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SC97287

IN THE SUPREME COURT OF MISSOURI

DAVID and JILL KEHLENBRINK,

Plaintiffs-Respondents,

vs.

DIRECTOR OF REVENUE,

Defendant-Appellant.

Appeal from the Missouri Administrative Hearing Commission

BRIEF OF APPELLANT

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INTRODUCTION

This case is an appeal from a decision by the Administrative Hearing Commission that failed to apply the rule this Court has reiterated dozens of times: When a statute about tax exemptions or credits is determined to be ambiguous, it must be construed strictly *against* the taxpayer. Without acknowledging this rule, the Commission did just the opposite. It determined that a revenue statute was ambiguous and then construed that statute *in favor* of the taxpayer. The taxpayers failed to meet their burden of proof to show they were entitled to the credit.

The Commission's interpretation of the statute was also erroneous. Sales tax on the privilege of titling a motor vehicle is imposed at the time of titling. When a person sells or trades a vehicle to buy a replacement vehicle, a Missouri statute allows that person to subtract the value of the original vehicle from the purchase price of the replacement for purposes of calculating sales tax liability. The Commission has consistently held that the plain text of the statute allows taxpayers to credit only one vehicle sale against the replacement vehicle. But the Commission disregarded the analysis in those decisions and allowed the taxpayers to credit four vehicle sales against the purchase price of the replacement vehicle, allowing the taxpayers to purchase a $27,000 vehicle without tax. The plain language of the statute instead provides that taxpayers are allowed only one credit.

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JURISDICTIONAL STATEMENT

The decision by the Administrative Hearing Commission is final. The decision involves whether, for purposes of calculating sales tax, a taxpayer can apply more than one credit for selling a vehicle against the purchase price of buying a replacement vehicle, and thus involves construction of a revenue law of this State. This Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

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STATEMENT OF THE CASE

Ordinarily, a person who purchases a motor vehicle must pay sales tax based on the entire purchase price of that vehicle. § 144.020, RSMo. But Missouri law provides a partial exception to that default rule: When a person sells or trades a vehicle to buy a replacement vehicle, that person can subtract the value of the original vehicle from the purchase price of the replacement vehicle for purposes of calculating sales tax liability on the privilege of titling the replacement vehicle. § 144.025.1, RSMo, App. 8. Purchasing a $15,000 vehicle within 180 days of selling a $10,000 vehicle, for example, triggers a sales tax calculation based on the $5,000 net difference instead of the entire $15,000 purchase price.

David and Jill Kehlenbrink sold four cars, purchased a replacement truck, and requested a credit for all four sales against that replacement vehicle. They first sold two vehicles, one for $10,500 and another for $3,900. LF 12, App. 2. Days later, they purchased a truck for $27,495. LF 12, App. 2. But when they registered that truck, instead of crediting only $10,500 against the truck, they claimed a credit $14,400, the combined value of both vehicles sold. LF 12, App. 2. The Department of Revenue accepted their application and assessed sales tax on a net difference of $13,095. LF 12, App. 2. The Kehlenbrinks paid $1,095.15 in sales tax. LF 12, App. 2.

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Several months later, the Kehlenbrinks sold two more vehicles for a combined total of $13,600. LF 12, App. 2. The Kehlenbrinks then spoke with an employee at an independently owned establishment that is authorized to collect taxes for the Department. LF 12, App. 2. That employee, Devon Knupp, told the Kehlenbrinks that they could credit the sales of their last two vehicles against the truck. LF 12, App. 2. The Kehlenbrinks submitted an application for a tax refund based on their belief that they could credit $13,600 against the purchase price of their truck. LF 12, App. 2. They asserted that they were entirely exempt from paying any tax—even though they spent nearly $30,000—because the sum total for all four vehicles sold exceeded the purchase price of their truck. LF 12, App. 2.

