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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES & AUTHORITIES

STATUTES: PAGE(S)

REGULATIONS & OTHER:

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 unconstitutional and violates both Federal and Missouri law.

CASES:

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

McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).

North Supply Company v. Director of Revenue, 29 S.W.3d, (Mo. 2000).

Reich v. Collins, 513 U.S. 106 (1994).

STATUTES:

United States Constitution, Article III, section 2.

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 unconstitutional and violates both Federal and Missouri law.

A. Federal and Missouri law control

The Administrative Hearing Commission granted Respondent's motion for summary determination, but in the Memorandum and Order stated, "This Commission does not have authority to decide constitutional issues (citation omitted). Therefore, we do not address Sprint's constitutional claims, but we note they have been properly raised if Sprint wishes to pursue them further. We agree with Sprint that under general principles of standing such as those enunciated in ***Ryan v. Carnahan***, it has a sufficiently strong interest in the case. Sprint also makes persuasive practical arguments. ***Benton*** and ***DST*** both support its argument that it is the 'real party in interest'." (Record of Proceedings-AHC Case No. 01-0082 RV (RP82) 75 and Record of Proceedings-AHC Case No. 01-0119 RV (RP119) 65).

Respondent's motion for summary determination was granted on the basis that Appellant does not have standing to claim a refund on their own behalf under Mo. Rev. Stat. § 144.190. (RP82 79, RP119 69). Since Respondent made standing

the primary issue, Appellant identified numerous Federal and Missouri cases that set forth the standards to be applied in determining whether a party is the "real party in interest" or has "standing." (Brief of Appellant p. 11-13). While the Administrative Hearing Commission found these cases "persuasive and supportive," Respondent finds them "inapplicable." (Respondent's brief p. 14). Missouri-specific law that sets forth when a party has standing is not "inapplicable."

Regardless, Respondent continued by citing authority that sets forth the same rules for standing previously cited and discussed by Appellant, thus furthering Appellant's position. (Respondent's brief p. 13-14). *See* Reed v. City of Union, 913 S.W.2d 62, 64 (Mo. App. E.D. 1995) (to establish standing a party must generally demonstrate that she has a specific and legally cognizable interest in the subject matter of the action and that she has been directly and substantially affected thereby); Martee v. City of Kennett 784 S.W.2d 621, 626 (Mo. App. S.D. 1990) (same).

Respondent then cites Reed v. City of Union, 913 S.W.2d 62, 64 (Mo. App. E.D.1995) for the position that "To enjoy status to sue on a cause of action implied by the policy of a statute, however, the suitor must be a member of the class for whose special benefit the statute was enacted." Even this rule points to Appellant. Refund statutes are enacted to benefit the actual taxpayer – the party that bore the economic burden of the tax. The purpose of refund statutes is to get the money back to the party that originally bore the economic burden of the tax. There is no

question that purchasers, such as Appellant, bear the economic burden of the tax. (RP82 73, RP119 63). The legislature would not have had a rational basis to enact a refund statute for the benefit of the vendor because the vendor does not bear the economic burden of the tax. The vendor has no interest to protect on a refund issue. Any arguments that the vendor is the actual taxpayer are unpersuasive. Missouri law imposes criminal penalties on the purchaser for not paying the tax and on the vendor for not passing the tax through to the purchaser (see Brief of Appellant p. 11 for citations). The vendor merely remits the tax collected from the purchaser. Furthering Appellant's position, the Missouri State Auditor previously expressed concerns that vendors might apply for sales tax refunds and pocket the money rather than return that money to purchasers. *"McCaskill calls for end to corporate tax windfall,"* May 17, 2000, St. Louis Post-Dispatch. If the refund statute was truly enacted to benefit vendors, this concern would not exist.

Respondent contends Appellant misconstrued DST Systems, Inc. v. Director of Revenue, 43 S.W.3d 799 (Mo. banc 2001). This is incorrect. Appellant did not cite DST for the position that DST filed a claim for refund on their own behalf under section 144.190. Appellant cited it for the purpose of showing that this Court agreed with DST that the purchaser of equipment who pays tax to the vendor is the real party in interest – even when the vendor files the refund. (FN1. "DST is the real party in interest. This is because DST was the purchaser of the equipment from Data Switch… . Any tax refund Data Switch would receive would go to DST"). Id. at 800. This Court's conclusion regarding

who qualified as the "real party in interest" was not based on who remitted the tax and how. It was based on who bore the economic burden of the tax – i.e., who actually paid the tax. A similar analysis in this case would cause the Court to conclude that "[Appellant] is the real party in interest. This is because [Appellant] was the purchaser of the equipment from [Vendors]… . Any tax refund [Vendors] would receive would go to [Appellant]."

