicially amend its state's laws by adding "allowable" to the statute, this Court should reject the Estate's suggestion to judicially amend Missouri's statute by deleting "allowable" from the Missouri statute.

The Estate attempts to distinguish *Thalmann's Estate*, *Zinn's Estate*, and *Kelly* (all cited in the Commission opinion) on the basis that the Estate here supposedly did not have a federal tax **against** which the credit could be applied. But as noted above in Section I.B., the credit that could have been taken here would have been applied **against** the adjusted gross tax of $13,064,249.00 on line 14 of the federal return because the credit would have been subtracted from that amount (Resp. App. A15).

The Estate also cites two cases from other jurisdictions that the Estate contends support its position. But both of those cases involved statutes that tied the state tax to the "allowed," rather than "allowable," amount. *Dickinson v. Maurer*, 229 So.2d 247 (Fla. 1969), *citing Green v. State ex rel. Phipps*, 166 So.2d 585 (Fla. 1964); *Estate of Turner v. Washington Dept. of Revenue*, 724 P.2d 1013 (Wash. 1986).

Moreover, there are crucial differences between Missouri's law and the Florida and Washington laws. The Florida constitution stated that the power to impose a state estate tax was limited to "absorbing" the federal credit. *Dickinson*, 229 So.2d at 247. The word "absorbing" indicates an intent to allow the legislature to impose a tax only if it moves money from one place to another, that is, it takes away the money that would otherwise go to the United States. There is no such limiting language in Missouri's estate tax statute or its constitution.

Likewise, the "official explanation" provided by the Washington Attorney General in the Voters Pamphlet for the initiative that became the Washington estate tax law specifically stated that "only"

estates liable for federal taxes would be subject to state taxes. *Id.* at 1015. There was no such "official explanation" from the State's lawyer describing the Missouri estate tax law in the way the Estate describes it here (that no federal liability means there is no state liability).[5] The Washington law, like the former Indiana law, is different than Missouri's and should be interpreted differently.

The Estate cites one private letter ruling from the Arizona Department of Revenue that appears to support the Estate's position (Appellant's Br. 28). But that view (1) has not been adopted in a regulation, (2) is described in the letter as "the present position" of the department, (3) is subject to change depending upon changes in rules or notification of a different position by the department, and (4) is valid for no more than four years. *Private Taxpayer Ruling LR99-004*, available at *www.revenue.state.az.us/privaterules/lr99004.htm.* The persuasiveness of this letter pales in comparison to the court rulings referenced herein.

The laws that are like Missouri's have consistently been interpreted by courts in the same way that the Director interprets Missouri's estate tax law. The laws that have been drafted differently have been interpreted differently. The Director asks this Court to construe the Missouri estate tax statute according to the way it was drafted by the Missouri General Assembly and according to the way all other courts have interpreted similar statues.

II. The Legislative History Shows That the General Assembly Intended to Impose a Tax on Estates Even If Other Federal Credits Reduce the Federal Tax to Zero.

[5] The differences between the fiscal note and the Washington "official explanation" are discussed in Section II.C., below.

Because the legislative intent is ascertainable from the plain language of the statute as described above, this Court should not resort to other sources for interpretation. *Spradlin,* 982 S.W.2d at 258; *Blue Springs Bowl,* 551 S.W.2d at 599-600. Regardless, other sources and principles of statutory construction also lead to the conclusion that the Estate cannot avoid the state tax here.

A. The Department of Revenue has consistently articulated the position taken in this case since at least 1985 and has never taken a contrary position.

[Response to Appellant's Brief Section II.B.]

The Estate cites authority, with which we agree, for the proposition that courts should defer to the persons charged with administering ambiguous statutes (Appellant's Br. 26-27). For instance, one of the Estate's cases states that when dealing with ambiguous statutes, "consideration may be accorded to the contemporaneous and practical construction placed on laws over long periods of time by those charged with their construction and administration." *Lemasters v. Willman*, 281 S.W.2d 580, 588 (Mo. App. E.D. 1955). *Accord, L & R Distributing, Inc. v. Dept. of Revenue*, 529 S.W.2d 375, 378-79 (Mo. 1975)(administrative constructions of ambiguous statutes entitled to "great weight"). Here, the position taken by the Director has been published by the Department over a long period of time (since 1985) in an article and regulations. If ambiguity is assumed *arguendo*, deference to the Director's view is warranted.[6]

[6] In light of the plain language of the statute and the other evidence of legislative intent discussed herein, even strictly construing the statute against the state does not help the Estate.