The Department denied their request because they had already applied a credit for the sale of the first two vehicles against the purchase price of the replacement vehicle. LF 8. Although the Kehlenbrinks had already been allowed to credit two vehicles sold against the purchase price of their truck, the Department declined to compound that error, so it rejected the Kehlenbrinks' request to apply two more credits. LF 12, App. 2.

The Administrative Hearing Commission reversed. The statute provides that a taxpayer can credit only the value of "the original article" sold against the purchase price of the replacement vehicle. LF 13, App. 3. The Commission acknowledged that its previous decisions had held that the meaning of the

singular term "the original article" meant that taxpayers could credit only one vehicle sale against the purchase price of a replacement vehicle. LF 14, App. 4. But even though the Commission in those cases had scrutinized the text, the Commission set aside all those decisions because, "in the past, taxpayers challenging this statute have not alleged, or provided evidence, that § 144.025.1 is ambiguous." LF 14, App. 4. The Kehlenbrinks, in contrast, repeatedly argued that the section was ambiguous. LF 3, 14 (App. 4); Tr. 17–18.

The Commission determined that the statute was ambiguous for four reasons, none of which directly concerned the phrase "the original article." First, it determined that a separate clause was ambiguous. That clause provided that a taxpayer could credit a sale against "a *subsequent* motor vehicle . . . within one hundred eighty days *before or after* the date of the sale of the original article." § 144.025.1, RSMo, App. 8 (emphases added). The Commission determined that "subsequent" and "before" were contradictory, so this timing provision was ambiguous. LF 14–15, App. 4–5. Second, the Commission reiterated that the employee with whom the Kehlenbrinks spoke suggested that they could credit more than one vehicle sale against the purchase of a vehicle. LF 15, App. 5. Third, the Commission reiterated that the Department had accepted the Kehlenbrinks' first application, which had sought to apply two credits. LF 15, App. 5. And fourth, the Department, more

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than a decade before, had promulgated a regulation stating that a person can offset the purchase price for the replacement vehicle "[i]f a person purchases or contracts to purchase a motor vehicle or trailer and sells one (1) *or more* motor vehicles," 12 CSR 10-103.350(3)(G) (emphasis added). LF 15, App. 5. The Commission determined that the cumulative effect of these four factors rendered the statute ambiguous. LF 15, App. 5. The Commission never analyzed the meaning of the phrase "the original article," as other decisions by the Commission had done.

Despite finding ambiguity, the Commission did not apply this Court's rule that, "[w]here there is an ambiguity, statutes creating exemptions from taxation are strictly construed *against* the taxpayer." *Fid. Sec. Life Ins. Co. v. Dir. of Revenue*, 32 S.W.3d 527, 529 (Mo. banc 2000) (emphasis added). It instead decided to apply the putatively clarifying regulation and allow the Kehlenbrinks to credit four different sales to completely offset the purchase price of their replacement vehicle. LF 17, App. 7. The Commission ordered the Director to completely refund all taxes the Kehlenbrinks had paid, with interest. LF 16–17, App. 6–7.

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POINTS RELIED ON

I. The Commission erroneously ruled that the Kehlenbrinks were entitled to a tax refund, because any "ambiguity" in a statute creating a credit or exemption must be "strictly construed *against* the taxpayer," in that the Commission instead construed ambiguity *in favor* of the taxpayer.

- *Fid. Sec. Life Ins. Co. v. Dir. of Revenue*, 32 S.W.3d 527, 529 (Mo. banc 2000)
- *Fred Weber, Inc. v. Dir. of Revenue*, 452 S.W.3d 628, 630 (Mo. banc 2015)
- § 144.025.1, RSMo

II. The Commission erroneously ruled that the Kehlenbrinks were entitled to a tax refund, because a regulation that is inconsistent with the text of the statute has no effect, in that the plain text of the statute allows taxpayers to credit only one sale against the purchase price of a replacement vehicle.

