IN THE SUPREME COURT OF MISSOURI

Case No. SC89106
AMERICAN HOME ASSURANCE COMPANY, Appellant
v.
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents

Appeal from the Administrative Hearing Commission of Missouri
Case No. 07-1224 RG
Honorable John J. Kopp, Commissioner

Case No. SC89107
GRANITE STATE INSURANCE GROUP, Appellant
v.
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents

Appeal from the Administrative Hearing Commission of Missouri
Case No. 07-1229 RG
Honorable John J. Kopp, Commissioner

Case No. SC89108
NEW HAMPSHIRE INSURANCE COMPANY, Appellant
v.
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents

Appeal from the Administrative Hearing Commission of Missouri
Case No. 07-1228 RG
Honorable John J. Kopp, Commissioner

Case No. SC89109
NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, Appellant
v.
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents

Appeal from the Administrative Hearing Commission of Missouri
Case No. 07-1227 RG
Honorable John J. Kopp, Commissioner

Case No. SC89110
AIU INSURANCE COMPANY, Appellant
v.
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE, FINANCIAL INSTITUTIONS AND PROFESSIONAL REGISTRATION, Respondents

Case No. 07-1226 RG
Honorable John J. Kopp, Commissioner

INITIAL BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The five insurance companies (American Home Assurance Company, Granite State Insurance Group, New Hampshire Insurance Company, National Union Fire Insurance Co. of Pittsburgh, and AIU Insurance Company, respectively) filed Complaints with the Administrative Hearing Commission seeking review of the Director of Revenue's denials of refunds for insurance company premium taxes paid by the insurance companies for the year 2004.

The Administrative Hearing Commission erroneously upheld the denials of refund determining that insurance companies' claims for refund were not timely filed under Section 136.035, RSMo, on the grounds that a claim for refund must be received no later than two years after the last payment is made for the taxable period.

Resolution of the issues presented in this appeal requires this Court to construe revenue laws, including Sections 136.035, 148.350 and 148.076, RSMo. Because the resolution of these issues involves the construction of one or more revenue laws of this state, jurisdiction is proper in this Court under Article V, Section 3 of the Missouri Constitution and Section 621.189, RSMo Supp. 2007.

STATEMENT OF FACTS

American Home Assurance Company v. Director of Revenue and Director of Insurance, Financial Institutions and Professional Registration

Supreme Court No. SC89106

Appellant American Home Assurance Company ("Appellant American Home," hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 51.)[1] Under the provisions of Chapter 148, RSMo, Appellant American Home is required to pay a tax on the premiums it collects in Missouri. Appellant American Home has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). Appellant American Home made estimated payments of $93,640 on March 1, 2004; $269,855 on June 1, 2004[2]; $93,640 on August 30, 2004; and $93,640 on November 29, 2004. (L.F. 17-30.) Appellant American Home paid a total of $730,810 for 2004. (L.F. 27.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant American Home and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The

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[1] All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89106.

[2] This payment represented an estimated payment of $93,640 for tax year 2004 and the post-audit payment for tax year 2003 in the amount of $176,215. (L.F. 19).

Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent to Appellant American Home at some time prior to June 1, 2005. (L.F. 27). The Notice of Assessment states that Appellant American Home is to "Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005." *Id.* The Notice of Assessment later states, "Tax payments are due June 1, 2005." *Id.* The Notice concluded that Appellant American Home had over-estimated its tax liability for 2004 by $301,703. *Id.*

Appellant American Home did not owe any additional premium taxes for 2004. *Id.* Note that Appellant American Home did owe an additional retaliatory tax payment which was paid and received by the Division on June 2, 2005. *Id.* Appellant American Home made a final premium tax return for tax year 2004 to the Director of Revenue on June 2, 2005, when it paid its retaliatory tax. (L.F. 27).

Appellant American Home's claim for refund, for 2004 taxes, of $429,107 was postmarked June 1, 2007.[3] (L.F. 48). This claim for refund was sent via Express Mail, a service of the United States Postal Service. *Id.* Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). *Id.* Delivery was then effectuated on June 4, 2007. (L.F. 48).

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[3] The $429,107 representing the 2004 tax paid by American Home. (L.F. 27).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 49). This denial was based upon the Director's position that the claim for refund was out of time. *Id.*

On July 17, 2007, the Appellant American Home filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative Hearing Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant American Home filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 50). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 81).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant American Home's Cross-Motion for Summary Determination and held that the refund claim was not timely filed. (L.F. 87).

Appellant American Home filed its Petition for Review in this Court on February 15, 2008.

On April 25, 2008, this Court sustained Appellant American Home's Motion to Consolidate for Purposes of Briefing and Argument. Accordingly, Appellant American Home's (SC89106) statement of facts and argument are consolidated in this Appellants' Brief with the statements of facts and arguments of Appellant Granite State Insurance Group

(SC89107); Appellant New Hampshire Insurance Company (SC89108); Appellant National Union Fire Insurance Company of Pittsburgh, PA (SC89109); and AIU Insurance Company (SC89110).

Granite State Insurance Group v. Director of Revenue and Director of Insurance, Financial Institutions and Professional Registration

Supreme Court No. SC89107

Appellant Granite State Insurance Group ("Appellant Granite State," hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 51.)[4] Under the provisions of Chapter 148, RSMo, Appellant Granite State is required to pay a tax on the premiums it collects in Missouri. Appellant Granite State has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). Appellant Granite State made estimated payments of $16,823 on March 1, 2004; $148,031 on June 1, 2004[5]; $16,823 on August 30, 2004; and $16,823 on November 29, 2004.(L.F. 17-30.) Appellant Granite State paid a total of $262,501 for 2004. (L.F. 27.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant Granite State and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent to

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[4] All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89107.

[5] This payment represented an estimated payment of $16,823 for tax year 2004 and the post-audit credits for tax year 2003 in the amount of $164,854. (L.F. 19).

Appellant Granite State at some time prior to June 1, 2005. (L.F. 27). The Notice of Assessment states that Appellant Granite State is to "Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005." *Id.* The Notice of Assessment later states, "Tax payments are due June 1, 2005." *Id.* The Notice concluded that Appellant Granite State had over-estimated its tax liability for 2004 by $200,647. *Id.*

Appellant Granite State did not owe any additional taxes for 2004. *Id.* However, Appellant Granite State made a final return for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant Granite State's claim for refund, for 2004 taxes, of $61,854 was postmarked June 1, 2007.[6] (L.F. 48). This claim for refund was sent via Express Mail, a service of the United States Postal Service. *Id.* Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). *Id.* Delivery was then effectuated on June 4, 2007. (L.F. 48).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 49). This denial was based upon the Director's position that the claim for refund was out of time. *Id.*

On July 17, 2007, the Appellant Granite State filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative

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[6] The $61,854 representing the 2004 tax paid by Granite State. (L.F. 27).

