

**IN THE SUPREME COURT OF
THE STATE OF MISSOURI**

SC97091

Crescent Plumbing Supply, Inc.

Appellant

v.

Missouri Director of Revenue

Respondent

**Appeal from the Administrative Hearing Commission of Missouri
The Honorable Brett W. Berri, Commissioner**

APPELLANT'S REPLY BRIEF

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ARGUMENTS

I. THE DOR HAS ERRED IN ITS LEGAL & FACTUAL ANALYSIS

The Director of Revenue’s (hereinafter “DOR”) primary argument that Crescent is “legally and factually mistaken” is in error. [DOR Response p. 11]. DOR’s argument is based on the assertion that only “plain text and settled precedent control the meaning of ‘date of overpayment.’” [DOR Response p. 11]. DOR further misapplies the law to the facts when stating that regulation Missouri 12 Code of State Regulations (hereinafter “CSR”) 10-102.016(2)(A) is outdated. [DOR Response p. 11]. This is a factual misreading of the statutes and regulations that has led the DOR to mistaken legal conclusions.

12 CSR 10-102.016(2)(A) is not outdated. *Missouri 12 CSR 10-102.016* (2002). § 144.015 RSMo. (1995). Regulations shall become effective if promulgated pursuant to RSMo. § 536.024, which vests the General Assembly’s authorization of such rules and regulations in state agencies. § 144.015 RSMo.; § 536.024 RSMo. (2005).

12 CSR 10-102.016(2)(A) was properly promulgated simultaneously during the *Ford Motor Co.* appeal, on or about September 30, 2002. *12 CSR 10-102.016; Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458, 460 (Mo. banc. 2003). In fact, the regulation language contained within 12 CSR 10-102.016 was not considered by the *Ford Motor Co.* Court. *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d at 461. As stated in Crescent’s original brief, The *Ford Motor Co.* Court did not have the opportunity to review the regulation, as Regulation 12 CSR 10-102.016(2)(A) was absent from the Code of State Regulations at the time of the lower court decision. *Id.* at 460.

Further, DOR claims the text of statute § 144.190.2 is unambiguous. This assertion is contradictory to the facts. The *Ford Motor Co.* Court clarified the meaning of the statute regarding “date of overpayment” and separately and contemporaneously the Director of Revenue additionally added the regulation to clarify the meaning of the “date of overpayment”. *Id.*; § 144.190.2. Therefore, DOR’s assertion that statute § 144.190.2 was unambiguous is false. *Ford Motor Co.* Court’s decision stands as a ruling on the language of the statute. In this case, the Court’s reading of § 144.190.2 should be take into consideration 12 CSR 10-102.016(2)(A) by applying it to the definition of the “date of overpayment.”

The DOR argues “Regulations are adopted by agencies, not by the legislature,” citing *Hearst Corp.* 779 S.W.2d at 559. [DOR Response p. 13] While this point is factually true, it is unrelated to the reading and interpretation of such regulations. The DOR further asserts, “if anything, they suggest a *lack* of legislative intent.” [DOR Response p. 13]. However, DOR’s assertion that such regulations suggest a lack of legislative intent has no precedential authority on that point and moreover is contrary to the Court’s decision in *Aquila Foreign Qualifications Corporation v. Director of Revenue*, 362 S.W.3d 1, 4-5 (Mo. banc 2012) and *Circuit City Stores Inc. v. Director of Revenue/Dillard’s Inc. v. Director of Revenue (herein “Dillard’s v. Director of Revenue”)* 438 S.W.3d 397, 402-403 (Mo. banc 2014).

In the *Aquila* case, while applying similar standards as the *Ford Motor Co.* Court in resolving ambiguities in statutes by determining the intent of the legislature and giving effect to that intent whenever possible, the Court held that “legislative intent is further

reflected in the Missouri Code of State Regulations.” *Id.* at 5; *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d at 461. The *Aquila* Court went on to cite the relevant CSR and applied the CSR meaning to the relevant legislative statute under Chapter 144 in that matter. *Id.* The *Aquila* decision, as well as *Ford Motor Co.*, is controlling when reading and interpreting the Missouri statutes, and in particular, RSMo. Chapter 144. *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d at 461.

