CASE NO. SC83820

BEFORE THE SUPREME COURT OF THE STATE OF MISSOURI

SPRINT COMMUNICATIONS COMPANY, L.P.

Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Respondent.

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This action involves the question of whether Sprint Communications Company, L.P. ("Appellant") is entitled to file claims for refund of sales and use tax under Mo. Rev. Stat. § 144.190 on its own behalf when Appellant's vendors refuse, are unable, unwilling, or otherwise fail to file such refund claims. The Missouri Supreme Court has exclusive jurisdiction over this matter as it involves the construction of a revenue law of this state. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

Following the Missouri Supreme Court's decision in IBM v. Director of Revenue, 958 S.W.2d 554 (Mo. Banc 1997), Appellant determined that it paid Missouri sales and use tax on equipment purchases that qualified for the Missouri manufacturing exemption (Record of Proceedings-AHC Case No. 01-0082 RV (RP82) 69 ¶ 1 and Record of Proceedings-AHC Case No. 01-0119 RV (RP119) 59 ¶ 1).

Appellant identified that it paid sales and use tax to 831 vendors on purchases that potentially qualify for the Missouri manufacturing exemption. Due to the administrative burdens of dealing with so many vendors, Appellant decided to pursue refunds from only 105 of the 831 vendors. (RP82 70 ¶ 2, RP119 60 ¶ 2).

In April 1998, Appellant sent letters to the 105 vendors requesting they file refunds on Appellant's behalf. Shortly thereafter, Appellant met with representatives of the Director of Revenue ("Respondent") from its Kansas City, Missouri office to discuss the refund process. In June 1998, pursuant to recommendations from Respondent, Appellant sent additional letters to the 105 vendors that included partially completed refund applications and power of attorney forms. (RP82 70 ¶ 3, RP119 60 ¶ 3).

From June 1998 through January 2000, Appellant continued to contact vendors and attempt to get them to file the refunds on Appellant's behalf. Finally, on or about January 29, 2000, Appellant filed Missouri sales and use tax refund claims on its own behalf for those vendors who refused, were unable, unwilling, or

otherwise failed to file the refund on Appellant's behalf. The vendors at issue are Wavelinq, Inc. (Texas), IBM (Texas), Sun Microsystems, Inc (California), Cisco Systems, Inc. (California), General Electric Computer Services (Georgia), and IEX Corporation (Texas). (RP82 70 ¶ 4&5, RP119 60 ¶ 4&5).

In letters dated January 5, 2000 (IBM, Sun Microsystems, Inc., Cisco Systems, Inc., General Electric Computer Services, and IEX Corporation) and January 11, 2000 (Wavelinq), Respondent notified Appellant that it declined to process the refund claims because a properly executed Power of Attorney form was not received with the refund request. (RP82 71 ¶ 9&10, RP119 61 ¶ 9&10).

Appellant timely appealed these refund denials to the Administrative Hearing Commission ("Commission"). (RP82 1-9, RP119 1-4). Respondent moved for summary determination in these cases on the basis that Appellant lacked standing to claim a refund for taxes remitted by another entity. (RP82 10-26, RP119 5-15). In a Memorandum and Order dated July 3, 2001, the Commission granted Respondent's motion for summary determination. (RP82 68-80, RP119 58-70). Appellant hereby appeals this decision to the Missouri Supreme Court and challenges the Commission's Order.

POINTS RELIED ON

I. The Administrative Hearing Commission erred in granting Respondent's motion for summary determination based on the determination that Appellant did not have standing to file a claim for refund on its own behalf, because this determination is contrary to both Federal and Missouri case law regarding standing

A. Federal Case Law

CASES:

United States v. Jefferson Electric Mfg. Co., 291 U.S. 386 (1934).

B. Missouri Law

CASES:

DST Systems, Inc. v. Director of Revenue, 43 S.W.3d 799 (Mo. Banc 2001).

