SC88482

IN THE SUPREME COURT OF MISSOURI

KIDDE AMERICA, INC. *et al.*,

Petitioners/Appellants

v.

DIRECTOR OF REVENUE,

Respondent

On Petition for Review from the Administrative Hearing Commission

Hon. Terry M. Jarrett, Commissioner

PETITIONERS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

This petition for review arises from a decision by the Administrative Hearing Commission denying additional interest claimed by Kidde America, Inc. on an income tax refund resulting from the filing of an amended corporate income tax return. Kidde America, Inc. owned the Kidde Group, which consisted of 37 direct or indirect subsidiaries. In *Kidde America, Inc. v. Director of Revenue,* 198 S.W.3d 153 (Mo. banc 2006), the Court held that Kidde should have been permitted to file an amended corporate income tax return to exercise its election to file a consolidated return. As a result of that decision, Kidde became entitled to a refund of $5,792,993, plus interest.

Kidde sought interest for the period April 16, 2001 to August 2, 2006 based upon § 143.811.1, RSMo. That statute provides for interest at 6% per annum "where the overpayment [of any income tax] resulted from the filing of an amendment of the tax by the taxpayer after the last day prescribed for the filing of the return" — precisely the situation in this case. The Director claimed that the interest for the period January 1, 2003 to August 2, 2006 should be calculated according to §§ 32.068 and 32.069 RSMo. Those statutes provide for interest at a rate determined each calendar quarter by the state treasurer equal to the previous twelve-month annualized average rate of return on all state funds. *See* § 32.068.2. Sections 32.068 and 32.069 were enacted as part of Senate Bill 1248. Senate Bill 1248, however, also repealed and re-enacted § 143.811.1, while adding another section not relevant to this issue. *See* S.B. 1248, Laws of Missouri, 2002, at pp. 1128-1129, 1133.

The resolution of this petition for review requires the construction of the revenue laws of this State, in particular, §§ 32.068, 32.069, and 143.811.1, RSMo. Accordingly, the jurisdiction of this Court is invoked under Article V, Section 3 of the Missouri Constitution and § 621.189 RSMo.

STATEMENT OF FACTS

A. The Prior Appeal

Kidde America, Inc. is the parent corporation of the Kidde Group, an affiliated group of corporations that included Masterchem Industries, Inc., a manufacturer of various specialty paint products headquartered in Missouri. L.F. 2, 10-14. (All of the companies within the group are petitioners, and they are listed in Exhibit 1 to the original Petition for Review.) L.F. 24.

In 2000, Kidde sold Masterchem to another company. L.F. 2. Kidde reported the gain from the sale on its 2000 consolidated federal corporate income tax return. L.F. 3. Masterchem, however, filed a separate Missouri income tax return for the 2000 tax year on October 15, 2001. Ex. A-2, L.F. 59-78. After discovering that its accountants had failed to make an election to file a consolidated Missouri corporate income tax return, Kidde filed an amended Missouri corporate income tax return on March 12, 2004, seeking to elect a filing on a consolidated basis and claiming a resulting refund of $5,792,993. L.F. 137; Ex. A-7, L.F. 87-114.

The Director denied Kidde's refund because she claimed that the return making the election "must be filed before the extended due date of the federal consolidated income

tax return," or by October 15, 2001. Ex. A-8; L.F. 115. Eventually, the question of whether Kidde should have been allowed to file an amended corporate income tax return reached this Court. On June 30, 2006, the Court held that Kidde should have been allowed to file the amended return and to elect filing on a consolidated basis. *Kidde America, Inc. v. Director of Revenue*, 198 S.W.3d 153 (Mo. banc 2006).

B. *The Controversy Over The Interest Due On The Refund*

As a result of the Court's decision, Kidde became entitled to a refund of $5,792,993, plus interest. On August 2, 2006, the Director issued a check to Kidde for $6,091,840.82. The check was for the principal amount plus interest from March 12, 2004 through August 2, 2006. L.F. 174, 179, 185. After Kidde questioned both the rate of interest and the interest period, the Director agreed that the interest period should have been from April 16, 2001 through August 2, 2006. L.F. 179. The Director issued a second check on August 29, 2006 for an additional $924,412.69. L.F. 179. The Director computed the interest for the period April 16, 2001 to December 31, 2002 under § 32.065,[1] and interest for January 1, 2003 to August 2, 2006 under § 32.068. The Director paid Kidde a total of $1,223,260.51 interest on the refund. L.F. 185, 195.

