SC97091

IN THE SUPREME COURT OF MISSOURI

CRESCENT PLUMBING SUPPLY CO.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

From the Administrative Hearing Commission of Missouri
The Honorable Brett W. Berri, Commissioner

BRIEF OF RESPONDENT, THE DIRECTOR OF REVENUE

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INTRODUCTION

Crescent Plumbing Supply Company ("Crescent") filed two tax returns making two sales-tax payments, one in April 2013 and one in December 2013. It asked for a refund of both payments in May 2016. Missouri law authorizes the Director of Revenue ("Director") to grant sales-tax refunds only if they are filed "within three years from date of overpayment." § 144.190.2, RSMo. Crescent's December 2013 payment fell within this window, so the Director refunded that payment. Crescent's April 2013 payment, however, was filed more than three years before the refund request, so the Director denied the refund. The Administrative Hearing Commission ("Commission") affirmed this decision.

The plain text of the statute, controlling precedent, statutory context, and principles of sovereign immunity all confirm the Commission's conclusion. The phrase "date of overpayment" is not a defined term, but its meaning is plain. Crescent made its alleged overpayment in April 2013, and that started the three-year clock. This Court adopted that plain reading in *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458, 462 (Mo. banc 2003). The statutory context shows that the tax code measures several rights and duties by the same clock. And, as *Ford Motor* explains, any possible ambiguity as to the "date of overpayment" must be strictly construed in favor of denying the refund because Missouri's waiver of sovereign immunity must

be unambiguous. *Id.* at 461. All this confirms that the Director and the Commission used the right start date to measure the three-year refund window.

In response, Crescent argues that the Court should follow a 2002 regulation that defined "date of overpayment" as the "due date" of the return. Crescent then argues that all its sales were made to the same buyer, and were allegedly all part of the same overarching contract, so the sales tax it paid in April 2013 was not due until all terms of the contract were met in June 2013.

This argument is legally and factually mistaken at each step. Legally, the meaning of "date of overpayment" is controlled by the plain text and by this Court's precedent, not by an outdated regulation. As for the sales tax "due date," that too is determined by statute. By statute, sales tax is due on each exchange of goods for consideration, and any sales tax collected must be remitted on the seller's next return. Crescent cannot *charge* sales tax on each individual sale and shipment, then wait to *remit* the tax to the Director until all sales and shipments are completed. Factually, the Commission's findings and Crescent's own exhibits show a series of sales with separate invoices, separate order numbers, and separate charges. Crescent's "due date" for the earlier sales was April 2013. Crescent did not apply for a refund until over

three years later in May 2016. Thus, the Director and the Commission correctly found that the refund is time-barred under either statutory reading.

STATEMENT OF FACTS

The Administrative Hearing Commission made the following findings of fact.

Crescent's April 26, 2013 tax return reported two sales, and paid $11,186.46 in taxes on those sales to the Director. Comm'n Dec. ¶ 4. The first sale occurred in December 2012. *Id.* at ¶ 2. Crescent sold two hot water generating systems to Murphy Company ("Murphy") for $120,361.06. *Id.* Crescent also charged Murphy $10,219.86 in sales tax, *id.*, which Murphy quickly paid, Tr. 23:7-17. The second sale occurred in February 2013. *Id.* at ¶ 2. Crescent sold three more items to Murphy, a "OneFlow" and two mesh strainers, for $11,376.55. *Id.* Crescent also charged Murphy an additional $965.68 in sales tax, which Murphy again quickly paid. *Id.*; Tr. 24:10-22.

Six months later, Crescent's December 20, 2013 tax return reported a third sale to Murphy, and Crescent paid $30.71 in taxes on that sale to the Director. Comm'n Dec. ¶ 6. This sale occurred in June 2013. *Id.* at ¶ 5. Crescent sold a "class 3-port diverter chrome" to Murphy for $368.95. *Id.*

At trial, a Crescent employee explained that all these sales were for parts of a custom-built industrial hot water system. The buyer, Murphy, paid for each sale as it was invoiced. Tr. 15:3-9. Upon "receiv[ing] money on a

particular invoice," Crescent remitted the sales tax to the Director "immediately at the next appropriate juncture." Tr. 15:6-13.

