IN THE
SUPREME COURT OF MISSOURI

No. SC89431

MFA PETROLEUM COMPANY,

APPELLANT,

v.

DIRECTOR OF REVENUE,

RESPONDENT.

REPLY 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 Cases

REPLY ARGUMENT

I. Introduction

The Director ignores numerous canons of statutory construction in order to advance her unduly punitive construction of section 149.015.4.[1] The Director ignores the rule of statutory construction that legislative intent is to be determined from the words of the statute and the rule that when those words are plain and unambiguous, there is no room for statutory construction. Rather, without identifying any ambiguous term in section 149.015.4, the Director employs a series of assumptions about the intent of the General Assembly to advance her argument that this Court should, under the guise of statutory construction, rewrite section 149.015.4 so that it precludes an overpayment credit as well as a refund.

According to the Director's construction of this section, the General Assembly intended to empower the State to extract additional sales tax from a taxpayer whenever that taxpayer, acting as the State's agent in collecting sales tax, makes an inadvertent collection error on cigarette sales, even though the taxpayer has remitted all the taxes collected and the State has, in fact, received the full amount of taxes it is owed. Her interpretation ignores both the import of Missouri's sales tax statutes that recognize the difference between refunds and credits and the presumption that the General Assembly understood that difference when it crafted section 149.015.4.

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

As MFA demonstrated in its opening brief, had the legislature intended section 149.015.4 to preclude an overpayment credit in addition to a refund, that section would have stated that "no refund . . . **or overpayment credit** … shall be allowed" rather than stating that "no refund … shall be claimed." Section 149.015.4 does not bar a credit because, as the Administrative Hearing Commission found and as supported by authorities cited in MFA's opening brief, a refund is fundamentally different from an overpayment credit.

Rather than address MFA's arguments regarding the plain language of section 149.015.4, the Director advances a creative, albeit incorrect, interpretation of the legislative history of section 149.015.4 to support her position that section 149.015.4 broadly provides that "the seller [may] not benefit in any way from erroneously collected sales tax [on cigarette sales.]" Dir. Br. 13, 17.[2] The "benefit" that the Director seeks to deny is the credit that section 144.190.2 allows for payments made to the Director. This Court should reject the Director's invitation to rewrite section 149.015.4 and reverse the decision of the Administrative Hearing Commission.

[2] The heading of the Director's argument, Dir. Br. 8, actually states that no credit is due "without first attempting to refund the sales tax to consumers."

II. The Legislature Did Not Intend to Preclude an Overpayment Credit Under Section 149.015.4

A. The Plain Language of Section 149.015.4 Does Not Preclude a Credit

The Director fails to address MFA's argument that the plain language of the statutes permits a credit in this case. Chapter 144 of the Missouri Revised Statutes establishes the general framework for the collection and payment of sales taxes in Missouri; it is undisputed that chapter 144 applies to the collection of sales tax on cigarettes, except to the extent that the provisions of chapter 144 have been expressly preempted by other statutes. Section 144.190 makes ***both*** a refund and a credit available to a taxpayer that is legally obligated to remit the sales tax. If the taxpayer overpays sales tax to the State, the amount of the overpayment is first credited against any taxes then due from the taxpayer and any overpayment balance is refunded. Section 144.190 provides:

> If any tax … has been paid more than once, ***or has been erroneously collected … or 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, and the balance, with interest … shall be refunded[.] (Emphasis added).

Thus, in setting sales tax collection procedures in Chapter 144, the legislature deemed it necessary to provide expressly for ***both*** a refund and credit process. The terms "refund" and "credit" are not terms of art used only in connection with tax provisions; they are common terms with plain meanings, and the legislature clearly understood them to be different from one another in adopting section 144.190.2.

Section 149.015.4 was passed subsequent to section 144.190, and was plainly intended to trump the refund remedy for overpaid sales tax on cigarette sales. But section 149.015.4 does not mention the application of any credits. In fact, section 149.015.4 does not mention the term "credit" at all, nor does it use general language broadly limiting remedial provisions in section 144.190 or purport to deny taxpayers any "benefit" that would otherwise be available.