Hearing Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant Granite State filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 50). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 81).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant Granite State's Cross-Motion for Summary Determination and held that the refund claim was not timely filed. (L.F. 87).

Appellant Granite State filed its Petition for Review in this Court on February 15, 2008.

New Hampshire Insurance Company v. Director of Revenue and

Director of Insurance, Financial Institutions and Professional Registration

Supreme Court No. SC89108

Appellant New Hampshire Insurance Company ("Appellant New Hampshire," hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 52.)[7] Under the provisions of Chapter 148, RSMo, Appellant New Hampshire is required to pay a tax on the premiums it collects in Missouri. Appellant New Hampshire has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). Appellant New Hampshire made estimated payments of $12,693 on March 1, 2004; $26,956 on June 1, 2004[8]; $12,693 on August 30, 2004; and $12,693 on November 29, 2004.(L.F. 17-30.) Appellant New Hampshire paid a total of $99,060 for 2004. (L.F. 27.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant New Hampshire and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent

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[7] All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89108.

[8] This payment represented an estimated payment of $12,693 for tax year 2004 and the post-audit payment for tax year 2003 in the amount of $14,263. (L.F. 23).

to Appellant New Hampshire at some time prior to June 1, 2005. (L.F. 27). The Notice of Assessment states that Appellant New Hampshire is to "Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005." *Id.* The Notice of Assessment later states, "Tax payments are due June 1, 2005." *Id.* The Notice concluded that Appellant New Hampshire had over-estimated its tax liability for 2004 by $1,792,887. *Id.*

Appellant New Hampshire did not owe any additional taxes for 2004. *Id.* However, Appellant New Hampshire made a final return for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant New Hampshire's claim for refund, for 2004 taxes, of $53,408 was postmarked June 1, 2007.[9] (L.F. 49). This claim for refund was sent via Express Mail, a service of the United States Postal Service. *Id.* Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). *Id.* Delivery was then effectuated on June 4, 2007. (L.F. 49).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 50). This denial was based upon the Director's position that the claim for refund was out of time. *Id.*

On July 17, 2007, the Appellant New Hampshire filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative

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[9] The $53,408 representing the 2004 tax paid by New Hampshire. (L.F. 27).

Hearing Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant New Hampshire filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 51). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 82).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant New Hampshire's Cross-Motion for Summary Determination and held that the refund claim was not timely filed. (L.F. 88).

Appellant New Hampshire filed its Petition for Review in this Court on February 15, 2008.

National Union Fire Insurance Co. of Pittsburgh v. Director of Revenue and Director of Insurance, Financial Institutions and Professional Registration

Supreme Court No. SC89109

Appellant National Union Fire Insurance Co. of Pittsburgh ("Appellant National Union," hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 52.)[10] Under the provisions of Chapter 148, RSMo, Appellant National Union is required to pay a tax on the premiums it collects in Missouri. Appellant National Union has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). Appellant National Union made estimated payments of $838,981 on March 1, 2004; $3,746,984 on June 1, 2004[11]; $838,891 on August 30, 2004; and $838,891 on November 29, 2004.(L.F. 17-30.) Appellant National Union paid a total of $6,631.820 for 2004. (L.F. 27.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant National Union and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent

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[10] All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89109.

[11] This payment represented an estimated payment of $838,891 for tax year 2004 and the post-audit payment for tax year 2003 in the amount of $2,908,003. (L.F. 23).

to Appellant National Union at some time prior to June 1, 2005. (L.F. 27). The Notice of Assessment states that Appellant National Union is to "Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005." *Id.* The Notice of Assessment later states, "Tax payments are due June 1, 2005." *Id.* The Notice concluded that Appellant National Union had over-estimated its tax liability for 2004 by $1,792,887. *Id.*

Appellant National Union did not owe any additional taxes for 2004. *Id.* However, Appellant National Union made a final return for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant National Union's claim for refund, for 2004 taxes, of $4,255,399 was postmarked June 1, 2007. (L.F. 49). This claim for refund was sent via Express Mail, a service of the United States Postal Service. *Id.* Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). *Id.* Delivery was then effectuated on June 4, 2007. (L.F. 49).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 50). This denial was based upon the Director's position that the claim for refund was out of time. *Id.*

On July 17, 2007, the Appellant National Union filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative Hearing Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant National Union filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 51). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 82).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant National Union's Cross-Motion for Summary Determination and held that the refund claim was not timely filed. (L.F. 88).

Appellant National Union filed its Petition for Review in this Court on February 15, 2008.

AIU Insurance Company v. Director of Revenue and

Director of Insurance, Financial Institutions and Professional Registration

Supreme Court No. SC89110

Appellant AIU Insurance Company ("Appellant AIU," hereinafter) is a foreign insurance company doing business in the State of Missouri. (L.F. 50.)[12] Under the provisions of Chapter 148, RSMo, Appellant AIU is required to pay a tax on the premiums it collects in Missouri. Appellant AIU has done so for the time periods in question in this case. *Id.*

The tax year in question is 2004 (which is also calendar year 2004). Appellant AIU made estimated payments of $14,382 on March 1, 2004; $29,773 on June 1, 2004[13]; $14,382 on August 30, 2004; and $14,382 on November 29, 2004.(L.F. 17-30.) Appellant AIU paid a total of $112,245 for 2004. (L.F. 27.)

After all payments for 2004 were made, the Director of Revenue was then required to audit the premiums of the Appellant AIU and issue an assessment of the amount of tax due, but not paid in the estimated payments. Section 148.350, RSMo. The Notice of Assessment, under Section 148.350, RSMo, by the Director of Revenue was sent to Appellant AIU at some time prior to June 1, 2005. (L.F. 27). The Notice of Assessment

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[12] All cites in this section of the Statement of Facts are to the record on appeal filed in Supreme Court Case No. SC89110.

[13] This payment represented an estimated payment of $14,382 for tax year 2004 and the post-audit payment for tax year 2003 in the amount of $15,391. (L.F. 23).

states that Appellant AIU is to "Send this Form and Check to Missouri Department of Revenue on or before June 1, 2005." *Id.* The Notice of Assessment later states, "Tax payments are due June 1, 2005." *Id.* The Notice concluded that Appellant AIU had over-estimated its tax liability for 2004 by $55,411. *Id.*

Appellant AIU did not owe any additional taxes for 2004. *Id.* However, Appellant AIU made a final return for tax year 2004 to the Director of Revenue on June 2, 2005. (L.F. 27).