- *Great S. Bank v. Dir. of Revenue*, 269 S.W.3d 22, 25 (Mo. banc 2008).
- *Waldeck v. Dir. of Revenue*, No. 13-1022 (Mo. Admin. Hearing Comm'n April 29, 2014).
- *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. banc 2014).
- § 144.025.1, RSMo

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SUMMARY OF THE ARGUMENT

The Commission departed from more than a dozen of its previous decisions in at least two significant respects. Both justify reversing.

First, unlike previous decisions, the Commission did not apply the well-established rule that any ambiguity must be "strictly construed *against* the taxpayer." This Court has uniformly applied that rule. The Kehlenbrinks failed to establish that the statute unambiguously favored them. They failed to meet that burden and instead merely asserted that the statute was ambiguous. Once the Commission agreed that the statute was ambiguous, however, it was required to rule in favor of the Director.

Second, the Commission did not review, as previous decisions had, whether the phrase "the original article" precluded relief for the Kehlenbrinks. This Court need not address this argument because the Kehlenbrinks did not show that the statute unambiguously provided them a credit, as required. But if this Court does interpret the statute, the statute was not ambiguous. It allows a taxpayer to apply a credit only for the single "original article" sold. As the Commission has previously determined—and as many dictionaries affirm—the term "original" refers to the first article sold, so the statute allows taxpayers to credit only one sale against the purchase price of a replacement vehicle.

Elsewhere in the same statute, the legislature provided that taxpayers can combine a credit for the trade-in value of "the original article" with a credit for a rebate. The legislature's decision to allow combining a trade-in credit with a rebate credit but to omit any language allowing combining credits for sales of more than one vehicle establishes that the latter practice is not allowed. Because the statute unambiguously rejects allowing taxpayers to apply multiple credits here, and because a regulation that is "is inconsistent with the statute" has no effect, the Kehlenbrinks could apply only one credit against the purchase price of their replacement vehicle.

STANDARD OF REVIEW AND PRESERVATION OF ISSUES

"The AHC's interpretation of revenue laws is reviewed de novo." *Loren Cook Co. v. Dir. of Revenue*, 414 S.W.3d 451, 453 (Mo. banc 2013).

Both points-relied-on were preserved for appellate review. In the brief to the Administrative Hearing Commission, the Director argued both that any ambiguity must be construed against the taxpayer and that the provision at issue allows taxpayers to credit only one sale against the purchase price of a replacement vehicle.

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ARGUMENT

I. The Commission erroneously ruled that the Kehlenbrinks were entitled to a tax refund, because any "ambiguity" in a statute creating a credit or exemption must be "strictly construed *against* the taxpayer," in that the Commission instead construed ambiguity *in favor* of the taxpayer.

Once the Commission determined that section 144.025 was ambiguous, the Commission was required to rule for the Director. This Court has uniformly held that, if a statute providing a tax exemption or credit is ambiguous, the statute must be construed in favor of the Director. "Where there is an ambiguity, statutes creating exemptions from taxation are strictly construed *against* the taxpayer." *E.g.*, *Fid. Sec. Life Ins. Co. v. Dir. of Revenue*, 32 S.W.3d 527, 529 (Mo. banc 2000) (emphasis added). This rule applies both to tax credits and tax exemptions. *Hermann v. Dir. of Revenue*, 47 S.W.3d 362, 365 (Mo. banc 2001) ("Tax credits and exemptions are construed strictly and narrowly against the taxpayer."). "Taxpayers have the burden of showing they are entitled to an exemption," "[e]xemptions are strictly construed against the taxpayer, and any doubts are resolved in favor of applying the tax." *Loren Cook Co. v. Dir. of Revenue*, 414 S.W.3d 451, 453 (Mo. banc 2013).

Because of this demanding burden, the only way a taxpayer can successfully assert entitlement to a tax credit is by establishing "'clear and unequivocal proof,' that it qualifies." *E.g.*, *Fred Weber, Inc. v. Dir. of Revenue*,

452 S.W.3d 628, 630 (Mo. banc 2015) (quoting *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126, 128 (Mo. banc 2014)). The taxpayer must establish that the exemption or credit "fits the statutory language *exactly*." *Cook Tractor Co. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006) (emphasis added). If the text of the statute is anything "less than perfectly clear," the Director must prevail. *Fid. Sec. Life Ins. Co.*, 32 S.W.3d at 529.

