SC94097

IN THE SUPREME COURT OF MISSOURI

MUMTAZ LALANI,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission of Missouri
The Honorable Mary E. Nelson, Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Appellant Lalani operates a wholesale business called Mid America Wholesale, which sells tobacco products other than cigarettes to Missouri retailers. Tr. 20:9-18. He does not buy his other tobacco products ("OTP") directly from the manufacturer. Tr. 24:24-25:1. Describing himself as a "jobber" or "runner," Lalani Br. at 15, Lalani buys OTP from other wholesalers and resells it to retailers at 2-3% mark-up. Tr. 20:17-21:3.

In 2005, Lalani bought tobacco products other than cigarettes from a wholesaler in New York and resold it to retailers in Missouri. Tr. 22:2-7. When Lalani failed to pay the required 10% tax on the "first sale of tobacco products, other than cigarettes, within the state,"[1] the Director sent Lalani a notice of tax lien. Tr. 21:18-22:7. Based on conversations with the Director's staff while settling that liability, Lalani believed that his sales had been the "first sale within the state" because he purchased his OTP from an out-of-state wholesaler. Tr. 22:8-10. Consequently, he believed that if he had purchased OTP from a wholesaler *within* Missouri, he would not have owed the 10% tax. Tr. 22:17-23:4. Since 2005, Lalani has only purchased OTP from wholesalers within Missouri. Tr. 22:17-20.

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[1] §149.160.1 RSMo. All statutory references are to the Missouri Revised Statutes (2000) unless noted otherwise.

In 2009, Lalani reapplied for a wholesaler's license to sell OTP. Tr. 26:15-20. In contemporaneous conversations with Revenue Processing Technician Kaidy Martin, Lalani described his practice of purchasing OTP from other wholesalers in Missouri and selling it to retailers in Missouri. Tr. 27:25-28:7. He also explained his understanding of the law as follows: "I should not be responsible for any 10 percent taxes since I'm buying in State of Missouri." Tr. 26:18-20. When she issued the license, Martin sent a fax to Lalani, which read as follows:

> If you purchase form [sic] a licensed wholesaler you don't need a license. If you purchase from a [sic] unlicensed wholesaler, you will need a license. Since you now have a license, you will need to file the monthly reports that I sent with the license. This way we can make sure the tobacco tax has been paid on the tobacco product. If you have any other questions please contact me . . . .

Tr. 26:20-8; LF00011; Resp. Appx. 1 (Petitioner's ex. B from the AHC hearing). Though Martin did not respond directly to his in-state/out-of-state distinction, Lalani understood Martin's fax to confirm his understanding of the law. Tr. 17:19-28:7.

Throughout 2009 and 2010, Lalani bought OTP from Missouri wholesaler Rock Bottom Wholesale. Tr. 20:17-21; 22:17-20. Sales receipts from Rock Bottom show that Lalani was charged $0.00 in taxes. Tr. 23:18-

24:4; LF00011; Resp. Appx. 2 (Petitioner's ex. A from the AHC hearing). Notwithstanding the zeroed-out tax line in the receipt, Lalani believed the tax was already paid because his receipt read "Tobacco Tax is automatically added for MO coustomers [sic]." Tr. 30:15-31:18; Resp. Appx. 1. Lalani sold all of the OTP he bought from Rock Bottom to grocery stores, convenience stores, and other retailers in Missouri; he did not sell any of it directly to consumers. Tr. 30:6-19. Believing he was not the "first purchaser" because he bought his OTP from a Missouri wholesaler, Lalani reported no purchases or sales of OTP on his monthly tax returns. Tr. 8:23-11:8; 25:2-19.

During a subsequent audit of Rock Bottom, the Director noticed that Rock Bottom had reported tax-exempt sales to Lalani throughout 2009 and 2010 while Lalani had reported no purchases or sales during that same period. Tr. 8:4-9:2. Because Lalani purchased OTP from another wholesaler and sold to retailers, the Director concluded that he was responsible for the "first sale within the state" as that term is defined in §149.011(5). Tr. 11:10-12:8; 15:19-16:11. Consequently, the Director sent Lalani a notice of tax lien in the amount of $42,863.19 for back taxes, penalties, and interest. Tr. 5:7-11. Lalani sought administrative review of the Director's decision from the Administrative Hearing Commission, but the AHC concurred with the Director's assessment. This appeal followed.

ARGUMENT

Standard of Review

> "In cases reviewable under the provisions of section 621.189, the decision of the administrative hearing commission shall be upheld when authorized by law and supported by competent and substantial evidence upon the whole record . . . ."

§ 621.193; *see also Balloons over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 820 (Mo. 2014) (citing § 621.193).