The Estate argues that the Department of Revenue's position here is different from the position it has previously taken on interpreting Section 145.011, and that the first position is entitled to great weight (Appellant's Br. 26-29). The Estate's premise for its argument–that the Director originally took a contrary position–is not correct.

The position taken here was described in 1985 in the "Missouri Tax Review," a publication of the Missouri Department of Revenue (L.F. 626-632). The Assistant General Counsel to the Department of Revenue explained in that publication that in "most cases" the Missouri estate tax will not increase the overall tax burden of the estate.

Significantly, he noted that there are exceptions, specifically referring to the situation we have here: where other federal credits reduce the federal tax liability to an amount less than would be derived from applying 26 U.S.C. § 2011 (L.F. 628). The author explained that an estate cannot avoid the Missouri tax simply by not taking the federal credit or by taking other federal credits first (L.F. 628-32). The author identified not only the prior transfer credit, but also federal gift tax or foreign death tax credits. Thus, the ramifications of the Estate's position extend beyond the $3 million at stake here. The Estate's position would negatively impact the State of Missouri's revenue not only in cases involving the prior transfer credit, but also in gift tax or foreign death tax credit cases as well.

The Department of Revenue regulation on Section 145.011 expresses the same position taken in the 1985 article and in this case: the state death tax is not to be reduced by use of the prior transfer, gift, or foreign death tax credits, and the state death tax cannot be eliminated by mere failure to take the credit. 12 CSR § 10-8.190 (originally adopted in 1988) (L.F. 552). The regulation is applicable to all decedents dying on or after January 1, 1981. There is no evidence of any prior or different regulations in which the Department took a different position.

The Estate's argument is based on an incorrect factual premise: that in 1981 the Director interpreted the statute to mean that "an estate that does not owe federal tax is not subject to Missouri estate tax" (Appellant's Br. 26-27). But the Director never interpreted the statute that way. The Estate points to a Department of Revenue booklet that contains the sentence: "The Missouri estate tax is an amount that would otherwise be paid in federal estate taxes." The sentence is in a short (eleven-sentence) "General Preface" of a booklet that otherwise simply reproduces statutes for public convenience (L.F. 512-53, esp. 513). As one would reasonably expect from a "General Preface," the statement in the General Preface describes in "general" terms the information which the preface precedes (here, estate tax statutes). And it is accurate as a **general** description. Like many general descriptions, it does not fully explain or include all exceptions or qualifications to the general rule. It is not a complete description, nor does it purport to be a complete description.

The Estate would have a point if the sentence it cites had a limiting term, such as: "The Missouri estate tax is *only* an amount that would otherwise be paid in federal estate taxes," or the tax "is limited to" that amount. The Estate would also have a point if the booklet (or any other Department of Revenue publication) said "an estate that does not owe federal tax is not subject to Missouri estate tax"– words that the Estate ascribes to the Department of Revenue booklet (Appellant's Br. 26-27). But the Department of Revenue did not use such phrases. That the booklet does not stand for the proposition that the Estate says it stands for is shown by the fact that the Estate felt compelled to "paraphrase" the language in the booklet with an entirely different phrase ("an estate that does not owe federal tax is not subject to Missouri estate tax").

Moreover, if the Director had intended to use the terms "only" or "is limited to" in describing the general rule, the Director would have done so. In fact, in that very same General Preface, the Director did use the word "only" in describing the limited circumstances when a Missouri Estate Tax Return must

be filed: "*only* if a federal estate tax return is required" (L.F. 513, emphasis in original). When the Director meant "only," the Director said "only."

The Estate has cited *L & R Distributing, Inc. v. Dept. of Revenue*, 529 S.W.2d 375, 378-79 (Mo. 1975), for the proposition that the Director's "original" interpretation should be given great weight (Appellant's Br. 27). But *L & R Distributing* supports the Director's position here because there has been only one, consistent interpretation. As explained above, the Director did not originally take a different position. And it is undisputed that the Department of Revenue has consistently taken the same position for 16 years, including for 13 years by regulation. In the four years between the effective date of the statute (1981) and the publication of the article explaining the how the statute operated, there was never a Department of Revenue proclamation inconsistent with the article or the regulation. This stands in stark contrast to the situation in *L & R Distributing*, in which the Director issued a new regulation directly contrary to regulations issued by the Director for the previous 37 years.