The Commission did not apply this standard. The Commission's decision here stands in stark contrast to its previous decisions, which do cite this rule. Indeed, in one recent opinion, the Commission determined that this statute was ambiguous, but it held that it had to "construe the ambiguity against the taxpayer." *Kisling v. Dir. of Revenue*, No. 08-0316 (Mo. Admin. Hearing Comm'n May 23, 2008) (citing *Hermann v. Dir. of Revenue*, 47 S.W.3d 362, 365 (Mo. banc 2001).

The Kehlenbrinks also did not establish their burden. They needed to establish that the statute unambiguously permitted stacking multiple credits. But they instead argued that the statute is ambiguous. LF 3, 14 (App. 4); Tr. 17–18. So under *no* circumstance could the Commission have ruled in the taxpayer's favor. It did so anyway.

Although this Court need not revisit this rule, the basis for it is stands on two well-established principles. First, the rule applies the universal

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principle that exceptions from statutes are construed narrowly. The default tax position under Missouri law is that a person who purchases a vehicle must pay sales tax based on the entire purchase price of that vehicle. § 144.020, RSMo. Each exemption or credit is a carve-out exception to this default rule. The U.S. Supreme Court has long declared that the rule "that exemptions must be strictly construed, and that doubt must resolved against the one asserting the exemption" is a "general principle" of statutory construction. *United States v. Allen*, 163 U.S. 499, 504 (1896). The U.S. Supreme Court has repeated this general principle many times since then, especially in tax cases. *E.g., Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) ("Exemptions from taxation must be unambiguously proved." (quoting *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)) (alterations adopted)); *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) ("[E]xemptions from antitrust laws are strictly construed."); *Piedmont & N. Ry. Co. v. ICC*, 286 U.S. 299, 311–12 (1932) (holding that exemptions to the Transportation Act must be narrowly construed).

Second, the rule rests on the similarly well-established principle that courts will not determine that a State waived its sovereign immunity without an express, unambiguous declaration by the legislature. The statute allowing the Kehlenbrinks to apply for a refund of taxes is "a limited waiver of sovereign immunity." *Cmty. Fed. Sav. & Loan Ass'n v. Dir. of Revenue*, 796 S.W.2d 883,

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885 (Mo. banc 1990); *accord Kansas City Royals Baseball Corp. v. Dir. of Revenue*, 32 S.W.3d 560, 563 (Mo. banc 2000) (stressing that the tax refund statute is only a "narrow waiver"). So the Kehlenbrinks cannot receive any relief under this statute unless the legislature first waived sovereign immunity for that kind of relief. Yet sovereign immunity can be waived only by an "*express* statutory exception." *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. banc 2016) (emphasis added); *accord F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) ("Any ambiguities in the statutory language are to be construed in favor of immunity . . . . Ambiguity exists if there is a plausible interpretation of the statute that would not authorize [relief] against the Government."). The Kehlenbrinks can obtain a refund only if the statute unambiguously entitles them to a refund.

The Director is thus doubly protected. A determination that the statute is ambiguous requires ruling in favor of the Director because of the longstanding rule that ambiguities in tax statutes are construed against the taxpayer, and also because allowing a taxpayer to sue to obtain relief not unambiguously provided by the statute would violate sovereign immunity.

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II. The Commission erroneously ruled that the Kehlenbrinks were entitled to a tax refund, because a regulation that is inconsistent with the text of the statute has no effect, in that the plain text of the statute allows taxpayers to credit only one sale against the purchase price of a replacement vehicle.