I. Under the plain language of § 149.011(5), Lalani made the "first sale within the state."

Missouri law imposes a tax on "the first sale of tobacco products, other than cigarettes, within the state . . . at the rate of ten percent of the manufacturer's invoice price before discounts and deals, *[which] shall be paid by the person making the first sale within the state*." § 149.160.1 (emphasis added). "First sale within the state" is defined as "the first sale of a tobacco product by a manufacturer, wholesaler or other person *to a person who intends to sell such tobacco products at retail or to a person at retail* within the state of Missouri." § 149.011(5) (emphasis added).

The statutory language of § 149.011(5) has two components: one addresses the party *selling* the OTP; the other, the party *buying* the OTP. To

qualify as the "first sale within the state," the *selling* party must be a "manufacturer, wholesaler, or other person," and the *buying* party must be "a person who intends to sell such tobacco products at retail or to a person at retail." § 149.011(5). Thus, even though there may be multiple manufacturers, wholesalers, and other persons in the chain of commerce, only one of them actually sells the OTP "to a person who intends to sell such tobacco products at retail." Under the plain language of the statute, the person who sells the OTP to the retailer is responsible for paying the tax on the "first sale within the state."

There is no dispute in this case that Lalani bought OTP from a wholesaler and resold it to a retailer. Nonetheless, Lalani argues he is not responsible for the tax because he is neither a "manufacturer, wholesaler, or other person" within the meaning of the statute. Lalani Br. at 16. Lalani is obviously not a manufacturer, but he reasons that he is not a wholesaler either because "wholesaler" is defined in §149.011(18) as someone who does business "primarily to sell cigarettes or other tobacco products" and buys his OTP "directly from the manufacturer," neither of which applies to him.[2] But

[2] Lalani claims he is not in business "primarily" to sell cigarettes or other tobacco products because only 50% of the goods he sells are tobacco products. Tr. 20:22-24.

Lalani overlooks the last sentence in the statutory definition of wholesaler, which explicitly provides that the term "shall include any manufacturer, *jobber*, broker, agent or other person, whether or not enumerated in this chapter, who so sells or so distributes cigarettes or tobacco products." *Id.* (emphasis added). Lalani describes himself as a "jobber" on page 15 of his brief.

Lalani's reliance on *ejusdem generis* to exclude himself from the catch-all "other person" is equally flawed. Rules of construction only apply where statutory language is ambiguous. *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988). "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. 2012). A court "will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013). Lalani offers no plausible reason why "other person" should not be given its plain meaning to include *any* other person who sells tobacco products to a retailer. He claims that only the manufacturer and its direct purchasers know the manufacturer's invoice price and, therefore, only they would ever know how much tax is owed. But nothing in the plain language of the 149.011(5) limits the "first sale within the state" to sales by *those who know* the manufacturer's invoice price. Nor does Lalani proffer any

reason why he could not simply *ask* the manufacturer or the wholesaler what the invoice price was.

If, as Lalani insists on page 19 of his brief, "other person" were limited to "people that manufacture tobacco or buy directly from the manufacturer," the term would be superfluous. The class of sellers enumerated in §149.011(5) already includes "manufacturers" and "wholesalers." And, as Lalani notes elsewhere in his brief, "wholesaler" is defined to include anyone "that purchases cigarettes or tobacco products directly from the manufacturer." Lalani Br. at 17 (quoting §149.011(18)). For "other person" to have any meaning, it must mean someone *other* than manufacturers and wholesalers.

Under Lalani's reading of the statute, *no one* would owe the tax. To qualify as the "first sale within the state" under § 149.011(5), the tobacco product must be sold "by a manufacturer, wholesaler or other person *to a person who intends to sell such tobacco products at retail*." §149.011(5). The the only person who sold tobacco products *to a person who intends to sell such tobacco products at retail* in this case was Lalani. He is responsible for the paying the tax.

II. Lalani's failure to ask the manufacturer's invoice price when purchasing OTP from another wholesaler does not render §§ 149.011(5) and 149.160.1 unconstitutionally vague.

"A statute is unconstitutionally vague if it does not give a person of ordinary intelligence sufficient warning as to the prohibited behavior. The vagueness doctrine is designed to help protect against arbitrary and discriminatory application of laws." *State v. Self*, 155 S.W.3d 756, 760 (Mo. 2005) (internal citations omitted). "The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *State v. Brown*, 140 S.W.3d 51, 54 (Mo. 2004) (internal citations omitted). "The constitution does not ... require the legislature to adhere to impossible standards of specificity." *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 689 (Mo. 2006) (internal citations omitted). "If the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence, they satisfy the constitutional requirements as to definiteness and certainty." *State v. Beine*, 162 S.W.3d 483, 491 (Mo. 2005).

Lalani claims that §§ 149.160.1 and 149.011 are unconstitutionally vague if the definition of "first sale within the state" applies to anyone other than manufacturer and wholesaler because only they know the

manufacturer's invoice price on which the tax is based. Lalani does *not* claim not to have understood that § 149.160 imposes a 10% tax on the first sale within the state. His prior assertions to DOR personnel that he "should not be responsible for any 10 percent taxes since I'm buying in State of Missouri," Tr. 26:18-20, indicate that he was well aware of the tax obligation and formula in §149.160.1. Nor does he allege that the statute *prohibited* him from knowing the manufacturer's invoice price, or rendered him *incapable* of ascertaining it through normal due diligence. At most, Lalani claims to have been *unaware* of the invoice price because it was not the amount he paid for the OTP himself.

