SC96731

IN THE SUPREME COURT OF MISSOURI

CASS COUNTY, MISSOURI,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

From the Administrative Hearing Commission
The Honorable Audrey Hanson McIntosh, Commissioner

BRIEF OF RESPONDENT

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ATTORNEYS FOR
RESPONDENT
DIRECTOR OF REVENUE

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This case presents three questions:

1. Whether the Missouri Administrative Hearing Commission has jurisdiction to review the Missouri Director of Revenue's automatic processing of an amended sales tax return;

2. Whether the Director of Revenue may automatically process an amended sales tax return when the return corrects the political subdivision to which the tax revenue is owed; and

3. Whether the processing of an amended sales tax return is a request for a tax "refund" if the return does not ask for any money to be returned to the taxpayer.

JURISDICTIONAL STATEMENT

I. This Court has appellate jurisdiction to review the decision below of the Administrative Hearing Commission construing the State's revenue statutes. This Court has jurisdiction to review any decision rendered by an administrative agency, including a decision by the Administrative Hearing Commission. Mo. Const. Art. V, § 18. Here, this Court has exclusive appellate jurisdiction because this case concerns the proper construction of Missouri's revenue laws. Mo. Const. Art. V, § 3; § 621.189, RSMo; *see, e.g.*, *Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 626 (Mo. 2015).

II. But, although this Court has jurisdiction to review the Administrative Hearing Commission's decision, the Administrative Hearing Commission had no jurisdiction to review the Director of Revenue's automatic processing of an amended sales tax return. The Administrative Hearing Commission's decision is thus void, and the required remedy in this Court is vacatur—a point raised by the Director before the Administrative Hearing Commission and discussed in full in this brief. *See infra* Argument Pt. I; *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 76 (Mo. 1982).

INTRODUCTION

This dispute concerns the authority of the Director of Revenue to process an amended sales tax return. Processing a return is an automatic and non-discretionary act: it is triggered by individual tax filers, and it refers to the acceptance of a sales tax return and the allocation of tax revenue to the right local government in accord with the information on the return via the Department of Revenue's automatic computer accounting system. The Director of Revenue processes, at a low estimate, 1,600 amended returns per month, a number that does not include the much higher number of original sales tax returns processed in the same manner.

The processing of amended returns has not been subject to notice requirements to third parties or to appeals to the Administrative Hearing Commission until this controversy.

In this case, the Administrative Hearing Commission claimed jurisdiction to review and potentially halt the processing of any amended sales tax return, before the filer even files the return. Adopting the reasoning of the Western District Court of Appeals in a prior writ action concerning this controversy, it reasoned that every time the Director processes a return, the Director makes a "decision" subject to review by the Administrative Hearing Commission. This is a significant expansion of the Administrative Hearing

Commission's jurisdiction—and, consequently, of this Court's appellate tax docket.

These administrative notice and appeal requirements are not grounded in law, and the decision of the Administrative Hearing Commission is void for lack of jurisdiction. The state constitution and the state statutes vest this tax administration authority solely in the Director of Revenue. Nor is the automatic processing of a return a "decision" by the Director within the meaning of the statute governing review by the Administrative Hearing Commission: it is a passive, non-discretionary, and ministerial act triggered by a taxpayer action.

In its petition for review, Cass County suggests that the Commission's expansion of its jurisdiction, broad as it is, is not enough, and that the Administrative Hearing Commission should have gone further to find that the refund procedures also govern matters of this kind. According to Cass County, every amended return is a request for a refund, and subject to the additional administrative procedures governing refunds, if it adjusts the information on the return as to which local government is entitled to the revenue. This position, too, is not warranted by the statutes: an amended sales tax return is a request for a tax refund only when it seeks the return of money to a taxpayer, which the amended returns at issue here do not.

This procedural controversy, arcane as it may seem, is of real public consequence. If this Court lets the decision of the Administrative Hearing Commission stand, or worse, adopts the position of Cass County in this appeal, it will create serious delays and uncertainty in the Department of Revenue's administration of local sales taxes.

In his role as custodian of local sales tax accounts, the Director processes untold numbers of regular and amended tax returns every day, and makes, as a conservative estimate, about 1,600 automatic adjustments back and forth each month in the sales tax accounts of counties, cities, ambulance districts, and over 1100 political subdivisions across the state. Adjustments occur because mistakes happen in returns or old returns need to be corrected as new facts come to light. Under the theory adopted below, the Director would be required to notify each subdivision individually of each contemplated adjustment (no matter how small), and potentially to wait to accept any amended return until lengthy rights of review and appeal are exhausted.

This serious administrative burden threatens to grind to a halt the processing of amended sales tax returns in the Department of Revenue. In cases concerning serious errors, local governments might have to wait years for their revenue, as the City of Lee's Summit has had to do here. The only beneficiaries of these delays will be the very entities wrongly credited with sales tax revenue.

STATEMENT OF FACTS

This case is about the ability the Director of Revenue to promptly and accurately disburse sales tax revenue to local governments. The Director of Revenue has historically automatically processed all amended sales tax returns, promptly crediting and debiting local governments' accounts as each new return or amended return comes in, according to the listed amount of each local government's sales tax proceeds. Cass County, a local government that was mistakenly credited by several sales tax returns with nearly a million dollars in excess sales tax revenue during the periods between December 2008 and December 2011, seeks to interpose lengthy administrative procedures before the Director may process amended sales tax returns to adjust the county's account to the correct total.

I. Legal Background

The Director of Revenue has the authority and duty to make sure that local governments get their sales tax money in a prompt and error-free way.

A. By law, the collector, custodian, and administrator of all local sales tax accounts is the Director of Revenue—and not local political subdivisions or the state treasurer. Mo. Const. Art. IV, § 15 (Resp. A1); § 32.087.6 (Resp. A7), RSMo. Under Article IV, Section 15 of the Missouri Constitution, the state Treasurer and the state Director of Revenue share control of public tax revenue. The state treasurer holds in the state treasury "all state funds and

funds received from the United States government." Art. IV, § 15 (Resp. A1).[1] And the Department of Revenue "shall take custody of and invest nonstate funds" and "other moneys authorized to be held by the department of revenue." *Id*. This division of power is strict: under this provision, "[n]o duty shall be

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[1] In relevant part, Article IV, Section 15 of the Missouri Constitution provides that:

> The state treasurer shall be custodian of all state funds and funds received from the United States government. The department of revenue shall take custody of and invest nonstate funds as defined herein, and other moneys authorized to be held by the department of revenue. All revenue collected and moneys received by the state which are state funds or funds received from the United States government shall go promptly into the state treasury. All revenue collected and moneys received by the department of revenue which are nonstate funds as defined herein shall be promptly credited to the fund provided by law for that type of money. * * * Unless otherwise provided by law, all interest received on nonstate funds shall be credited to such funds. * * * The investment and deposit of state, United States and nonstate funds shall be subject to such restrictions and requirements as may be prescribed by law. * * * No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government. * * * As used in this section, the term "nonstate funds" shall include all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as "nonstate funds" to be administered by the department of revenue.

Mo. Const. Art. IV, § 15 (Resp. A1).

imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds and funds received from the United States government." *Id*. Accordingly, the Department of Revenue is in charge of all non-state funds, defined to include "all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue." *Id*.

The Department of Revenue is furthermore charged by the state Constitution with promptly distributing local tax money from non-state revenue funds to local governments' bank accounts. Under Article IV, Section 15 of the Missouri Constitution, "All revenue collected and moneys received by the department of revenue which are nonstate funds as defined herein shall be *promptly credited* to the fund provided by law for that type of money." Art. IV, § 15 (emphasis added) (Resp. A1).

The Director of Revenue is also charged by statute with the general administration of local tax funds. Under Section 32.087.6 (Resp. A7), once any local sales tax is imposed, "the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the

state of Missouri all additional local sales taxes authorized under the authority of the local sales tax law." § 32.087.6, RSMo (Resp. A7).[2] The statute contemplates that the Department's administration will include, for example, "the collection, deposit, transfer, transmittal, disbursement, safekeeping, accounting, or recording of funds." § 32.087.14, RSMo (Resp. A9). For these reasons, local sales taxes, together with Missouri state sales taxes, "shall be collected together and reported upon such forms and under such administrative rules and regulations as may be prescribed by the director of revenue." *Id*.

These laws also empower and require the Director to let filers submit amended returns that make the corrections necessary for accurate

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[2] In full, Section § 32.087.6 provides:

> 6. On and after the effective date of any local sales tax imposed under the provisions of the local sales tax law, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri all additional local sales taxes authorized under the authority of the local sales tax law. All local sales taxes imposed under the local sales tax law together with all taxes imposed under the sales tax law of the state of Missouri shall be collected together and reported upon such forms and under such administrative rules and regulations as may be prescribed by the director of revenue.

§ 32.087.6, RSMo (Resp. A7).

distributions of tax funds to local government. Art. IV, § 15 (Resp. A1); § 32.087, RSMo (Resp. A3). In addition, once a filer amends a return, the Department has the power and duty to distribute the tax proceeds as directed by the amended return, while automatically correcting a distribution made in error. § 144.100, RSMo (Resp. A19).

B. Here is how sales tax collection works in practice.

After a local election puts in place a sales tax, consumers buying a taxed product or service pay the sales tax at the point of sale to the business selling the product. § 32.087.6, 32.087.12, RSMo (Resp. A7–8). In this tax collection structure, the business is termed the taxpayer, and the consumer is termed the purchaser. Tr. 66–67. When this sales tax scheme governs sales of utility services, for example, the utility is responsible for collecting sales taxes from the consumer or purchaser. § 144.032, RSMo. (By statute, any sales tax on metered water services, electricity, electrical current and natural, artificial or propane gas, wood, coal, or home heating oil for domestic use "shall be administered by the department of revenue and assessed by the retailer in the same manner as any other city, county, or hospital district sales tax.") *Id*.

After the business collects the tax, it sends the money to the Department of Revenue with an accompanying sales tax return. § 144.100, RSMo (Resp. A19); Tr. 66–68. Each business must file its return on blanks designed and furnished by the director of the department of revenue, which "show the

amount of gross receipts from sales of taxable property and services by the person and the amount of tax due." § 144.100.2, RSMo (Resp. A19).

The business's check is at once placed temporarily in a holding or safekeeping account while the return is processed because, until the return is processed, the Department does not know which state or local entity is entitled to the money. LF 19, A 5; Tr. 67–69.

At the same time, once the Department of Revenue receives the money, the Department of Revenue's accounting system begins automatically processing the sales tax return. LF 18–19, A 4–5. The Department automatically takes the information that the business listed on the sales tax return and automatically directs the money to the local government listed on the return. LF 18–19, A 4–5. This process results in the computer program automatically issuing a report to the cashier division allocating the money to the local government identified on the return. LF 19, A 5; Tr. 69–70.

Then, each month, the Department reconciles the account of each local government and sends the local government its money. LF 19, A 5. Reconciling an account is much like balancing a checkbook (although this process is also automated today by the Department's accounting system). The Department balances the new credited funds in the local government's fund (usually, the new sales tax money that has come in on a new sales tax return) against any debits or deductions (often, misdirected funds that need to be taken out of the

account due to the filing of an amended return). Tr. 70–73; 105–07. Once the account is reconciled, the Department then pays the money left in the account to the local government, usually by electronic funds transfer to the local government's bank. § 67.525, RSMo (counties). Tr. 70–73; 105–07.