[1] The Director did not explain why she used the prime rate under § 32.065 rather than the flat rate of 6% for the period prior to January 1, 2003. The Commission noted the fact, but refrained from deciding which was correct because the Director did not address the issue. L.F. 219.

Kidde contended that § 143.811.1, RSMo rather than § 32.068, RSMo applied to the computation of interest on a refund resulting from the filing of an amended income tax return. L.F. 175. Section 143.811.1, RSMo provides that "where the overpayment [of any income tax] resulted from the filing of an amendment of the tax by the taxpayer after the last day prescribed for the filing of the return, interest shall be allowed and paid at the rate of six percent per annum." At the 6% rate for the entire period from April 16, 2001 until the refund was paid in August 2006, the interest should have been $1,840,744.14. Accordingly, Kidde contended that the Director still owed it $617,483.63. L.F. 175.

The Director claimed that § 32.069 requires that interest on any refund or overpayment be calculated according to § 32.068. L.F. 186. Section 32.068 uses a rate determined each calendar quarter by the state treasurer equal to the previous twelve-month annualized average rate of return on all state funds. *See* § 32.068.2.

The Commission denied any additional refund to the Kidde Group, holding that § 32.068 and § 32.069 did not conflict with § 143.811.1 because the new statute applied to "all applicable situations" after January 1, 2003, and the old statute now applied only to interest on refunds for periods prior to that date. L.F. 219. Thus, according to the Commission, § 143.811.1 provided the interest rate for the period April 16, 2001 to December 31, 2002, and § 32.068 provided the interest rate to be applied from January 1, 2003 to August 2, 2006. L.F. 219. Kidde filed its petition for review on April 23, 2007.

POINT RELIED ON

The Administrative Hearing Commission Erred In Denying Kidde Additional Interest On Its Income Tax Refund Because § 143.811.1, Providing For Interest At 6%, Applies To The Computation Of Interest On Income Tax Refunds Resulting From The Filing Of Amended Tax Returns, Rather Than § 32.068 And § 32.069, In That Where Two Statutes Passed At The Same Time Dealing With The Same Subject Matter Conflict, The More Specific Provision Governs Over The More General Provision

State v. Harris, 337 Mo. 1052, 87 S.W.2d 1026 (1935)

Citizens Bank and Trust Co. v. Director of Revenue, 639 S.W.2d 833 (Mo. banc 1982)

State ex rel. Dean v. Daues, 321 Mo. 1126, 14 S.W.2d 990 (1929)

§ 143.811.1 RSMo

ARGUMENT

The Administrative Hearing Commission Erred In Denying Kidde Additional Interest On Its Income Tax Refund Because § 143.811.1, Providing For Interest At 6%, Applies To The Computation Of Interest On Income Tax Refunds Resulting From The Filing Of Amended Tax Returns, Rather Than § 32.068 And § 32.069, In That Where Two Statutes Passed At The Same Time Dealing With The Same Subject Matter Conflict, The More Specific Provision Governs Over The More General Provision

A. *Standard of Review*

The Court reviews *de novo* the Commission's construction of state revenue laws. *Kidde America, Inc. v. Director of Revenue*, 198 S.W.3d 153, 154 (Mo. banc 2006).

B. *Sections 32.068, 32.069 and 143.811.1 Conflict*

In 2002, the General Assembly passed S.B. 1248. As relevant here, S.B. 1248 enacted two new statutes dealing with the allowance of interest on refunds and overpayments, § 32.068 and § 32.069. L.F. 182. The new statutes called for the allowance of interest at a rate equal to the State's return on its investments, as certified by the State Treasurer, computed quarterly. L.F. 182.

S.B. 1248 also repealed and re-enacted § 143.811, leaving that statute unchanged except to add a subsection 6 concerned with refunds of certain tax credit carrybacks. L.F. 183. Section 143.811.1, as re-enacted, still allowed for the payment of interest at 6% per annum on refunds resulting from the filing of an amended income tax return. L.F. 183.

The repeal and re-enactment § 143.811 to add a new subsection was unremarkable, and indeed, required by Article I, § 28 of the Missouri Constitution when amending a statute. If that is all that S.B. 1248 did, we wouldn't be here. The complicating factor in S.B. 1248 is that the bill also enacted two sets of statutes dealing with the same subject that conflict — § 32.068 and § 32.069, *and* § 143.811.1. L.F. 182, 183.