The Administrative Hearing Commission correctly concluded that the booklet contained a statement of a general rule, and this statement of a general rule is consistent with the 1985 article and the 1988 regulation describing the exceptions to the general rule.

B. The Missouri General Assembly rejected an effort to legislatively adopt the Estate's position, and when the General Assembly intends to fully incorporate federal tax benefits into its system of taxation, it does so clearly.

[Partial Response to Appellant's Brief Section II.C.]

In the instant case, the Estate's position would effectively adopt a state "prior transfer credit" for Missouri estates. Missouri has not adopted such a credit. An effort to do so failed. In 1987 a bill was introduced that would have amended Section 145.011 to add the following clause: "except that the amount of the tax shall not exceed the amount necessary to minimize the federal estate tax, after allowing for the

federal credit for tax on prior transfers." HB 561, 84th General Assembly, 1st Regular Session, 1987 (L.F. 634-37). The bill was never even voted out of the Ways and Means Committee. The legislature's rejection of a bill to change the Department of Revenue's construction is strong evidence that the Department of Revenue's public interpretation was the same as that of the legislature. *L & R Distributing*, 529 S.W.2d at 379. The most plausible explanation for the legislature's action in failing to report the bill out of committee is that it did not want to change the operation of Missouri's estate tax law as interpreted of the Department of Revenue, already publicly stated. "Legislative inaction following a contemporaneous and practical construction is evidence that the legislature intends to adopt such an interpretation," especially where that interpretation has been called to the legislature's attention. 2B *Sutherland's Statutes and Statutory Construction*, § 49:10, at 112, 117 (6th ed. 2000). *See Miller v. Lockett*, 457 N.E.2d 14, 17 (Ill. 1983)(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).[7]

The Estate also suggests that the prior transfer credit should be integrated into Missouri law as a matter of fairness and to avoid undue hardship on those who have "suffered enough" from two deaths

[7] Although the rejected amendments in *L & R Distributing* came to a vote and the 1987 bill to add the prior transfer credit did not come to a vote, the fact that the proposal reached committee and died there indicates a legislative intent not to overrule previous, public statements of the Department of Revenue.

within a few years (Appellant's Br. 30-31,§II.C.). While some may agree that the prior transfer credit is a matter of fundamental fairness, others may not view a $3 million tax on a $30 million inheritance as an undue hardship. It is the legislature's function to weight these policy choices. *State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker*, 955 S.W.2d 931 (Mo. banc 1997) (rejecting argument of what the law "should" be based on public policy when the legislature has chosen a different policy); *In re Estate of Rahn v. Martin*, 291 S.W. 120, 123 (Mo.), *cert. denied*, 274 U.S. 745 (1927) ("the very highest evidence of the public policy of any State is its statutory law"). The legislature has weighed those choices and rejected the prior transfer credit.

When the Missouri legislature defers to the United States Congress in determining what tax benefits the State should give, the legislature does so clearly. For instance, when the Missouri legislature decided that the state "adjusted gross income" for income tax purposes should be tied to the federal adjusted gross income, the legislature left no doubt as to its intent: "The Missouri adjusted gross income of a resident individual shall be his federal adjusted gross income subject to the modifications in this section." Mo. Rev. Stat. § 143.121.1. The link to the federal tax is explicit. Similarly, the corporate income tax is based on the "federal taxable income." Mo. Rev. Stat. § 143.431.1.

If the legislature intended to reduce state revenues by the millions of dollars at stake here, the legislature would have expressed an intent to give effect to all federal credits.

C. The Estate's argument regarding a "fiscal note" (1) was not raised before the Commission, (2) relies on material outside the record, (3) ignores the fact that only one of the fiscal notes for the estate tax law has the language on which the Estate relies, and (4) incorrectly presumes that a fiscal note expresses the legislature's intent.

[Response to Appellant's Brief Sections II.A. and II.C.]

The Estate's brief relies heavily on an argument raised for the first time on appeal. The Estate argues that "the" fiscal note for the bill codified at Section 145.011 establishes a legislative intent that the Missouri estate tax would be limited to amounts that would go to the federal government anyway (Appellant's Br. 10-11, 25-26, 31). The fiscal note upon which the Estate relies is found in the Appendix to Appellant's Brief and is not in the Legal File.