C. This process also applies to amended returns, which helps the Department keeps all accounts current and accurate.

When a filer misdirected tax funds because of a coding error on its return, it may file an amended return, and the re-allocation will be posted promptly and automatically. This happens, for example, when a taxpayer lists the wrong county or city on its sales tax return. LF 19, A 5.

By statute, corrections to returns may be made by the filer to "[t]he amount of gross receipts from sales and the amount of tax due returned by the person, as well as all matters contained in the return." § 144.100.5, RSMo (Resp. A19).[3] If a mistake is caught right away, and where "an error or

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[3] Section § 144.100.4–.5 provides:

> 4. If an error or omission is discovered in a return or a change be necessary to show the true facts, the error may be corrected, the omission supplied, or the change made in the return next filed with the director for the filing period immediately following the filing period in which the error was made or the omission occurred, as prescribed by law * * * Any other omission or error must be corrected by filing an amended return for the erroneously reported period if the amount of tax is less than that originally reported, or

omission is discovered in a return or a change be necessary to show the true facts, the error may be corrected, the omission supplied, or the change made in the return next filed with the director." § 144.100.4, RSMo (Resp. A19). But "[a]ny other omission or error must be corrected by filing an amended return for the erroneously reported period." *Id*. Because the Department has no discretion to decline tax returns, an "additional return shall be deemed filed on the date the envelope in which it is mailed is postmarked or the date it is received by the director, whichever is earlier." § 144.100.4, RSMo (Resp. A19).

Once the filer files an amended return and it is accepted by the Department for processing, the return adjusts the revenue reported for the

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> an additional return if the amount of tax is greater than that originally reported. An additional return shall be deemed filed on the date the envelope in which it is mailed is postmarked or the date it is received by the director, whichever is earlier. Any payment of tax, interest, penalty or additions to tax shall be deemed filed on the date the envelope containing the payment is postmarked or the date the payment is received by the director, whichever is earlier. If a refund or credit results from the filing of an amended return, no refund or credit shall be allowed unless an application for refund or credit is properly completed and submitted to the director pursuant to section 144.190.
> 5. The amount of gross receipts from sales and the amount of tax due returned by the person, as well as all matters contained in the return, is subject to review and revision in the manner herein provided for the correction of the returns.

§ 144.100.4–.5, RSMo (Resp. A19).

local governments, with dynamic changes to the funds in the relevant state accounts. Tr. 77. The act of filing is what triggers the adjustment.

Each month, the Director provides reports to local taxing jurisdictions outlining the taxes that will be received, including a report of the different businesses and taxpayers in the taxing jurisdiction. LF 19, A 5; Tr. 82, 93–94. One report that the Director makes available is a detailed coded report about the tax paid by each business in the jurisdiction (Cass County sometimes uses this report to check that new businesses are paying their taxes). Tr. 93–94. The counties are not given the actual tax returns because by statute the Director is in charge of processing the returns and there are confidentiality laws protecting private taxpayer information. Tr. 94–95; Tr. 105–06.

D. The process is slightly different and not nearly as automatic as when an amended return claims a sales tax *refund*, as opposed to correcting the name of the local government to which the sales taxes are due.

When a filer has paid more taxes than are owed, either the purchaser or the seller can request a refund. Tr. 84. Once a refund claim is received, a revenue technician examines whether the claim appears to be in compliance with the law. Tr. 89–90. An additional form is also required: "If a refund or credit results from the filing of an amended return, no refund or credit shall be allowed unless an application for refund or credit is properly completed and submitted to the director pursuant to section 144.190." § 144.100.4, RSMo

(Resp. A19). If the refund request appears proper, it goes to the processing department, which then mechanically takes the information and issues the appropriate orders to the accounts. Tr. 89–90. Because the revenue technician has made an important decision affecting an individual taxpayer, if the technician denies the refund request, the taxpayer can appeal the decision to the Administrative Hearing Commission. Tr. 85–86.

Under this refund system, money could be withheld from a current month of tax distribution for a refund from three years ago, given that the actual money submitted three years ago was long-since transferred to and spent by the local government. Tr. 73. Rather than make the local government dredge up its own new money to pay the refund, the refund is simply automatically deducted from the new money coming in for the country—much like with automatic adjustments to reallocate misdirected funds. Tr. 75.

The Department does not begin a refund process without a claim of some amount of money being due back to the purchaser or seller: a refund request without a request for some amount of money back is no refund request at all. Tr. 86. After all, the Department cannot refund zero dollars. Tr. 86. Nor would a refund include a situation whether the taxpayer underpaid (that would result in a tax assessment, not a tax refund). Tr. 81.

The counties also get specific reports about each tax refund processed and any check redeemed from a county account. § 67.525.2. A 20. Resp. A13.

But the Department does not contact individual local governments when refund claims come in because the Director makes the decision on refund claims. Tr. 87, 105–07.

E. Although this statutory authority has been ample for the Director of Revenue to administer county sales taxes, the Director has additional sources of authority from two other statutes, § 67.525, A 20, Resp. A13, and § 94.550 (Resp. A16), when they are read in conformity with the state constitution.

The County Sales Tax Act, §§ 67.500–.548, and the City Sales Tax Act, §§ 94.500–.550, have identical language that expressly states that refunds and corrections may be made administratively by the state for erroneous payments or overpayments in the operation of local sales taxes. § 67.525, A 20, Resp. A13, § 94.550, RSMo (Resp. A16). The County Sales Tax Act, codified at Section 67.525 (Resp. A13), expressly allows for dynamic adjustments to the local funds, permitting "refunds from the amounts in the trust fund" and credits "to any county for erroneous payments and overpayments made" including in cases of "dishonored checks and drafts deposited to the credit of such counties." Likewise, the City Sales Tax Act, codified at § 94.550 (Resp. A16), expressly allows for dynamic adjustments to the local funds, permitting "refunds from the amounts in the trust fund" and credits "to any city for erroneous payments and overpayments made" including in cases of "dishonored checks and drafts deposited to the credit of such cities." § 94.550, RSMo (Resp. A16).

The County Sales Tax Act and the City Sales Tax Act contravene the state constitution, however, in one key way: they purport to give many of these duties to the state treasurer. In identical language, the acts provide that county or city sales taxes collected by the director of revenue "shall be deposited with the state treasurer" and "shall not be deemed to be state funds and shall not be commingled with any funds of the state." When authorized by the Director of Revenue, the statute empowers "the state treasurer to make refunds from the amounts in the trust fund and credited to any county [or city] for erroneous payments and overpayments made" and to "redeem dishonored checks and drafts deposited to the credit of such counties [or cities]". §§ 67.525

(Resp. A13)[4], 94.550 (Resp. A16),[5] RSMo.

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[4] In relevant part, Section 67.525 (the County Sales Tax Act) provides that:

> 1. All county sales taxes collected by the director of revenue under sections 67.500 to 67.545 on behalf of any county * * * shall be deposited with the state treasurer in a county sales tax trust fund, which fund shall be separate and apart from the county sales tax trust fund established by section 66.620. The moneys in such county sales tax trust fund shall not be deemed to be state funds and shall not be commingled with any funds of the state. * * * Not later than the tenth day of each month the director of revenue shall distribute all moneys deposited in the trust fund during the preceding month by distributing to the county treasurer * * * the sum due the county as certified by the director of revenue.
> 2. The director of revenue may authorize the state treasurer to make refunds from the amounts in the trust fund and credited to any county for erroneous payments and overpayments made, and may redeem dishonored checks and drafts deposited to the credit of such counties. If any county abolishes the tax, the county shall notify the director of revenue of the action at least ninety days prior to the effective date of the repeal, and the director of revenue may order retention in the trust fund, for a period of one year, of two percent of the amount collected after receipt of such notice to cover possible refunds or overpayment of the tax and to redeem dishonored checks and drafts deposited to the credit of such accounts. After one year has elapsed after the effective date of abolition of the tax in such county, the director of revenue shall authorize the state treasurer to remit the balance in the account to the county and close the account of that county. The director of revenue shall notify each county of each instance of any amount refunded or any check redeemed from receipts due the county.

§ 67.525, RSMo (Resp. A13).

[5] In relevant part, Section 94.550 (the City Sales Tax Act), provides:

By placing these local tax revenue funds in the control of the state treasurer, these acts contravene Article IV, § 15, which requires non-state funds like local tax revenue funds to be held in a non-state account over which

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> 1. All city sales taxes collected by the director of revenue under sections 94.500 to 94.550 on behalf of any city * * * shall be deposited with the state treasurer in a special trust fund, which is hereby created, to be known as the "City Sales Tax Trust Fund". The moneys in the city sales tax trust fund shall not be deemed to be state funds and shall not be commingled with any funds of the state. * * * Not later than the tenth day of each month the director of revenue shall distribute all moneys deposited in the trust fund during the preceding month, to the city treasurer * * * the sum due the city as certified by the director of revenue.
> 2. The director of revenue may authorize the state treasurer to make refunds from the amounts in the trust fund and credited to any city for erroneous payments and overpayments made, and may redeem dishonored checks and drafts deposited to the credit of such cities. If any city abolishes the tax, the city shall notify the director of revenue of the action at least ninety days prior to the effective date of the repeal and the director of revenue may order retention in the trust fund, for a period of one year, of two percent of the amount collected after receipt of such notice to cover possible refunds or overpayment of the tax and to redeem dishonored checks and drafts deposited to the credit of such accounts. After one year has elapsed after the effective date of abolition of the tax in such city, the director of revenue shall authorize the state treasurer to remit the balance in the account to the city and close the account of that city. The director of revenue shall notify each city of each instance of any amount refunded or any check redeemed from receipts.

§ 94.550, RSMo (Resp. A16).

the Department, not the State Treasurer, has custody. Mo. Const. Art. IV, § 15 (Resp. A1). Still, as the Administrative Hearing Commission correctly found below, what "the Director had been doing in his day-to-day administration of the local sales tax law is precisely what [the language in these acts] describes– taking the proceeds he received from sellers like KCP&L, putting those proceeds into an account that his program manager for the Taxation Division describes as a "safekeeping" account, using MITS records to decide how to allocate those funds, and transmitting the funds in the amounts consistent with what he (and MITS) concluded were correct." LF 29, A 15 (No. 16-2551, 2017 WL 4984429 (Sept. 27, 2017)).

The Director of Revenue has exercised his powers in conformity with the sales tax acts—except for the provisions about keeping the funds in the custody of the state treasurer—upon the advice of the Attorney General that the provisions regarding the state treasurer were severable from the remainder of the acts. Mo. Attorney General Opinion No. 192 (Oct. 24, 1977); Mo. Attorney General Opinion No. 110-70 (Jan. 12, 1970); LF 30, A 16. Under § 1.140, the "provisions of every statute are severable" unless "the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being

executed in accordance with the legislative intent." § 1.140, RSMo; *see Dodson v. Ferrara*, 491 S.W.3d 542, 558 (Mo. 2016). Here, the Attorney General advised that the County and City Sales Tax Acts are readily severed by deleting each reference to the state treasurer, leaving all duties to be constitutionally performed by the Director of Revenue in keeping with his pre-existing broad powers.