Appellant AIU's claim for refund, for 2004 taxes, of $56,834 was postmarked June 1, 2007.[14] (L.F. 47). This claim for refund was sent via Express Mail, a service of the United States Postal Service. *Id.* Delivery was attempted on June 2, 2007; however, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). *Id.* Delivery was then effectuated on June 4, 2007. (L.F. 47).

The Director of Revenue denied the claim for refund on June 18, 2007. (L.F. 48). This denial was based upon the Director's position that the claim for refund was out of time. *Id.*

On July 17, 2007, the Appellant AIU filed its Complaint with the Administrative Hearing Commission. (L.F. 1). The Director of Revenue filed her Answer on August 1, 2007. (L.F. 5). Upon Motion by the Director of Revenue, the Administrative Hearing

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[14] The $56,834 representing the 2004 tax paid by AIU. (L.F. 27).

Commission entered an order adding the Director of Insurance as a party to the case. (L.F. 7). The Director of Insurance filed his Answer on August 29, 2007. (L.F. 8)

The Respondents filed a Motion for Summary Determination before the Administrative Hearing Commission on October 31, 2007. (L.F. 9). Appellant AIU filed its Cross-Motion for Summary Determination on November 21, 2007. (L.F. 49). The Administrative Hearing Commission issued its Decision on January 16, 2008. (L.F. 80).

The Decision of January 16, 2008, granted Respondents' Motion for Summary Determination and denied Appellant AIU's Cross-Motion for Summary Determination and held that the refund claim was not timely filed. (L.F. 86).

Appellant AIU filed its Petition for Review in this Court on February 15, 2008.

POINTS RELIED ON

I.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT THE FINAL TAX PAYMENT ONLY OCCURS WHEN THE FINAL TAX RETURN IS FILED FOR THE TAX YEAR.

Hanna Mining Co. v. Limbach, 484 N.E.2d 691 (Ohio 1985)

Community Bancshares, Inv. v. Secretary of State, 43 S.W.3d 821 Mo. banc 2001)

Section 148.350, RSMo

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT PHYSICAL DELIVERY WAS ATTEMPTED WITHIN TWO (2) YEARS OF THE LAST FILING OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX BY APPELLANTS.

Evergreen Lawn Service, Inc., v. Director of Revenue, 685 S.W.2d 829 (Mo. banc 1985)

III.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT THE PROPER STATUTE OF LIMITATIONS ON THE FILING OF A REFUND CLAIM OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX IS EITHER THREE YEARS FROM THE DATE OF THE TAX RETURN OR TWO YEARS FROM THE LAST PAYMENT UNDER SECTION 148.076, RSMO, AND THE REFUND CLAIM FILED BY APPELLANTS FALLS WITHIN THE THREE YEAR LIMITATION UNDER THIS PROVISION.

Section 148.076, RSMo

Investors Title Co., Inc. v. Hammonds, 217 S.W.3d 288 (Mo. banc 2007)

ARGUMENT

The decision of the Administrative Hearing Commission ("Commission," hereinafter) erroneously declares the law of Missouri, in finding that estimated payments of taxes constitute final payments for the purpose of calculating the date upon which a refund claim must be filed with the Director of Revenue. When estimated payments are made, they do not represent payments that start the clock ticking on the final date for a refund claim. Instead, the date upon which a final return (whether requiring a payment or a credit and refund) is known and filed is the correct date for calculation of the deadline under the refund statute. To determine that estimated payments are the starting point for the statute of limitations would be inequitable and illogical. Thus, the final return date is the only fair and logical date on which to base the statute of limitations.

The Commission also erroneously declares the law of Missouri, in finding that attempted physical delivery of a claim for refund within the statute of limitations for filing such a claim is not sufficient to protect and preserve that refund claim. Effectively, the decision of the Commission eliminates a taxpayer's ability to file a refund claim when the Director of Revenue chooses to close her offices in Jefferson City.

Missouri law has been clearly stated by this Court; where physical delivery is attempted prior to a filing deadline and the documents are filed on the next day which the State agency is open, then such filing is made within the requisite timeframe. This Court's decision in *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc

1985) is controlling and should have been followed by the Commission. For that reason, and for the undisputed facts in this case, the decision of the Commission should be reversed.

Alternatively, the Commission erred in finding that the provisions of Section 148.076, RSMo, do not apply to the current case. This provision establishes a refund timeframe for filing claims that is specific to Chapter 148, RSMo. This is the same chapter in which the foreign insurance company premium tax is found and due to the similar types of taxes and the proximity in the statutes of these provisions, the Commission should have applied Section 148.076 as the appropriate refund statute. Under Section 148.076, RSMo, the refund claims failed by the Appellants were timely filed. Thus the decision of the Commission should be reversed.

This Court has consolidated the above-captioned five cases (Supreme Court Nos. SC89106, SC89107, SC89108, SC89109, and SC89110) for purposes of briefing and oral argument. Throughout this Appellants' Brief, the Appellants are cumulatively identified as "Appellants." The arguments contained herein apply equally to all five Appellants and to all five cases relating to each respective individual Appellant.

STANDARD OF REVIEW

The standard of review for tax cases on appeal from the Administrative Hearing Commission is found in section 621.193, RSMo 2000,[15] which provides that this Court is to uphold the decision of the Commission when it is "authorized by law and supported by competent and substantial evidence upon the whole record." *Suburban Newspapers of Greater St. Louis, Inc., v. Director of Revenue*, 975 S.W.2d 107 (Mo. banc 1998). While this case arises out of a Motion for Summary Determination before the Administrative Hearing Commission; the same standard of review applies to such cases. *Buder v. Director of Revenue*, 869 S.W.2d 752, 752 (Mo. banc 1994).

[15] All citations are to RSMo 2000, unless otherwise noted.

I.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT THE FINAL TAX PAYMENT ONLY OCCURS WHEN THE FINAL TAX RETURN IS FILED FOR THE TAX YEAR.

The Commission's initial basis for its ruling limiting the availability of tax refunds is incorrect. The Commission asserts that Appellants are limited by the estimated payments made to the Director prior to June 2, 2005 (at which time the final return was made). This position ignores the clear language of Chapter 148, Section 136.035 and the import of this Court's precedent and similar cases from other jurisdictions.

Chapter 148, RSMo, establishes the scheme for the foreign insurance company premium tax and requires estimated payments be made during the year with a final payment and return to be made in the following year after review and assessment by the Director. Section 148.350, RSMo. The language in Section 136.035 does not convert the insurance premium scheme from estimated payments with a final assessed payment into a series of final payments during a tax year. The final payment or credit on the final return represents payment for the full tax year and thus starts the clock running for the filing of refund claims.