Crescent filed a claim for a refund on the three sales (reported across two tax returns) on May 11, 2016. Comm'n Dec. ¶ 7. The Director allowed the refund for the June 2013 sale that Crescent had reported in December 2013. *Id.* at ¶ 8. But the Director denied the refund for the December 2012 and February 2013 sales that Crescent had reported in April 2013 because the refund was not filed "within three years from date of overpayment." *Id.*; *see* § 144.190.2, RSMo.

The Administrative Hearing Commission also denied Crescent's untimely refund claim. LF12. Crescent then filed this appeal.

STANDARD OF REVIEW

This Court upholds decisions of the Administrative Hearing Commission "when authorized by law and supported by competent and substantial evidence upon the whole record." § 621.193, RSMo. This means the Commission's "interpretations of the state's revenue laws are reviewed de novo." *Mackey v. Director of Revenue*, 200 S.W.3d 521, 523 (Mo. banc 2006). "Substantial evidence is evidence that if true has probative force; it is evidence from which the trier of fact reasonably could find the issues in harmony therewith." *Id.* The Court does not "determine the weight of the evidence or substitute its discretion for that of the administrative body." *Id.*

ARGUMENT

I. Crescent's May 2016 request for a refund must be denied because Crescent made the request more than three years after the date of its overpayment in April 2013. (Responds to Crescent's Points Relied On I, II, and III)

Missouri law authorizes the Director of Revenue to refund sales tax only if the request for refund is filed "within three years from date of overpayment." § 144.190.2, RSMo. The Director and the Commission denied Crescent's May 2016 refund request because it was not filed within three years of its April 2013 overpayment. This Court should affirm because the plain text of the statute, controlling precedent, statutory context, and sovereign-immunity principles all confirm that the statute means exactly what it says.

Start with the plain text. "This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). The statute does not define the phrase "date of overpayment," so the Court should adopt its plain and ordinary meaning—the date the taxpayer made the alleged overpayment for which it now seeks a refund. Crescent paid $11,186.46 in sales tax to the Director on April 26, 2013. Comm'n Dec. ¶ 4. It did not seek a refund of that payment

until over three years later on May 11, 2016. *Id.* at ¶ 7. The statute bars the refund.

This Court previously considered the very same statutory phrase and adopted the phrase's plain and ordinary meaning in *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458, 462 (Mo. banc 2003). *Ford Motor* held that the "date of overpayment" is "when the taxpayer remits payment of tax on the transactions that generate the issue of overpayment." *Id.* Crescent concedes that *Ford Motor* determined "the meaning of the date of overpayment." Apt. Br. 23. Though Crescent tries to distinguish *Ford Motor* on other grounds (discussed below), the substance of *Ford Motor*'s holding is not in dispute, and it controls here. Crescent remitted payment of tax in April 2013, so its May 2016 refund claim is time barred.

The statutory context also confirms the statute's plain meaning. As *Ford Motor* explains, this statute of limitations is not the only three-year deadline tied to the day of filing; the tax code also ties "similar rights and obligations to the filing of a tax return and the payment of tax." *Ford Motor*, 97 S.W.3d at 461. For example, the Director has three years from the filing date to tell the taxpayer if it owes additional sales tax. § 144.220.3, RSMo. The same is true for income taxes. Filing an income tax return starts a three-year clock for the Director's notice of deficiency and for the taxpayer's claim for refund. *See* §§ 143.711.1, 143.801.1, RSMo. These examples show

the statute means what it says: refund claims must be filed within three years of the date of overpayment, not from some other date.

Finally, any ambiguity in the tax refund provision must be strictly construed against the party seeking a refund. *Ford Motor*, 97 S.W.3d at 461. "[T]he state's sovereign immunity shields it from refunding taxes voluntarily paid, even if illegally collected." *Insurance Co. of State of Pa. v. Director of Revenue*, 269 S.W.3d 32, 36 (Mo. banc 2008). When the State consents to a limited waiver of its sovereign immunity, "'it may prescribe the manner, extent, procedure to be followed, and any other terms and conditions as it sees fit.'" *Id.* (citation omitted). Tax refund provisions are just such "limited waivers of sovereign immunity." *Id.* Thus, the Court has no discretion to expand those provisions or its own jurisdiction. *Id.* The Court should uphold the Commission's decision because the State has not expressly and unambiguously waived its immunity when a refund is requested more than three years after the date of overpayment.