II. Factual Background

In this case, a utility filed a series of sales tax returns listing the right amount of tax collected—but listing the wrong local government's name as to whom the tax belonged.

A. The City of Lee's Summit is split between two counties. The city is located mostly in Jackson County, except for a small part located in Cass County. LF 17, A 3. Under § 144.032, RSMo, both Lee's Summit and Cass County tax services by local domestic utilities, as allowed by § 144.032, of 1.25% and 1.5% respectively, but Jackson County does not. Thus, Lee's Summit residents in Cass County had to pay a tax of 2.75% on their utility bills, while Lee's Summit residents in Jackson County had to pay 1.5%. LF 17, A 3. Kansas City Power & Light (KCP&L), then Aquila, sold electricity and gas to customers in both parts of Lee's Summit. LF 17, A 3. KCP&L collected the right amount of these taxes from all of its Lee's Summit customers. LF 17, A 3. KCP&L also filed its monthly sales tax returns with the Director of Revenue,

and it used the state-provided forms with codes for local government sales taxes of either Lee's Summit/Jackson County or Lee's Summit/Cass County. LF 17–18, A 3-4.

But on KCP&L's returns from December 2008 through November 2011, it coded all of the sales tax collected from Lee's Summit residents to Lee's Summit/Cass County, with none coded as Lee's Summit/Jackson County. LF 18, A 4. This meant that taxes for Lee's Summit residents in Jackson County, that were supposed to be payable only to Lee's Summit (because Jackson County had no tax) were instead divided between Lee's Summit and Cass County.

In total, the utility's returns have sent $966,692.25 in tax proceeds to Cass County that belonged to Lee's Summit. LF 18, A 4. In essence, each residential utility customer had paid the right amount of tax, and the utility had collected the right amount of tax. Tr. 39. It just went to the wrong local government.

B. The Director of Revenue discovered this error in a 2011 audit of the utility. LF 18, A 4; Tr. 30. Truth be told, it was not the first time that a Department audit discovered that a large taxpayer has misreported income, so there was an established procedure. Tr. 40. In these cases, the general procedure is to file an amended return to put the correct tax or taxable sales onto the locations, and then the Department processes the returns. Tr. 41. In

fact, large taxpayers like utilities frequently have to file refund claims or adjustments and make multiple amended returns, usually partial amended returns, correcting particular, inaccurate lines. Tr. 56–58.

Given the complexity of many of these returns and the technical limits of the tax computer system, the Department usually performs the amended return on behalf of the taxpayer, essentially entering the amended return on its behalf into the Department computer system. Tr. 41–42. That is what was going to happen here.

The Department prepared to enter, on the utility's behalf, a partial amended return, to redirect the sales tax money from Cass County to Lee's Summit. *Id*. During the audit, once it learned of the error, the utility confirmed the error, began reporting the tax properly on future returns as of January 2012, and provided information to the Department for the Department to amend this part of its past returns. LF 18, A 4; Tr. 41–43. The Department in turn received the necessary information for the utility's amended return and was prepared to generate an amended return on the utility's behalf for the time period of December 2008 to November 2011. LF 19, A 5; Tr. 51–52. This procedure was selected because the information did not result in any refund or credit for the utility, which, after all, had sent in the correct amount of money. LF 19, A 5.

In fact, the utility then executed waivers of the statute of limitations for this three-year period, which it extended by agreement with the Department annually. LF 18, A 4; Tr. 45–49; Tr. Resp. H'ring Exh. B. (copies of waivers).

Because of the size of the adjustment, when the utility was ready to have its returns amended roughly two years after the end of the tax period in question, the Director of Revenue warned Cass County on June 16, 2014 of the reporting error and that he would process one corrected month's return at a time over a three-year period until the $966,692.25 was adjusted from Cass County's account to Lee's Summit's account. LF 19, A 5. Tr. 96. Although the Cass County treasurer had received reports from the Director, he could not tell from those reports whether the County was receiving too much or too little tax revenue. LF 19, A 5.

C. Cass County then delayed the filing of the utility's amended returns, and the subsequent automatic adjustment of the county accounts, by bringing suit in state circuit court. LF 19, A 5; Tr. 53. Cass County filed one petition for a writ of prohibition in Cole County Circuit Court that was denied, and then a second petition for a writ of prohibition in the same court that was granted, on the theory that the Department was proposing to issue a refund or credit and had not followed the procedures to issue a tax refund. LF 15–16, A 1–2.

On appeal, in a short opinion, the Western District Court of Appeals reversed, holding that a writ was improper because the Director's proposal to

accept and process amended returns from the utility was a "final decision" appealable to the Administrative Hearing Commission under § 621.050, RSMo. *State ex rel. Cass County, Missouri v. Mollenkamp*, 481 S.W.3d 26 (Mo. App. W.D. 2015); LF 16, A 2. This decision was reached without either party presenting this argument as the basis for the outcome of the case, and the court did not cite or discuss the relevant constitutional or statutory provisions, such as Sections 621.050 and 621.189.

The court remanded for the entry of an order quashing the writ of prohibition, in a footnote, the court noted that it was "unclear whether the June 16, 2014 decision contained a notice of the right to appeal as required by section 621.050.1." *Id.* at 31 n.4. "If it did not," the Court ordered the Director "to reissue the decision with the required notice." *Id.* This Court denied transfer.

D. After that case concluded, the Director intended to begin accepting the returns on July 1, 2016. It notified Cass County that as a result of the amended returns, "the local sales tax in the amount of $966,692.25 that Cass County received and that should have been distributed to the City of Lee's Summit will be redistributed to the City over a three-year period" essentially "by withholding each month a specified amount of local sales tax collected by the Director on behalf of Cass County." LF 2.

Without saying that the Administrative Hearing Commission had jurisdiction, this letter noted that "Sections 144.261 and 621.050 govern

appeals from the Director," and that, when a final decision has been made within the meaning of the statute, that there was a right to appeal to the Administrative Hearing Commission. LF 16, A 2; LF 2, 7.

III. Procedural Background

A. Cass County then filed a complaint with the Administrative Hearing Commission. LF 1. The Director filed an answer objecting to jurisdiction. LF 8. The City of Lee's Summit intervened. LF 16, A 2. The Administrative Hearing Commission then stayed the Director's actions, LF 16, A 2, and denied a summary decision on August 5, 2016, LF 34-40, before holding a hearing on September 16, 2016, LF 16, A 2.

At the hearing, the Administrative Hearing Commission took evidence on the effect of the amended returns on Cass County and Lee's Summit. LF 32, A 18. Cass County's treasurer testified that Cass County had been in financial trouble during 2008-2011 because people had stopped spending as much during the recession, and the county was solely dependent on sales tax revenue. Tr. 97. Although the recession was now over, if Cass County had to pay the money back, he estimated that the county may have to terminate as many as six deputies or eight clerks—although he admitted that Cass County had around $650,000 in its reserve fund. LF 32, A 18. A finance director from Lee's Summit also testified, explaining, in essence, that Cass County was able to weather the recession by leaning on funds due to Lee's Summit, and that

Lee's Summit did not have as easy a time of weathering the recession. LF 32, A 18; Tr. 15–16. During the three years when the tax was not paid to the city, Lee's Summit was unable to hire 21 officers that it had projected it would have been able to hire and that it had deemed necessary for public safety, instead having to wait until five years had passed, and the utility's error had been corrected, to add the officers. Tr. 18–20. Now, in 2017, Lee's Summit needed funds to build storm water projects. Tr. 15–16.

B. The Director objected to the jurisdiction of the Administrative Hearing Commission, LF 10, but the Administrative Hearing Commission held that it had jurisdiction, because, in its view, the automatic acceptance and processing of an amended sales tax return is a "decision" of the Director, like a decision on whether or not to issue a tax refund or assessment.

The Director cited Article IV, § 15 of the Constitution and § 32.087.6 (Resp. A7), which provide that the Director is the sole custodian and administrator of local tax revenue funds, with sole powers of administration, collection, enforcement, and operation. LF 25–26, A 11–12. He stated that "inherent in [those] powers is the ability to distribute such tax [proceeds] after collection and to correct a distribution made in error." LF 27, A 13. These constitutional duties were vested in the Department of Revenue and could not be exercised by the Administrative Hearing Commission, which is part of the Office of Administration. LF 21, A 7.

Just as it was void for the Administrative Hearing Commission to attempt to exercise the powers of the judiciary, when it had earlier attempted to rule on the validity of state statutes, so, too, it would be void and in absence of jurisdiction for the Administrative Hearing Commission to attempt to exercise constitutional powers vested exclusively in the Department of Revenue. LF 22, A 8 (citing *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445,450 (Mo. 1985)). It is long established that the Commission has no authority to superintend the operation of an agency, or to determine what procedures it should follow. "It is limited to reviewing its decisions in accordance with the governing statutes." *Missouri Health Facilities Review Comm.*, 700 S.W.2d at 450.

The Administrative Hearing Commission nevertheless followed the opinion of the Western District Court of Appeals, holding that a proposal to accept and process an amended sales tax return was a final decision under Sections 144.261 and 621.050.1, RSMo, subject to appeal to the Administrative Hearing Commission, despite state statutes vesting this power exclusively in the Department of Revenue, and even if the case did not involve a claim by a taxpayer.

The Administrative Hearing Commission rejected the contention that the Administrative Hearing Commission could not substitute its judgment for the Director's on appeal. It did not find in the Missouri constitution an

exclusive vesting of authority over tax administration in the Director, because, in so many words, it identified its own role as making findings of fact and rulings of law to govern the Director. LF 21, A 7 (citing § 536.090, RSMo). The Administrative Hearing Commission instead interpreted this constitutional limit to mean that it was forbidden only from "commenting on the making of the decision itself" by the Director, not from reviewing the Director's decisions. LF 22, 27, A 8, 13.

The Administrative Hearing Commission also held that it has statutory jurisdiction to hear an appeal brought by a third party like Cass County, essentially holding that any interested third person may challenge the Director's intention to process the amended sales tax return of another person. LF 21, A 7. The Administrative Hearing Commission stated that requirements of subject matter jurisdiction and jurisdiction over the person apply in courts, not in the Administrative Hearing Commission, and that the only jurisdiction that the Administrative Hearing Commission needed was authority over the Director under § 621.050. LF 21, A 7 (citing *In re Wright*, 397 S.W.3d 924, 926 (Mo. App. S.D. 2013) (Commission had the authority to review Director's decision regarding salvage title)). In support, the Administrative Hearing Commission cited cases when it had jurisdiction to review the decision of the Director to revoke an obscene license plate, and the complaint for review in those cases was filed by the license-plate holder, not by a taxpayer. LF 20, A 6

(citing *State ex rel. Director of Revenue v. Deutsch*, 751 S.W.2d 132 (Mo. App. W.D. 1988)).