Lalani is claiming ignorance, not vagueness. One cannot rely on his lack of knowledge of the amount of an obligation to excuse its non-payment. That would be no different from a shoplifter claiming his theft of goods from a store was not really stealing because the price tag was missing. Surely, it is incumbent upon a consumer to *ask* the price of unmarked goods before simply walking out of the store without paying for them. So, too, was it incumbent on Lalani to make *some* effort to obtain the information on which his liability would be calculated. He alleges no such effort here, nor that he would have been unable to ascertain the manufacturer's invoice price through due diligence. At its core, Lalani's defense is "No one told me."

Even if ignorance were a defense to the non-payment of taxes, Lalani's claim of ignorance in this case does not jibe with his prior tax trouble. The taxes he failed to pay in 2005 were for OTP he purchased from a wholesaler and resold to retailers. He did not buy directly from the manufacturer that time either, and presumably he did not have any greater knowledge of the manufacturer's invoice price then than he did this time. Yet, he was still responsible for paying the tax at a rate of 10% of the manufacturer's invoice price even though he had not paid that price himself. It is true that the 2005 wholesaler was out-of-state whereas the 2009 and 2010 wholesaler was in Missouri. But his obligation then, as now, was still based on a manufacturer's invoice price he didn't know when he bought the goods from the other wholesaler. Lalani had at least four years' actual notice that his 2009 and 2010 tax liability would be based on the manufacturer's invoice price. That he made no effort to determine that price before purchasing OTP did not excuse his tax delinquency in 2005, and it does not excuse his delinquency now.

III. Lalani failed to prove that the Director's tax assessment was inconsistent with prior representations made by the Director's staff.

Claiming DOR personnel told him he wouldn't owe tax on the first sale of OTP within the state if he bought from an in-state wholesaler, Lalani asks this Court to hold the Director estopped from collecting the tax. "The doctrine of equitable estoppel is rarely applied in cases involving a governmental entity, and then only to avoid manifest injustice." *Lynn v. Dir. of Revenue*, 689 S.W.2d 45, 48 (Mo. 1985). "The incidence of taxation is determined by law, and the Director of Revenue and subordinates have no power to vary the force of the statutes." *Id.* at 49.

Lalani "acknowledges his high burden of proof" to equitably estop the government from enforcing the law, but suggests that the alleged facts giving rise to estoppel in this case are "uncontroverted and substantiated in part by written documentation from [the Director's] representative." Lalani Br. at 29. The Record on Appeal suggests otherwise. The only written documentation Lalani refers to is a fax from Revenue Processing Technician Kaidy Martin, which provides in its entirety:

> If you purchase form [sic] a licensed wholesaler you don't need a license. If you purchase from a [sic] unlicensed wholesaler, you will need a license. Since you now have a license, you will need to

> file the monthly reports that I sent with the license. This way we can make sure the tobacco tax has been paid on the tobacco product. If you have any other questions please contact me . . . .

Tr. 26:20-8; Resp. Appx. 2. Nothing in this fax even remotely suggests the first-sale-within-the-state tax does not apply if the wholesaler is in-state. On the contrary, the fax confirmed that Lalani was a "licensed *wholesaler*" who must file "monthly reports" so DOR "can make sure the tobacco tax has been paid."

Even assuming for the sake of argument that Martin explicitly told Lalani the tax depended on the location of the wholesaler, one would expect Lalani to have submitted monthly reports showing that all of his purchases were made from in-state wholesalers, and thus no taxes were owed. Instead, Lalani submitted forms reporting *no purchases or sales of OTP at all*. If the tax worked the way Lalani claims Martin told him it did, his reports would have been useless to the Director because Lalani listed *no* purchases or sales, in-state or out-of-state, rather than supposedly tax-exempt purchases from only in-state wholesalers. He cannot claim detrimental reliance on his misinterpretation of the statute when his own conduct does not support that interpretation.

The Director is not estopped from collecting Lalani's taxes based on Lalani's misreading or misunderstanding of Martin's fax. If he had any

question as to his tax obligations, he could have called Martin back or consulted a tax attorney. It is the language of the law itself, not Lalani's understanding of it, that governs his legal obligations.

CONCLUSION

For the reasons state above, 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

I hereby certify that:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) in that it contains 2,953 words exclusive of the cover, this Certificate of Compliance and of Service and the signature block, as determined by the Word Count feature of the software in which it was prepared, Word 2010;

2. I hereby certify that a true and correct copy of the foregoing was filed electronically via CaseNet on August 8, 2014, to:

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/s/J. Andrew Hirth
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