Appellant reasserts that both Missouri and Federal law make it unequivocally clear that Appellant, not Appellant's vendor, is the real party in interest entitled to standing.

B. Case or Controversy

To conclude that Appellant does not have "standing" or is not the "real party in interest," by merely looking at section 144.190 or its interpretation in Galamet, Inc. v. Director of Revenue, 915 S.W.2d 331 (Mo. banc 1996), violates the United States and Missouri Constitutions and the Missouri Rules of Civil Procedure.

The principle of standing evolves from the case or controversy requirement of the United States Constitution, Article III, section 2. As such, the Missouri legislature does not have authority to statutorily revoke standing from a party who otherwise qualifies as the "real party in interest." Furthermore, this Court's interpretation of a statute in such a manner is unconstitutional.

The United States Supreme Court set forth that "One of those landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred

to in Article III—`serv[ing] to identify those disputes which are appropriately resolved through the judicial process,`- -is the doctrine of standing." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The case and controversy requirement of Article III of the Constitution was designed to limit courts "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and to "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to other branches of government." Flast v. Cohen, 392 U.S. 82, 95 (1968). The converse should also be true. The case and controversy requirement of the Constitution should prevent the other branches of government from intruding into areas committed to the judiciary. Specifically, in the case at hand, the legislature should not be able to statutorily limit the Courts jurisdiction to hear cases if those cases deal with "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." Statutorily or judicially granting standing to parties who have no interest in the claim, and denying standing to parties who have been injured and have a direct interest, is contrary to the foundation upon which standing was established. Therefore, a determination that Appellant does not have standing to file a claim for refund on their own behalf under section 144.190 is contrary to the United States Constitution.

Such a determination is also contrary to Missouri Rules of Civil Procedure, Rule 52.01, that requires "every civil action shall be prosecuted in the name of the real party in interest."

C. The State must comply with Constitutional Due Process and Equal Protection.

1. Sovereign Immunity

Respondent argues that when the state consents to be sued it may prescribe the procedures to be followed and such other terms and conditions as it sees fit. (Respondent's brief p. 17). This is not correct. A state cannot use sovereign immunity as a defense for implementing rules, procedures, and requirements that violate Constitutional Due Process and Equal Protection. Even a statute that is strictly and narrowly construed must be constitutional. Once a state waives sovereign immunity and consents to be sued for refunds, it must do so in a manner that affords all taxpayers the rights and protections guaranteed by the United States and Missouri Constitutions.

2. Choice of Remedy

Respondent contends that Appellant was not denied Due Process because Appellant could have chosen a predeprivation remedy (payment under protest under section 144.700) and had a hearing before it was "finally deprived of a property interest." Respondent asserts that since a remedy was available that would have allowed Appellant to pursue a refund without implicating Due Process, Appellant is forever precluded from asserting a Due Process claim (party

that does not take advantage of a predeprivation opportunity to contest the tax "cannot complain"). **(**Respondent's brief p. 19). Under Respondent's theory, Appellant could have provided an exemption certificate to its vendors at the time of purchase and paid the tax directly to the state under protest. Respondent suggests that this is what DST did. (Respondent's brief p. 19-20). Respondent's argument is impractical, substantially undermines the foundation of Respondent's case, and is contrary to United States and Missouri Supreme Court decisions.

a. Impractical

Respondent's option is impractical because the Appellant's claim for refund originated when this Court handed down its decision in IBM v. Director of Revenue. 958 S.W.2d 554 (Mo. banc 1997). This decision opened the door for service providers, such as Appellant, to file the manufacturing exemption refund claims. At the time of the IBM decision, the taxes at issue were already paid to the vendors and thus the payment under protest option was unavailable.