Because the Kehlenbrinks did not argue that the statute unambiguously granted an exception, this Court need not address the statutory interpretation issue. But if it does, the Director also is entitled to relief because section 144.025 unambiguously rejects the Kehlenbrinks' assertion that they are entitled to more than one credit. It allows a taxpayer to credit one—and only one—vehicle sale against the purchase price of a replacement vehicle. The four factors the Commission determined created ambiguity do not, in fact, create ambiguity. And the regulation the Commission identified does not apply because it is inconsistent with the statute.

A. The statute unambiguously allows taxpayers to credit only one vehicle sale against the purchase price of a replacement vehicle.

The Commission did not analyze the pertinent text. The Director argued that the Commission should follow its previous decisions and hold that the plain text—which allows a taxpayer to credit the value of "the original article" sold—prohibits crediting more than one sale against the purchase of a replacement vehicle. LF 14, App. 4. But instead of engaging this analysis, the Commission determined that the cumulative effect of four different factors

rendered the entire statute ambiguous: a different provision related to timing was ambiguous (according to the Commission), a third party told the Kehlenbrinks that the statute allowed them to credit more than one sale, the Department accepted the Kehlenbrinks' first attempt to do so, and the Department a decade ago promulgated a regulation that the Commission determined supported the Kehlenbrinks' argument. LF 14–15, App. 4–5.

Had the Commission began by considering the relevant text, as courts have instructed, *e.g.*, *State v. Wilson*, 55 S.W.3d 851, 852 (Mo. Ct. App. 2001), it would have been compelled to arrive at the same conclusion it arrived at many times before: the statute allows taxpayers to credit only one vehicle sale against the purchase price of a replacement vehicle.

The statute begins by explaining that taxpayers can credit against the price of a replacement vehicle 1) the value of an article they trade to obtain the replacement vehicle and 2) a rebate by the seller or manufacturer:

> [I]n any retail sale . . . where any article on which sales or use tax has been . . . satisfied or which was exempted . . . is taken in trade as a credit or part payment on the purchase price of the article being sold, the tax imposed . . . shall be computed only on that portion of the purchase price which exceeds the actual allowance made for the article traded in or exchanged . . . . Where the purchaser of a motor vehicle, trailer, boat or outboard motor receives a rebate from the seller or manufacturer, the tax imposed . . . shall be computed only on that portion of the purchase price which exceeds the amount of the rebate . . . . Where the trade-in or exchange allowance plus any applicable rebate exceeds the

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> purchase price of the purchased article there shall be no sales or use tax owed.

§ 144.025.1, RSMo, App. 8. The statute then states that taxpayers also can apply this credit when they sell a vehicle—instead of trading one—to obtain a replacement vehicle. *Id.* But the statute limits this credit to the single "original article" the taxpayer sold:

> This section shall also apply to motor vehicles, . . . sold by the owner . . . if the seller purchases or contracts to purchase a subsequent motor vehicle . . . within one hundred eighty days before or after the date of sale of the original article . . . .

§ 144.025.1, RSMo, App. 8.

This statute never contemplates allowing taxpayers to credit more than one vehicle sale. It instead provides that a taxpayer may credit only the value of "the original article." The legislature did not define that phrase, so this Court must look to relevant dictionary definitions. *Great S. Bank v. Dir. of Revenue*, 269 S.W.3d 22, 25 (Mo. banc 2008) ("When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary."). Dictionaries define "original" as "first" or "source." "'[O]riginal' means the absolute first or earliest." *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1338 (Fed. Cir. 2008) (citing 10 *Oxford English Dictionary* 933–34 (2d ed. 1989)). Black's Law Dictionary defines "original" as "first in order." *Original*, *Black's Law Dictionary* 1099 (6th ed. 1990). And the latest edition of the *Oxford English Dictionary* defines the term as "[b]elonging to the beginning or earliest

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stage of something; existing at or from the first; earliest, first in time." *Original*, *Oxford English Dictionary* (online) (last visited August 28, 2018). Because the statute allows a taxpayer to credit only the value of "the original article" against the replacement vehicle, and because only one vehicle sale can be "first" or "original," the taxpayer can credit only one vehicle sold to obtain a replacement vehicle.