All of this confirms that the "date of overpayment" is the day the taxpayer made the payment for which it now seeks a refund. "It is undisputed," Crescent concedes, that Crescent paid the sales tax for which it now seeks a refund "during the quarterly taxation period[] of March 2013." Apt. Br. 15. Specifically, Crescent filed that March 2013 tax return on April 26, 2013. Comm'n Dec. ¶ 4. That filing started the clock on any refund

claim. Crescent did not request a refund until May 2016. Accordingly, Crescent did not request the refund "within three years from date of overpayment," § 144.190.2, RSMo, and the request is now time barred.

II. Crescent's contrary arguments are legally and factually mistaken. (Responds to Crescent's Points Relied On I, II, and III)

Crescent's contrary arguments are legally and factually mistaken. Crescent begins by saying that "date of overpayment" should mean the "due date of the original return." It then argues that when a series of transactions are part of the same contract, no sales tax is due until all parts of the contract are performed, so the clock did not start until *after* it had made all of its shipments to Murphy. But "date of overpayment" means the date Crescent actually paid the sales tax to the Director, and even if it meant the date the payment was due, Crescent's argument is still legally and factually flawed.

First, the plain text and settled precedent control the meaning of "date of overpayment," not outdated regulatory language, Apt. Br. 14-16, 21-22. Crescent cites a 2002 department regulation that provides "[t]he date of the overpayment is the due date of the original return or the date paid whichever is later." 12 CSR 10-102.016(2)(A). The Court should follow the statute's plain text, not the regulation. Unambiguous text "cannot be made ambiguous by administrative interpretation and thereby given a meaning which is

different from that expressed in a statute's clear and unambiguous language." *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). Because the text is unambiguous, the Court's analysis ends there.

If the Court finds the text ambiguous, it should follow *Ford Motor*. *Ford Motor* addresses and controls any ambiguity in the statute's language. Crescent offers no explanation why the Court should ignore its controlling opinion in *Ford Motor* in favor of an earlier regulation. To be sure, an administrative regulation can fill a gap in a statute, and that regulation would be entitled to some deference if this Court had not already interpreted the very language at issue. But once this Court determines the meaning of the statutory text, regulations cannot give that same text a broader meaning. *See Teague v. Mo. Gaming Comm'n*, 127 S.W.3d 679, 687 (Mo. App. W.D. 2003) ("As a rule, an administrative agency may not promulgate a regulation that is broader than the authorizing statute."); *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 n.2 (Mo. banc 1999) ("The regulation of course cannot be broader than the statutory language."). At best, Crescent suggests *Ford Motor* should have considered the regulation when ruling fifteen years ago. By now, however, reliance interests favor following *Ford Motor* rather than the earlier, effectively-overruled regulation. *Hearst Corp. v. Director of Revenue*, 779 S.W.2d 557, 559 (Mo. banc 1989) ("Erroneous

regulations are a nullity"). Crescent does not argue that *Ford Motor*'s straightforward reading was "'clearly erroneous and manifestly wrong.'" *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 379 (Mo. banc 2014) (citation omitted) (discussing stare decisis principles).

Crescent briefly argues that *Ford Motor* should not be followed because the facts in that case were different. Apt. Br. 23. It is true that Ford urged a much more aggressive reading of the statute than Crescent urges, but a "wholly unrelated fact pattern," *id.*, is not enough to distinguish *Ford Motor*'s holding on the dispositive question of statutory interpretation. That holding is directly on point and controls here. Crescent also seems to argue that the Code of State Regulations is evidence of legislative intent. Apt. Br. 24-25. This argument is also mistaken. Regulations are adopted by agencies, not by the legislature. *Hearst Corp.*, 779 S.W.2d at 559. And regulations fill statutory gaps, so, if anything, they suggest a *lack* of specific legislative intent.

Second, even if "date of overpayment" is defined to mean "due date of the original return," Crescent's original return was due by April 2013. Crescent argues that all the shipments were part of the same overarching contract with the same buyer, so it did not owe sales tax until all terms of the overarching contract were satisfied in June 2013. Apt. Br. 17-20. This argument is legally and factually mistaken.