U.S. v. Benton, 975 F.2d 511 (8th Cir. (Mo.) 1992).

State ex rel. Ryan v. Carnahan, 960 S.W.2d 549 (Mo. App. E.D. 1998).

Citizens Ins. Co. v. Leiendecker, 962 S.W.2d 446 (Mo. App. E.D. 1998).

STATUTES:

Section 144.190, RSMo 2000.

Section 144.060, RSMo 2000.

Section 144.080, RSMo 2000.

RULES:

Rule 52.01, Mo. R. Civ. P. 2001.

II. The Administrative Hearing Commission erred in its determination that Appellant does not have standing and, therefore, is not entitled to file a claim for refund on its own behalf, because this determination violates the Due Process clause of both the United States and Missouri Constitutions.

CASES:

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 96 U.S. 18(1990).

District Paving Corp. v. District of Columbia, D.C. Super. Ct. (Tax Div.), Dkt. No. 7268-97, 4/22/99.

Galamet, Inc. v. Director of Revenue, 915 S.W.2d 331 (Mo. Banc 1996).

STATUTES:

United States Constitution, Bill of Rights Amendment V

United States Constitution, Bill of Rights Amendment XIV

Missouri Constitution, Article I Section 10.

Section 144.190, RSMo 2000.

Section 79-3650, RSKan 2000.

III. The Administrative Hearing Commission erred in its determination that Appellant does not have standing and, therefore, is not entitled to file a claim for refund on its own behalf, because this determination is in violation of the Equal Protection clause of both the United States and Missouri Constitutions.

CASES:

U.S. v. Benton, 975 F.2d 511 (8th Cir. (Mo.) 1992).

STATUTES:

United States Constitution, Bill of Rights Amendment XIV.

Section 144.190, RSMo 2000.

ARGUMENT

I. The Administrative Hearing Commission erred in granting Respondent's motion for summary determination based on the determination that Appellant did not have standing to file a claim for refund on its own behalf, because this determination is contrary to both Federal and Missouri case law regarding standing.

Appellant, as the taxpayer, is the real party in interest and has standing under both Federal and Missouri case law to file a claim for refund of incorrectly paid sales and use tax on its own behalf.

A. Federal Case Law

In United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 402 (1934), the United States Supreme Court ruled that the actual taxpayer is the real party in interest. The Court determined that if a vendor shifts the burden of paying taxes to the purchasers then the purchasers, not the vendor, are the "actual sufferers" and are the real parties in interest. Appellant is the purchaser and the actual taxpayer, therefore, under the Supreme Court's ruling, Appellant is the real party in interest.

B. Missouri Law

There is no question that the purchaser (Appellant) is the actual taxpayer. Mo. Rev. Stat. § 144.060 requires every person making a purchase of taxable property or services pay the tax or be guilty of a misdemeanor. Additionally, Mo. Rev. Stat. § 144.080(5) sets forth a vendor's collection duty and makes it unlawful for a vendor to absorb the tax.

In DST Systems, Inc. v. Director of Revenue, 43 S.W.3d 799, 800 (Mo. Banc 2001), this Court recognized that "…DST is the real party in interest. This is because DST was the purchaser of the equipment from Data Switch, which claimed a sales/use tax refund under section 144.190.2 from the state of Missouri for the machinery and equipment purchased by DST. Any tax refund Data Switch would receive would go to DST." DST Systems (the purchaser), like Appellant, is the taxpayer, not the person legally required to collect the tax (the vendor). Following this Court's reasoning in DST, Appellant is clearly the real party in interest and, therefore, has standing to file a claim for refund on its own behalf.

