IN THE
SUPREME COURT OF MISSOURI

No. SC89431

MFA PETROLEUM COMPANY,

APPELLANT,

v.

DIRECTOR OF REVENUE,

RESPONDENT.

BRIEF OF APPELLANT

BRYAN CAVE LLP
Edward F. Downey, #28866
221 Bolivar Street, Suite 101
Jefferson City, MO 65101-1574
Telephone: (573) 556-6622
Facsimile: (573) 556-6630
efdowney@bryancave.com

Brenda Talent, #35568
211 North Broadway, Suite 3600
St. Louis, MO 63102
Telephone: (314) 259-2777
Facsimile: (314(259-2020
bltalent@bryancave.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Missouri Statutes

Missouri Regulations

Missouri Cases

Other Missouri Authority

STATEMENT OF FACTS

The parties submitted this matter to the Missouri Administrative Hearing Commission (the "Commission") on cross-motions for summary determination under 1 CSR 15-3.440(3), with Statements of Undisputed Material Facts and a stipulation of facts clarifying the amount of tax in dispute (L.F. 61-65, 100, 102). From those documents, the Commission adopted its Findings of Fact (L.F. 103-5). The Commission's decision under appeal (L.F. 102-111) is attached hereto as an appendix (App. A1-A10).

Appellant MFA Petroleum Company ("MFA") is a corporation headquartered in Columbia, Missouri. During the tax periods at issue, January 2001 through December 2003 ("Tax Periods"), MFA owned and operated convenience stores, vehicle oil change stores, vehicle service and repair centers, a wholesale tire division, and gasoline fueling stations (L.F. 103, App. 2). During the Tax Periods, the convenience stores sold cigarettes, as well as numerous other products. MFA paid state excise tax and, where applicable, local excise tax on the cigarettes that it sold. MFA incorporated the excise taxes into the price that it charged for the cigarettes. MFA also collected and remitted Missouri and local sales tax on cigarette sales and sales of other products. For purposes of this case, MFA concedes that any applicable local excise tax on cigarette sales was imposed on MFA and not the customers purchasing the cigarettes (L.F. 103).

For part of the Tax Periods at issue (January 1, 2001, through April 30, 2002), MFA included in the sales tax base upon which it calculated sales tax, the full sales price of cigarettes, including the state excise tax and any local excise tax. During April 2002,

MFA's tax advisors informed MFA that it was overpaying sales tax on cigarettes since the excise tax component of the purchase price was not taxable. MFA understood that advice to apply both to the state excise tax and local excise tax components of the cigarette sales price. Accordingly, beginning May 2002 and continuing until December 2003, and thereafter, MFA deducted both the state and the local excise tax components of the sales of cigarettes from the sales price before calculating the sales tax to be charged. MFA collected the sales tax so computed from its customers and remitted the same to the Director, less the statutory two percent tax collection fee. L.F. 103-4.

The Director audited MFA for the Tax Periods and determined that MFA had underpaid its Missouri and local sales tax in the amount of $113,451.52, plus interest. MFA appealed that assessment to the Commission (L.F. 1-9). After appeal, the Director conceded that $14,411.87 of the assessed sales tax was not due, leaving a balance of $99,039.65. Of that balance, MFA conceded that $8,228.51 was due, but did not pay it because the Director refused to issue a separate assessment for that amount (L.F. 70). L.F. 104-105. The tax at issue in this appeal is thus $90,811.14.

During the course of the audit, the auditor informed MFA that sales tax is not due on the state excise tax component of the sales price, but is in fact due on the local excise tax component of the sales price unless the local excise tax was imposed on the buyer rather than the seller (L.F. 68, ¶ 7). Accordingly, MFA determined that during part of the Tax Periods under audit, January 2001 through April 2002, it had overpaid its sales tax on cigarette sales by the amount of $90,811.14 (L.F. 104). At no time has the Director disputed either that such tax was overpaid or the amount of such tax overpayment (L.F.

68, ¶ 8). MFA also determined that during part of the Tax Periods (May 2002 through December 2003) it had underpaid its sales tax on cigarette sales in the amount of $32,774.27. That sales tax underpayment, coupled with other sales tax underpayments for other sales during the Tax Periods, total $99,039.65, $8,228.51 of which MFA concedes is due. The difference, $90,811.14, is the tax overpayment MFA made to the Director on cigarette sales from January 2001 through April 2002. MFA has never sought a refund of the $90,811.14 tax overpayment, but rather sought to have the Director credit that overpayment against underpayments of tax as is typically done during an audit of taxpayers (L.F. 68, ¶ 8; L.F. 104-5).