For these reasons, the Administrative Hearing Commission felt free to "render the administrative decision" of the Director, and "actually step[] into the [Director's] shoes and becomes the [Director] in remaking the [Director's] decision. This includes the exercise of any discretion that the [Director] would exercise", with deference owed to the Administrative Hearing Commission's findings by a court. LF 21–22, A 7–8 (brackets in original).

C. On the merits, which overlaps with questions of jurisdiction, the Administrative Hearing Commission concluded that the Director of the Department of Revenue "has the legal authority to withhold a total of $966,692.34 in local sales tax proceeds from payment to Cass County, Missouri (Cass County) in order to remit those proceeds to the City of Lee's Summit, Missouri (Lee's Summit)." LF 15, 33, A 1, 19.

First, the Administrative Hearing Commission agreed that Cass County was not entitled to the money. Noting that Cass County has the burden of proof under § 621.050.2, the Commission found that it had not proven that Cass County had received $966,692.34 in sales tax revenue that belonged to Lee's Summit. LF 23–25, A 9–11.

Second, the Administrative Hearing Commission narrowly construed the powers of the Department of Revenue.

It held that because the state constitution spoke of duties by the Director, not "powers" as such, the Director had no powers from the state constitution. "There are no powers that we can discern given to the Director in Article IV, § 15 regarding local sales taxes other than that local sales tax proceeds are paid into a non-state account that is in the custody of the Director." LF 26, A 12; LF 28, A 14. "The section does impose several duties, the relevant ones here being that he has custodial and investment powers over non-state funds and, more importantly for our purposes, has a duty to see that all non-state funds are "promptly credited to the fund provided by law for that type of money." LF 26, A 12. Without any powers incident to the custody of non-state funds, there was no constitutional obstacle to the Administrative Hearing Commission substituting its decision as to the fund for the Director's. LF 22, 26–27, A 8, 12–13.

The Administrative Hearing Commission also narrowly construed the Director's authority under Section 32.087.6 (Resp. A7), which provided that the "director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation" of local sales taxes, which he shall collect. § 32.087.6, RSMo (Resp. A7). Rather than allowing that an incident function was the automatic processing of amended returns that correct distribution errors, the Administrative Hearing Commission held that the Director's statutory functions were only an "operational and administrative

scheme of the sales tax law," and that these incidents "include[] the right to appeal final decisions of the Director to this Commission." LF 27, A 13. "It does not, as the Director argues, constitute a conveyance of unreviewable power." LF 27, A 13. In support, it cited in *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 242 (Mo. 2007), where it was held that the "all functions incident" phrase was used in the gaming tax law to incorporate the operational and administrative scheme of the sales tax law, but not to incorporate substantive tax exemptions. LF 27, A 13.

In all of this analysis, as to both the constitution and the statutes, the Administrative Hearing Commission emphasized that the law spoke in terms of *duties* vested in the Director, through the verb shall, not in terms of *powers* or exclusive powers. LF 28, A 14.

Third, the Administrative Hearing Commission held that the Director nevertheless has a duty to reallocate the sales tax funds here. LF 28, A 14. "While we make it clear above that the Director does not have the power to withhold Cass County's local sales tax proceeds and pay them to Lee's Summit," these constitutional and statutory provisions still contain "a fairly clear legal command to the Director to take appropriate care of those funds and see that they are paid according to law." LF 28, A 14.

The Administrative Hearing Commission noted that it did not have the power to declare statutes invalid and to revise and sever them according to its

opinion of their constitutionality, which was in issue with another statute governing the Director, the City Sales Tax Act. LF 28, A 14. "What would make matters more clear, if we could only apply it, would be a law giving the Director the duty to make refunds for erroneous payments and overpayments made in the operation and administration of local sales taxes. There is such a law, but it presents problems." LF 28, A 14.

The City Sales Tax Act "impermissibly conflicts with Article IV, § 15 (Resp. A1), which requires non-state funds such as those at issue here to be held in a non-state account over which the Department, not the State Treasurer, has custody." LF 29, A 15. Because the Director was following the Act in all other respects for the funds in his control, the Administrative Hearing Commission thought that "the Director should have the authority to take money from the trust account into which Cass County's tax proceeds are paid and use that money to credit erroneous payments and overpayments, pursuant to § 94.550.2." LF 29, A 15. Resp. A16. Indeed, many others had seen the "flaw" in the County Sales Tax Act besides the Administrative Hearing Commission, including the Director, the Treasurer, and successive Attorneys General, who all believed that the unconstitutional portion purporting to vest sales tax authority in the treasurer could be severed by a court. LF 29–30, A 15–16. The Administrative Hearing Commission then went on to give a proposed revision of the City Sales Tax Act, showing with strikethroughs which

portions it would cut, if it were a court (it would be all the parts referring to the treasurer). LF 30–31, A 16–17.

But because the Administrative Hearing Commission is not a court of competent jurisdiction, it held that it could not find the City Sales Tax Act unconstitutional and apply a severed version. LF 31, A 17. In that situation, the Director would have extra authority for his actions, and "the Director's authority to perform the duties he feels he needs to perform would be complete." LF 31, A 17.

Still, the Administrative Hearing Commission, found in the Act a legislative intent to uphold the Director's acceptance of amended returns. The "existence of this statute, however flawed it is, shows the Legislature's intention that the Director have the ability to cure 'erroneous payments and overpayments' such as the ones occurring here." LF 31, A 17. "Accordingly, we conclude that the Director had the duty to reallocate the funds in question." LF 31, A 17.

Fourth and finally, the Administrative Hearing Commission dealt swiftly with Cass County's contention that the need for an adjustment in the identity of the taxing jurisdiction for the utility should have been brought as a refund under the process in § 144.190.2. LF 31, A 17. "The primary reason that this is not a § 144.190.2 refund case is that the statutes and constitution provide a fairly clear method of curing mistakes such as the ones made by

KCP&L." *Id*. "The second reason is that no party in this case is seeking a refund, as the term is used in the statute": "Cass County seeks to expand the definition of 'refund.'" *Id*. "The third reason why the refund process does not apply here is found in the language of § 144.190.2," which states that refunds "may only be claimed by 'the person legally obligated to remit the tax' or KCP&L." LF 31–32, A 17–18. Cass County "ignores what the statute says about what gets refunded-the balance." *Id*. "In this case, there is no balance to be refunded." *Id*. "The testimony adduced was that when all corrections have been made, KCP&L has a balance of zero." *Id*. "Therefore, the statute is plain that this is not a refund case because there is no balance to be refunded." LF 32, A 18.

D. The Administrative Hearing Commission then dissolved its stay. LF 33, A 19; *see* § 536.120, RSMo. This Court then denied a stay as well, and the Department began processing the amended sales tax returns in January 2018, causing approximately $27,000 per month to be redirected to Lee's Summit. LF 16.

Cass County now petitions for review in this Court.

SUMMARY OF ARGUMENT

This Court must vacate the Administrative Hearing Commission's decision because the Administrative Hearing Commission lacks jurisdiction to review the automatic processing of amended tax returns. Unlike tax assessments or refunds, this non-discretionary action by the Director does not fit within any of the few, narrow statutory grounds for which review is authorized in the Administrative Hearing Commission. What is more, even if it were statutorily authorized, which it is not, the statute would be unconstitutional because the administration of sales tax revenues is committed by the Missouri Constitution exclusively to the Director's management. For this reason, if an amended return results in an unlawful redistribution of revenue, the sole legal remedy is through the courts: either in a civil common-law writ action or in a criminal prosecution resulting in restitution to the victim.

Still, even if the Administrative Hearing Commission had jurisdiction, the Director would still have authority to automatically process an amended sales tax return. By statute, the Director of Revenue may process an amended sales tax return to promptly credit the appropriate political subdivision's account with the right amount of tax revenue, and, correspondingly, debit any misdirected tax revenue from another political subdivision's account. Even though the Administrative Hearing Commission unduly narrowly construed

the general powers of the Director of Revenue, it reached the right conclusion when it held that the Director may accept an amended return to correct the wrongful distribution of sales tax revenue.

The Administrative Hearing Commission also correctly understood that the automatic processing of an amended sales tax return is not a request for a tax "refund," subject to even more administrative procedures, where the amended return does not result in a tax refund.

The decision below should be vacated, or, in the alternative, affirmed.

STANDARD OF REVIEW

This Court conducts *de novo* review of the Administrative Hearing Commission's interpretation of revenue laws and will uphold the Administrative Hearing Commission's decision if it is "authorized by law and supported by competent and substantial evidence upon the whole record." *Six Flags Theme Parks, Inc. v. Director of Revenue*, 179 S.W.3d 266, 268 (Mo. 2005); § 621.193. The primary rule of construing statutes "is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *Nelson v. Crane*, 187 S.W.3d 868, 869–870 (Mo. 2006). This Court gives no deference to the Commission's resolution of the proper interpretation of state law. *AAA Laundry & Linen Supply Co. v. Director of Revenue*, 425 S.W.3d 126, 128 (Mo. 2014).

ARGUMENT

I. The Administrative Hearing Commission lacks jurisdiction to review the Director's automatic processing of amended sales tax returns. (Response to Cass County's Point I).

The Administrative Hearing Commission has no constitutional or statutory jurisdiction to review the Director of Revenue's automatic processing of an amended sales tax return. The Administrative Hearing Commission's decision is thus void, and the required remedy in this Court is vacatur. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 76 (Mo. 1982).

Never before this controversy has the Director's processing of an amended sales tax return—an automatic and non-discretionary act triggered by individual tax filers—been considered a final "decision" subject to appeal to the Administrative Hearing Commission. Nor has this Court ever held that a non-party to an amended return can administratively challenge and prevent the automatic processing of a sales tax return.

If the theory of the Administrative Hearing Commission is correct, every time the Director processes a return, even if the processing is an automatic adjustment to state accounts caused by an individual filer, his action is a "decision" that requires notice to any affected third parties and that is subject to review and potential displacement by the Administrative Hearing Commission.

This new administrative process will cause a major expansion of the Administrative Hearing Commission's jurisdiction over the Director of Revenue—and, consequently, of this Court's tax docket.

A. The Administrative Hearing Commission lacks constitutional authority to review the Director's automatic processing of amended sales tax returns.

The Director of Revenue has broad constitutional and statutory powers to accept and process amended sales tax returns, powers that must be executed by the Director, and that the Constitution does not allow the Director to hand over to the Administrative Hearing Commission. The Missouri Constitution vests these powers in the Department, and, by implication, in no one else.

1. The duties of the Director of Revenue are laid out in Article IV of the Missouri Constitution and various chapters of the Missouri statutes. Many duties are defined with precise details while others are more broadly described. In determining the statutory authority of the Director, the legislature is deemed to have intended what the enacting statutes state directly. *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 402 (Mo. 1986).

Where the statute is not explicit, but instead confers powers and duties in general terms, one may look to the necessary extension of the language to determine legislative intent. *AT&T v. Wallemann*, 827 S.W.2d 217, 223–24 (Mo. App. W.D. 1992) (citing *State ex rel. McKittrick v. Wymore*, 345 Mo. 169, 132 S.W.2d 979 (Mo. banc 1939)). "An implied power within this meaning is

the power necessary for the efficient exercise of the power expressly conferred by the statutes." *Id*.

