No. SC89431

IN THE MISSOURI SUPREME COURT

MFA PETROLEUM COMPANY,

Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Respondent.

BRIEF OF RESPONDENT DIRECTOR OF REVENUE

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ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

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STATEMENT OF FACTS

The Director of Revenue adds the following facts for the purposes of completeness and clarification.

The Director of Revenue audited MFA Petroleum Company (MFA) for the period of January 2001 through December 2003. (App. 1 ¶2) According to the audit, the director assessed MFA a total of $113,394.66 in sales tax, plus interest.[1] (App. 1 ¶2) The total amount is comprised of three parts: 1) $32,774.27 pertaining to cigarette sales; 2) $66,249.98 in sales tax on a) sales made at various tire and automotive repair centers owned by MFA, b) in-state purchase of supplies, equipment, furniture, and other items for MFA's own use but purchased under a claim of exemption, and c) reconciliation of errors made by MFA on some of its original reported returns; and 3) $14,370.41 in sales tax on sales of assets. (App. 1 ¶2) After the director determined that the assets were sold by MFA's parent company, he reduced the assessment by $14,370.41, for a revised total of $99,024.25 in sales tax, plus interest. (App. 2 ¶3) MFA does not dispute the director's assessment of $66,249.98 in sales tax, plus interest. (App. 6 ¶11) The Administrative Hearing Commission (AHC) found, however, that the correct amount is $66,265.38. (MFA's App. A3–A4 ¶9 and n.1)

[1]According to the parties' stipulation, however, the director assessed MFA a total of $113,451.52. (App. A10 ¶1)

The $32,774.27 assessment represents sales tax on that component of the sales price of cigarettes sold at MFA's convenience stores from May 2002 through December 2003 representing local excise taxes. (App. 6 ¶9) MFA did not collect and remit sales tax on the local excise tax component of the sales price of cigarettes during that period. (App. 4–5 ¶¶ 6–7) MFA believed it was advised by tax consultants in April 2002 that it could deduct *both* state and local excise taxes from the sales price of cigarettes when calculating the gross receipts upon which sales tax is due. (App. 4–5 ¶¶ 6–7)

Before May 2002, MFA had collected and remitted sales tax on the local *and state* excise tax components of the sales price of cigarettes. (App. 4–5 ¶¶ 6–7) For the period of January 2001 through April 2002, MFA calculated that it collected and remitted $90,811.14 in sales tax on the state excise tax component of the sales price of cigarettes. (App. 5 ¶8) During the audit, MFA requested that the director credit MFA with a $90,811.14 overpayment, but the director refused. (App. 5 ¶8) MFA filed with the director a formal request for a credit in that amount. (App. 5 ¶8)

As a result of the audit, the director issued assessments and final decisions. (L.F 17–52) MFA appealed the director's final decisions to the AHC. (L.F. 1) MFA and the director filed motions for summary determination, suggestions, statements of undisputed material facts, and affidavits. (L.F. 53, 56, 61, 65, 70, 82,

84) A letter from counsel for the director to counsel for MFA acknowledged that the correct amount of the director's total assessment is $113,451.52 and revised the assessment of tax on the sale of assets, which the director had conceded was not due, from $14,370.41 upward to $14,411.87. (App. A8) These revisions made the total assessment $99,039.65 ($32,774.27 + $66,265.38 = $99,039.65). (App. A8)

Noticing counsel's letter, the AHC ordered "either party to supplement its motion with an authenticated exhibit as to the amount at issue or for the parties to file a stipulation as to the amount at issue." (App. A9) The parties filed a Stipulation of Facts, stating that "if MFA is entitled to an overpayment credit for sales tax overpaid on its cigarette sales from January 2001 through April 2002, which overpayment amount is $90,811.14," MFA owes sales tax of $8,228.51, but that if MFA is not entitled to such an overpayment, MFA owes sales tax of $99,039.95. (App. A10 ¶¶3, 4)