In summary, MFA underpaid its sales tax liability during the Tax Periods in the net amount of $8,228.51, but the Director seeks $99,039.65 more sales tax. Relying on section 149.015.4,[1] the Director refused to allow MFA an overpayment credit for the sales tax that it overpaid on cigarette sales during the Tax Periods to offset the amount of tax MFA underpaid on cigarette and other sales during the Tax Periods. The Commission found in favor of the Director on this issue, and this appeal followed.

[1] Unless otherwise noted, all statutory references are to the 2000 Revised Statutes of Missouri.

STANDARD OF REVIEW

The decision of the Commission shall be reversed if: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence upon the whole record; (3) mandatory procedural safeguards are violated; or (4) it is clearly contrary to the reasonable expectations of the General Assembly. Section 621.193, RSMo. 2000; *Whitehead v. Director of Revenue*, 962 S.W.2d 884, 885 (Mo. banc 1998). The first and fourth standards are at issue in this case.

This Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

POINT RELIED ON

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN AFFIRMING THE DISPUTED PART OF THE SALES TAX ASSESSMENT BECAUSE UNDER SECTION 621.193 THE DECISION IS NOT AUTHORIZED BY LAW AND CREATES A RESULT CLEARLY CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT: (1) THE COMMISSION MISINTERPRETED SECTIONS 149.015.4 AND 144.190.2, AND; (2) THE RESULT OF SUCH MISINTERPRETATION AMOUNTS TO A PENALTY AGAINST AN INNOCENT TAXPAYER.

Jones v. Director of Revenue, 981 S.W.2d 571 (Mo. banc 1998);

ITT Canteen Corporation v. Spradling, 526 S.W.2d 11 (Mo. 1975);

Medicine Shoppe International v. Director of Revenue, 156 S.W.3d 333 (Mo. banc 2005);

Section 144.190.2, RSMo. 2000.

ARGUMENT

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN AFFIRMING THE DISPUTED PART OF THE SALES TAX ASSESSMENT BECAUSE UNDER SECTION 621.193 THE DECISION IS NOT AUTHORIZED BY LAW AND CREATES A RESULT CLEARLY CONTRARY TO THE REASONABLE EXPECTATIONS OF THE GENERAL ASSEMBLY IN THAT: (1) THE COMMISSION MISINTERPRETED SECTIONS 149.015.4 AND 144.190.2, AND; (2) THE RESULT OF SUCH MISINTERPRETATION AMOUNTS TO A PENALTY AGAINST AN INNOCENT TAXPAYER.

In what amounts to a high-stakes game of "gotcha" taxation, the Director seeks to employ section 149.015.4 to exact a penalty from an innocent taxpayer of more than $90,000 in additional sales tax that the Missouri General Assembly did not intend the Director to collect because the taxpayer had already paid that amount to the Director. According to the Director, vendors like MFA, who both erroneously overpay and erroneously underpay sales tax on cigarette sales, and erroneously underpay on other than cigarette sales, must pay assessments for all of the underpayments with no credit for tax overpayments. The Director's position, and the Commission's acceptance of it, are contrary to the plain language of sections 144.190.2 and 149.015.4.

1. Section 144.190.2 Requires That MFA's Overpayment of Tax Be Applied As a Credit Against its Underpayment of Tax

The clear and unambiguous language of section 144.190.2 provides that a sales tax overpayment shall be credited against any tax underpayments:

> If any tax … has been paid more than once, or has been erroneously … computed, ***such sum shall be credited on any taxes then due*** from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525 [.] (Emphasis added).

It is a matter of undisputed fact that MFA overpaid sales tax on certain of its cigarette sales by $90,811.14 during the Tax Periods. Application of section 144.190.2 thus requires that MFA receive a credit of $90,811.24 against any taxes found due for the Tax Periods. The Commission's decision to the contrary, which relied upon a misreading of section 149.015.4, should be reversed.

2. Section 149.015.4 Does Not Alter or Trump the Credit Provision of 144.190.2

In finding against MFA, the Commission relied on section 149.015.4, but misinterpreted that section, which states:

> It shall be the intent of this chapter that the impact of the tax levied hereunder be absorbed by the consumer or user and when the tax is paid by any other person, the payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user with the person first selling the

> cigarettes acting as an agent of the state for the payment and collection of the tax to the state, except that in furtherance of the intent of this chapter ***no refund of any tax collected and remitted by a retailer upon gross receipts from a sale of cigarettes*** subject to tax pursuant to this chapter ***shall be claimed pursuant to chapter 144, RSMo,*** for any amount illegally or erroneously overcharged or overcollected as a result of imposition of sales tax by the retailer upon amounts representing the tax imposed pursuant to this chapter ***and any such tax shall either be refunded to the person who paid such tax or paid to the director.*** The director may recoup from any retailer any tax illegally or erroneously overcharged or overcollected unless such tax has been refunded to the person who paid such tax. (Emphasis added).