The Estate's fiscal note argument should be disregarded because it is raised for the first time in this Court and relies on documents not in the Legal File and submitted for the first time in the appendix appellant's brief. *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 462 (Mo. banc 1998)("Issues raised for the first time on appeal are not preserved for review") *citing Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 252 (Mo. banc 1996)(points raised for first time on appeal not preserved for review); *State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531, 539 (Mo. App. E.D. 1998)("Arguments on substantive issues, raised for the first time on appeal, must be rejected").

By raising and relying heavily on the fiscal note for the first time on appeal, the Estate has taken from the Director the opportunity to fully investigate the Estate's fiscal note and gather additional evidence relevant to the argument and the evidence. But even with the limited resources available at the appellate stage of these proceedings, we have been able to determine that the fiscal note on which the Estate relies is not kept in the official State Archives for the bills in question.[8] There are three fiscal notes in the State Archives, and none of them has the language that the Estate considers so crucial from its fiscal note

[8] Although the Estate's brief does not identify the source document for the two page fiscal note appended to the Estate's brief, counsel for the Estate has advised counsel for the Director that the Estate's fiscal note was obtained from the Legislative Library of the Missouri Senate.

("Missouri collects only those tax dollars from an estate that would go to the federal government anyway"). The only fiscal note in the Journal of the Senate on the bill in question is not the one on which the Estate relies (Resp. App. A27-31).[9] There are no fiscal notes on the bill in the House Journal.

The Estate's argument presents a classic example of why parties should not be allowed to present new evidence and raise issues for the first time on appeal. If the fiscal note argument had been raised in the Commission, the Department of Revenue could have attempted to further investigate issues regarding the facts surrounding the fiscal note with the language cited by the Estate. For instance, the counsel could have attempted to locate the author of the fiscal note or sought out other sources to try to ascertain (1) from where the bill description came, (2) when in the legislative process that description was prepared, (3)

[9] If this Court deems the Estate's inclusion of the fiscal note in the Appellant's Appendix proper under Mo. S. Ct. R. 84.04(h), and this Court chooses to consider the Estate's fiscal note argument, the Director hereby requests that the fiscal notes in Respondent's Appendix also be considered. If this Court does not consider the fiscal note argument or concludes that the Estate's fiscal note is not properly included in the Appendix because it is not in the Legal File, then this Court need not consider the additional fiscal notes in Respondent's Appendix.

for what purpose it was prepared, (4) which legislators, if any, were or were likely to have been aware of the content of the fiscal note, and (5) what other information was available to the legislators on the meaning of the statute.

Moreover, if the fiscal note argument were considered, the Estate makes an erroneous assumption as to the role of fiscal notes, especially at the time in question. In quoting the fiscal note, the Estate claims: "The legislature stated" (Appellant's Br. 26).

But a fiscal note has never been a statement of the legislature. It is not enacted or adopted by the legislature. Presumably, the authority for creating fiscal notes in 1980 came from Chapter 23 (Committee on Legislative Research) as it existed in 1980, even though in 1980 there was not a statutory reference to fiscal notes. See Mo. Rev. Stat. § 23.140 (2000)(enacted 1984) and Mo. Rev. Stat. §§ 23.010 through 23.090 (1978) (Resp. App. A24-26).

The 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. The purpose of fiscal notes or bill summaries in 1980 appears be quite limited. The 1980 version of Chapter 23 does not refer to bill summaries. The 1980 version of Chapter 23 *does* authorize the Committee on Legislative Research to index bills for collecting and cataloguing and keeping an index or digest on bills. Mo. Rev. Stat. § 23.030(2),(3) (1978)(Resp. App. A24). Thus, the summary in the Estate's fiscal note could have been primarily intended to serve as an indexing or cataloging device, and not as a summary of the bill for use by legislators in determining the bill's effect. Regardless, it certainly was not the legislature speaking or the "legislature's own words," as the Estate asserts (Appellant's Br. 26). And apparently it was the view shared by only one of the bill summary authors.

The fiscal note is not at all similar to the "official explanation" drafted by the Attorney General for the initiative petition that led to the Washington state estate tax law. *Compare, Estate of Turner*, 724 P.2d

at 1015. There the summary was prepared by the Attorney General. The law was being presented to voters at the ballot box, and the Attorney General's summary was specifically intended to advise the voters accurately of the meaning of the proposed law.

Furthermore, under no circumstances can a fiscal note or bill summary override the language of the statute.

Perhaps the Estate will address some of the questions raised herein about the fiscal notes in its Reply Brief. But the Director will not have the opportunity to respond. And that is why arguments that rely on documentary material not presented to the tribunal below should not be considered on appeal.