The Commission determined that the last payment was made on November 24, 2004 and thus the deadline for filing a refund claim is November 24, 2006.[16] The Commission is mistaken in its reading of the provisions relating to refunds and in determining the date of payment of the taxes by Appellants.

There is no dispute that the payments made by Appellants in 2004 were ESTIMATED payments and not final payments of taxes. Section 148.350, RSMo, provides that insurance companies shall make estimated payments, just as income taxpayers do, during the course of a year. Those payments are due in quarterly increments with the final estimated payment due on December 1 of each year. Section 148.350.2, RSMo. The Commission stopped its analysis of the case at this point, effectively ignoring the remainder of the statutes related to the insurance tax. Their omission of the full statute is no accident, since Section 148.350.2 is fatal to Respondents' position and the decision of the Commission. Section 148.350.2 states as follows:

> Beginning January 1, 1983, the amount of the tax due for that calendar year and each succeeding calendar year thereafter shall be paid in four approximately equal estimated quarterly installments and a fifth reconciling installment. The first four installments shall be based upon the tax assessed for the immediately preceding taxable year ending on the thirty-first day of

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[16] On March 1, 2004 and thus March 1, 2006, in the case of Appellant Granite State, SC89107.

December, next preceding. The quarterly installment shall be made on the first day of March, the first day of June, the first day of September, and the first day of December. Immediately after receiving from the director of the department of insurance, certification of the amount of tax due from the various companies, the director of revenue shall notify and assess each company the amount of taxes on its premiums for the calendar year ending on the thirty-first day of December, next preceding. The director of revenue shall also notify and assess each company the amount of the estimated quarterly installments to be made for the calendar year. If the amount of the actual tax due for any year exceeds the total of the installments made for such year, the balance of the tax due shall be paid on the first day of June of the following year, together with the regular quarterly installment due at that time. If the total amount of the tax actually due is less than the total amount of the installments actually paid, the amount by which the amount paid exceeds the amount due shall be credited against the tax for the following year and deducted from the quarterly installment otherwise due on the first day of June. If the March first quarterly installment made by a company is less than the amount assessed by the director of revenue, the difference will be due on June first, but no interest will accrue to the state on the difference unless the amount paid by the company is less than eighty percent of one-fourth of the total amount of tax assessed by the director of revenue for the immediately preceding taxable year. If the

> estimated quarterly tax installments are not so paid, the director of revenue shall certify such fact to the director of the department of insurance who shall thereafter suspend such delinquent company or companies from the further transaction of business in this state until such taxes shall be paid, and such companies shall be subject to the provisions of sections 148.410 to 148.461.

Section 148.350.2, RSMo. As is clear from the first sentence of this statute, each insurance company is required to make five (5) payments for each taxable year. The fourth payment is due in December; however, the fifth and final payment is to be made on June 1 of the ensuing year. *Id.*

The statute next requires the Director of Revenue to review the tax return of each insurance company which is filed on March 1 of the following year (e.g. March 1, 2005 for the 2004 tax year). Section 148.350, RSMo. Then the Director of Revenue is to determine if the company has paid more tax than was due for the preceding tax year or less. Section 148.350.2, RSMo.

The Director is to "notify and assess each company the amount of taxes on its premiums for the calendar year ending on the thirty-first day of December, next preceding." Section 148.350.2, RSMo. After such notice and assessment, the insurance company is required to make the fifth and final payment by June 1. In the event that the notice reflects an overpayment, that overpayment is credited on the estimated payment due, for the current year, on June 1.

The Commission ignores the entire statutory scheme in Section 148.350, RSMo. There is no final amount of tax due and paid for any tax year until the Director of Revenue carries out her duty under Section 148.350. Moreover, there the final payment of taxes is made on June 1 of the following year. In this case, the final payment for the taxes due for 2004 was on June 2, 2005.

Under the theory espoused by the Respondents and adopted by the Commission, the provisions of Section 136.035 control the refund deadline for the Petitioner.[17] Section 136.035 provides that all refund claims must be made no later than two years after the final payment of the taxes sought to be refunded. Under the scheme found in Section 148.350, the only date which can reasonably be the final payment date is the date of the final return, June 2, 2005. There is no language in Section 136.035 that converts ESTIMATED payments into final payments for the purposes of determining when refunds may be made.

Estimated payments are just that, estimates. They are not final payments of the type that the language of Section 136.035 envisions. Unlike other tax payments, such as those under the sales tax statutes, Section 144.010 et seq., the estimated payments made by insurance companies are not based upon actual tax year data but on prior year receipts. Then the Director is responsible for truing up the actual tax due with the estimated payments made by an insurance company. Section 148.350.2 RSMo.

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[17] A theory Appellants contest. See Point III, herein.

This Court has indicated that a timely claim on any of a tax year's payments is sufficient to allow the full year's tax to be subject to refund. *Community Bancshares, Inc., v. Secretary of State,* 43 S.W.3d 821, 825 (Mo. banc 2001). After finding that tax payments for 1996 were made up through February 17, 1996, this Court stated:

> the last possible day for Bancshares to file its claim for the 1996 refund would have been February 17, 1998.

Id. This Court did not hold that Bancshares was limited to seeking refund of the amount paid on February 17, 1996, but a refund for all of 1996.[18]

The concept of limiting the filing of refund claims to the date of a single estimated payment ignores the finality of payments and returns under the tax scheme in question. For example, the Sales Tax Act refund limitations in Section 144.190 relate the tax paid to the period in question. If payments are made on a monthly basis, then the two year statute applies to the period of time covered by the payment. E.g. if the return and payment is made on February 20, for January taxes; the refund limitation applies to taxes for the entire month of January.[19]

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[18] Under the statutory scheme for the tax in *Community Bancshares*, the February return was the final return for that tax year.

[19] Sales tax payments are final upon being made for each tax period. Unlike the insurance premium tax, in question in this case, there is no calculation of the proper tax after estimated payments. Nor is there a catch-up payment made. The sales tax payment

The income tax statutes, similar to the insurance premium taxes, provide for estimated payments, with a final return and payment to be made after the tax year's end. Chapter 143, RSMo. The deadline for filing a refund claim runs from due date of the final return.

The Commission has created a new policy where the final payment and return for a tax year is ignored; only the individual estimated payment matters for the purpose of filing a refund claim. Nothing in Section 136.035, Chapter 148 or any case remotely suggests ignoring the full tax year for purposes of refund claims. In fact, everything points in the other direction; that is, a timely filed refund claim covers the entire tax period represented by the last payment made.

Return with Credit Filed on June 2, 2005 Constituted Payment Pursuant to Section 136.035

The statutory scheme for the insurance premium tax mandates that a payment be made by June 1 after the tax year in question, when the assessment for a tax year is made by the Director. Similarly, when the Director determines that the estimated taxes remitted during the tax year exceeded the liability, then a credit (negative payment) is ordered by the Director.