Similarly, in U.S. v. Benton, 975 F.2d 511 (8th Cir. (Mo.) 1992), the 8th Circuit Court of Appeals held that the United States (the taxpayer) had standing to bring a claim for refund on its own behalf. This decision was based on the 8th Circuit Court of Appeals conclusion that, "Permitting the government to bring this case means that the money ends up in the right place, back with the government, after only one lawsuit, instead of two. No substantive rights are violated. To dismiss this case for lack of standing, accordingly, seems to us a needless procedural exercise." Id. at 513-14. Appellant asserts that this Court should reach the same conclusion in this instance.

The Missouri Rules of Civil Procedure (Rule 52.01) provide that "Every civil action shall be prosecuted in the name of the real party in interest." This means that the party filing the claim for relief must have "standing." Missouri

case law has identified the considerations that should be reviewed and the conditions that must be met for a party to have standing.

"Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual injury." State ex rel. Ryan v. Carnahan, 960 S.W.2d 549, 550 (Mo. App. E.D. 1998). Appellant paid the sales or use tax that is the basis for the refund claim at issue. Therefore, Appellant's legally cognizable interest is the tax amount that has been overpaid. Appellant's vendor, as an agent of Respondent, merely remitted Appellant's money to Respondent. Appellant's vendor has no legally cognizable interest in the refund.

Standing requires the "party must be sufficiently affected so as to insure that a justiciable controversy is presented to the court." Citizens Ins. Co. of Am. v. Leiendecker, 962 S.W.2d 446, 449 (Mo.App. E.D. 1998). Appellant is sufficiently affected by Respondent's denial of the refund claim to insure that a justiciable controversy is presented to the court. Appellant's vendors are not affected at all by Respondent's denial of the refund claim and, since they stand to gain nothing from the refund, they have no interest in pursuing this claim before the court.

Standing requires the "party must have some actual, justiciable interest susceptible of protection through litigation." Warner v. Warner, 658 S.W.2d 81, 83 (Mo.App. E.D. 1983). Appellant will lose money if this refund is denied. Therefore, Appellant's interest in the refund claim is actual and entitled to

protection through litigation. Appellant's vendors will lose nothing if the refund is denied. Therefore, Appellant's vendors have no actual interest in the refund claim.

To summarize, Appellant meets each standing requirement. Appellant's vendors do not meet any standing requirement. Appellant, as the real party in interest, clearly has standing to file a claim for refund on their own behalf under Missouri law.

The Commission's determination (RP82 78-80, RP119 68-70) that Mo. Rev. Stat. § 144.190(2) should be interpreted to conclude that Appellant does not have standing to file a refund claim on its own behalf is contrary to Missouri case law. Therefore, one of three possible conclusions can be made regarding Mo. Rev. Stat. § 144.190(2).

1.) The Commission's interpretation of the statute is erroneous because Appellant met the statute's requirement that refunds be made by the person that "remit the tax" when Appellant remitted the tax to the state through its agent, the vendor;

2.) In addition to the taxpayer who is the real party in interest and who has standing under common law, the statute merely authorizes the vendor, who otherwise does not have standing, to also file refund claims; or

3.) The Statute is unconstitutional because it denies the real party in interest, the taxpayer, standing to file refunds.

II. The Administrative Hearing Commission erred in its determination that Appellant does not have standing and, therefore, is not entitled to file a claim for refund on its own behalf, because this determination violates the Due Process clause of both the United States and Missouri Constitutions.

Under both the United States and Missouri Constitutions, Constitutional Due Process requires that the State provide a means for obtaining a sales tax refund in a manner other than through the person "legally obligated to remit the tax" as set forth in Mo.Rev.Stat. § 144.190(2).

The Due Process clause of the United States Constitution, Bill of Rights Amendment V and XIV, and Missouri Constitution Article I, Section 10, provides that no person shall be "deprived of life, liberty, or property without due process of law." The United States Supreme Court, in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990), specifically identified that "Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause."

Missouri law, as applied in this instance, does not provide taxpayers the protections and safeguards required to prevent an unlawful exaction of property. Therefore, Appellant's inability to request a refund of incorrectly paid sales and use tax on its own behalf constitutes a denial of Due Process under both the United States and Missouri Constitutions.