The rule that extends a statute by necessary implication has been given application in the construction of laws delegating powers to public officers and administrative agencies many times. The powers and duties of a public agency, thus, include "those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes." *Id*.

Missouri courts have long recognized the validity of a statutory construction granting implied powers. "when a power is given by statute, everything necessary to make it effectual or requisite to attain the end is necessarily implied." *Ex parte Sanford*, 139 S.W. 376, 383 (Mo. 1911); *see also Reilly v. Sugar Creek Tp. of Harrison County*, 139 S.W.2d 525 (Mo. 1940); *State ex rel. Brokaw v. Board of Education of City of St. Louis*, 171 S.W.2d 75 (St.L. Mo. App. 1943); *Missouri Ethics Comm'n v. Wilson*, 957 S.W.2d 794 (Mo. App. 1997).

2. In its general provisions governing tax administration, Missouri Constitution gives the Director of Revenue a simple and exclusive job: to make sure that local governments get their sales tax money in a prompt and error-free way. The collector, custodian, and administrator of all local sales tax

accounts is the Director—not local political subdivisions or the state treasurer or the Administrative Hearing Commission. Mo. Const. Art. IV, § 15 (Resp. A1); § 32.087.6, RSMo (Resp. A7). Under Article IV, Section 15 of the Missouri Constitution, the Department of Revenue "shall take custody of and invest nonstate funds" and "other moneys authorized to be held by the department of revenue." *Id*. The Department of Revenue is in charge of all non-state funds, defined to include "all taxes and fees imposed by political subdivisions and collected by the department of revenue; all taxes which are imposed by the state, collected by the department of revenue and distributed by the department of revenue to political subdivisions; and all other moneys which are hereafter designated as 'nonstate funds' to be administered by the department of revenue." *Id*.

The Constitution explains that this single executive was necessary for the prompt administration of the disbursement of local tax revenue: the Department of Revenue is expressly charged by the state Constitution with promptly distributing this local tax money from non-state revenue funds to local governments' bank accounts. Under Article IV, Section 15 of the Missouri Constitution, "All revenue collected and moneys received by the department of revenue which are nonstate funds as defined herein shall be *promptly credited* to the fund provided by law for that type of money." Art. IV, § 15 (emphasis added) (Resp. A1).

3. Despite this plain constitutional language putting in place these general constitutional powers, the Administrative Hearing Commission held this constitutional limit only forbids the Commission from "commenting on the making of the decision itself" by the Director, although the Administrative Hearing Commission could freely review the Director's decisions. LF 22, 27, A 8, 13.

But under Article IV, § 15 of the Constitution (and § 32.087.6), *the Director* is the sole custodian and administrator of local tax revenue funds, with sole powers of administration, collection, enforcement, and operation. LF 25–26, A 11–12. Inherent in these powers is the "ability to distribute such tax [proceeds] after collection and to correct a distribution made in error." LF 27, A 13. These constitutional duties were vested in the Department of Revenue and cannot be exercised by the Administrative Hearing Commission, which is part of the Office of Administration. LF 21, A 7. The statute says nothing about another agency being able to second-guess the Director's decisions.

Just as it was void for the Administrative Hearing Commission to attempt to exercise the powers of the judiciary, when it had earlier attempted to rule on the validity of state statutes, so, too, it would be void and in absence of jurisdiction for the Administrative Hearing Commission to attempt to exercise constitutional powers vested exclusively in the Department of Revenue. The Administrative Hearing Commission was without subject

matter jurisdiction, and its decree is therefore void. *State Tax Comm'n v. Admin. Hearing Comm'*n, 641 S.W.2d 69, 76 (Mo. 1982); *see also* LF 22, A 8 (citing *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445,450 (Mo. 1985)). The Administrative Hearing Commission cannot substitute its judgment for the Director's on appeal without taking over the power vested in another part of the executive branch. Just as the Governor cannot exercise the Attorney General's power to sue in the name of the State, the Office of Administration cannot decide how to administer and control local tax revenue funds.

4. The Commission also held that because the state constitution spoke of *duties* by the Director, not *powers* as such, the Director had no powers from the state constitution. It said that "[t]here are no powers that we can discern given to the Director in Article IV, § 15 regarding local sales taxes other than that local sales tax proceeds are paid into a non-state account that is in the custody of the Director." LF 26, A 12; LF 28, A 14. "The section does impose several duties, the relevant ones here being that he has custodial and investment powers over non-state funds and, more importantly for our purposes, has a duty to see that all non-state funds are "promptly credited to the fund provided by law for that type of money." LF 26, A 12. For the Commission, this distinction between powers and duties mattered: without any powers incident to the custody of non-state funds, there was no

constitutional obstacle to the Administrative Hearing Commission substituting its decision as to the fund for the Director's decision on how to carry out his duties. LF 22, 26–27, A 8, 12–13.

But this reading of the Missouri Constitution misses the mark. It ignores the long-established rules of construction for statutes vesting general powers in a state officer. When a power is given by statute, "everything necessary to make it effectual or requisite to attain the end is necessarily implied." *Ex parte Sanford*, 139 S.W. 376, 383 (Mo. 1911).

Moreover, the distinction between powers and duties is semantic, at best. The correct term might be authority: the Director has sole authority over the administration of local sales tax revenue—and the Administrative Hearing Commission does not. Asserting jurisdiction to sit in the place of the Director and second-guess and veto his attempts to meet his ministerial responsibilities, is not any authority given to the Commission or permitted under the state constitution.

This Court thus must vacate the Commission's decision. When the Commission acts based on an unconstitutional grant or assertion of power, it is without subject matter jurisdiction. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982).

B. The Administrative Hearing Commission lacks statutory authority to review the automatic processing of amended sales tax returns.

The Missouri Administrative Hearing Commission also lacks any statutory jurisdiction to review the Missouri Director of Revenue's automatic processing of an amended sales tax return.

1. As with the Department's constitutional authority, the Department's statutory authority makes no mention of the Administrative Hearing Commission in this context. Because of the state constitution, even if the legislature purported to give the Commission jurisdiction here by statute, which it has not, the legislature could not do so. But, setting constitutional concerns aside, the plain conclusion from this statute is that the Administrative Hearing Commission has no authority in this area unless set forth in another, superseding statute.

The Director of Revenue is charged by statute with the general administration of local tax funds. Under Section 32.087.6 (Resp. A7), "the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri all additional local sales taxes authorized under the authority of the local sales tax law." § 32.087.6, RSMo (Resp. A7). The Department's administration includes, for example, "the collection, deposit, transfer, transmittal, disbursement,

safekeeping, accounting, or recording of funds" by *Department* employees. § 32.087.14, RSMo (Resp. A9).

Distributing the tax proceeds as directed by a return is at the heart of this function. This statute thus empowers and requires the Director to process amended returns that make the corrections necessary for accurate distributions of tax funds to local government. Art. IV, § 15 (Resp. A1); § 32.087, RSMo (Resp. A3). This includes a return that would correct a distribution made in error. § 144.100, RSMo (Resp. A19).

What is more, although this constitutional and statutory authority has been ample for the Director of Revenue to administer county sales taxes, the Director also has authority to process amended returns that correct overpayments under the City and County Sales Tax Acts, as discussed below. Part II. With this interpretation of the County and City Sales Tax Acts, there can be no dispute that the Director of Revenue may process amended sales tax returns to adjust city and county sales taxes to correct errors that result in adjustment of local accounts. These Acts provide for no role for the Administrative Hearing Commission.

2. There is also nothing in the governing statutes of the Administrative Hearing Commission's jurisdiction that make this type of automatic processing a decision subject to review. All functions are vested in the Director subject to limited exceptions for certain decisions. None of the exemptions apply here.

This is fatal to the Commission's position. "Being a creature of statute, the Administrative Hearing Commission has no more and no less authority than that granted it by the legislature...." *State Board of Registration for the Healing Arts v. Master*s, 512 S.W.2d 150, 161 (Mo. App. K.C. Dist. 1974).

Two statutes are relevant, neither of which indicate a legislative intent to sweep every action of the Director under the Administrative Hearing Commission's review. First, under Section 144.261, "[f]inal decisions of the director under the provisions of this chapter are reviewable by the filing of a petition with the administrative hearing commission." § 144.261, RSMo. This statute does not define a decision. Under section 621.050, "[e]xcept as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission from any finding, order, decision, assessment or additional assessment made by the director of revenue." § 621.050, RSMo.

First of all, this statute expressly limits Commission jurisdiction when otherwise provided by law: here, its jurisdiction is limited by other law because the Director has sole constitutional and statutory authority to manage the ministerial and automatic actions of the office. This case is one of those situations, as described above in Part I concerning the Director's constitutional authority.

Second, this statute also shows what kind of "decision" is a decision subject to appeal. Only decisions like in kind to tax refund and assessment disputes are appealable. After all, lots of decisions and actions by the Department are not decisions or actions subject to Commission review. It could hardly be argued that the Director's decision of where to go to lunch, or what stationery to order for the office, or what conference to attend, count as appealable decisions.

Third, this statute also provides further light on who may appeal a decision: it goes on to say that "[a]ny person or entity who is a party to such a dispute shall be entitled to a hearing before the administrative hearing commission by the filing of a petition with the administrative hearing commission." § 621.050, RSMo.

This statute creates a clear rule against appeals to the Commission by non-parties to disputes—and it makes clear that the relevant decision by the Director is one that rules on a *dispute*. The statute implies that decisions would be decisions affecting disputed taxpayer liability, like a refund denial or a tax assessment, which are the other examples in the statute. This is why only the person whose return has been affected has ever been allowed to challenge the decision. Whoever the decision's liability affects can appeal. No third-party intervenors can appeal.

These conclusions dispose of this petition. Here, Cass County is not a party to the amended return (only the Department and the utility are parties), and the processing of an amended return is not even in dispute. It was uncontested by the actual parties (the Department and the utility), so there was no actual dispute. Nor is it the kind of case or hearing which is meant when the statute is considered in context: it is not like a ruling on a tax refund or assessment, where parties may be said to have disputed the issue and been adversely affected by some action of the Department that involved the application of reason to facts. § 621.050, RSMo.

More importantly, a decision is some active choice or determination by the Director, not a passive ministerial processing of the choices or information given by others. Here, processing a tax return is an automatic, non-discretionary task triggered by a taxpayer and governed by its listed distributions: it is not a "decision" by the Director in any meaning of the statute providing for appeals of refunds, assessments, and similar decisions to the Administrative Hearing Commission.

The main, determinative action in this case is not the Department's action, but the taxpayer's action. Its proposed action is not a decision but an acceptance of information from the taxpayer and the automatic adjustments directed by the return. After a business collects the tax, *it* sends the money to the Department of Revenue with an accompanying sales tax return. § 144.100,

RSMo (Resp. A19); Tr. 66–68. Each business lists "the amount of gross receipts from sales of taxable property and services by the person and the amount of tax due." § 144.100.1, RSMo (Resp. A19). Once the Department of Revenue receives the money, the Department of Revenue's computer system begins automatically processing the sales tax return, and it directs the money how the return says to direct it. LF 18–19, A 4–5. The Department has no discretion. It cannot refuse properly-filed returns because they are deemed filed upon mailing. This process in actuality is just a computer program automatically issuing a report to the cashier division allocating the money to the local government identified on the return. LF 19, A 5; Tr. 69–70. Then, each month, the Department reconciles the account of each local government and sends the local government its money. LF 19, A 5; Tr. 70–73; 105–07. The Department has no say in who gets the money.

