IN THE
SUPREME COURT OF MISSOURI

No. SC83820

SPRINT COMMUNICATIONS COMPANY, L.P.,

Appellant,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Respondent.

Petition For Review
From The Administrative Hearing Commission,
The Honorable Karen A. Winn, Commissioner

Respondent's Brief

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ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

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Jurisdictional Statement

Sprint Communications appeals from an order of the Administrative Hearing Commission granting the Director of Revenue's motion for a summary determination. This appeal does not involve the construction of the revenue laws of this state, one of the bases that would suffice to invoke the general appellate jurisdiction of this Court. Article V, § 3, Missouri Constitution. The statute at issue, § 144.190, RSMo has previously been construed by this Court in *Galamet, Inc. v. Director of Revenue,* 915 S.W.2d 331 (Mo. banc 1996), a virtually identical case.

However, Sprint challenges the validity of the statute on due process and equal protection grounds – a challenge that does invoke this Court's jurisdiction. Article V, § 3, Missouri Constitution.

Statement of Facts

The Director of Revenue agrees with and adopts Sprint's Statement of Facts.

The Director adds that the only issue that the Administrative Hearing Commission decided was the threshold issue of Sprint's standing to seek refunds. Having decided that Sprint lacked such standing, the Commission did not address the merits of the refund claims.

Point Relied On

The Administrative Hearing Commission did not err in granting the Director's motion for summary determination because Sprint lacked standing to seek the refunds under § 144.190, RSMo, in that Sprint did not remit the tax, nor did it have authorization from the vendors who did remit the tax to seek refunds; and the statute does not deny Sprint due process or equal protection.

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

§ 144.190, RSMo 2000

12 C.S.R. 10-3.520

12 C.S.R. 10-4.255

12 C.S.R. 10-41.030

Standard of Review

Review of the Commission's decision is limited to the determination of whether that decision was supported by competent and substantial evidence on the whole record, or whether it was arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction. *J.B. Vending Co., Inc. v. Director of Revenue,* 2001 Mo. LEXIS 76, *5-6 (Sept. 12, 2001), *quoting Psychiatric Health Care Corp. of Missouri v. Dep't of Social Services, Division of Medical Services,* 996 S.W.2d 733, 735 (Mo.App. W.D. 1999) (quotations omitted).

Argument

The Administrative Hearing Commission did not err in granting the Director's motion for summary determination because Sprint lacked standing to seek the refunds under §144.190, RSMo, in that Sprint did not remit the tax, nor did it have authorization from the vendors who did remit the tax to seek refunds; and the statute does not deny Sprint due process or equal protection.

A. Galamet controls; Sprint lacked standing [responds to Sprint's Point I]

The Director did not dispute the facts for purposes of her motion for summary determination. Sprint purchased machinery and equipment from several vendors. The vendors collected sales or use tax on Sprint's purchases, and in turn remitted the tax to the Department of Revenue. Sprint subsequently submitted, directly to the Director, applications for refunds in which it claimed that it had incorrectly paid sales or use tax on the purchases.[1] But Sprint did not provide the Director of Revenue powers of attorney authorizing it to seek refunds of sales or use tax on behalf of the vendors, §32.057.2(1)(2), RSMo and 12 CSR 10-41.030, and the Director denied Sprint's

[1] Sprint claimed that the purchases should have been exempt under the manufacturing exemptions contained in §§144.033.2(4) and (5), RSMo.

applications.

Five years ago, this Court addressed and rejected a claim identical to that of Spint, in *Galamet, Inc. v. Director of Revenue,* 915 S.W.2d 331 (1996). Galamet had purchased electricity from Kansas City Power & Light Co. (KCP&L), and paid sales tax to KCP&L on its purchases. KCP&L in turn remitted the tax to Revenue. Galamet later claimed that its electricity purchases should have been exempt from sales tax under §144.030.2(5), and directly applied to Revenue for a refund.