Legally, Crescent mistakenly relies on several UCC sections defining "contract for sale" and "course of performance" to argue that the terms of the sale are defined by the parties not by statute. Apt. Br. 17-19 (quoting §§ 400.2-208, 400.2-209, RSMo). Though the parties write the contract, the statute defines a "sale" for tax purposes. The tax code defines a "sale" as "*any* transfer, exchange or barter, conditional or otherwise, *in any manner or by any means whatsoever*, of tangible personal property for valuable consideration." § 144.010.1(12), RSMo (emphasis added). Thus, for tax purposes, a sale occurred each time Crescent shipped goods out and received consideration in return. Crescent then had to report each sale's gross receipts on its next sales tax return. § 144.080.1, RSMo.

For similar reasons, whenever a seller charges and collects sales tax, the seller's next tax return must "remit . . . the taxes levied." § 144.080.1, RSMo. A seller cannot charge and collect sales tax from the buyer, then sit on the tax money collected until the seller is satisfied that all contractual terms have been met. Whenever a seller charges sales tax, it must remit that tax to the Director. *See Automatic Retailers of Am., Inc. (Coffee Time Div.) v. Morris*, 386 S.W.2d 901, 905 (Mo. 1965) ("the seller shall make returns (§ 144.080) of all taxes collected 'or required to be collected' and shall *remit 'the taxes so collected or required to be collected*'"); *Brittingham v. Gove-Ortmeyer*, 174 F. Supp. 3d 1043, 1053 (Mo. App. E.D. 2016) (finding probable cause that

plaintiff knowingly violated the law by collecting sales tax from customers but not remitting funds to the State). Crescent invoiced the buyer for each shipment, charged sales tax, and collected payment. Thus, it had to report the earlier sales in April 2013 and had to remit the sales tax it collected at the same time.

Factually, Crescent has not proven that there was only one transaction. To the contrary, the Commission's findings and Crescent's own invoices show that Crescent remitted sales tax on a series of sales. The Commission found three sales, not one. Comm'n Op. ¶¶ 2, 3, and 5. Its findings are supported by substantial evidence. *Mackey*, 200 S.W.3d at 523. Crescent's own records list three sales on three invoices, with three different invoice numbers, and three different order numbers. *See* Ex. 1–3. (Exhibit 1 does not show the complete invoice, but the rest of the December 2012 invoice is included in Exhibit A at DOR A0019.) At the end of each invoice, Crescent charged the buyer separately for each of those sales and included sales tax on each invoice. Ex. 1–3. And the original invoices found in Exhibit A (not the duplicate invoices of Exhibits 1-3) list contract "terms" at the bottom of each invoice that say "unpaid balance due on 10th of Month following month of invoice." *See* Ex. A at DOR A0015, A0019, A0020. So Murphy did not pay early; it paid each invoice the month it was due. Crescent then remitted the sales tax to the Director the month it was due, in April 2013.

Those invoices are the only records Crescent offered of the sales. Crescent never offered any broader contract into evidence, and no testimony suggested that Murphy did not owe any payment until June as is now alleged. To the contrary, testimony suggested additional items were ordered as time passed. *E.g.* Tr. 12:3-9 (Crescent's witness testifying that "as we shipped material" the order "was revised, not revised, but it was[,] other items were determined necessary for the full functionality of this system"). While the Director has no reason to doubt Crescent's assertion that the three sales were connected, the invoices demonstrate that any broader transaction was *effected* through three separate exchanges of goods for consideration.

Again, the invoices demonstrate that Crescent billed Murphy on three separate occasions for payments due in January 2013, March 2013, and July 2013. Crescent had to report the January 2013 and March 2013 payments on its next tax return and remit to the Director the sales tax paid to it by Murphy. § 144.080.1, RSMo; *see also* Apt. Br. at 9, 15 (explaining that Crescent paid the sales tax "upon receipt of monies paid by the purchaser"). That tax return was due in April 2013. § 144.090.2, RSMo (returns due by the end of the month following the reporting month). Crescent indisputably filed that return and remitted the sales tax on April 26, 2013. Crescent did not file for a refund until May 2016. Accordingly, Crescent's refund claim

was late whether measured by the "date of overpayment" or by the "due date."

CONCLUSION

The Director of Revenue requests that this Court affirm the decision of the Administrative Hearing Commission.

Respectfully submitted,

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July 25, 2018

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Brief of Respondent was served electronically by Missouri CaseNet e-filing system on July 25, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 3,144 words.

/s/ *Peter T. Reed*
Deputy Solicitor