The Department is thus passive in this endeavor. Unlike a decision involving the application of reason to facts, which occurs with the denial of a tax refund to a taxpayer or the imposition of a tax assessment on a taxpayer, or even the revocation of a license plate from a license-plate holder, there is no individual determination of reason made when the Department merely accepts and processes a return according to the taxpayer's directions on the return.

The same is true even if the Department is processing an *amended* return. When a filer misdirects tax funds because of a coding error on its

return, it may file an amended return, and then the re-allocation will be posted promptly and automatically. LF 19, A 5. By statute, corrections to returns may be made by the filer to "the amount of gross receipts from sales and the amount of tax due returned by the person, as well as all matters contained in the return." § 144.100.5, RSMo (Resp. A19). If a mistake is caught right away, and where "an error or omission is discovered in a return or a change be necessary to show the true facts, the error may be corrected, the omission supplied, or the change made in the return next filed with the director." § 144.100.4, RSMo (Resp. A19). But "[a]ny other omission or error must be corrected by filing an amended return for the erroneously reported period." *Id.* Because the Department has no discretion to decline to accept tax returns, an "additional return shall be deemed filed on the date the envelope in which it is mailed is postmarked or the date it is received by the director, whichever is earlier." § 144.100.4, RSMo (Resp. A19). Once the filer files an amended return and it is accepted by the Department for processing, the return adjusts the revenue reported for the local governments, with dynamic changes to the funds in the relevant state accounts. Tr. 77. The act of filing is what triggers the adjustment, and it is just as automatic and passive an action on the part of the Department as the processing of an initial return.

Here, the Director of Revenue discovered this error in a 2011 audit of the utility, which is a fairly common situation. LF 18, A 4; Tr. 30, 40. In these

cases, the general procedure is to file an amended return to put the correct tax or taxable sales onto the locations, and then the Department processes the returns. Tr. 41. Large taxpayers like utilities often file refund claims or adjustments and make multiple amended returns, usually partial amended returns, correcting particular, inaccurate lines. Tr. 56–58. Here, the utility did not file an amended return itself, but instead provided information to the Director of Revenue to have the Director file an amended return on the utility's behalf.

This stands in stark contrast to actual final decisions of the Department, such as the decision to grant or deny a tax refund. When a filer has paid more taxes than are owed, either the purchaser or the seller can request a refund. Tr. 84. In that situation, a revenue technician examines whether the claim appears to be in compliance with the law. Tr. 89-90. Because the revenue technician is making an important decision affecting an individual taxpayer, if the technician denies the refund request, the statute says that the taxpayer can appeal the refund decision to the Administrative Hearing Commission. Tr. 85–86.

3. Finally, even if there were doubt on this subject, which there is not, to the extent that it was reasonable to read the statute either in favor of the Department or the Commission, this Court would be required to interpret the

scope of the Commission's jurisdiction narrowly to avoid raising a serious constitutional question about the core powers of the Department.

Under both federal and state law, if a law is subject to "competing plausible interpretations," *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015), the statute must be construed "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score," *Almendarez-Torres v. United States*, 523 U.S. 224, 237–38 (1998) (quotation omitted). For this reason, where "one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. 1991) (en banc).

This canon "is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). And it "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). "The courts will therefore not lightly assume that [a legislature] intended to infringe

constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.*

Under the canon of constitutional avoidance, state statutes "must, if possible, be construed as consistent with the Constitution." *Cascio v. Beam*, 594 S.W.2d 942, 946 (Mo. 1980); *State Highway Commission v. Spainhower*, 504 S.W.2d 121, 125 (Mo. Div. I 1973). This Court is "reluctant to declare statutes unconstitutional and must resolve all doubts in favor of their validity." *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4, 8 (Mo. 1975). State statutes thus "cannot be held unconstitutional if they are susceptible to any reasonable construction supporting their constitutionality." *State v. Burnau*, 642 S.W.2d 621, 623 (Mo. 1982) (emphasis added). In short, if there is any doubt about the statute's meaning, this Court must accept the interpretation that avoids constitutional concerns. *Martin v. Schmalz*, 713 S.W.2d 22, 25 (Mo. App. E.D. 1986) (quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 35 (Mo. 1982)).

This canon applies in force in cases like this one concerning the separation of powers and the scope of the powers of an executive agency. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 73 (Mo. 1982).

As a result, if the statutes providing for the Commission's jurisdiction were ambiguous, they must be read to avoid a serious question under the state constitution, rather than providing for review and bringing that question to the fore.

4. In response, Cass County may suggest that the Department's actions here are somewhat less than the ordinary case of passively or automatically processing a return, but these contentions would be incorrect.

The county might argue that this amended return came out of an audit, not from independent action of the taxpayer. But that is hardly unusual: the whole point of audits is to identify and correct mistakes. It is entirely routine, in complex business returns, for the business to authorize the Department to enter its corrected information into its computer copy of the return, and to generate the new return on the business's behalf. That the Department assists with this task as a courtesy does not make the amended return as less a return filed on behalf of a business.

Given the complexity of many of these returns and the technical limits of the tax computer system, the Department usually performs the amended return on behalf of the taxpayer, essentially entering the amended return on its behalf into the Department computer system. LF 18, A 4; Tr. 41–43. With returns like this, it is often technically difficult and lengthy to have the filer amend the return itself, rather than use the Department's computer system. Here, the Department received the necessary information for the utility's amended return and was prepared to generate an amended return on the utility's behalf and with its consent for the time period of December 2008 to November 2011. LF 19, A 5; Tr. 51-52. The utility consented to the audit

findings on this issue, which was consent to file an amended return and adjust the utility's information for them with the information the Department now had. The Department then proposed to enter this information on the taxpayer's behalf.

Cass County might also point to the fact that, in this case, the Department suggested and the utility agreed, to rectify the mistake by filing 36 amended returns spread over three years. To mitigate the effect of the amended return on Cass County, the Director proposed, and the utility agreed, to file a new amended return each month for a future period of 36 months, resulting in 36 amended returns to mirror the original 36 months for which Cass County incorrectly received the utility's tax collection. In January 2018, when this Court lifted the administrative stay, the Director began processing amended returns once per month for the utility, which it continues to do today.

But this does not make the amended returns any less the decision of the utility nor the filing of them any less an action on behalf of the utility. The timing was suggested only as a courtesy to Cass County, to lessen the blow, by making it pay back the money on the same schedule as it had unwittingly received it. This is an entirely legal (and kind) way to correct the mistake.

The only other way in which Cass County could suggest that this proposed processing of a return is out of the ordinary is that the Department telephoned Cass County to notify it about the adjustment, rather than simply

filing the amended returns. But this form of courtesy, although not required by law, does not change the nature of the Department's proposed automatic processing of a return once it is submitted on behalf of the utility. The Department's action is rote and automatic, not the application of reason or discretion. In any event, this Court should encourage and reward this sort of intergovernmental cooperation and communication, rather than dis-incentivize it by considering it a factor triggering an appeal.

C. The Administrative Hearing Commission's claim of jurisdiction has no basis in law.

Rather than make any of these arguments, the Administrative Hearing Commission embraced the terse opinion of the Western District Court of Appeals, holding that a proposal to accept and process an amended sales tax return was a final decision under Sections 144.261 and 621.050.l, RSMo, subject to appeal to the Administrative Hearing Commission, despite state statutes vesting this power exclusively in the Department of Revenue, even if the case did not involve a claim by a taxpayer.

1. Central to the Commission's decision rejecting the Missouri constitution's exclusive vesting of authority over tax administration in the Director was its belief that, in so many words, its own role is making findings of fact and rulings of law to govern the Director. LF 21, A 7 (citing § 536.090, RSMo). It held that it had jurisdiction to take this decision-making

responsibility away from the Department via an appeal, because, in its view, the automatic acceptance and processing of an amended sales tax return is a "decision" of the Director, like a decision on whether or not to issue a tax refund or assessment. LF 25–26, A 11–12. The Administrative Hearing Commission thus felt free to "render the administrative decision" of the Director, and "actually step[] into the [Director's] shoes and becomes the [Director] in remaking the [Director's] decision. This includes the exercise of any discretion that the [Director] would exercise", with deference owed to the Administrative Hearing Commission's findings by a court." LF 21–22, A 7–8 (brackets in original).

But, as just explained, this makes any action of the Department, no matter how passive, ministerial, or automatic, a "decision" subject to appeal, just as the denial of a tax refund is subject to appeal.

And this conclusion overlooks the constitutional mandate that the Department of Revenue, not the Office of Administration, has exclusive control and administration of local tax revenue accounts.

2. The Administrative Hearing Commission also narrowly construed the Director's authority under Section 32.087.6 (Resp. A7), which provided that "the Director of Revenue shall perform all functions incident to the administration, collection, enforcement, and operation" of local sales taxes, which he shall collect. § 32.087.6, RSMo (Resp. A7). Rather than allowing that

an incident function included the automatic processing of amended returns that sought to correct distribution errors, the Administrative Hearing Commission held that these functions were only an "operational and administrative scheme of the sales tax law," as well as the framework, and the most important incident "includes the right to appeal final decisions of the Director to this Commission." LF 27, A 13. "It does not, as the Director argues, constitute a conveyance of unreviewable power." LF 27, A 13. In support, it cited in *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 242 (Mo. 2007), where the "all functions incident" phrase as used in the gaming tax law was held to incorporate the operational and administrative scheme of the sales tax law, but not substantive tax exemptions. LF 27, A 13.

This holding cannot be squared with the plain text of Section 32.087.6 (Resp. A7). That statute says nothing about a role for the Administrative Hearing Commission. It adds no extra basis for it to exercise authority here. Nor could it: the constitution vests exclusive authority in the Department.

Nor does the decision in *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 242 (Mo. 2007), shed any light on the meaning of the term the "all functions incident" in this context. LF 27, A 13. In that case, the question was whether section 313.822's mandate that "all functions incident to the administration, collection, enforcement, and operation of the tax imposed by [the sales tax law] shall be applicable" to the gaming tax, also brought over

with the Director's administrative responsibilities substantive tax exemptions to the gaming tax. 219 S.W.3d at 239–40. This Court held it did not: this language only meant, as in other statutes, that the legislature intended to carry over "a framework for governing administrative functions related to the tax," that is, "to incorporate the operational and administrative scheme of the sales tax law and not to also *sub silencio* incorporate the substantive provisions of the sales tax law." *Id.* at 242. Given that this case is not at all about substantive tax exemptions but is entirely about the scope of these statutory powers of administration and operation, the decision in *President Casino* sheds no light on the questions in this case.