While application of section 149.015.4 to a situation such as MFA's is a case of first impression, "the starting point [in determining the meaning of a statute] is the plain language of the statute itself." *Jones v. Director of Revenue,* 981 S.W.2d 571, 574 (Mo. banc 1998), *citing International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 557 (Mo. banc 1998).

Section 149.015.4, on its face, requires that a vendor remit to the Director all sales tax collected on cigarette sales, including overpayments of the tax, or return the tax to its customers. If the vendor fails to do either, the Director has the right to collect the tax from the vendor. In addition, if the vendor remits the tax to the Director, the vendor cannot seek a refund of it.

Here, MFA has not sought any refund of a tax. MFA also paid to the Director all sales tax that it collected on cigarette sales. MFA, pursuant to section 144.190.2, has simply requested that its overpayment of sales tax be "credited against any taxes due." Section 149.015.4, therefore, has no application to this case.

A. Under Missouri Law, a Credit Against a Tax Differs From a Refund of Tax

Before the Commission, the Director argued that the term "refund" as used in section 149.015.4 really means "refund or credit." MFA refuted this argument on the grounds that: (1) the word "credit" is found nowhere in section 149.015.4; (2) section 144.200 requires appropriations for refunds and no similar requirement exists for credits; (3) section 144.100.4 and 12 CSR 10-102.016 allow taxpayers to take tax overpayment credits on their tax returns and there is no similar provision for refunds, which must be claimed by filing separate refund claims, and; (4) interest is sometimes allowed on refunds under sections 144.190 and 32.069 but no interest is allowed on a tax credit (L.F. 58-9). Against these authorities, the Director argued that a credit has the same economic effect as a refund so the Commission should read the word "credit" into section 149.015.4.

The Commission rejected the Director's argument, agreeing with MFA that the word "refund" does not encompass a "credit:"

> We accept MFA's argument that "crediting" and "refund" are two different terms with two different meanings in the sales tax statutes. Each word or phrase in a statute must be given meaning if possible. When § 144.190.2 applies, it requires that an overpayment be "credited" on any taxes due and that the balance be refunded. To "credit" a sales tax overpayment is to apply it to another tax amount due. A "refund" is defined as "[t]he return of money to a person who overpaid, such as a taxpayer who overestimated tax liability[.]" In ***Union Elec. Co. v. Director of Revenue***, [799 S.W.2d 78 (Mo. banc 1990)], the Court noted the distinction between sales tax credits and refunds in § 144.190.2, RSMo 1986, and concluded that § 144.190.2 allows the payment of interest on refunds, but does not allow the payment of interest on a credit. Therefore, when § 149.015.4 states that "no refund . . . shall be claimed" for an overpayment of sales tax upon the amounts representing the state excise tax, that same language does not preclude a credit (L.F. 108-9).

The Commission's conclusion in this regard is correct and, accordingly, the Commission should have found for MFA. Nevertheless, the Commission found against MFA, crafting and accepting its own argument regarding the interpretation of section 149.015.4. The Commission concluded that a 2001 amendment to section 149.015.4 evidenced an intent that section 149.015.4 override section

144.190.2 with regard to the right to an overpayment credit. As explained below, the Commission's conclusion is not supported by a fair reading of the statute.

B. The 2001 Amendment to Section 149.015.4 Does Not Show an Intent to Override Section 144.190's Allowance of a Credit

The Commission found that the following language of section 149.015.4, adopted in 2001 and effective in 2002,[2] impliedly eliminated section 144.190.2's allowance of a credit:

> [A]nd any such tax shall either be refunded to the person who paid such tax or paid to the director. The director may recoup from any retailer any tax illegally or erroneously overcharged or overcollected unless such tax has been refunded to the person who paid such tax (L.F. 109).

Rather than reading this language literally, namely that the sales tax a purchaser of cigarettes overpays must be refunded by the vendor to the purchaser or paid to the Director, the Commission concluded that:

> The General Assembly's intent that the overpayment be paid to the Director, unless it has been refunded to the person who paid the tax, is expressed in the plain language of the statute. MFA makes no claim that it has refunded the tax to the cigarette purchasers who paid it. The plain language of the statute precludes the option of a credit, which would otherwise be allowable under § 144.190.2. (L.F. 110).