The plain meaning of section 149.015.4 is therefore to limit the refund remedy while leaving the credit allowance alone. Both common sense and the authorities cited both in MFA's opening brief and in the Commission's decision show that the term "refund" has a plain meaning in Missouri law that is different than the term "credit." *See* MFA Opening Brief, pp. 12-14. The legislature is presumed to know the law and to know that section 144.190.2 expressly authorizes both a credit and a refund. Thus, had the legislature intended to disallow both in section 149.015.4, it would have expressly disallowed both rather than expressly disallowing only the one remedy, or it would have used more general terms that indicate a broader intent to prevent all allowances or remedies for overpayment of the sales tax on cigarettes.

"[T]he 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). Further, where a statute's language is clear and unambiguous, there is no room for construction. *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 401 (Mo. banc 1986). The Director ignores these primary

rules of statutory construction. While section 149.015.4 ***does*** expressly preclude a refund claim, it ***does not*** preclude an overpayment credit nor does it use general language purporting to deny any overpayment remedy to taxpayers. The plain language of section 149.015.4 therefore leaves the credit provision of section 144.190 undisturbed. Accordingly, this Court may end its analysis here and allow the credit sought.

B. The Legislature Intended Section 149.015.4's Silence Regarding Overpayment Credits

Without identifying any ambiguous provision or term of section 149.015.4, the Director, under the guise of discussing legislative intent, devotes her brief to policy arguments for why this Court should rewrite section 149.015.4 to exclude overpayment credits as well as refunds. The Director claims that there could be no reason why the legislature would preclude a refund while allowing a credit. The Director thus ignores both the arguments and authorities in MFA's opening brief (MFA Op. Br. at 12-13) and the common sense workings of the tax system. A taxpayer who overcollects and overpays the sales tax on cigarette sales, and then is allowed a refund, would reap a windfall because of its error. Section 149.015.4 prohibits that windfall. In contrast, a taxpayer like MFA who pays the correct amount of tax in the aggregate, but inadvertently undercollects on some sales (including cigarette sales) but overcollects on other cigarette sales, must in effect pay a tax penalty under the Director's construction of section 149.015.4. The difference between disallowing a refund and disallowing a credit is the difference between not sending a bonus to a taxpayer as opposed to extracting an additional tax from it. Thus, the words of section 149.015.4 show that, for cigarette sales,

the legislature did not intend to allow vendors to seek refunds of overpaid tax or to retain overpaid taxes to enrich themselves. But those same words also show that the legislature did not intend to enrich the State treasury by exacting more tax from a vendor than the law contemplated had the vendor made no honest mistakes in collection. Here, the Director is attempting to use section 149.015.4 to collect an additional $90,811.14 in taxes, money that she already possesses and that is above and beyond what the sales tax law contemplates.[3]

The Director treats sales and excise tax collection as if it were easy so that vendors, like MFA, are somehow culpably negligent if they make a mistake. Dir. Br. 16-17. Nothing could be further from the truth. In fact, this case highlights the difficulties faced by vendors, many of whom are small businesses, in collecting the state sales tax,

[3] The record is absolutely clear that MFA disputes $90,811.14 of the $99,039.65 assessment remaining at issue. *See* Stipulation of Facts (L.F. 98) and Baxley Aff., ¶12 (L.F. 69). The Director's statement, Dir. Br. 4-5, that MFA does not dispute $66,265.38 of the assessment, is incorrect. What the Director may have intended to say was that MFA does not dispute that, during the audit period, it made underpayments of tax in the amount of $66,265.38 on transactions not involving cigarette sales, in addition to its underpayment of tax on cigarette sales during the second part of the audit period in the amount of $32,774.27. Against those agreed underpayments, the parties agree that MFA overpaid sales tax in the amount of $90,811.14 on cigarette sales during the first part of the audit period. *See* Stipulation of Facts (L.F. 98).