This Court should hesitate long before ratifying this narrow understanding of the general constitutional powers of an agency. The decision in this case will be cited as precedent in the interpretation of other agencies' general powers under their organic statutes. Many other agencies also have broad grants of power, and this is by design, because their offices have been made strong by the intent of the framers of the state constitution, whereas the powers of the Commission were not.

3. The Administrative Hearing Commission also held that it has statutory jurisdiction to hear an appeal brought by a third party like Cass County, and that any interested third person may challenge the Director's intention to process the amended sales tax returns of another person. LF 21, A

7. The Administrative Hearing Commission stated that requirements of subject matter jurisdiction and jurisdiction over the person apply in courts, not in the Administrative Hearing Commission, and that the only authority that the Administrative Hearing Commission needed was authority over the Director under § 621.050. LF 21, A 7 (citing *In re Wright*, 397 S.W.3d 924, 926 (Mo. App. S.D. 2013) (Commission had the authority to review Director's decision regarding salvage title). After all, the Administrative Hearing Commission reasoned, the Administrative Hearing Commission had jurisdiction to review the decision of the Director to revoke an obscene license plate, and the complaint for review in those cases was filed by the license-plate holder, not a taxpayer. LF 20, A 6 (citing *State ex rel. Director of Revenue v. Deutsch*, 751 S.W.2d 132 (Mo. App. W.D. 1988)).

But this is an unlimited holding, and, for two reasons, one not grounded in the law. First of all, the laws of subject matter jurisdiction and jurisdiction over the person apply in the Administrative Hearing Commission just as much as they do in court. Jurisdictional requirements are rooted as a matter of the due process clause in the state and federal constitutions, as well as a matter of positive law in state statutes. Second, this point of view entirely removes and disregards the clear limits in the revenue statutes contemplating that revenue decisions are to be appealed by the person affected, not by any interested bystanders. It makes perfect sense to let a taxpayer appeal a refund or

assessment through administrative procedures. It likewise has been reasonable historical practice to let a license-plate holder appeal the decision of the Director to revoke an obscene license plate through administrative procedures. It does not harmonize with the statutes, and indeed, expands all past practice beyond recognition, to allow a political subdivision that does not have control over non-state funds to dispute an adjustment filed by another taxpayer on his own return that directs his taxes (correctly) to another local government.

4. Nor is this case controlled by the opinion of the Western District Court of Appeals in *Missouri v. Mollenkamp*, 481 S. W.3d 26 (Mo. App. W.D. 2015); LF 16, A 2.

This terse decision was issued as a surprise to the parties: it was briefed on other grounds, and the court rested its decision on this issue without the input of either party, and the opinion did not the relevant constitutional and statutory provisions, or even Sections 621.050 and 621.189. More importantly, that court did not explain why the acceptance and automatic processing of a return is a decision within the meaning of the statute: indeed, it seemed to assume that *any* decision or action was appealable, which cannot be the case.

In any event, that opinion is only relevant here as precedent, not as law or the case or as res judicata. It governed the original adjustment to be caused by the taxpayer's proposed filing of amended returns for the time period

beginning in 2014, not its new amended returns and new adjustment for the new time period identified by letter in 2016. Rather than re-issue that notification of its proposal to file amended returns, the Department entered a new adjustment, beginning a fresh case. This time, the Director intended to begin accepting the returns on July 1, 2016. It notified Cass County that as a result of the amended returns, "the local sales tax in the amount of $966,692.25 that Cass County received and that should have been distributed to the City of Lee's Summit will be redistributed to the City over a three-year period" essentially "by withholding each month a specified amount of local sales tax collected by the Director on behalf of Cass County." LF 2. This case concerns only this adjustment as to future returns, and so, although the Western District opinion remains precedent, it is not law-of-the-case or res judicata.

Still, although the Western District's decision is incorrect, the Director complied with the order as to the original adjustment, by abandoning that original proposal. The Western District said that the original adjustment would be invalid without a notice of a right to seek administrative review. In issuing a new announcement of the intent to adjust the taxes, while disagreeing with the Western District decision as matter of precedent, and not bound by the decision as to any future proposals, the Director nevertheless, in keeping with the spirit of the Western District decision, issued a notice of the

right to file an administrative appeal, while objecting contemporaneously to any jurisdiction by the Administrative Hearing Commission.

Nor has the Department at any time waived this jurisdictional issue or failed to preserve it for review. This is true for two reasons. First, in its letter to Cass County, the Department did not concede that the Administrative Hearing Commission had jurisdiction over the automatic acceptance and processing of a taxpayer's amended returns: this letter only noted, in a nod to the Western District's precedent, that "Sections 144.261 and 621.050 govern appeals from the Director," and that, when a final decision has been made within the meaning of the statute, that there was a right to appeal to the Administrative Hearing Commission. LF 16, A 2; LF 2, 7. The Department has never issued a similar letter to anyone else, and it does not do so for the 1600+ other adjustments it regularly processes each month. Second, the Director objected to the subject-matter jurisdiction of the Administrative Hearing Commission. LF 10. The Director filed an answer objecting to jurisdiction. LF 8, and it moved for a summary decision on this point, LF 34–40.

After the Commission ruled, the Director, having won before the Commission and remaining free to exercise his authority in the proposed manner, did not feel confident that he was a party entitled within the law ask for this Court's review. But Cass County, which lost before the Commission, did petition for review.

Now, on appeal, the Director again urges this Court to recognize that the Commission has no jurisdiction here or in the alternative to affirm the Commission on the merits. Jurisdiction may be raised at any time, and, in the alternative, the decision of the Commission may be defended on any alternate merits grounds available in the record, whether adopted by the Commission or not. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982).

D. Having to issue notices of rights to appeal, and then to follow appeal procedures, will delay payments, delay justice, and create gridlock in the Department of Revenue.

1. If this Court lets the decision of the Administrative Hearing Commission stand, it will create serious problems in the Department of Revenue's administration of local sales taxes. The Department has a duty to promptly credit local governments' accounts on strict statutory timelines. The Department also has to process untold numbers of regular and amended tax returns every day, resulting, in the aggregate, in at least 1,600-plus automatic adjustments per month in the sales tax accounts of counties, cities, ambulance districts, and over 1,100 political subdivisions across the state. (This figure speaks only to the number of adjustments due to amended returns, so it does not include other types of adjustments, such as, for example, adjustments for returned checks).

If the Administrative Hearing Commission has jurisdiction over each of these adjustments caused by an amended return, the Director would be required to notify each subdivision individually of each contemplated adjustment (no matter how small), and potentially to wait to accept any amended return until lengthy rights of review and appeal are exhausted. The Director will have to issue notices of rights to appeal to every person connected to an adjustment because both the individual taxpayer and the past or future local recipients of the tax would need opportunities to contest and to determine the amount of the adjustment. Then, each would have a right to appeal the adjustment to the Administrative Hearing Commission and then to the Missouri Supreme Court.

This will cause real delays for local governments as notices are sent out and appeals pursued (or appeals period are waited out). Rather than promote prompt payment, local governments will have to wait years for their rightful revenue, as the City of Lee's Summit has had to do here *for nearly a decade*. Sheriffs, ambulances, and police services would be the first to have their funds delayed. The public will not benefit from these delays: the only beneficiaries will be the very entities wrongly credited with sales tax revenue: these entities, like Cass County here, will be able to spend another government's money while pursuing several administrative appeals.

And, in cases of large significance, where the money involved is large and thus likely to draw litigation, the process will be worse if the taxpayer and the Director attempt to soften the blow for a local county by spreading the adjustment over a long period of time through multiple successive returns, like the 36 returns spread over 36 months here, rather than making one amended return with an enormous lump sum transfer or impoundment of county revenue. When the amount due is spread over multiple successive returns, the right to appeal would apply to *each* return, and the potential appeals period would be multiplied accordingly. Given that the local government wrongly credited with the money would have every incentive to delay the transfer, not being subject to the assessment of interest on the wrongly-credited funds, it is not unlikely that multiple appeals would be filed, even when the legal issues would be repetitive, if the sole hope is to push the next transfer into the next budget year or the next officeholder's term of office. It would be like litigating a mortgage default one payment at a time, with no acceleration clause.

True, in theory, because any adjustments would potentially be subject to challenge, the Director would be on safer ground, legally speaking, not to make any distributions at all to local authorities until the statute of limitations runs. That would avoid any conflicts over the propriety of an adjustment and it would avoid the problems of trying to claw back tax money that a county or city wrongly received yet already spent. But, for reasons that readily spring to

mind, impounding all local tax money for three years is not feasible. Therefore, the Director will have to continue the historical practice of making adjustments and correcting distributions on a backward-looking basis. It cannot avoid the new procedures imposed by the Commission in its reliance on the Western District opinion.

2. Far better then, to allow the Department to have an automatic, streamlined procedure that swiftly corrects incorrect distributions, resulting in the prompt transfer of money to jurisdictions to whom the money should have been paid in the first place. Being able to adjust things automatically is the best way to handle the process. It is speedy. It is accurate. And, given the unavailability of interest charges on funds misallocated by taxpayers among local governments, it provides the quickest relief, making the wronged government whole as soon as possible, and limiting the time during which another local government spends money thinking it owns but which in reality belongs to someone else.

Although political subdivisions do not have the right to appeal an adjustment to the Commission, the laws provide for several practical and legal options in this situation. First and foremost, the action is reviewable by the taxpayer. If they disagree with or object to their own adjustment or amended return, they can appeal the assessment or file a refund. Second, the employees of the Department like all officers are subject to the criminal laws, which would

apply if their adjustments were for wrongful gain, that is, if they would amount to financial crimes, such as embezzlement or dereliction of duty. Criminal jurisdiction exists to provide restitution to wronged victims. And third and most importantly, Cass County could go directly to court to seek to enjoin the transfer.

The proper legal remedy for Cass County is a writ under Section 536.150, based on the common law. If the law is actually against the adjustment, the county can go directly to court for an order stopping the Department. It would be based on the common law because there is no statutory remedy. Rather than appeal to the Commission, which cannot enter declaratory judgments or reach constitutional issues, a court can reach these issues and issue a common law writ.

Plus, it is by constitutional design that the county's remedy is a writ, not an administrative appeal. The county has no right of review because the Director has authority to administer the funds, not the county, even if county later objects to the disbursement. The Director is in a better position to know what is correct. If his decision is actually wrong, the county may file a writ and win on the merits, requiring him to credit the funds back from the other government entity.

3. Cass County might object that none of these remedies matter if the county never learns of the adjustment and if the Department operates in secret, but that concern would be misplaced. A writ remedy is not hollow.

Counties and local taxing authorities have several means to learn the amounts of tax revenue due them from the funds controlled by the Director. Local governments are not left to guess about what adjustments may occur. Each month, the Director provides reports to local taxing jurisdictions outlining the taxes that will be received, including a report of the different businesses and taxpayers in the taxing jurisdiction. LF 19, A 5; Tr. 82, 93–94. One report that the Director makes available is a detailed coded report about the tax paid by each business in the jurisdiction (Cass County sometimes uses this report to check that new businesses are paying their taxes). Tr. 93–94. The counties also get specific reports about each tax refund processed and any check redeemed from a county account. § 67.525.2. A 20. Resp. A13. The law also provides other notice procedures for other adjustments. § 32.087.15–.17 (Resp. A9–10), § 67.525 (Resp. A13), §94.550, RSMo (Resp. A16).