Respondent's option is also not viable because it suggests that Appellant should have undertaken a scheme to shift the burden of remitting the tax from its vendors (sellers) to Appellant (purchaser) and thus enable Appellant to control the refund action. Appellant seriously doubts Respondent condones this scheme. Regardless, this scheme would require convincing vendors to accept knowingly suspect exemption certificates and then confirm that such exemption certificates are suspect by immediately remitting the tax directly to the Department under protest. Even if Appellant were to pursue such a scheme, its effectiveness is

contingent upon cooperation from vendors. Vendors would have to cooperate by accepting suspect exemption certificates. Cooperation from vendors, or lack thereof, is the heart of Appellant's case. If Appellant could have obtained cooperation from its vendors this case would not be necessary because the vendors would have filed the refunds when requested and Appellant would not have had to.

b. Undermines Respondent's case

As for undermining Respondent's case, Respondent's case is based on the foundation that refund actions are intended to benefit "sellers" not purchasers because "sellers" are the true taxpayers. (Respondent's brief P. 13). If refund actions are truly intended to benefit "sellers," it would not be possible to shift the intended beneficiary from the "seller" to the "purchaser" by merely filing an exemption certificate with the "seller." It is only possible because the true intended beneficiary of the refund statute is the person that bore the economic burden of the tax. In all cases, that person is the purchaser. This is why the Court stated that "DST is the real party in interest" even though DST was not the party that filed the refund claim. DST at 800.

c. Contrary to United States and Missouri Supreme Court decisions.

Setting aside the practical issues, Respondent's argument fails because both the United States Supreme Court and this Court have found that, contrary to Respondent's claim, (1) payment under protest statutes such as Missouri's are "post-deprivation" procedures that require clear and certain remedies in order to comply with constitutional Due Process and (2) that taxpayers have the right to

choose any refund remedy available to them and thus cannot be prejudiced by choosing a post-deprivation remedy over a pre-deprivation remedy when both exist.

Respondent contends that Missouri's payment under protest statute, section 144.700, constitutes a valid pre-deprivation remedy and that since Appellant did not take advantage of this remedy, Appellant is forever precluded from asserting Due Process challenges (party that does not take advantage of a predeprivation opportunity to contest the tax "cannot complain"). **(**Respondent's brief p. 19). Payment of tax to the state, even if it is paid under protest, constitutes a deprivation of property without a hearing. In McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39 (1990), the United States Supreme Court stated, "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under "duress" in the sense that the State has not provided a fair and meaningful predeprivation procedure." Missouri imposes penalties and interest for non-payment of taxes, so under McKesson, paying tax under protest does not constitute a predeprivation procedure as suggested by Respondent. "To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,'… for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." Id. Under this case law, section 144.700 is a post-deprivation

remedy, not a pre-deprivation remedy. Since section 144.700 is a post-deprivation remedy, Respondent's claim that Appellant cannot assert a Due Process claim because it failed to take advantage of a pre-deprivation remedy fails. Missouri does not have a pre-deprivation remedy.

Even if Missouri had a pre-deprivation remedy, Appellant cannot be prejudiced for selecting a post-deprivation remedy over a pre-deprivation remedy when both exist. In North Supply Company v. Director of Revenue, 29 S.W.3d 378, 379-80 (Mo. 2000), this Court followed the United States Supreme Court and held that, "To the extent that the Director is suggesting that NSC should have availed itself of other remedies under the law, *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), compels the opposite conclusion. The *Reich* Court held that a state that has imposed a discriminatory tax may provide either a post-deprivation remedy, a pre-deprivation remedy, or both, but it may not "hold out what plainly appears to be a 'clear and certain' post-deprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Id.* at 108, 115 S.Ct. 547." This Court further concluded that, "It was not apparent that any of the other remedies suggested by the Director provided the exclusive remedy available at the time NSC filed for its tax refund, and NSC was entitled to pursue what appeared to be a clear and certain post-deprivation remedy under sec. 144.190, regardless of the availability of the other remedies."

Following North Supply Company, Appellant cannot be denied Due Process for exercising Appellant's right to pursue what appeared to be a clear and

certain post-deprivation remedy – a claim for refund under section 144.190. Appellant could not have foreseen that Appellant's vendors would: 1.) no longer be in business; 2.) refuse, be unable, unwilling, or otherwise fail to file such refund; or 3.) make their own determination that Appellant did not qualify for exemption. Regardless, general Due Process concepts of fairness, and the obligation to have a "clear and certain remedy," require that Respondent afford Appellant safeguards against failure or inability on the part of Respondent's agents to file refunds on Appellant's behalf.

Respondent also argues that Appellant could have obtained powers of attorney from vendors authorizing them to pursue a claim for refund on their own behalf. As cited above, Appellant is entitled to pursue what appeared to be a clear and certain post-deprivation remedy under section 144.190, regardless of the availability of any other remedies. Id. Furthermore, as evidenced by Appellant's own experience, it can safely be assumed that the same vendors who would not file a claim for refund on Appellant's behalf will not authorize a power of attorney. Regardless, the power of attorney and claim for refund should not be viewed as separate and independent remedies.