Citing the plain language of §144.190.2,[2] which requires that the person who requests the sales tax refund to be "the person legally obligated to remit the tax," the Court held that Galamet, as a purchaser, had no standing to demand a refund directly

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[2] Section 144.190.2 states:

> If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax under sections 144.101 to 144.510, and the balance, with interest as determined by section 32.067, RSMo shall be refunded to the person legally obligated to remit the tax[.]

from Revenue. *Id.* at 336. The Court acknowledged that while purchasers have a statutory duty to pay sales tax to sellers under §144.060, RSMo it is the person receiving that payment who has a duty to remit the tax to Revenue. In *Galamet,* the entity with the obligation to remit was KCP&L; Galamet's remedy was to prevail upon KCP&L to apply for the refund. *Id.*

Citing *Galamet,* the plain language of §144.190, and two regulations in existence at the time of the refund claims,[3] the Commission here agreed with the Director that

[3] The Commission referred to sales tax regulation 12 C.S.R. 10-3.520 and use tax regulation 12 C.S.R. 10-4.255 (both rescinded on October 30, 2000). The sales tax regulation provided that:

> The seller whose sales tax account has been credited the sales tax is the person who is to request a refund or credit. No other person may make a refund request to the Department of Revenue. Persons who make erroneous payment to the seller should seek their monies back directly from the seller.

The use tax regulation contained wording to the same effect:

> The person who is to request a refund or credit is the person whose account has been credited for the tax by the

Sprint lacks standing to seek a sales or use tax refund under §144.190.[4] LF 78. The holding in *Galamet,* the statute, and the regulations make plain that the only parties who may request refunds of tax directly from Revenue are the parties legally obligated to remit the tax – in this case, Spirnt's vendors, not Sprint. *Cf. Reed v. City of Union,* 913 S.W.2d 62, 64 (Mo. App. E.D. 1995) (to establish standing to sue on a cause of action implied by the policy of a statute, plaintiff must be member of the class for whom special benefit of statute was intended); *Martee v. City of Kennett,* 784 S.W.2d 621, 626 (Mo. App. S.D. 1990)(same); and *State ex rel. inf. Ashcroft v. Kansas City Firefighters Local No. 42,* 672 S.W.2d 99, 110 (Mo. App. W.D. 1984)(same).

In view of *Galamet* and the explicit statutory directive that establishes who may seek a refund under §144.190, the Missouri cases that Sprint cites concerning general principles of standing are inapplicable.

Sprint's citation of the two federal cases is also inapposite. Appellant's Brief, pp. 11 and 12 (*citing United States v. Jefferson Electric Manufacturing, Co.,* 291 U.S. 386, 402 (1934) and *U.S. v. Benton,* 975 F.2d 511 (8th Cir. 1992)). The Court

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> Department of Revenue. Any other persons should make their requests to the vendor who in turn will request the tax from the Department[.]

[4] Section 144.696, RSMo applies §144.190 to use tax, as well as sales tax.

in *Jefferson* did not purport to establish when, in the abstract, an entity obtains standing under state tax law. Rather, it addressed a due process challenge to a refund statute that required a taxpayer, who wished to establish the right to pursue a refund of erroneously paid or illegally collected tax, to show that the taxpayer alone bore the burden of the tax, or – if the taxpayer shifted the burden to the purchasers – that the taxpayer would reimburse the purchasers if the taxpayer obtained a refund. 291 U.S. at 401-402. The Court did not hold that such a statutory scheme was required by law, nor did it hold that an entity, such as Sprint, doing business under a statute like Missouri's §144.190, must have standing to seek refunds regardless of the statutory scheme under which it operates. Rather, the Court held that the scheme before it did not violate due process; the scheme simply provided that "money shall go to the one who has been the actual sufferer and therefore is the real party in interest." *Id.* at 402.