The Director generally does not disclose individual taxpayer identities without taxpayer consent but there is also an exception for times when the taxpayer consents. Here, the utility waived its confidentiality rights, and so the Director was able to inform Cass County before the adjustment. § 32.087.7 (Resp. A7), RSMo.

In addition, the state provides for audits and the auditor can issue a report. The audit did in fact catch the wrong coding here, to the benefit of Lee's Summit.

II. The Director of Revenue may process an amended sales tax return to promptly credit or debit political subdivisions' accounts with the right amount of revenue. (Response to Cass County's Point I).

The Director of Revenue has the power to continue his hitherto-unchallenged historical practice of automatically processing all amended sales tax returns and causing the state tax computer system to promptly credit and debit local governments' accounts with the amount of their sales tax proceeds. It is time for Cass County to repay to the City of Lee's Summit the nearly million dollars that it was mistakenly credited nearly a decade ago and there is no call to interpose even more administrative procedures before the Director may process the amended sales tax returns to adjust the county's account.

Under both constitutional and statutory provisions, the Director of Revenue has the clear power to process an amended sales tax return if the return corrects the political subdivision to which the tax revenue is owed. This is why, assuming that the Commission had jurisdiction, it would have been correct to find that the constitution and statutes vests in the Director the power and discretion to proceed in the way contemplated here.

As outlined in Part I, the Department has authority under the state constitution and two state statutes to process amended returns that result in adjustments to local tax accounts. Mo. Const. Art. IV, § 15 (Resp. A1); § 32.087.6, RSMo (Resp. A7); § 144.100.1 (Resp. A19), RSMo; *see* Pt. I.

What is more, in addition to this ample constitutional and statutory authority, the Director also has authority to process amended returns that correct overpayments under the City and County Sales Tax Acts.

Although this issue need not be briefed is this case is resolved on jurisdictional grounds, if this case proceeds to the merits, this occasion would be an ideal time for this Court to clarify this long-simmering but clear-cut issue of law.

A. When these two acts, § 67.525 (Resp. A13) and § 94.550 (Resp. A16), are read in conformity with the state constitution, it is clear that refunds and corrections may be made for erroneous payments or overpayments to local government accounts. § 67.525, A 20, Resp. A13, § 94.550, RSMo (Resp. A16). The County Sales Tax Act, codified at Section 67.525 (Resp. A13), expressly allows for dynamic adjustments to the local funds, permitting "refunds from the amounts in the trust fund" and credits "to any county for erroneous payments and overpayments made" including in cases of "dishonored checks and drafts deposited to the credit of such counties." Likewise, the City Sales Tax Act, codified at § 94.550 (Resp. A16), expressly allows for dynamic

adjustments to the local funds, permitting "refunds from the amounts in the trust fund" and credits "to any city for erroneous payments and overpayments made" including in cases of "dishonored checks and drafts deposited to the credit of such cities." § 94.550, RSMo (Resp. A16).

But the County Sales Tax Act and the City Sales Tax Act do not comply with the state constitution's requirement that the Director of Revenue, and not the state treasurer, has control of non-state funds. Each act provides that county or city sales taxes collected by the Director of Revenue "shall be deposited with the state treasurer" and "shall not be deemed to be state funds and shall not be commingled with any funds of the state." They purport to permit "the state treasurer to make refunds from the amounts in the trust fund and credited to any county [or city] for erroneous payments and overpayments made" and to "redeem dishonored checks and drafts deposited to the credit of such counties [or cities]". §§ 67.525 (Resp. A13), 94.550, RSMo (Resp. A16). By statute, the legislature gave the treasurer control of city and local tax money.

This is unconstitutional because the legislature cannot change by statute powers delineated by the state constitution. These statutes are thus unconstitutional to the extent that they place these local tax revenue funds in the control of the state treasurer, in contravention of Article IV, § 15 (Resp. A1), which requires non-state funds like local tax revenue funds to be held in

a non-state account over which the Department alone has custody. Mo. Const. Art. IV, § 15 (Resp. A1).

But these acts are also readily susceptible to a construction that severs the unconstitutional language. Under § 1.140, the "provisions of every statute are severable" unless "the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." § 1.140, RSMo; *see Dodson v. Ferrara*, 491 S. W.3d 542, 558 (Mo. 2016). Here, no one contends that any other part of the Act is unconstitutional, or would be unable to be executed, or would be contrary to the intent of the legislature. The County and City Sales Tax Acts are thus readily severed by deleting each reference to the state treasurer, leaving all duties to be constitutionally performed by the Director of Revenue in keeping with his pre-existing broad powers.

Indeed, as the Administrative Hearing Commission correctly found below, the Department has been assuming the control of these funds and following all other aspects of the statute in all other ways as if the statute has been severed, upon the advice of the Attorney General. This approach is exactly what "the Director had been doing in his day-to-day administration of the local

sales tax law is precisely what [the language in these acts] describes–taking the proceeds he received from sellers like KCP&L, putting those proceeds into an account that his program manager for the Taxation Division describes as a "safekeeping" account, using MITS records to decide how to allocate those funds, and transmitting the funds in the amounts consistent with what he (and MITS) concluded were correct." LF 29, A 15; Mo. Attorney General Opinion No. 192 (Oct. 24, 1977); Mo. Attorney General Opinion No. 110-70 (Jan. 12, 1970); LF 30, A 16.

The proper course for this Court is thus to announce the unconstitutionality, and, once and for all, sever the unconstitutional portion of the Act, with the result of placing all of these duties under the Department of Revenue.

B. With this interpretation of the County and City Sales Tax Acts, there can be no dispute that the Director of Revenue may process amended sales tax returns to adjust city and county sales taxes to correct errors that result in adjustment of local accounts.

The Administrative Hearing Commission in fact suggested that a court may hold the City Sales Tax Act unconstitutional and apply a severed version. LF 28, A 14. But if it were severed by a court, the Commission volunteered, "the Director's authority to perform the duties he feels he needs to perform would be complete." LF 31, A 17. "What would make matters more clear, if we

could only apply it, would be a law giving the Director the duty to make refunds for erroneous payments and overpayments made in the operation and administration of local sales taxes." LF 28, A 14. Under this law, "the Director should have the authority to take money from the trust account into which Cass County's tax proceeds are paid and use that money to credit erroneous payments and overpayments, pursuant to § 94.550.2." LF 29, A 15. Resp. A16. The Administrative Hearing Commission then went on to give a proposed revision of the City Sales Tax Act, showing with strikethroughs which the parties referring to the treasurer that it would ever, if it were a court. LF 30–31, A 16–17.

But, even without invalidating this law and severing it, the Administrative Hearing Commission still found in the Act a basis to uphold the Director's acceptance of amended returns. The "existence of this statute, however flawed it is, shows the Legislature's intention that the Director have the ability to cure 'erroneous payments and overpayments' such as the ones occurring here." LF 31, A 17. "Accordingly, we conclude that the Director had the duty to reallocate the funds in question." LF 31, A 17.

These acts were suggested a legislative intent to vest in the Director a duty to reallocate the sales tax funds here by processing the utility's return. LF 28, A 14. These constitutional and statutory provisions give "a fairly clear

legal command to the Director to take appropriate care of those funds and see that they are paid according to law." LF 28, A 14.

Cass County argues that these acts are to no avail, because they still speak of issuing a *refund* for overpayments or erroneous payments. §§ 67.525.2 (Resp. A13–14), 94.550 (Resp. A16), RSMo. Aplt. Br. at 19.

But the fact that these Acts also allow for refunds does not mean that the Department would be helpless to make an adjustment that does not require a refund. Instead, it speaks to the broader legislative intent to give the Department administrative power to correct accounts informally, even in the absence of refunds. After all, the Department cannot issue a refund where there is no money to be refunded.

III. An amended sales tax return only requests a "refund" if the amended return seeks or results in a refund. (Response to Cass County's Point I).

Cass County's chief argument in this Court is that the filing or processing of an amended sales tax return is a request for a tax "refund" whether or not the return seeks to get money back to the taxpayer or purchaser. But the automatic processing of an amended sales tax return is not a request for a tax "refund" if the amended return does not result in a tax refund.

For three reasons, Administrative Hearing Commission correctly held that an adjustment in the identity of the taxing government not a request for

a refund that requires the process described in § 144.190.2. LF 31, A 17. "The primary reason that this is not a § 144.190.2 refund case is that the statutes and constitution provide a fairly clear method of curing mistakes such as the ones made by KCP&L." *Id.* "The second reason is that no party in this case is seeking a refund, as the term is used in the statute": "Cass County seeks to expand the definition of 'refund.'" *Id.* As the Administrative Hearing Commission correctly held, Cass County "ignores what the statute says about what gets refunded-the balance." LF 31, A 17. "In this case, there is no balance to be refunded." *Id.* "The testimony adduced was that when all corrections have been made, KCP&L has a balance of zero." *Id.* "Therefore, the statute is plain that this is not a refund case because there is no balance to be refunded." LF 32, A 18. "The third reason why the refund process does not apply here is found in the language of § 144.190.2," which states that refunds "may only be claimed by 'the person legally obligated to remit the tax' or KCP&L." LF 31–32, A 17–18. The statute goes into exquisite details about exactly who may be a refund applicant: only the taxpayer (here, the utility) or the original purchaser (that is, the consumer), describing what exactly a vendor or a purchaser must do and when. § 144.190.2, RSMo.

This interpretation of the statute is also the undisputed, historical practice and understanding of the Department. The Department does not begin a refund process without a claim of some amount of money being due back to

the purchaser or seller: a refund is not a refund without a request for some amount of money back. Tr. 86. It would be impossible to "refund" zero dollars. Tr. 86.

Cass County urges this Court to extend the strict construction principle from the refund and exemption context to the statutes mentioned above governing revenue administration and adjustments. Aplt. Br. at 13–14. But because this is not a refund or exemption case, these rules do not apply. In any event, these laws by their plain text give the Department the authority at issue here.

In the end, Cass County urges, in an attempt to interpose a statute of limitations defense against having to pay back Lee's Summit's money, that an amended sales tax return, whether or not it seeks or results in a tax refund, is always a request for a tax "refund"—and subject, at the behest of third parties, to even more lengthy review procedures. Aplt. Br. at 21. There is no precedent for this position. But in any event, the taxpayer here has waived the statute of limitations, which means that even if Cass County got the refund procedures it seeks, it still, eventually, would have to pay back the money it owes. LF 18, A 4; Tr. 45–49; Tr. Resp. H'ring Exh. B. (copies of waivers). The refund procedures would not gain Cass County anything except more delay, and surely nearly a decade is long enough for Lee's Summit to wait to get its money.

CONCLUSION

The decision of the Administrative Hearing Commission should be vacated for want of jurisdiction and remanded with directions that the cause be dismissed. In the alternative, the decision of the Administrative Hearing Commission should be affirmed on the grounds described in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing Brief and Appendix of Respondent were served electronically via Missouri CaseNet e-filing system on the 12th day of March, 2018, to all parties of record.

I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 20,004 words.

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