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made is the final payment, based upon final sales for the return period, and the refund deadline then runs from that final payment of taxes.

In the current case, the Appellants remitted more taxes for 2004, in the form of estimated payments, than the actual liability of the Appellants for the tax year 2004.[20] After the Director determined the proper amount of tax liability for 2004, an action solely taken by the Director and not by the Appellants, a credit was due. It was not until that credit was submitted to the Director that a final amount of tax for 2004 was known and paid. (L.F. 27).

The intent of Section 136.035 is to have a deadline for claiming a refund that is two years from the date upon which the final amount of tax paid was known and remitted. That date was not until the credit return was filed with the Director...June 2, 2005. It is not the date of the last ESTIMATED payment. Section 148.350 provides that the final amount of tax is not certain until the June return is filed. If the final amount of tax is not certain until the June return, how can a final payment be made before that June return? It cannot.

The Commission ignores the entire concept of a final payment for purposes of a refund claim deadline. Attempting to convert estimated payments to final payments only serves the interest of the Director in denying any and all refund claims, thus such an attempt should not have been adopted by this Commission and should therefore be reversed by this Court. Under the Commission's analysis, the statute of limitations could have run prior to the return even being filed if the taxpayer had made a large estimated payment in a prior year, that the Director had carried forward instead of refunding the amount. Such a reading

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[20] Note that Appellant American Home paid retailatory tax that was due when it submitted its return on June 2, 2005. (L.F. 27).

of the statute would completely deprive the taxpayer of any procedural rights with regard to that return.

The only citation contained in the Commission's decision is to its own decision, never affirmed by any court, *State Farm Mutual Automobile Insurance Company, et al. v. Director of Revenue, et al.*, Case No. 2000-1598RV (Apr. 24, 2002). Appellants admit that this ruling of the Commission finds that estimated payments constitute payments under Section 136.035 and thus serve as the running date for the time period to claim refunds. However, the decision of the Commission in 2002 was just as incorrect as its decisions in the current appeals.

The analysis contained in the 2002 *State Farm* decision of the Commission is flawed and, more importantly, is in conflict with the logic and holding of this Court in *Community Bancshares, Inc., v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001). This Court, in *Community Bancshares*, reviewed a similar statutory scheme and, as discussed above, looked at the full payments over the course of a tax year as the standard for refund claims under Section 136.035. *Id.* at 825. Yet the Commission, relying on its own decision in *State Farm* and not on any decision of this Court, believes that the date of an estimated payment is the terminal date for purposes of Section 136.035. The Commission is wrong.

There are no Missouri cases that directly address the determination of the calculation of the statute of limitations for refund claims where estimated tax payments, followed by a final return, are in question. However, this fact pattern has occurred outside of Missouri in the state of Ohio. In *Hanna Mining Co., v. Limbach*, 484 N.E.2d 691 (Ohio 1985), the

Supreme Court of Ohio was presented with this exact issue. In that case, the taxpayer had made estimated payments of franchise tax to the State of Ohio. *Id.* at 692. The taxpayer filed for a refund of the franchise tax within three years (the Ohio statute of limitations) of the final return date, but not within three years of the estimated payments of the franchise tax. *Id.* The Ohio Tax Commissioner denied the refund claims as being beyond the statute of limitations since the claims were more than three years after the estimated payments were remitted. *Id.* The Ohio Supreme Court reversed, stating:

> The language in R.C. 5733.12 which stated a refund application must be filed within three years from the date of the illegal or erroneous payment is particularly ambiguous because while estimated franchise tax installment payments are still "payments," determination of these payments' illegality or erroneousness must logically await the filing of the taxpayer's final report.

Id. at 693. The Court continued its review, as this Court should also do, by looking at the practicalities of the taxing and refund scheme.

> It appears to us inequitable, if not illogical, to require the taxpayer to keep track of a plethora of limitations periods based upon estimated installment payments when the commissioner has three years from the date the final report is filed to make additional assessments based on the entire tax year.

Id. The Ohio Supreme Court ordered the decision of the Tax Commissioner reversed, concluding that:

> Ultimately, the commissioner's position also fails to consider the underlying framework of the franchise tax collection procedure. An extension to file a franchise tax report, pursuant to R.C. 5733.13, is necessary to enable certain taxpayers to ascertain the exact amount of tax liability contingent on the preparation of their federal tax returns. Starting anew the limitations period each time an estimated installment payment is made thwarts the economies of tax compilation that this mechanism is designed to effectuate. Corporate taxpayers who timely file their final reports and who timely remit the tax due in estimated payments should not be denied a full three-year period to seek a refund of the final tax due in the report merely because they are required to remit their estimated tax before the report can be filed.

Id. The rationale and logic in *Hanna* is equally applicable to the current case. The Appellants could not know what their actual tax was until the Director (not even the Appellants themselves) issues the final return which is in June. The estimated tax payments made in 2004 should not be used to calculate the time limits for filing a refund claim; instead the final return filed on June 2, 2005 should be the proper starting date.

Courts in other states have also taken the position that estimated tax payments do not start the refund claim clock. In the case of *In re Estate of Allyn*, 487 N.E.2d 28 (Ill. App. 1985), the Illinois Appellate Court found that until a final determination of estate tax liability was made, the refund statute of limitations was tolled. *Id.* at 588-589. The Court in *Allyn* cited to *O'Malley v. Sims*, 75 P.2d 50 (Ariz. 1938) as controlling.

In *O'Malley*, the Arizona Supreme Court found that an estimated tax payment did not commence the running of the statute of limitations for refunds.

> ...we think it would be unjust to hold that the statute of limitations commences to run before it has been definitely and finally ascertained, by the only authority competent to do so, the true amount of the tax, or whether, indeed, any tax at all is due. We hold, therefore, that unless and until a court of competent jurisdiction has definitely determined the true amount of the tax, or that no tax at all was due, the statute of limitations does not commence to run against a payment upon an estimate made by virtue of section 3166, supra.

Id. at 166. The logic of *O'Malley* and *Allyn* should be followed by this Court.

This Court should follow the decision of the Ohio Supreme Court in *Hanna* and reverse the decision of the Commission and determine that the refund claims of the Appellants were properly and timely filed.

II.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTIONS FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTIONS FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT PHYSICAL DELIVERY WAS ATTEMPTED WITHIN TWO (2) YEARS OF THE LAST FILING OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX BY APPELLANTS.