The $99,039.65 is comprised of $66,265.38 in sales tax on a) sales made at various tire and automotive repair centers owned by MFA, b) in-state purchase of supplies, equipment, furniture, and other items for MFA's own use but purchased under a claim of exemption, and c) reconciliation of errors made by MFA on some of its original reported returns. (App. 1 ¶2) MFA does not dispute this amount. (App. 6 ¶11) The remaining amount of $32,774.27 is sales tax, which MFA admits it did not collect, on that component of the sales price of cigarettes sold at MFA's

convenience stores from May 2002 through December 2003 representing local excise taxes. (App. 6 ¶9, 4–5 ¶¶ 6–7)

The AHC concluded that MFA is not entitled to a credit for sales tax it erroneously paid on the state excise tax component of the sales price of cigarettes "because the statutes do not allow a credit" and that MFA is liable for $99,039.65 in sales tax, plus interest, for January 2001 through December 2003. (MFA's App. A1)

ARGUMENT

MFA Petroleum Company is not entitled to a credit for erroneously collected sales tax on the state excise tax component of the sales price of cigarettes that it remitted to the Director of Revenue without first attempting to refund the sales tax to consumers.

MFA erroneously collected $90,811.14 sales tax on the state excise tax component of the sales price of cigarettes and remitted the sales tax to the Director of Revenue without first attempting to refund the tax to consumers. This is undisputed. Then, MFA failed to collect $32,774.27 sales tax on the local excise tax component of the sales price. This, too, is undisputed. Moreover, it is undisputed that MFA failed to pay $66,265.38 sales tax on other sales and purchases. The issue in this case is whether MFA may apply its erroneous over collection as a credit to its underpayment. The issue is resolved by the history and nature of the excise tax upon cigarettes.

The legislature intended for the impact of the state excise tax upon cigarettes to be absorbed by the consumer, for the tax to be added to the sales price of cigarettes and not to be a part of the retail seller's gross receipts from the sale of cigarettes, and for the seller to collect the cigarette tax, but not any sales tax on the cigarette tax, as an agent of the state. *ITT Canteen Corporation v. Spradling*, 526 S.W.2d 11 (Mo. 1975). The legislature intended for the retail seller to refund to

the consumer any illegally or erroneously collected sales tax on the cigarette tax and when refunds can no longer be made, for the seller to remit the remaining sales tax to the state. § 149.015.4, RSMo Cum. Supp. 2008; 2001 Mo. Laws 448. Therefore, the legislature did not intend for the retail seller to recover, whether by refund or by credit, any sales tax on the cigarette tax that the seller illegally or erroneously collected from the consumer and remitted to the state without first attempting to refund the tax to the consumer. MFA is not entitled to a credit and must pay $99,039.95 in sales tax.

The cigarette tax

An excise or excise tax is a tax "imposed on the manufacture, sale, or use of goods (such as a cigarette tax)[.]" Black's Law Dictionary 605 (8th ed. 2004). Missouri's cigarette tax is an excise imposed upon the use of cigarettes at the time of retail sale.

Missouri's cigarette tax was first enacted in 1955. 1955 Mo. Laws 838. In 1961, the legislature reenacted the law to state for the first time: "Every person required to pay this tax shall add the amount of the tax to the sales price of the cigarettes, it being the purpose and intent of this act that the tax is in fact a levy on the consumer or user with the person first selling the cigarettes acting merely as an agent of the state for the payment and collection of the tax to the state." 1961 Mo. Laws 637–38. Since then, substantially similar language has appeared in every

reenactment of the law, including the law in effect today, which in pertinent part 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[.]

§ 149.015.4, RSMo Cum. Supp. 2008.

In 1975, this court construed the 1969 and 1974 versions of the cigarette tax law and concluded:

> We find no intent therein [the 1974 reenactment] to change our conclusion that the incidence of the tax was and is on the consumer, imposed at the time of the retail sale, that the tax was to be an item "added to" the sales price and not a part thereof, and that the seller is an agent of the State. A sales tax can only be collected from the seller. In other words, we find that the reenactment of the Cigarette Tax Act did not change the nature or effect of the previous law or the conclusions which we have heretofore drawn.