Further, *Circuit City Stores, Inc. v. Director of Revenue*, combined with *Dillard’s Inc., v. Director of Revenue* (because of the similarity in legal issues each presented) illustrates the Supreme Court’s analysis in these matters. The analysis by the Court in these cases is completely different from DOR’s suggested method of analysis in this case. In the *Dillard’s* matter, the Court not only reads § 144.190.2 but also examines the Respondents’ citation of the 12 CSR 10-102.100. *Dillard’s v. Director of Revenue*, 438 S.W.3d at 402-403. While finding against the Respondents Circuit City and Dillard’s in that matter, it is clear that the Court’s analysis of the validity of the requested refund depended on reviewing the statute *and* the accompanying CSR to determine whether or not the interpretation was clearly contrary to the reasonable expectations of the legislature. *Id.* at 400-404. Respondents in that matter wanted to stretch the definition of “unit” to include separate entities. *Id.* To define “unit,” the *Dillard’s* C

ourt looked to the dictionary for its “plain and ordinary meaning.” *Id.* at 400.

In the present case, Crescent is not stretching the definition of “date of overpayment”. Crescent cites the CSR which has a clear and intended meaning of the “date of overpayment” in plain English as “the due date” if it is later than the date of payment.

12 CSR 10-102.016. Further, Crescent is relying on the plain and ordinary meaning of the term “sale” as governed by the UCC, whereas the DOR seeks to narrowly define the term “sale” entirely within the tax code.

The DOR argues that “the tax code defines a ‘sale’ as ‘any transfer, exchange or barter, conditional or otherwise, *in any manner by any means whatsoever*, of tangible personal property for valuable consideration.’ § 144.010.1(12) RSMo.” (emphasis theirs). The DOR argues that this is the definition of a sale for tax purposes, then misconstrues this definition to mean that each time Crescent shipped goods, a sale occurred. The DOR attempts to rely on its own tax forms, rather than Crescent’s testimony and agreement with Murphy; this reliance is not based on the facts presented by Crescent which were undisputed at trial. The purpose of § 144.010.1(12) RSMo. is not to define what all sales in the state of Missouri *are*, but simply to define what type of transactions *are taxable*. § 144.010.1(12) RSMo. (2017). Crescent does not disagree that its sale to Murphy is a taxable one, only that it was taxable at the conclusion of the sale. This testimony was unrefuted at trial.

The UCC defines sale as “the passing of title from the seller to buyer for a price.” § 400.2-106 RSMo. (1963). The title to goods cannot pass if the goods are incomplete. However, the DOR attempts to twist the definition of sale for the purposes of taxation to shorten the time in which Crescent is rightfully entitled to a refund on taxes inadvertently paid to the State of Missouri. This is an extravagant effort by the DOR to keep taxpayer money.

While DOR argues that Crescent has not “proved” that there was only one sale, Crescent’s evidence and testimony presented at trial was not challenged or otherwise contradicted by the DOR. The Commission’s finding that Crescent’s sale to Murphy wasn’t a single sale was a finding based in law, not on any lack of evidence. The Commission erred in this finding by determining that Crescent was attempting to show how the UCC would “create a single sale.” The UCC, coupled with the actions and intent of the parties, should be applied to determine the context of the single sale.

The Commission erred in not applying 12 CSR 10-102.016 in conjunction with the *Ford Motor Co.* precedent in this case, and further erred in not looking to the UCC to define a single sale in this case.

For these reasons, Crescent is entitled to the entire refund as it has timely applied for it under the Statute of Limitations.

CONCLUSION

The DOR wholly failed to demonstrate why Crescent is not entitled to its refund as Crescent timely applied for such refund within the Statute of Limitations. The DOR made factual and legal errors in its analysis of the case law, rules, statutes, and facts in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(b), the undersigned certifies that the forgoing Brief of Appellant Crescent Plumbing, Inc. complies with the limitations in that rule and contains approximately 1,752 words, excluding the cover, signature block, and the certificates.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the forgoing was e-filed with the Court on August 8, 2018 and served via electronic mail to Respondent's attorney Thomas A. Houdek via the electronic filing system pursuant to Missouri Supreme Court Rule 103.08.

/s/ D. Dean Plocher