There is no doubt that the interest rate computation required by § 143.811.1 is different from that required by § 32.068. The former calls for a flat rate of 6%; the latter for a variable rate — one that fluctuated during the relevant period from 1.7% to 3.4%. L.F. 195. And the result in applying the different methods is substantial. The amount in dispute is an additional $617,483.63. L.F. 175.

C. *A Conflict Between Statutes Enacted At The Same Time Dealing With The Same Subject Matter Should Be Resolved By Giving Effect To The More Specific Provision*

Section 32.069.1 provides: "Notwithstanding the provisions of any other law to the contrary, interest shall be allowed and paid on any refund or overpayment at the rate determined by section 32.068 only if the overpayment is not refunded within one hundred twenty days from the latest of [certain dates]." Section 32.068.2 provides that the interest rate "shall be equal to the previous twelve-month annualized average rate of return on all funds invested by the state treasurer, rounded to the nearest one-tenth of one percent." The rate is to be calculated each quarter. Section § 32.068.3 provides: "Beginning January 1, 2003, the director of revenue shall apply the calculated rate of interest as determined by this section to all applicable situations."

The Director contended that the introductory language to § 32.069 — "[n]otwithstanding any other provision of law to the contrary" — meant that § 32.069 controlled the allowance of a refund for income taxes that resulted from the filing of an amended return, and that the rate of interest (at least for the period after January 1, 2003) was controlled by § 32.068. L.F. 189. It is true that such language generally is intended to override any arguably contrary statutory provision already in existence. *See, e.g.* B. Garner, A DICTIONARY OF MODERN LEGAL USAGE at 601 (2d ed. 1995). If the legislature had enacted only § 32.068 and § 32.069 without making any change to § 143.811 at all, the Director might have had a valid point. *See, e.g., Edwards v. St. Louis*

County, 429 S.W.2d 718 (Mo. banc 1968)(later conflicting statute effectively repeals prior statute).

That is not what happened. Sections 32.068 and 32.069, and 143.811.1, were passed in the same bill in the same session of the legislature, and became effective at the same time. S.B. 1248 repealed and re-enacted § 143.811, while adding a subsection 6 (not at issue here). *See* S.B. 1248, Laws of Missouri, 2002, at 1130, 1133. But the re-enactment of subsection 1 to § 143.811 is not meaningless, as the Director suggests.

The legislature *could* have amended § 143.811.1 to require that interest on all refunds be paid at the rate called for by § 32.068 in all situations, not just for all "applicable" situations. And S.B. 1248 as originally drafted did just that. As introduced, S.B. 1248 would have not only enacted the new §§ 32.068 and 32.069, but it also would have amended § 143.811.1 to provide for the allowance of interest on refunds resulting from the filing of amended income tax returns "pursuant to sections 32.068 and 32.069 RSMo." S.B. 1248 (as introduced), http://www.senate.mo.gov/02info/billtext/intro/sb1248.htm (91st Gen. Assem., 2d Sess., Feb. 28, 2002), App. at ___.

Under *Hallmark Cards, Inc. v. Director of Revenue*, 159 S.W.3d 352 (Mo. banc 2005), either of those changes would have achieved the result the Director seeks here. In *Hallmark*, for example, the taxpayer sought a refund of sales taxes paid before and after January 1, 2003. It made the claim in June 2003, and the Director of Revenue paid the refund in October 2003, less than 120 days after the claim was filed. The Director, however, refused to pay any interest on the refund. Prior to the enactment of S.B. 1248,

the only statute that addressed the right to a refund or the right to interest on a refund of sales tax was § 144.190.2. That section allowed a refund and interest on the refund at the prime rate, as provided in § 32.065, regardless of when the State paid it.

S.B. 1248, and specifically § 32.069.1, changed the scheme for paying interest on sales tax refunds. It allowed interest on a refund only if the overpayment was not refunded by the Director within 120 days of certain events — as applied in *Hallmark*, the date the taxpayer filed for the refund. The Court pointed out that the right to a refund, and the right to interest on the refund, depended upon what rights the statute gave the taxpayer. Such rights are an exception to the principle of sovereign immunity, and require statutory authorization. Thus, until the right to a refund (and interest) vested, the legislature was free to change the rules governing such payments by the State. *See id*. at 354.