ITT Canteen, 526 S.W.2d at 20. The holding of *ITT Canteen* is that the cigarette tax is not part of the sales price of cigarettes, 526 S.W.2d at 17, and thus the Department of Revenue could not require retail sellers of cigarettes to include the tax in their gross receipts for the purpose of collecting sales tax upon the cigarette tax. See 526 S.W.2d at 13 for the department's rule prohibiting the deduction of the cigarette tax on sales tax returns.

The "crucial feature" of the cigarette tax is that the tax is "added to" the sales price of cigarettes. *ITT Canteen*, 526 S.W.2d at 19; § 149.015.4. This means that the tax is not a part of the sales price of cigarettes and, thus, not a part of the seller's "sales tax base" from the sale of cigarettes, the gross receipts or amount received "for the seller's benefit and use." *ITT Canteen*, 526 S.W.2d at 17–18. The seller has "no personal interest" in the cigarette tax. *ITT Canteen*, 526 S.W.2d at 18. Therefore, Missouri does not impose any sales tax upon the cigarette tax, and MFA never had to collect sales tax upon the cigarette tax in the first place.

In 1994, to further the intent that the impact of the cigarette tax be absorbed by the consumer, the legislature amended the law to prohibit any refund of sales tax upon the cigarette tax that has been erroneously or illegally collected and remitted to the state. The amendment, in effect today, states:

> [I]n 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 the 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[.]

§ 149.015.4; 1994 Mo. Laws 488. The prohibition of a refund to a retail seller, who must remit the sales tax paid by the consumer, is unusual. *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005). The refund provision of Chapter 144 allows refunds to the "person legally obligated to remit the tax," § 144.190.2, but only to that person. *Galamet, Inc. v. Director of Revenue*, 915 S.W.2d 331, 336 (Mo. banc 1996) (steel company had no standing to seek refund of sales tax on electricity paid to power company).

The remedy for a consumer who has paid sales tax on an amount that should not have been included in a retail seller's gross receipts is to prevail upon the seller to obtain a refund and, if necessary, achieve restitution through an action for a constructive trust. *Galamet*, 915 S.W.2d at 336; *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192, 196 and n.3 (Mo. banc 2003) (Wolff, J., concurring). In the case of erroneously remitted sales tax upon the cigarette tax, however, the seller cannot obtain a refund, and the consumer's remedy is frustrated.

To address that problem, the legislature made clear in 2001, with a further amendment to the cigarette tax law, its intent to permit the consumer and, failing that, the state to recover from the seller erroneously collected but unremitted sales tax. By doing so, the legislature expressed its intent that the seller not benefit in any way from erroneously collected sales tax.

> [A]ny 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.

§ 149.015.4; 2001 Mo. Laws 448. MFA states that § 149.015.4 "on its face" requires erroneously collected sales tax to be remitted to the state or returned to the consumer (MFA Brief at 11), as if MFA was merely doing its duty when it remitted the erroneously collected sales tax to the state. Rather, MFA has no duty to collect sales tax on the cigarette tax, and when it erroneously collects sales tax, its duty is to refund the erroneously collected tax to the consumer and when refunds can no longer be made, to remit the remaining tax to the state. MFA does not claim that it sought to refund to the consumer the sales tax it erroneously collected before it remitted the tax to the state.