For years, the Administrative Hearing Commission arrived at the same conclusion. The Commission here determined that whether the statute was ambiguous was "never decided" in previous decisions. LF 16, App. 6. Not so. More than a dozen times the Commission has reviewed the text of the statute and determined that it forecloses any attempt to credit more than one vehicle sale. Because dictionaries reveal that "'[o]riginal' means 'being the first instance or source,'" the Commission recently held, "[t]he reference to 'original article' indicates there can only be one. . . . The statute does not authorize any additional credit." *Waldeck v. Director of Revenue*, No. 13-1022 (Mo. Admin. Hearing Comm'n April 29, 2014). In at least sixteen other decisions in recent years, the Commission arrived at the same conclusion for the same reason.*

* *E.g.*, *Robinson v. Dir. of Revenue*, No. 16-2124 (Mo. Admin. Hearing Comm'n October 14, 2016); ("The reference to 'the original article' indicates that there can be only one."); *Claude and Brenda Parker v. Dir. of Revenue*, No. 15-1772 (Mo. Admin. Hearing Comm'n August 4, 2016) (same); *Voelkel v. Dir. of Revenue*, No. 13-1429 (Mo. Admin. Hearing Comm'n October 1, 2013) (same); *Hubbard v. Dir. of Revenue*, No. 12-2234 (Mo. Admin. Hearing Comm'n August

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The statute also fails to contemplate crediting more than one vehicle sale because the statute speaks in singular terms. A taxpayer may credit the value of "*the* sale of *the* original article" or "*the* article traded in." § 144.025.1, RSMo, App. 8 (emphases added). "The statute's use of the definite article 'the,' as opposed to the indefinite 'a,' 'an,' or 'any,' indicates that [the legislature] intended the term modified to have a singular referent." *In re Hawker Beechcraft, Inc.*, 515 B.R. 416, 428 (S.D.N.Y. 2014) (citation omitted). As the U.S. Supreme Court explained in the context of habeas law, "[t]he consistent use of the definite article in reference to the custodian indicates that there is generally *only one* proper respondent." *Rumsfeld v. Padilla*, 542 U.S. 426, 434

8, 2013) (same); *Keeling v. Dir. of Revenue*, No. 11-0698 (Mo. Admin. Hearing Comm'n July 15, 2011) (same); *Tricamo v. Dir. of Revenue*, No. 10-1935 (Mo. Admin. Hearing Comm'n May 26, 2011) (same); *Trovillion v. Dir. of Revenue*, No. 10-0629 (Mo. Admin. Hearing Comm'n January 10, 2011) (same); *Hulsey v. Dir. of Revenue*, No. 10-1043, 2010 WL 4779278 (Mo. Admin. Hearing Comm'n Oct. 14, 2010) (same); *Stallcup v. Dir. of Revenue*, No. 10-1391, 2010 WL 4656575 (Mo. Admin. Hearing Comm'n Oct. 6, 2010) (same); *Kieffer v. Dir. of Revenue*, No. 09-1584, 2010 WL 3781990 (Mo. Admin. Hearing Comm'n August 17, 2010) (same); *Lawrence v. Dir. of Revenue*, No. 08-1218, 2008 WL 5611792 (Mo. Admin. Hearing Comm'n Nov. 6, 2008) (same); *Bindner v. Dir. of Revenue*, No. 08-0475, 2008 WL 4183166 (Mo. Admin. Hearing Comm'n June 3, 2008) (same); *Edwards v. Dir. of Revenue*, No. 08-0609, 2008 WL 4183170 (Mo. Admin. Hearing Comm'n June 3, 2008) (same); *Parris v. Dir. of Revenue*, No. 08-0368 (Mo. Admin. Hearing Comm'n April 22, 2008) (same); *Stewart v. Dir. of Revenue*, No. 08-0066 (Mo. Admin. Hearing Comm'n April 22, 2008) (similar); *Revocable Trust of Robert and Eileen Munich v. Dir. of Revenue*, No. 08-0115 (Mo. Admin. Hearing Comm'n April 1, 2008) (same); *see also Kisling v. Dir. of Revenue*, No. 08-0316 (Mo. Admin. Hearing Comm'n May 23, 2008) (determining that the statute was ambiguous and construing that ambiguity against the taxpayer).