Hallmark's right to a refund did not vest until it applied for it in 2003. *See id*. The right to interest could not arise until the refund was claimed. Between the time the overpayments were made in 2002 and the time Hallmark sought a refund in 2003 the legislature enacted § 32.069.1, which denied interest on any refund that the State actually paid within 120 days. The State owed the taxpayer no interest because Hallmark did not make its claim until after the effective date of the new statute providing to the State a 120-day "grace period."

Hallmark, however, did *not* decide the analogous question that is presented by this case — *which* interest rate applies? *Hallmark* only decided that the 120-day grace period

added by § 32.069.1 applied to refunds of sales and use taxes sought after January 1, 2003. (There was already a similar limitation on interest on refunds of income taxes prior to the passage of S.B. 1248 — § 143.811.4 prohibited the payment of interest if the Director paid the refund within four months of the claim.)

S.B. 1248 did not change § 143.811.1. Rather, it repealed and re-enacted this subsection in its entirety as it had existed since 1982, with the exception of adding a new subsection. As noted previously, the General Assembly considered amending § 143.811.1 in a manner that would have adopted the Director's position, but the General Assembly specifically abandoned this draft of S.B. 1248 and made no amendments whatsoever to § 143.811.1. The end result is that we have two statutes that call for different interest rates for the same refund.

When a statute is amended in part, "it is presumed that the Legislature *intended the unamended and unchanged sections or parts of the original statute to remain operative and effective*, as before the amendatory act." *Citizens Bank and Trust Co. v. Director of Revenue*, 639 S.W.2d 833, 835 (Mo. banc 1982), *quoting State ex rel. Dean v. Daues*, 321 Mo. 1126, 1151-1152, 14 S.W.2d 990, 1002 (1929)(emphasis added). Thus, § 143.811.1 remained effective, even though S.B. 1248 also enacted conflicting interest provisions in the same bill.

If the legislature passes two bills relating to the same subject in the same session (or, for that matter, two statutes in the same bill relating to the same subject matter), the Court should consider them *in pari materia*. The Court should uphold both, if by any fair

interpretation it is possible to do so. *Hull v. Bauman*, 345 Mo. 159, 131 S.W.2d 721 (1939).

The only logical way to resolve the inherent conflict between §§ 32.068 and 32.069 and 143.811.1 is by resort to the canon of construction that the more specific provision controls over a more general one. The application of this canon is illustrated in *State v. Harris*, 337 Mo. 1052, 87 S.W.2d 1026 (1935).

In *Harris*, the defendant was one of three persons who robbed a bank with drawn pistols. He was convicted of first degree robbery. The jury sentenced him to 10 years in prison under § 4061, RSMo 1929. The judge added two more years to the sentence under § 4428, RSMo 1929.

Section 4061 provided for a minimum sentence of 5 years if a person was found guilty of first degree robbery, and an additional 5 years (for a total of 10 years) if the robbery was committed with a dangerous and deadly weapon. Section 4428 provided that any person convicted of a felony while armed with a pistol or any deadly weapon would receive an additional two years in prison for a first offense, with escalating periods of prison time for subsequent offenses.

Both statutes were passed during the 1927 legislative session. Both became effective at the same time. The Court was faced with reconciling two statutes passed at the same session, taking effect at the same time, and relating to the same general subject that were, however, inconsistent with each other. *See id*. 337 Mo. at 1059, 87 S.W.2d at 1029. One called for an additional sentence of two years and the other for an additional sentence of

5 years for essentially the same act. The Court resolved the conflict by holding that the specific provisions of § 4061 assessing an additional five years punishment for committing robbery with a deadly and dangerous weapon controlled over § 4428, which called for an additional punishment of two years for being armed while committing any felony, not just robbery.

In the situation before this Court, the apparent conflict should be resolved in favor of the more specific provision. Section 32.068 is a general provision that by its terms applies to the calculation of interest on refunds of overpayments to the State. Section 32.069 is also a general provision that by its terms applies to the allowance of interest on refunds and overpayments of all kinds, not just income tax refunds. When read together with § 32.068, § 32.069 was enacted to provide a safe harbor to relieve the Director from paying interest under certain circumstances occurring after January 1, 2003 in "all applicable situations."