The decisions of the Commission should be reversed because the refund claims were filed within two years from the final returns being made to the Director of Revenue. The statute of limitations for filing a refund claim does not bar the claims of Appellants since their claims for refund were properly filed in a timely manner with the Department of Revenue. Since the refund claims were timely filed, the Appellants' are entitled to refunds of their taxes paid for the year 2004. The Commission should have denied Respondents' Motions for Summary Determination and should have granted Appellants' Motions for Summary Determination. The Commission's decisions are not authorized by law and are not supported by the undisputed facts in this case.

Refund Claim is Timely

The Commission's justification for part of its Decision is that the provisions of Section 136.035, RSMo Cumm. Supp. 2007, establish the filing deadline for a claim of refund at the date of the last payment made for the filing year[21] and that the attempted physical delivery of the refund claims were irrelevant.[22] The Commission then concludes that only receipt of the refund claims by the Director of Revenue is of any relevance to the statute of limitations. The Commission is plainly incorrect in this determination and this Court should reverse.

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[21] It is not settled that Section 136.035 is the proper statute of limitations for the purpose of refund of the tax imposed under Section 148.340, as the Commission has supposed. Within Chapter 148, there is an alternative refund statute. Section 148.076 provides for a different statute of limitations for the bank tax. While this section only references Sections 148.010 through 148.110, it is in the same chapter and should be found by this Court as the alternative to Section 136.035. Since Section 148.076 is more specific and in the same chapter as Section 148.340, the insurance premium tax, it has better application than the broad general statute, Section 136.035. This issue is more fully addressed in Point III, infra.

[22] Citations to L.F. 87 reflect the Legal File in SC89106. This is the same page on L.F. 86 in SC89110; L.F. 87 in SC89107 and L.F. 88 in SC89108 and SC89109. This only applies to L.F. 87 where noted herein.

The facts in this case are not in question, as noted in the Statement of Facts. Without restating the full Statement of Facts, the salient dates and actions are short and simple. The Notices of Assessment by the Director of Revenue were sent to the Appellants at some time prior to June 1, 2005. (L.F. 17)[23]. The final returns made to the Director of Revenue were received by the Director on June 2, 2005. (L.F. 27).

Appellants' claims for refund were postmarked June 1, 2007 and delivery was attempted, via United States Postal Service Express Mail, on June 2, 2007. (L.F. 48).[24] However, Respondent Director of Revenue had closed her offices on that day (as it was a Saturday). Delivery was then effectuated on June 4, 2007. (L.F. 48).

This Court has clearly addressed this point in *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985). In *Evergreen*, the taxpayer attempted to deliver an appeal of an assessment to the Administrative Hearing Commission by delivery, using Airborne Express. *Id.* The Commission was closed on the day delivery was attempted, because it was a Saturday. *Id.* That Saturday was also the last day for an

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[23] The Legal Files in each of the three cases consolidated for purposes of briefing are identically paginated. All citations to the Legal File are to the same page in each Legal File, unless otherwise noted.

[24] Citations to L.F. 48 reflect the Legal File in SC89106. This is the same page on L.F. 47 in SC89110; L.F. 48 in SC89107 and L.F. 49 in SC89108 and SC89109. This only applies to L.F. 48 where noted herein.

appeal to be timely filed. *Id.* The appeal was redelivered on the following Monday and filed. *Id.* The Commission dismissed the appeal as not timely. This Court reversed:

> When a petitioner attempts to file an appeal on the thirtieth day (and that terminal date falls on a Monday thru Saturday) by personal delivery to the appropriate office but the actual filing is thwarted because the office is closed, the Commission must treat the petition as timely filed, at the time the office next opens.

Id. at 831. This Court concluded:

> Thus, we hold that the Commission is deemed to have accepted the terminal Saturday filing when delivered to its offices (though closed) and to have processed the petition as timely filed on its next business day.

Id. The decisions of the Commission are in direct conflict with this Court's decision in *Evergreen.* The attempt by the Commission to distinguish *Evergreen* from the current matters is unsuccessful and should be reversed by this Court as *Evergreen* is controlling. This Court should reverse the cases and remand them to the Commission for a determination that the refund claims were filed on June 2, 2007, in a timely manner.

The Commission attempts to distinguish *Evergreen* from the facts in the current situation. The arguments contained in the Commission's decision are not supported either by facts of the cases relied on or by the state of the law in Missouri. The first argument that is used as a justification to distinguish *Evergreen* is the Commission's analysis of Section 621.205, RSMo.

This statute was in question in the *Evergreen* case. The Commission now notes that Section 621.205 has been amended and no longer provides the same language that was originally contained when the *Evergreen* case was decided. On this account the decision is correct because the General Assembly amended Section 621.205 to add the following sentence in subsection 1:

> If the document is sent by any method other than registered mail or certified mail, the Administrative Hearing Commission shall deem it to be filed on the date the Administrative Hearing Commission receives it.

Section 621.205.1, RSMo. This amendment by the General Assembly, coming in 1991, is arguably a response to the *Evergreen* decision referenced herein. However, the General Assembly did not apply this change to all other provisions of law that reference filing dates and deadlines. The General Assembly changed the Administrative Hearing Commission's purview, with respect to filing dates, but did not change the language contained in Section 136.035, or any other provision that would apply to the current case. In fact, the language contained in Section 136.035 is analogous to the language contained in Section 621.205 prior to the amendment.

This Court in reviewing that language in Section 621.205 prior to the amendments of 1991, found that attempted physical delivery by Airborne Express was sufficient to meet the requirements contained in Section 621.205 and thus the Complaint had been properly filed. *Evergreen* at 830-831. The language contained in Section 136.035, RSMo, should be

analyzed in the same manner in which Section 621.205 was previously analyzed by this Court. That being attempted delivery, whether in person or by a delivery service, is sufficient to meet the time limits if such delivery was attempted within the proper time frame.

In this case, it is unquestioned that the delivery was attempted (L.F. 49) and that such attempt was within the proper time frame. That the Director of Revenue had closed her office, much the way the Administrative Hearing Commission had closed its office in *Evergreen*, merely means that the attempted delivery was completed on June 4, 2007 (the next business day) but under the provisions of Section 136.035 delivery and filing was accomplished when the attempt was made and documented on June 2, 2007 (a Saturday).

When the General Assembly amends a statute it is presumed to know the state of the law and amendments made to one statute, without similar amendments made to other analogous statutes reflect that the General Assembly did not intend to amend those other statutes. It would have been easy for the General Assembly to have amended Section 136.035 at the same time it amended Section 621.205; however, it chose not to do so. The Commission now attempts to interpret the General Assembly's explicit choice of amending one statute, but not amending the other, as a basis for repudiating this Court's analysis of the prior language.

The position of the Commission is untenable and should be rejected by this Court. What the Commission is effectively doing is subsuming the role of the legislature, inserting its preferences into the arena of the legislator's prerogative, and changing the law in complete

derogation of its powers and duties. This Court should reject the Commission's dramatic attempted expansion of the law and of its powers and reverse the decision with respect to the Motions for Summary Determination.