Sprint also points to *U.S. v. Benton*, 975 F.2d 511 (8th Cir. 1992); the Commission correctly held that *Benton* does not apply. LF 76-77. The issue there was not standing to bring a refund claim pursuant to §144.190, but whether there had been a taxable sale at retail at all under §144.020.1, RSMo. To the extent that the Eighth Circuit even addressed standing, it addressed only the federal government's standing to bring its suit in federal court, in light of the Tax Injunction Act, 28 U.S.C. § 1341, and the contract between the parties. Accordingly, the holding in *Benton* has

no bearing on Sprint's standing to bring a refund claim pursuant to §144.190.

Sprint also misconstrues *DST Systems, Inc. v. Director of Revenue*, 42 S.W.3d 799 (Mo. banc 2001). *DST* was a case primarily involving the appeal of denied protest payments, not refunds; Sprint fails to recognize the distinction between protest payments and refunds. The procedure for paying tax under protest is contained in §144.700, RSMo. It is a remedy separate and distinct from the refund provision contained in §144.190. If a person pays tax under protest, §144.700 grants that person standing to appeal; in contrast, § 144.190 limits standing for refund claims to persons legally obligated to remit the tax.

In *DST*, the company paid tax under protest, directly to Revenue. Because DST had done so, it had standing to appeal the denial of the protest payments. A procedural issue that somewhat complicated the facts in *DST* was that the company's protest claim was consolidated with another appeal, an appeal that did involve a refund claim. That refund claim had been properly filed and appealed by Data Switch, DST's vendor. Data Switch, as the entity legally obligated to remit that tax and the entity with standing to bring the refund claim, moved for consolidation of its claim with DST's protest appeal. If not for Data Switch's decision to consolidate its claim with that of its customer, any refund that Data Switch received would have gone to Data Switch, not to DST. The language in *DST* upon which Sprint relies, Appellant's Brief, p. 12

(*quoting DST*, 43 S.W.3d at 800 n.1), was merely the Court's explanation of why, for purposes of the opinion, references to DST included Data Switch.

Fundamentally, none of the claims in *DST* involved the purchaser attempting to obtain a refund directly from Revenue of taxes paid to a vendor, which is what Sprint seeks to do in the present case. Therefore, *DST* has no bearing on the instant case, as the Commission correctly held. LF 75-77.

Finally, Sprint suggests that this Court may construe § 144.190 not as a statute that limits who may seeks a refund, but as merely illustrating who may do so, in other words, expansively. Appellant's Brief, p. 14. The Court can do no such thing. As a preliminary matter, the general rule is that " the sovereign need not refund taxes voluntarily paid," even if the taxes were "illegally collected." *Ring v. Metropolitan St. Louis Sewer District*, 969 S.W.2d 716, 718 (Mo. banc 1998) (citations omitted).

Further, refund statutes are limited waivers of sovereign immunity, and as such, must be strictly and narrowly construed. When the state consents to be sued, it may be sued only in the manner and to the extent provided by statute, and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit. *Charles v. Spradling*, 524 S.W.2ds 820, 823 (Mo. banc 1975). In fact as this Court noted in *Galamet*, 915 S.W.2d at 336, the appellant in *Norwin G. Heimos Greenhouse, Inc. v. Director of Revenue*, 724 S.W.2d 505 (Mo. banc 1987), made the

same "expansive construction" argument that Sprint makes here. And when this Court agreed with the Appellant in *Heimos*, the legislature amended § 144.190 for the specific purpose of limiting sales tax refunds to the person legally obligated to remit the tax. 915 S.W.2d at 336. The legislature has made its intent regarding the scope of § 144.190 refunds abundantly clear.

In a related vein, the Directed pointed below a statutory provision, § 32.057, RSMo, that prohibits her from disclosing taxpayer-specific information to a third party without authorization to do so. The Director promulgated a companion regulation, 12 C.S.R. 10-41.030, establishing that if a taxpayer consents (by executing a power of attorney), the Director may deal directly with the third party. In the instant case, even assuming that Sprint could overcome the standing hurdle, which it cannot, Sprint still could not overcome the privacy hurdle of § 32.057. Any refund that the Director might make to Sprint would require examination of the vendor's records; if there was any dispute regarding entitlement to the refunds on the merits, particularly any dispute requiring a hearing before the Commission, the Director would be prohibited from disclosing any taxpayer-specific information in aid of resolution.