The primary reason that taxpayers, such as Appellant, are not protected is because Missouri law does not require vendors to file refund claims when requested. Ignoring the fact that Missouri law does not require vendors to file refunds claims when requested, the Missouri refund statute also incorrectly assumes several facts. For example, 1.) it assumes that vendors are ready and willing to file refunds requested by the taxpayer. This assumption is incorrect because many vendors are not inclined to spend time and resources understanding, filing, and supporting a refund that will not benefit them; 2.) it assumes that a limited number of vendors are involved and such vendors can be found quickly and easily. This assumption is incorrect because, due to technology and competition, purchases are made from hundreds of vendors – many of whom are not local. Therefore, the administrative burden of locating hundreds of vendors, not to mention locating the vendor's tax department since it quite often is not at the same business address or location, is a time-consuming process. This burden forces a taxpayer to evaluate the facts and only pursue those refunds where the benefit outweighs the cost rather than all refunds to which a taxpayer is entitled. Additionally, the statute-of-limitations continues to run and the taxpayer continues to lose refund amounts during the time it takes to locate a vendor and convince them to file the claim; 3.) it assumes that the vendor is still in business. This assumption is incorrect because many vendors, whether due to voluntary closure, bankruptcy, merger, or other acquisition, are no longer in business or around to file the refund claim; 4.) it assumes that this method will increase administrative

efficiency for Respondent. This is incorrect because Respondent must individually review a number of issues (i.e. authorized signatures, statute of limitations, validity of claim) on many claims as opposed to just one; and 5.) it assumes that vendors will file refund claims requested by the taxpayer and allow Respondent to determine the validity of the claim (i.e. does the equipment qualify for the manufacturing exemption?). This is incorrect because some vendors choose to judge the validity and qualifications of the refund on their own rather than allowing the taxpayer the opportunity to obtain a determination from Respondent.

These examples show the Commission's interpretation and application of Mo. Rev. Stat. § 144.190(2) in this case (RP82 68-80, RP119 58-70) is clearly in violation of Constitutional Due Process since Appellant would be denied all opportunities to obtain a refund (prevent unlawful exaction of property).

This exact conclusion was reached by the District of Columbia Superior Court which held that "purely as a matter of due process, it would be unconstitutional to require that taxpayers rely upon vendors in order to pursue their right to a refund for illegally collected taxes." District Paving Corp. v. District of Columbia, D.C. Super. Ct. (Tax Div.), Dkt. No. 7268-97, 4/22/99. The court found that, in tax refund cases, vendors are a totally unreliable avenue of redress against the Government for the following reasons:

1.) They are not the real parties in interest, they have absolutely no impetus to voluntarily spend their own time and resources to represent customers.

2.) Since the code does not require vendors to pursue tax refunds (even though this is permitted), a taxpayer would not have a legally cognizable cause of action against any vendor that refuses to seek a refund on its behalf.

3.) Vendors have a built-in conflict of interest in pursuing appeals or demanding refunds because vendors are compensated by the District for service as collection agents.

4.) The District's position is predicated on the assumption that the same vendor that collected the disputed tax would still be in existence at a time when the taxpayer would want to demand a refund.

Id.

The Commission's decision focuses on this Court's ruling in Galamet, Inc. v. Director of Revenue, 915 S.W.2d 331 (Mo. Banc 1996). (RP82 76-79, RP119 66-69). However, Constitutional Due Process was not addressed in Galamet. Therefore, this is a case of first impression. This Court has not considered whether a taxpayer who, for whatever reason, is unable to get a vendor to file a claim for refund on its behalf is denied Due Process since Missouri law, as interpreted in Galamet, does not provide any alternate means for obtaining relief.