especially when other taxes are part of that computation. A vendor collects and remits sales tax based upon its "gross receipts," a term generally meaning "the total amount of the sales price[.]" Section 144.010.1(3). However, as the Director correctly observes, in the case of the state excise tax on cigarettes, the recovery by the vendor from the customer of the state cigarette excise tax that is imbedded in the sales price is to be excluded from "gross receipts" in calculating the sales tax. But many cities impose their own excise taxes on cigarettes, and most of the city excise taxes are imposed on the vendor rather than the purchasers. Because of this, the pass-through of the city excise taxes, although also imbedded in the sales price, are to be included in the calculation of taxable gross receipts.

Here, during the first part of the audit period under examination, MFA collected and remitted sales tax on the full sales price of cigarettes, including its recovery of both the state and local cigarette excise taxes. It then received advice from a tax professional that the pass-through of the excise tax was not to be included in gross receipts. Accordingly, it stopped collecting sales tax on its recovery of excise tax, both state and local, from its customers during the second half of the audit period and thereafter until the Director's auditors advised it to collect sales tax on recovery of the local excise tax. (L.F. 103-4). Thus, MFA overcollected sales tax from cigarette customers and undercollected sales tax from cigarette customers during the same audit period. MFA also undercollected sales tax from cigarette customers for some time after the audit period under examination. While MFA cannot say that the cigarette customers that were undercharged tax were the exact same customers that were overcharged tax, MFA's

cigarette customers in general were both overcharged and undercharged sales tax during the audit period and undercharged sales tax for a time after the audit period.

One standard of review in this appeal is whether the result of the case is within the reasonable expectations of the General Assembly. Section 621.193; *Whitehead v. Director of Revenue*, 962 S.W.2d 884 (Mo. banc 1998). Under the Director's construction, a vendor who honestly both overcollects and undercollects sales tax on cigarette sales must make up the undercollections, but is given no credit for the overcollections, even against the undercollections on cigarette sales. That result is not necessary to prevent a windfall to MFA—disallowing a refund accomplishes that—but does result in a *de facto* tax increase on an innocent taxpayer in order to collect a windfall for the State. That result could not have been within the reasonable expectation of the General Assembly.

C. The 1994 and 2001 Amendments Do Not Alter the Result

Recognizing that the General Assembly did not expressly prohibit "credits" in section 149.015.4, the Director argues that the General Assembly nevertheless intended to preclude them based on her construction of the 1994 and 2001 amendments to section 149.015.4. But those amendments show no intent to deprive vendors of an overpayment credit otherwise allowed by section 144.190.2.

In 1994, the following was added to section 149.015.4:

> [E]xcept 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[.]

The 1994 amendment simply prohibits a vendor from claiming a refund of overpaid sales tax if the overpayment was due to collection of tax on the pass-through of the state excise tax.

In 2001, the following was added to section 149.015.4:

> [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.

The 2001 amendment prevents a vendor from keeping overpaid tax. The 2001 amendment literally requires the vendor who overcollects sales tax on cigarette sales to return the overpayments to its customers or pay the tax to the Director, with no preference of those two options indicated. If the vendor does neither, the Director may recoup the tax from the vendor. The 2001 amendment, like the 1994 amendment, is wholly silent regarding entitlement to an overpayment credit.[4]

[4] MFA is at a loss to understand how any language of the 2001 amendment "establishes a hierarchy of entitlement to illegally or erroneously collected sales tax and imposes a duty upon the retail seller to identify consumers from whom sales tax has been improperly collected and to refund the tax to them before remitting any remaining tax to

The Director theorizes that the General Assembly was concerned that the 1994 prohibition on refunds would prevent customers from reclaiming overpaid tax on cigarettes. Therefore, the Director claims, the General Assembly enacted the 2001 amendment. The Director asserts that the 2001 amendment permits purchasers to recover the overpaid tax from the vendor, and failing that, permits the Director to recover the tax from vendors. Having made those assumptions about legislative intent, the Director proclaims that "the legislature [thus] expressed its intent that the seller not benefit in any way from erroneously collected sales tax." Dir. Br. 12-13.