The foregoing demonstrates that the Commission correctly found that Sprint lacked standing.

B. The statute does not violate due process [responds to Sprint's Point II]

Sprint correctly points out that this Court did not address any constitutional challenge to § 144.190 in *Galamet.* As a preliminary matter, a statute is presumed valid unless it clearly contravenes a constitutional provision; any doubt as to validity is resolved in favor of its constitutionality. *General Motors Corp. v. Director of Revenue,* 1981 S.W.2d 561, 566 (Mo. banc 1998). Sprint cannot overcome these presumptions.

Further, Sprint's reliance on *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), is misplaced. Sprint argues that Missouri's refund statute violates due process because, quoting *McKesson,* "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." Appellant's Brief, p. 15 (citing 496 U.S. at 36). The quotation does not end the analysis in Sprint's favor.

First, Sprint assumes that *McKesson* permits and requires only one type of procedural safeguard where a person seeks to avoid an allegedly illegal tax. That is not true. The parties in *McKesson* presented the Court with the scenario of an illegal tax already paid, under a Florida tax scheme that only permitted taxpayers to raise their

objections in a post-deprivation refund action. 496 U.S. at 38-39. Under such a scheme, due process required the state to provide taxpayers with not only a fair opportunity to challenge the accuracy and validity of their tax obligation, but also a clear and certain remedy, to ensure that they have a meaningful opportunity to do so. *Id.* at 39 (citing *S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)).

The Florida statute at issue foundered because, though the Florida Supreme Court found that the statute discriminated against interstate commerce and enjoined future enforcement, the court did not permit meaningful backward looking relief to rectify the unconstitutional deprivation. *Id.* at 31.

In contrast, the Missouri statutory scheme would have permitted Sprint to give the vendors exemption certificates to avoid collection of sales or use tax at the time of purchase. §§ 144.210 and 144.610, RSMo. Sprint could have then paid its taxes directly to Revenue, under protest (as did the taxpayer in *DST*, discussed in Section A., *supra*). Sprint could thereby have raised the issue of the validity of the tax personally - in other words, Sprint could have had a hearing before it was "'finally deprived of a property interest.'" *Id.* at 37 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). But Sprint did not avail itself of that avenue. Accordingly, Sprint appears to fall into the category of taxpayers who "cannot complain." *Id.* at 39 (party that does not take advantage of a predeprivation opportunity to contest tax "cannot

complain.").

Second, Sprint misunderstands the nature and purpose of Missouri sales and use tax in any event. The tax is an "exaction" upon sellers.[5] The refund statue indeed provides sellers with procedural safeguards by allowing them to bring refund claims for wrongfully remitted tax. Therefore, Missouri's refund statute meets the requirements of *McKesson* and, even under Sprint's interpretation, satisfies due process.

Sprint also points to *District Paving Corp. v. District of Columbia*, D.C. Super. Ct. (Tax. Div.), Dkt. No. 7268-97 (4/22/99). Appellant's Brief, pp. 17-18. The opinion is not precedential. That court also had before it a statute that permitted the the company in the position of Sprint in that case to personally recover the taxes that

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[5] This Court in *Fabick v. Director of Revenue*, 492 S.W.2d 737 (Mo. 1973), long ago concluded that the nature and purpose of the sales tax is that of a gross receipts tax imposed upon sellers, for the privilege of engaging in the business of selling tangible personal property or taxable services at retail in this state. It is not a tax imposed upon purchasers. While sellers are permitted to ultimately collect the tax from their customers, the true burden of paying the tax rests upon the seller.

Similarly, the burden of remitting vendor's tax rests upon the vendor. §§ 144.635 and 144.655.1, RSMo.

the vendors collected. It was only in dicta that the tax court determined that the statute might have presented a due process concern. Further, the company in that case had no recourse analogous to Missouri's protest payment avenue, nor the power of attorney avenue.