The Commission cites to *Darr v. Director of Revenue*, 877 S.W.2d 697 (Mo. App. E.D. 1994) for the proposition that Section 621.205 would have no application to a refund claim filed with the Director of Revenue. *Darr* tacitly accepts this Court's ruling in *Evergreen* where physical attempt of filing is made. *Id.* at 699. In *Darr*, the question resulted from a driver who mailed a request for hearing after the deadline for the postmark on such request for hearing had elapsed. *Id.* at 698. The Eastern District determined that *Darr* could have mailed the request for hearing in a timely manner, where the final day to request a hearing was on a Saturday and a postmark was available on a Saturday. *Id.*

The Eastern District in *Darr* did reflect that Section 621.205 does not apply to actions before the Department of Revenue. *Id.* at 699. However, the Court did **not** reject the *Evergreen* principle as not applying to the Department of Revenue. *Id.* at 698-699. Accordingly, *Darr* is of no support to the Commission's decision in this matter.

The other two cases cited by the Commission in support of its position are *Morant v. State*, 783 S.W.2d 139 (Mo. App. E.D. 1989) and *Ely v. Parsons*, 399 S.W.2d 613 (St.L.Ct. App. 1966). Neither of these two cases assist or support the position of the Commission in this matter. The more recent case, *Morant*, never references the *Evergreen* case whatsoever. The only thing *Morant* stands for is that the certified mail argument, which appears to have been made by the prisoner, Morant, in this case did not apply under Supreme Court Rule

29.15(c). *Id.* at 143. The Court referenced solely criminal cases and criminal rules and did not refer to any administrative provisions, including any reference to the Department of Revenue. Moreover, the Eastern District in *Morant* was not dealing with attempted physical delivery to the Clerk. An attempted physical delivery, if rejected by the Clerk, would present an entirely different opinion and an entirely different set of facts. Accordingly, *Morant* does not support the decision of the Commission.

The latter case referenced by the Commission, the *Ely* case, has similar defects. First, it was a pre-*Evergreen* decision of the St. Louis Court of Appeals. Thus, the Court had no guidance from this Court as to how that type of issue might be interpreted. Again, the *Ely* case does not deal with any attempted physical delivery of a document with the Clerk, but instead deals with mailing and receipt upon mailing. *Id.* at 619. The Court held that "mailing" does not represent or constitute "filing." *Id.* The Court does not address what happens when attempted delivery is made in a timely manner but rebuffed by the receiving party. Based upon this Court's decision in *Evergreen*, it is apparent that where attempted physical delivery occurs, filing is accomplished.

No further inquiry is required. Based upon this Court's decision in *Evergreen*, the Commission's decisions must be reversed and these cases remanded to the Commission for entry of decisions in favor of the Appellants.

Respondents, in their Commission filings, have also opposed the timing of the refund claims based upon language contained in *Community Bancshares, Inv. v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001) (e.g., L.F. 11-12). This argument is based upon their

mistaken belief that the claims for refund were beyond the filing deadline for a claim of refund: two years from the date of the last payment made for the tax year. The date for filing a claim for refund of the 2004 taxes was two years from the final filing which was made on June 2, 2005; June 2, 2007.

Respondents' have previously argued that since the delivery was attempted by the Postal Service (via Express Mail), that there was no delivery attempted and only when the Department physically opened and accepted the refund claim was it received (e.g., L.F. 67). The other argument posited by Respondents appears to be that Postal Service Express Mail delivery is somehow different than Airborne Express delivery.[25] This is a frivolous distinction. The methods (Airborne Express and USPS Express Mail) are the same. This specious distinction stands in stark contrast to the unambiguous decision of this Court in *Evergreen* and the clear, uncontroverted facts of this case.

Facts Demonstrate Delivery Attempt on June 2, 2007

[25] The purpose of the delivery rule, versus postmark date, is fairly simple to understand. Since regular mail (postmarked mail) is not tracked and attempted delivery dates (or actual delivery dates) cannot be ascertained, it makes sense that receipt becomes controlling. However, Airborne Express and USPS Express Mail utilize identical hand-delivery options that include tracking of the package and offer delivery on Saturdays, in addition to Monday through Friday. These services were, in fact, used by Appellants in filing their refund claims. (L.F. 48.)

Appellants attempted delivery upon the Department of Revenue via United States Postal Service Express Mail Saturday, June 2, 2007. (L.F. 48). That delivery was unsuccessful since the offices of the Director were closed. Then delivery was successfully completed on June 4, 2007. (L.F. 48).

The Respondent Directors' own exhibit demonstrates that hand-delivery was attempted on June 2, 2007. (L.F. 48). This exhibit indisputably shows that delivery was attempted on the Director. Exhibit A-4, submitted and verified by the Director's own witness, is a copy of the Express Mail receipt. *Id.* It shows in the upper right hand corner that "Delivery Attempt" was made on "Mo. 6 Day 2" at "Time 1230." *Id.* This document then shows an employee signature of the Postal Service attesting to that date and time of attempted hand delivery. *Id.*

There can be no reasonable argument made that hand-delivery was not made in a timely manner. The facts are uncontroverted and, based upon Missouri case law, clearly demonstrate that the deadline for filing the refund claim was met, under any analysis.

Case Law Does Not Support the Commission's Decisions

The Commission did not cite to any case that is directly on point with the exact same facts as the current case. Instead the Commission created a patchwork attempt to overcome the precedential holding of this court in *Evergreen*, also discussed on Pages 24-24, supra.

First there is not one case cited in the Commission's decisions that relates to the insurance premium tax.[26]

There is only one recent Missouri case that addresses the insurance premium tax. *Fidelity Security Life Insurance Company v. Director of Revenue*, 32 S.W.3d 527 (Mo. banc 2000). The *Fidelity* case does not address the deadline for filing a refund claim and instead dealt with the assessment of tax by the Director of Revenue. *Id.* Interestingly, the decision of this Court reinforces Appellants' position in this case, as it refers to the assessment process contained in Section 148.350. *Id.* at 528.

Aside from *Evergreen Lawn Service, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985), there is no other case law required to be reviewed to resolve this case.

The Commission's decisions are without valid foundation. The Commission seeks to avoid this Court's decision in *Evergreen*; however, such avoidance is impossible. When the facts were exactly the same as the current facts, this Court ordered a Complaint filed in the Commission. Similarly, under identical facts, this Court should reverse the Commission's decisions and declare that the refund claims were timely filed with the Director of Revenue.