The Estate makes one other argument in reliance on the fiscal note. It asserts that the reference in the fiscal note to the estate tax being "based on federal estate tax provisions," means that there can be no state estate tax if there is no federal estate tax (Appellant's Br. 29-31, §II.C.). But that conclusion does not follow from the premise. Pursuant to the Director's interpretation here, the state tax **is** based on federal estate tax provisions. In order to compute the state estate tax, the taxpayer or the Department of Revenue must refer to 26 U.S.C. § 2011. That part of the fiscal note merely reflects a need to use federal estate tax provisions to calculate state death taxes, which is accurate. The fiscal note does **not** reflect, as the Estate contends, "the legislature's express desire to conform the Missouri estate tax with federal law" (Appellant's Br. 31). The "based on" phrase does not express or imply a legislative desire to "conform" state law to federal law in all respects, even assuming the note reflected the legislature's desires. If the legislature intended to "conform" the state estate tax to the federal tax in all respects, rather than merely base the calculation on federal estate tax provisions, the legislature could have and would have said so. And it would have said so in legislation, as some other states have done, and not in one of four fiscal notes.

The fiscal note argument should not be considered, and in any event does not reflect the legislative intent.

D. The state estate tax return form does not state or imply that only estates subject to federal estate tax are subject to Missouri estate tax.

[Response to Appellant's Brief Section II.D.]

Contrary to the Estate's argument, the state estate tax return does not imply that there is a tax only on federally taxable estates (Appellant's Br. 31-32, citing L.F. 619).[10] The state estate tax return, directs the taxpayer to enter the credit for state death taxes from the federal return (Resp. App. A19). As explained in Section I.B., above, the amount that the taxpayer should have written down in accordance with Section 145.011 is the credit the Internal Revenue Service would have allowed ($3,149,934.18).

The Estate may be arguing that there can be a credit only if the tax is paid, and by not paying there can be no credit and no duty to pay. But that would mean the word "allowable" means the same thing as "allowed." In fact, the duty to pay estate taxes could be avoided simply by not paying state estate taxes. Even the Estate rejects that position in another part of its brief, where it acknowledges that a taxpayer cannot avoid state estate taxes–even if only for spite–by not claiming the credit (Appellant's Br. 23). Regardless, the form could not override either the statute or the Department's regulations that explain the process in more than the few words on the return itself.

CONCLUSION

[10] The Estate cites a blank state return at L.F. 619, and its actual return is at L.F. 12 (Resp. App. A19). Because of the different years of preparation of the two forms, they refer to different lines of the federal return on which the state credit is placed.

The statute at issue has two express ways to calculate the Missouri estate tax. One is the allowed (legally taken) amount. The other is the allowable (could have been legally taken) amount. The Administrative Hearing Commission correctly concluded that the amount that was allowable was $3,149,934.18, plus interest, and not zero. For the foregoing reasons, the decision of the Administrative Hearing Commission finding the Estate liable to the Department of Revenue in the amount that had been determined by the Director should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

_____

Erwin O. Switzer, #29653
Special Chief Counsel
Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, MO 63101
(314) 340-6816 telephone
(314) 340-7957 facsimile
Attorney for Respondent
Director of Revenue

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the Brief of Respondent, and one disk containing the same, were mailed first class, postage prepaid, this 12th day June, 2001, to counsel for Appellant, Juan D. Keller, Bryan Cave LLP, One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, Missouri 63102-2750.

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CERTIFICATE REQUIRED BY SPECIAL RULE 1

Pursuant to Missouri Supreme Court Special Rule 1, adopted December 5, 2000, and effective January 1, 2001, the undersigned certifies that this Respondent's Brief complies with the limitations of Special Rule 1 in that the number of words is no more than 9772 [less than the 27,900 word limit in the rule] and the number of lines is no more than 757 [less than the 1980 line limit in the rule]. 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, 3.5 inch size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format (Wordperfect 9.0). The disks have been scanned for viruses and they are virus-free.

JEREMIAH W. (JAY) NIXON
Attorney General

_____

Erwin O. Switzer, #29653
Special Chief Counsel
Wainwright State Office Building
111 North 7th Street, Suite 204
St. Louis, MO 63101
(314) 340-6816 telephone
(314) 340-7957 facsimile
Attorney for Respondent
Director of Revenue

APPENDIX

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