Finally, the tax court in *District Paving* assumed that the government would not be prejudiced were it required to process refunds for purchasers in addition to vendors; apparently, the District of Columbia did not even advance the argument. But the Missouri Director of Revenue would be severely prejudiced by the administrative burden of tracking and matching purchasers' claimed payment of taxes to vendors' remittance of taxes. Taxes are paid along with returns that the vendors file; the vendors report gross receipts. To accurately track who has paid taxes, vendors would be required to report every transaction, a potentially enormous burden on vendors, and Revenue would have to be able to record and manage that information, an enormous burden on Revenue. Otherwise, Revenue would never be in a position to know if it has paid out refunds more than once.

Lastly, the Kansas statute, cited at Appellant's Brief, pp. 19-20, is just that – a Kansas statute. If the Missouri legislature wishes to amend § 144.190, it may. But it has not done so to date.

Missouri's statute does not violate due process.

C. The statute does not violate the equal protection [responds to Sprint's Point III]

Sprint's equal protection claim also fails. The first step in the analysis to determine whether the statue burdens a suspect class or impinges on a fundamental right that is explicitly or implicitly protected by the Constitution. *Casualty Reciprocal Exchange v. Missouri Employers Mutual Ins. Co.*, 956 S.W.2d 249, 256 (Mo. banc 1997). Purchasers such as Sprint are not a suspect class. *See id.* (for historical reasons, suspect classes, *e.g.*, classes based on race or national origin command extraordinary protection; right to participate in insurance business not a fundamental right). Nor does the statute impinge on a fundamental right. Assuming that Sprint has a fundamental right at stake, there are adequate procedural safeguards in place[6] to protect that right. *See id.* (assessment procedure under Chapter 375, RSMo prevents impingement of any fundamental property right to participate in insurance business).

Accordingly, the last step in equal protection analysis is to examine whether the statute "is rationally related to a legitimate state purpose." *Id.* at 257. It is Sprint's burden to demonstrate the lack of such a basis, *id.*, a burden that Sprint cannot carry.

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[6] *See* discussion of protest payment procedure and exemption certificates in Section B., *supra.*

If the question of rationality is "at least debatable, the issue settles on the side of validity." *Id.* (and citations therein).

The legislature could have rationally presumed that it need not provide a mechanism for a refund of sales tax to entities such as Sprint, because the tax is not imposed on such entities – it is imposed on Sprint's vendors. It would also have been rational to presume that Sprint, when purchasing millions of dollars worth of tangible personal property, possessed sufficient sophistication in matters relating to taxation that it would have presented its vendors with exemption certificates in the first instance, or to have paid the taxes to Revenue under protest. The fact that Sprint failed to do so does not demonstrate that the legislature's decision lacked a rational basis.

This Court has previously rejected an equal protection challenge similar to Sprint's, in *Bert v. Director of Revenue*, 935 S.W.2d 319 (Mo. banc 1996). There, the appellant argued that §144.030.2(23), RSMo the refund statute for utility purchases, violated equal protection because the statute contained no provision for a refund on purchases of domestic utilities, while the statute did contain a refund provision for non-domestic utilities. The Court disagreed, explaining that the statute contains no provision for a refund of sales tax paid on domestic purchases because domestic purchases are sales – tax exempt. *Id.* at 321. The court held that it was

rational for the legislature to have "presumed that nonresidential, domestic purchasers possessed a sufficient sophistication in matters relating to taxation to remind the utility that they owed no tax on their purchases ab initio." *Id.* Therefore, "the legislature's decision to demand that domestic purchasers report and pay a sales tax on their nondomestic purchases and to provide no mechanism for a credit or refund of sales taxes erroneously paid is a rational one." *Id.* at 321.

Section 144.190 does not violate equal protection.

Conclusion

The decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 30th day of October, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4117 words.

The undersigned further certifies 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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ALANA M. BARRAGÁN-SCOTT