The question here is the application of the second clause of § 143.811.1 — where the refund arises because of the filing of an amended income tax return — a very specific situation that is expressly governed by § 143.811.1. Because the General Assembly reenacted § 143.811.1 and provided a specific carve-out for the calculation of one particular type of overpayment, — an "overpayment [that] resulted from the filing of an amendment of the [income] tax by the taxpayer after the last day prescribed for the filing of the return" — such an overpayment is not an "applicable situation." As the provision

applicable to the more specific situation, § 143.811.1 controls. The Director should have allowed interest on Kidde's refund at 6% for the entire period.

D. *S.B. 1248 Did Not Amend § 143.811.1 To Apply Only To Refunds Arising From Income Tax Returns For Periods Prior To 2003*

The Commission took a somewhat different tack than the Director. It noted that § 32.068.3 says: "Beginning January 1, 2003, the director of revenue shall apply the calculated rate of interest as determined by this section to all applicable situations." According to the Commission, where a refund claim straddles the dividing line of January 1, 2003, § 32.068.3 means that interest is calculated at the rate in § 143.811.1 up to December 31, 2002, and at the rate in §32.068.2 for the period after January 1, 2003. L.F. 219.

The Commission's interpretation cannot be sustained in light of the history of S.B. 1248. *See, e.g., State ex rel. Missouri Power & Light co, v. Riley*, 546 S.W.2d 792, 797 (Mo. App. 1977)(construction of statute may require examination of original bill and amendments). As originally proposed, S.B. 1248 would have enacted the new right to interest and the new interest rate in §§ 32.068 and 32.069, *and* it would have changed the rate of interest for refunds generally and for refunds resulting from the filing of amended returns to the rate calculated according to § 32.068.

Thus, in the original bill the phrase "all applicable situations" did *not* refer to the time period for which the calculation of interest was to be made. The same variable interest rate calculation was going to be applied to any time period for any refund sought after

January 1, 2003. Under *Hallmark* that would have been permissible. The only "applicable situation" that could possibly have been meant was when the refund was paid more than 120 days after the events specified in § 32.069.1(1)-(3). Indeed, this was the meaning ascribed to the phrase in *Hallmark*. *See id*. at 354. The phrase "all applicable situations" establishes a dividing line, but it is between refunds paid before the 120 days has expired and those paid after that period expired — not between interest on refunds for periods before January 1, 2003, and interest for later periods.

The phrase "all applicable situations" did not take on the new meaning ascribed to it by the Commission simply because S.B. 1248, as ultimately passed, left § 143.811.1 intact. To reach that conclusion one would have to say that the legislature amended § 143.811.1 *sub silentio* to read that it only applied to refunds arising from income tax returns covering periods prior to 2003. Yet, S.B. 1248 made no such amendment. It changed nothing in § 143.811.1 regarding the allowance and calculation of interest. Sections 32.068 and 32.069 were passed as proposed. "All applicable situations" still only refers to situations where the Director paid the refund more than 120 days after it was claimed. That doesn't cure the conflict, it creates it.

Moreover, apart from its meaning in the legislation as originally written, the term "situation" signifies more than a mere temporal reference. It refers to an entire set of conditions and circumstances. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY at 1078 (1980). The circumstances surrounding Kidde's refund claim included not just *when* it was made, but *how* it came about — the very circumstances addressed in the second

clause of § 143.811.1. It sought a refund that resulted from the ability to file an amended return that reduced its tax liability substantially. The Director could have avoided payment of interest had she acted promptly. She chose rather, to contest the right to file any amended return (and thus the right to any resulting refund).

The conflict created in *that* "situation" should be resolved by applying the more specific statute — the second clause of § 143.811.1 which expressly provides for the allowance of interest at the rate of 6% per annum when the refund or overpayment results from the filing of an amended income tax return.

CONCLUSION

For the foregoing reasons, Kidde America, Inc. and its 37 subsidiaries request that the Court reverse the decision of the Administrative Hearing Commission, hold that the proper interest rate on the refund due is 6% per annum from April 16, 2001 to August 2, 2006, order the Director of Revenue to pay an additional $617,483.63 in interest, and grant such other relief as the Court deems proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and it contains 3.984 words, excluding the parts of the brief exempted; has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and a virus-free diskette were mailed, first class postage prepaid this ___ day of August, 2007 to:

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APPENDIX

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