[2] H.B. 381, 91st Gen. Assem., First Regular Session, 2001 Mo. Laws 448.

With all respect, the Commission's decision flies in the face of the plain language and clear purpose of the statute.

The Commission's holding contradicts the very authorities it relies upon, which require that taxing statutes be construed in favor of the taxpayer and against the Director. (L.F. 110, citing *Medicine Shoppe International v. director of Revenue*, 156 S.W.3d 333, 338 (Mo. banc 2005)). The Commission's conclusion reads words into the statute that simply are not there, namely that "no refund . . . **or overpayment credit** … shall be claimed." In addition, the Commission's conclusion ignores the basic rules of statutory construction: "Generally, statutes on similar subject matters are regarded as in *pari materia*, and must be considered together even though enacted at different times and found in different places … and the Court should, if possible, harmonize such statutes." *ITT Canteen Corporation v. Spradling*, 526 S.W.2d 11, 16 (Mo. 1975) (addressing consideration of the cigarette tax statutes when construing the sales tax law because the two laws were viewed as addressing "similar subject matters"); *see also Kidde America, Inc. v. Director of Revenue*, 242 S.W.3d 709, 712 (Mo. banc 2008).

The provisions of sections 149.015.4 and 144.190.2 are easily harmonized by recognizing that section 149.015.4 addresses only whether a vendor who has made net tax overpayments during a tax period may claim a refund. As the Commission correctly concluded, a refund is fundamentally different than an overpayment credit under the law. The Legislature sought to preclude vendors from reaping a windfall because the vendor must return the overpaid tax to customers or pay it to the Director. If a vendor does neither of those things, the Director may recover the tax from the vendor. Nothing in the

statute evidences an intent to work a *de facto* tax increase or penalty on an innocent vendor by precluding a vendor from claiming the normal overpayment credit under section 144.190.2 on cigarette sales against underpayments of tax on cigarette sales and sales of other products. That is why the statute prohibits ***refunds*** but not ***credits***.

Section 149.015.4, both before and after the 2001 amendment, is silent regarding the effect that may be given to an overpayment of tax that a vendor has remitted to the Director on cigarette sales. That is why neither MFA, nor the Director, addressed the 2001 amendment in their arguments to the Commission. As the Commission concluded, the preclusion of a refund does not preclude application of a credit under section 144.190.2. Had the General Assembly intended to nullify the credit provision of section 144.190.2, it easily could have, and MFA submits would have, done so by providing that "no refund shall issue, **and no credit shall be allowed,** on any such overpayment." It is improper for the Commission to read those emphasized words into the statute.

Moreover, the Commission's construction of section 149.015.4 leads to a patently unfair result in that an innocent taxpayer must pay an additional $90,811.14, with interest thereon, even though the taxpayer, acting as the Director's collection agent, did not for the Tax Periods underpay that amount of tax to the Director. While section 149.015.4 was intended to prevent a vendor from reaping a windfall by obtaining a refund of sales tax overpaid on cigarette sales, nothing about the statute supports an intent to punish an innocent vendor by imposing what amounts to a penalty. This appears particularly true here, where a significant portion of the tax underpaid during the later part of the Tax Periods under audit were taxes that MFA under-collected from its customers on cigarette

sales to them. Under section 621.193, such a result is "clearly contrary to … the reasonable expectations of the general assembly[.]"

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Commission with instructions to abate $90,811.14 of the tax assessment at issue, and interest thereon.

Respectfully submitted,

BRYAN CAVE LLP

By:_____

Edward F. Downey, #28866
221 Bolivar Street, Suite 101
Jefferson City, MO 65101-1574
Telephone: (573) 556-6622
Facsimile: (573) 556-6630

Brenda Talent, #35568
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
Telephone: (314) 259-2777
Facsimile: (314) 259-2020
bltalent@bryancave.com

Attorneys for Respondent

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that: (1) one true and accurate copy of the foregoing, as well as a labeled disk containing the same, were hand-delivered this ___, of November, 2008, to Jim Layton, Missouri Attorney General's Office, P.O. Box 899, Supreme Court Building, Jefferson City, Missouri, and to Dori J. Drummond, Missouri Department of Revenue, P.O. Box 475, Truman State Office Building, Jefferson City, Missouri; (2) that the foregoing brief complies with Rule 55.03 and complies with the limitations in Rule 84.06(b) in that it contains 3,329 words and; (3) that the attached floppy disk of this brief has been scanned for viruses and is virus-free.

APPENDIX TABLE OF CONTENTS