(2004) (emphasis added). The only time the statute uses the plural form is when providing that the taxpayer can choose from among any of his eligible vehicles, including "motor vehicles, trailers, boats, and outdoor motors," to designate as the "original article." § 144.025.1, RSMo, App. 8. But it never suggests that a taxpayer can select more than one original article.

Even more telling, the legislature expressly endorsed applying more than one credit elsewhere in the statute, just not where the Kehlenbrinks would like. Under the statute, a taxpayer may combine a credit for the trade-in value of the original article with a credit for a rebate offered by the seller or manufacturer of the replacement vehicle. § 144.025.1, RSMo, App. 8. But the legislature provided no other opportunity for asserting more than one credit. "It is well settled, in interpreting a statute, that the legislature is presumed to have acted intentionally when it includes language in one section of a statute, but omits it from another." *State v. Bass*, 81 S.W.3d 595, 604 (Mo. App. W.D. 2002). The legislature's decision to allow combining a trade-in credit with a rebate credit but to omit any language allowing combining credits for more than one vehicle establishes that taxpayers can apply one, and only one, credit for a vehicle sale against the purchase of a replacement vehicle.

To be sure, this negative-implications principle should be "used with great caution." *State ex rel. Hawley v. Pilot Travel Centers, LLC*, No. SC 96885, 2018 WL 3979467, at *6 (Mo. banc Aug. 21, 2018) (citation omitted). But this

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Court has applied that principle to this very statute. The statute allows taxpayers to credit a motor vehicle sale against the purchase of a replacement vehicle even if the taxpayer takes two different transactions to do so. But because this part of the statute mentions only "motor vehicles, trailers, boats, and outboard motors," and not aircraft, this Court held that the negative-implication rule barred a taxpayer from claiming a credit for an aircraft acquired using two successive transactions. *Loren Cook Co. v. Dir. of Revenue*, 414 S.W.3d 451, 454 (Mo. banc 2013).

B. None of the four factors the Commission determined created ambiguity undermine this plain text.

Ordinary methods of statutory construction—such as considering dictionary definitions and noticing the use of singular instead of plural language—render the text clear. So none of the four factors the Commission determined cumulatively created ambiguity were relevant. In any event, the Commission's analysis fails for each factor.

First, the Commission was wrong to determine that the separate timing provision in the statute helped create ambiguity. Instead of construing whether the term "original article" allowed a taxpayer to credit more than one vehicle sale, the Commission determined that a separate timing provision was ambiguous. That part of the text allows a taxpayer to credit a sale against the purchase price of "a *subsequent* motor vehicle . . . within one hundred eighty

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days *before or after* the date of the sale of the original article." § 144.025.1, RSMo, App. 8 (emphases added). The Commission determined that the time constraints in the statute were ambiguous because the statute uses both the terms "before" and "subsequent" to refer to the replacement vehicle. LF 14–15, App. 4–5.

That determination makes no difference to the relevant question. Whether the statute is ambiguous about the timing of credits has no bearing on the number of credits a person can apply. Ambiguity in one part of a section does not undermine the whole section. The timing provision, moreover, is not ambiguous; the statute merely uses a less common meaning of the term "subsequent." Although "subsequent" can refer to a later-in-time event, dictionaries define "subsequent" as "following in time, order, or *place*." *Subsequent*, *Webster's New Collegiate Dictionary* 1152 (1981) (emphasis added). Here, the legislature used the term "subsequent" to refer not to a vehicle purchased after another vehicle is sold, but to a vehicle purchased to take the "place" of another. Because this Court presumes that the legislature drafts legislation rationally, *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. banc 1999), the Court should adopt this meaning of the term "subsequent" instead of the meaning the Commission ascribed to the statute. This term is consistent with the rest of the statute, which contemplates providing a tax credit when replacing one vehicle with another.