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[26] Respondents previously cited to franchise tax cases, e.g. *Community Bancshares, Inc., v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001) and to savings and loan tax cases, e.g. *Macon County Savings & Loan Association v. Director of Revenue*, No. 91-001328 RI (Mo. Admin. Hearing Comm'n Oct. 7, 1992). See, L.F. 9, et seq. Not one of these cases dealt with the insurance premium tax in question in this case.

III.

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN GRANTING THE DIRECTORS' MOTION FOR SUMMARY DETERMINATION AND DENYING APPELLANTS' CROSS-MOTION FOR SUMMARY DETERMINATION BECAUSE THE APPELLANTS' REFUND CLAIMS WERE TIMELY FILED WITH THE DIRECTOR OF REVENUE IN THAT THE PROPER STATUTE OF LIMITATIONS ON THE FILING OF A REFUND CLAIM OF THE FOREIGN INSURANCE COMPANY PREMIUM TAX IS EITHER THREE YEARS FROM THE DATE OF THE TAX RETURN OR TWO YEARS FROM THE LAST PAYMENT UNDER SECTION 148.076, RSMO, AND THE REFUND CLAIM FILED BY APPELLANTS FALLS WITHIN THE THREE YEAR LIMITATION UNDER THIS PROVISION.

Appellants' alternatively assert that Section 148.076, RSMo, is the appropriate refund statute for insurance premium tax refund claims and that Appellants' refund claims were filed before the statute's three year deadline. The Commission in its Decisions rejected the use of the filing deadline contained in Section 148.076, RSMo. This provision is in the same chapter as the insurance premium tax. More importantly, it relates to the same general field and area of taxation: taxation of financial entities. Section 148.076 provides for a three year

statute of limitations from the date the return is filed, or two years from the final payment being made. *Id.* Under this statute, there is no question that the refund claim is timely.

The Commission rejected the use of Section 148.076 based upon the language apparently limiting the application of this statute to the tax on banking institutions.[27] However this provision is contained in the chapter dealing with taxation of financial institutions: Chapter 148, RSMo. This chapter contains taxes on banks (Sections 148.010-148.110); credit institutions (Sections 148.120-148.230); insurance companies (Sections 148.310-148.541, including Section 148.350 in question in this case); and credit unions and savings and loan associations (Sections 148.600-148.710). Section 148.076 is the only refund provision found in Chapter 148; but it IS found in Chapter 148.

The Commission, upon determining that there was no refund provision in Sections 148.340-148.350, immediately jumped to Section 136.035, the general refund provision. However, the Commission failed to look at the refund provision contained in the same chapter as the foreign insurance company premium tax...Section 148.076. This provision is the nearest refund provision and should be utilized in the current matter.

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[27] The only citation offered on this point is *Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996). *Akin* does not address the effect of refund provisions in similar tax provisions in the same chapter, but instead addresses (at the reference point noted by the Commission) a discussion of severability. *Id.* That issue is not before this Court in this case and thus *Akin* is of no weight on the issues presented in this case.

This Court has held that laws are to be read *in pari materia* and where laws apply to a similar topic they should be so interpreted. *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 295 (Mo. banc 2007).

> [L]aws are to be interpreted in pari materia in order to determine their meaning. Under this doctrine, statutes involving related subject matter are construed together as though constituting one consistent act, even if adopted at different times.

Id. quoting *Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676, 683 (Mo. banc 2006). Whether it is different statutes relating to county records (*Investors Title)*; or venue provisions (*State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991); or taxation on financial institutions as in the current case; statutes on similar topics should be read together. The Commission tossed aside the one statute on refunds that should have been read as applying to Section 148.350.

Before the Commission, the Respondents offered *Community Bancshares, Inc., v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001) to support their position rejecting the use of Section 148.076 and instead using Section 136.035. *Community Bancshares* addressed the provisions of the franchise tax and not the insurance premium tax. Notably, the franchise tax is not found in Chapter 148, but instead in Chapter 147. Chapter 147 only deals with the corporate franchise tax and no other topic. Since there is no statute creating a refund deadline in Chapter 147, the Respondents urged Section 136.035 be adopted by default as it was in *Community Bancshares*. (L.F. 79). However, there is a refund section in the same

chapter as the insurance premium tax: Section 148.076 and it should have been adopted by the Commission.[28] Under the provisions of Section 148.076, the refund claim is timely. This is also addressed in the Response to Motion for Summary.

Therefore Appellants pray this Court reverse the Commission's decisions in all three cases and remand the cases to the Commission to enter orders compelling refunds of $429,107 (Appellant American Home), $61,854 (Appellant Granite State), $53,408 (Appellant New Hampshire), $4,255,399 (Appellant National Union), and $56,834 (Appellant AIU).

CONCLUSION

As is clear in these cases, the Appellants filed their claims for refund in a timely manner. The final payment and return for tax year 2004 was filed with the Director of Revenue on June 2, 2005. This is the proper starting date, under Section 136.035, for the two year limit to file a refund claim. The estimated payments made during the course of 2004 are not final payments and should not have been used by the Commission or the Respondents under Section 136.035. The decision of the Ohio Supreme Court in *Hanna Mining Co. v.*

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[28] Respondents' relied below upon *Community Bancshares, Inv. v. Secretary of State*, 43 S.W.3d 821 (Mo. banc 2001), in opposition to the use of Section 148.076 as the appropriate statute. However, *Community Bancshares*, never addressed the application of Section 148.076. This provision was never discussed by the Court. This must be in great part due to the tax in question being the franchise tax and not a financial institution tax.

Limbach, 484 N.E.2d 691 should be adopted by this Court. It is only fair and equitable that the date of filing of the final return be the date the statute of limitations commences. For these reasons, the Decisions of the Commission should be reversed.

Under this Court's decision in *Evergreen Lawn Company, Inc., v. Director of Revenue*, 685 S.W.2d 829 (Mo. banc 1985), the attempt to file the claims for refund on Saturday, June 2, 2007, was sufficient to make the claims be timely filed. The Commission's attempts to avoid the reach of *Evergreen* should not be accepted by this Court. The Commission's decision should be reversed.

In the alternative, Section 148.076, RSMo, provides the proper statute for calculating the timeliness of a claim for refund of the foreign insurance company premium tax which is also in Chapter 148, RSMo. That provision allows filing within three years from when the return is filed or two years from the final payment. Under Section 148.076, the refund claims are clearly timely and the Commission should be reversed.

WHEREFORE Appellants pray that this Court reverse the Decisions of the Commission in the above-captioned cases, determine that the refund claims of Appellants were timely filed remand this case to the Commission for issuance of a decision approving the refund claims of Appellants, and for such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Initial Brief of Appellants complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 11,816 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
Marc H. Ellinger

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Initial Brief of Appellants were sent U.S. Mail, postage prepaid, to the following parties of record on this 4th day of June, 2008:

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