3. Administrative Burden

Respondent argues that if Appellant were allowed to file a refund directly with the Respondent "the Missouri Department of Revenue would be severely prejudiced by the administrative burden of tracking and matching purchasers' claimed payment of taxes to vendors' remittance of taxes." (Respondent's brief p.

21). No amount of administrative burden on Respondent would justify violating Appellant's Constitutional rights.

Appellant's own experience has shown that the administrative burden of requesting over 100 vendors to file claims for refund far outweighs any administrative burden that Respondent mentions. The administrative burdens are equally if not more difficult for the Respondent if Appellant's interests must be pursued by numerous vendors through numerous claims. Respondent has to review the necessary requirements (statute-of-limitations and date filed, appropriate signature, etc…) on a hundred different refund claims as opposed to just one. The case at issue involves only six (6) of the claims and the administrative difficulties encountered at the Department of Revenue and Administrative Hearing Commission levels have already shown the complications created by having 100 different fact patterns as opposed to just one.

Appellant has taken all actions suggested by the Department of Revenue personnel to simplify this process for the vendors and get them to file refund claims. Respondent suggests that Appellant's remedy is to prevail against vendors – assumably in a legal action. (Respondent's brief p. 12) Such action would cost substantial amounts of money, allow the statute-of-limitations to continue to run, and still not provide relief because Appellant has no legal theory in which it could prevail upon its vendors. Vendors are not obligated to pursue refunds on behalf of purchasers by contract nor by statute. If the Respondent's interpretation of section 144.190 is correct, purchasers are required to file refunds through an agent of

Respondent who does not have a corresponding requirement to actually file the refunds. Clearly this is not the intent of the legislature. Constitutional Due Process requires Respondent provide a reasonable alternate means for obtaining the relief sought – a clear and certain remedy.

Numerous other states, many with more taxpayers than Missouri, allow a taxpayer to file a claim for refund of tax amounts overpaid even when those tax amounts were paid to a vendor rather than directly to the Department. In addition to Kansas, whose refund law was cited in Appellant's original brief (Brief of Appellant p. 19-20), the following states also authorize the taxpayer to file a claim for refund on their own behalf: Connecticut (Conn. Gen. Stat. § 12-425, CT Policy Statement 98(5)); Texas (Tex. Tax Code Ann. § 111.104, Tex. Admin. Code § 3.325); District of Columbia (D.C. Code Ann. § 47-2020); New York (N.Y. Tax Law § 1139); Ohio (Ohio Rev. Code Ann. § 5739.07). While there may be additional states that also authorize the taxpayer to file a refund claim on their own behalf, Appellant has cited states with complex sales tax laws or a larger population to show that the "administrative burden" suggested by Respondent does not outweigh a taxpayer's right to Due Process and Equal Protection.

D. Confidentiality

Appellant is the taxpayer in this case. As the taxpayer, Appellant is fully aware of the amount of tax paid to Appellant's vendors. This information is within Appellant's possession and can be proven by invoices and payments made to the vendors. Therefore, no third-party communications are involved.

Respondent's position that Respondent is precluded from discussing this refund with Appellant, under Mo. Rev. Stat.§ 32.057 and Mo. Code Regs. § 10-41.030, is incorrect. Information about Appellant, already in Appellant's possession, is not confidential. Appellant can show tax payments made to the vendor. If the Department has questions regarding whether a vendor actually remitted the tax paid to them by Appellant the Department can examine those issues by performing an independent audit of that vendor. No violation of confidentiality will exist. Appellant should not be denied the opportunity to file a claim for refund on their own behalf under this theory.

CONCLUSION

Appellant reiterates its previous contention that there are only three possible outcomes for interpreting section 144.190 – all of which result in granting Appellant's refund:

1) Respondent's interpretation of section 144.190 is incorrect because Appellant met the statute's requirement that refunds be made by the person that remits the tax when Appellant remitted the tax to the state through its agent, the vendor;
2) Respondent's interpretation of section 144.190 is incorrect because, 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 an unconstitutional deprivation of property without Due Process of law because is denies the real party in interest, Appellant, standing to file refunds.

For the above-stated reasons, 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 12th day of November 2001, an original and ten (10) copies of the Appellant's Reply Brief and a copy of Appellant's Reply 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 Reply Brief and a copy of Appellant's Reply 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 4,047 words.

I also certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____

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