Other states refund laws are drafted to allow taxpayers to file refund claims on their own behalf and, therefore, ensure that the taxpayer is not denied Constitutional Due Process. One such example is Kansas. Kan. Stat. Ann. § 79-3650 provides that:

> (a) A refund request may be filed directly by a consumer or purchaser if the consumer or purchaser:
>
> (1) paid the tax directly to the department;
>
> (2) provides evidence that the retailer refused or was unavailable to refund the tax;
>
> (3) provides evidence that the retailer did not act upon its refund request in a timely manner as provided in subsection (b), or;
>
> (4) submits such a refund request pursuant to subsection (c).
>
> (b) If the director of taxation finds upon proper showing that a consumer or purchaser submitted a refund request to a retailer that was not acted upon by the retailer in a timely manner, the director shall extend the time for filing the request with the department beyond the three year limitation period that is otherwise provided by the time attributed to the delay caused by the retailer.
>
> (c) If, during the course of an audit examination of a business as a purchaser or consumer, it is determined that a vendor has collected Kansas tax from the purchaser on a transaction that is not subject to tax

imposed under this act, the purchaser may apply directly to the director for an offset or refund of the tax, notwithstanding subsection (a), if:

1.) the purchaser is currently registered to collect and remit tax, and

2.) the purchaser provides the director with an affidavit or other acceptable documentation that assures the purchaser has not and will not request a duplicate refund through the vendor.

III. The Administrative Hearing Commission erred in its determination that Appellant does not have standing and, therefore, is not entitled to file a claim for refund on its own behalf, because this determination is in violation of the Equal Protection clause of both the United States and Missouri Constitutions.

The 14th Amendment of the United States Constitution sets forth that "No state shall make or enforce any law which shall…deny to any person within its jurisdiction the equal protection of the laws."

A determination that Appellant is not entitled to file a claim for refund of incorrectly paid sales and use tax on its own behalf violates the Equal Protection Clause of the United States and Missouri Constitutions.

In U.S. v. Benton, 975 F.2d 511 (8th Cir. (Mo.) 1992), the Eighth Circuit Court of Appeals held that the taxpayer (the United States Government) had standing to file a claim for refund of incorrectly-paid sales and use tax on its own behalf. While the decision does not specifically refer to Mo. Rev. Stat. § 144.190, it is evident that the 8th Circuit Court of Appeals was applying Missouri sales tax

law throughout the opinion. The Department argues that the Government's vendor should be filing the claim for refund rather than the Government themselves. The 8th Circuit Court of Appeals was obviously applying the general rules of standing when they found, "We see no reason why such a circuity of action should be required. Permitting the government to bring this case means that the money ends up in the right place, back with the government, after only one lawsuit, instead of two. No substantive rights are violated. To dismiss this case for lack of standing, accordingly, seems to us a needless procedural exercise."

There is no rational basis for determining that the United States Government (who was the taxpayer not the vendor) had standing to bring a refund claim on its own behalf and Appellant does not.

Furthermore, there are instances where taxpayers successfully get vendors to file refund claims on their behalf which enables them to successfully obtain the refunds to which they are entitled. The State should provide protections to ensure that Appellant has the same opportunity to obtain refunds and is therefore treated equal to such taxpayers.

CONCLUSION

Appellant hereby respectfully requests that the Missouri Supreme Court reverse the decision of the Commission and find that Appellant is entitled to file a refund on its own behalf under Missouri law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2001, an original and ten (10) copies of the Appellant's Brief and a copy of Appellant's Brief on computer disk were mailed via Federal Express to: Clerk of the Supreme Court of Missouri, Missouri Supreme Court Building, 207 West High Street, Jefferson City, Missouri 65101; and one (1) copy of Appellant's Brief and a copy of Appellant's brief on computer disk were mailed via Federal Express to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations set forth in Rule 84.06(b). This brief (excluding cover, certificate of service, certificate required by Rule 84.06(c), and signature block) contains 3,863 words.

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