No credit

This legislative history, in addition to the nature of the cigarette tax, rebuts MFA's arguments that § 149.015.4 "has no application to this case" (MFA's Brief at 12) and that it is entitled to a credit because § 149.015.4 does not prohibit a credit, as it does a refund, and § 144.190.2 permits a credit for illegally or erroneously collected and remitted sales tax. (MFA's Brief at 16). The legislature did not intend for MFA to receive a credit for erroneously collected and remitted sales tax upon the cigarette tax. The goal of statutory construction is to give effect to legislative intent, *Six Flags*, 179 S.W.3d at 268, and in determining that intent, this court may consider the object the legislature sought to accomplish when resolving a problem. *Gott v. Director of Revenue*, 5 S.W.3d 155, 159 (Mo. banc 1999). The problem that the legislature sought to resolve with its 2001 amendment to the cigarette tax law is: How can the consumer obtain restitution for erroneously collected sales tax upon the cigarette tax when a refund to the retail seller is prohibited? The problem was resolved by requiring the retail seller to refund the erroneously collected tax to the consumer and when refunds can no longer be made, to remit the remaining tax to the state. By requiring the retail seller to refund erroneously collected sales tax to the consumer, the legislature expressed its intention that the retail seller not benefit in any way from erroneously collected tax.

The 2001 amendment to the cigarette tax law both 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 state.

> [A]ny 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.

§ 149.015.4; 2001 Mo. Laws. 448. Only the seller can identify consumers who erroneously paid sales tax and refund the tax to them and, failing that, remit the tax to the state. Once the seller has refunded erroneously paid sales tax to consumers, the state can recoup from the seller only amounts not refunded. In short, the consumer receives any erroneously collected sales tax and, failing that, the state does — whether by the seller's refunding tax to consumers and then remitting any non–refunded tax to the director or by the director's recouping any non–refunded tax from the seller. The seller receives nothing.

To give MFA a credit for sales tax upon cigarette tax that it erroneously collected and remitted, without MFA first seeking to refund the tax to consumers, would not only turn this hierarchy upside down. A credit would place MFA in a

better position, in relation to consumers, than it would be in if it were entitled to a refund. A credit would become more than the financial equivalent of a refund. If MFA were to receive a refund, consumers could seek restitution through a constructive trust. *Buchholz Mortuaries*, 113 S.W. 3d at 196 n.3. If MFA were to receive a credit, however, consumers could not establish a constructive trust. The erroneously collected taxes would not be in MFA's hands, but in the hands of the state, which the legislature has authorized to receive them. *John R. Boyce Family Trust v. Snyder*, 128 S.W.3d 630, 638–39 (Mo. App. E.D. 2004). Just as much, if not more, than a refund, a credit would "perversely" provide MFA with an "incentive to overcollect taxes, with the prospect of unjust enrichment[.]" *Buchholz Mortuaries*, 113 S.W.3d at 197.

For nearly fifty years, the law of Missouri has been that sales tax may not be imposed upon the cigarette tax. Yet MFA collected sales tax on the cigarette tax. For nearly seven years, the law of Missouri has been that a retail seller must refund to consumers such erroneously collected sales tax. Yet MFA failed to even attempt to refund the sales tax it erroneously collected from consumers before it remitted the tax to the state. Moreover, MFA failed to collect sales tax upon local cigarette taxes and failed to pay sales tax on other sales and purchases.

This is not a simple case of MFA being an "innocent taxpayer" caught in a game of "gotcha" taxation. (MFA's Brief at 9, 16) Rather, MFA is a negligent

collector of taxes, who seeks to turn its negligence into a financial advantage at the expense of consumers who were not obligated to pay a sales tax, but from whom MFA collected sales tax, anyway, and to whom MFA did not attempt to refund the tax before remitting it to the state. MFA wants to use sales tax over collected from consumers to offset separate tax liabilities that it does not dispute. The legislature did not intend for retail sellers, such as MFA, to benefit in any way from erroneously collected sales tax on the cigarette tax. The legislature intended to prohibit retail sellers of cigarettes, such as MFA, from recovering, whether by refund or by credit, erroneously collected sales tax on the cigarette tax that they have remitted to the state without first attempting to refund the tax to consumers.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that 1 copy and 1 computer diskette of the foregoing was served by first–class mail, postage prepaid, this ____ day of January, 2009, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 3,721 words and that the diskettes provided this court and counsel have been scanned for viruses and are virus–free.

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APPENDIX

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