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The provision allowing taxpayers to purchase a replacement vehicle before selling the vehicle to be replaced simply gives taxpayers greater transactional flexibility.

Second, the Commission noted that a license office employee believed that the Kehlenbrinks could credit more than one vehicle sale against their purchase. LF 15, App. 5. But "the mere fact that [people] disagree over the meaning of [a word] does not render the statute ambiguous." *J.B. Vending Co. v. Dir. of Revenue*, 54 S.W.3d 183, 188 (Mo. banc 2001). Otherwise virtually every statute would be ambiguous. Courts cannot find ambiguity without first considering ordinary tools of construction, such as considering a term in context, *id*., or reviewing dictionary definitions, *Great S. Bank*, 269 S.W.3d at 25; *accord Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth*., 539 F.3d 199, 210 (3d Cir. 2008) (declaring that courts should apply the canon against superfluity *before* deciding whether a statute is ambiguous). Nothing in the record suggests that the license office employee with whom the Kehlenbrinks spoke ever picked up a dictionary to look up the meaning of "original article." Indeed, nothing shows that he even read the statute.

Third, the statute is not ambiguous simply because the Department erroneously processed the Kehlenbrinks' documents the first time they tried to credit two vehicle sales against the purchase price of their vehicle. "The incidence of taxation is determined by law, and the Director of Revenue and

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subordinates have no power to vary the force of the statutes." *Lynn v. Dir. of Revenue*, 689 S.W.2d 45, 49 (Mo. banc 1985). The Internal Revenue Service, for example, cannot detect and correct every error in every single tax return filed, and its occasional acceptance of some improper claims for tax credits or refunds does not change the force of any statute denying a credit or refund.

Fourth, a regulation passed pursuant to a statute cannot itself render that statute ambiguous. As many courts have held, "it is improper to use the [agency] regulations themselves to determine [legislative] intent." *E.g.*, *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 479 (5th Cir. 2002). "It is only *after* . . . determining that [the legislature's] intent is ambiguous, that [courts] would then proceed to consider the [agency's] regulations . . . ." *Id.*; *accord Conner v. Office of Pers. Mgmt.*, 104 F.3d 1344, 1347 (Fed. Cir. 1997) ("We hold that section 8402 is not ambiguous and should be read according to its clear language; thus, under *Chevron*, we need not consider OPM's regulation.").

C. The Commission could not apply the regulation to rule in the Kehlenbrinks' favor.

The Commission, having determined that the statute was ambiguous, determined that the Kehlenbrinks were entitled to relief under a regulation promulgated in 2005. LF 16, App. 6. That regulation purports to clarify the statute at issue and states that a person can credit a vehicle sale against a purchase price "[i]f a person purchases or contracts to purchase a motor vehicle

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or trailer and sells one (1) or more motor vehicles." 12 CSR 10-103.350(3)(G). The Commission's decision to apply this regulation was erroneous.

Under no circumstance could the Commission apply a putatively clarifying regulation in favor of a taxpayer. A court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous." *Packard v. Comm'r*, 746 F.3d 1219, 1222 (11th Cir. 2014) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). So the Commission could not even apply a clarifying regulation without first finding ambiguity. *See, e.g.*, *id.* But as explained above, as soon as the Commission determined that the statute was ambiguous, it was required to rule for the Director.

Further, nothing in the statute allows taxpayers to credit more than one vehicle sale when titling the replacement vehicle. The Commission could not apply the regulation because, when a "regulation is inconsistent with the statute," as the Commission said this one is, "it is the statute, not the regulation, that this Court will apply." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. banc 2014).

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CONCLUSION

The decision of the Commission should be reversed, and judgment should be entered in favor of the Director.

September 19, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on September 19, 2018, to all counsel of record. The undersigned further certifies that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 6,522 words.

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