The Director's analysis is misguided. The 2001 amendment provides that the overpaid tax must be remitted to the Director or returned to customers. That amendment clearly was designed to, and does, prevent a vendor **from keeping** an overcollected sales tax on cigarette sales. The 1994 amendment prevents the vendor from seeking a refund of the tax after it remits the tax to the Director, but it did not require the vendor to remit the overpaid tax in the first place. An honest, but mistaken, vendor might realize its mistake before filing a tax return with the Director. Having no way to determine who paid the tax on the cigarette sales, which are likely cash sales, a vendor might keep the overpaid tax. The 2001 amendment addressed that precise issue. Now the vendor must

---

the state." Dir. Br. 15. Nothing in the words of the 2001 amendment supports that bald assertion. If anything, the 2001 amendment would appear to express a preference for payment to the Director, since the statute grants only the Director the right to recover the tax from the vendor in the event the vendor attempts to keep the tax.

either pay the tax to the Director or return the tax to customers if they can be determined. In the event that a vendor does neither, the 2001 amendment grants the Director the right to recover the tax from the vendor.

Both the 1994 and 2001 amendments are silent regarding the critical issue in this appeal, whether section 149.015.4 preempts section 144.190.2 regarding the recognition of an overpayment credit to offset underpayments of sales tax. And nothing about those amendments supports the Director's bald assertion that they evidence an intent that, notwithstanding the vendor's payments of this tax to the Director, the tax be treated as if it had not been paid to the Director at all. After all, an overpayment credit is merely a recognition that, for some sales, the vendor remitted more tax to the Director than was actually due.

The Director claims that a vendor is better off with a credit than a refund because cigarette customers will sue the vendor to recover the refund. Dir. Br. 16. That cigarette customers will sue a vendor to recover overpaid and refunded sales tax is a wholly unsupported assumption on the Director's part. The Director could just as easily have assumed that, regardless of whether any overpaid tax is credited or refunded to the vendor, cigarette customers will sue the vendor to recover their tax overpayments. Neither of those assumptions is grounded in reality.

As Judge Wolff has noted, refunds to sellers can create an "incentive to overcollect taxes with the prospect of unjust enrichment." *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192, 197 (Mo. banc 2003) (Wolff, J., concurring). Here, under a straightforward reading of sections 149.015.4 and 144.190.2, there is no

incentive to overcollect sales tax from cigarette customers because that overcollection can never result in the vendor pocketing that overcollection, either directly, or in the form of a refund. But where a vendor inadvertently both overcollects and undercollects tax on sales of cigarettes and other products, fairness dictates that the overcollections offset the undercollections of sales tax. Section 144.190.2 shows that the legislature understood that principle. Nothing suggests that the purpose of section 149.015.4 was to thwart that principle of fairness and in effect impose a penalty on a vendor who has tried in good faith to comply with the law. The legislature struck a clear balance by carefully wording section 149.015.4 to remove the refund remedy while leaving the credit allowance intact. This Court should resist the Director's invitation to rewrite section 149.015.4.

CONCLUSION

As demonstrated by the foregoing, and for the reasons explained in MFA's opening brief, the decision of the Administrative Hearing Commission in this case is not authorized by law and creates a result that is clearly contrary to the reasonable expectations of the General Assembly. Accordingly, the Court should reverse the decision of 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
efdowney@bryancave.com

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 Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that: (1) a true and accurate copy of the foregoing, as well as a labeled disk containing the same, were hand-delivered this ___, of January, 2009, to Gary Gardner, Missouri Attorney General's Office, P.O. Box 899, Supreme Court Building, Jefferson City, Missouri, and to Roger L. Freudenberg, 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 3,294 words and; (3) that the attached floppy disk of this brief has been scanned for viruses and is virus-free.

_____