

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 RESPONDENT

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JURISDICTIONAL STATEMENT

Respondents adopt the jurisdictional statement set forth by Appellant.

Appellant's brief does not contain a "Statement of Facts" or similar section which substantially complies with Rule 84.04, including the requirement that such statement present the "facts relevant to the questions presented for determination without argument." Rule 84.04(c). Pursuant to Rule 84.04(f), Respondents submit the following Statement of Facts.

STATEMENT OF FACTS

Respondents David and Jill Kehlenbrink purchased a 2016 Dodge truck for \$27,495.00 on March 14, 2017. (L.F. 12). Within a period of 180 days before the purchase of that Dodge truck, Respondents sold two other motor vehicles for the sum total of \$14,400.00. (L.F. 12). Within 180 days after the purchase of that Dodge truck, Respondents sold two other motor vehicles for the sum total of \$13,600.00. (L.F. 12)

On March 31, 2017, Respondents titled the Dodge truck and received a credit of \$14,400.00 against the purchase price of said Dodge truck for purposes of calculating sales tax. (L.F. 12). This \$14,400.00 credit was from the sale of two separate motor vehicles within the 180-day period prior to the purchase of the Dodge truck and was willingly allowed by the Appellant. (L.F. 12).

At the time of titling the Dodge truck, Appellant's agent, Devon Knupp, informed Respondents that they were allowed to claim additional sales tax credits against the purchase price of the Dodge truck for vehicles sold after said purchase. (L.F. 7, 12). On June 6, 2017, Respondents applied for a refund of sales tax paid at the time of titling the 2016 Dodge based upon the sum total sales proceeds (\$13,600.00) of two separate motor vehicle sales which occurred within the 180-day period after the purchase of the Dodge

truck. (L.F. 12). The sum total of sales for the four vehicles sold by Respondents within the applicable period exceeded the purchase price of the Dodge truck. (L.F. 12). On July 7, 2017, Appellant denied Respondents' application for sales tax refund. (L.F. 5, 13).

Respondents timely appealed Appellant's denial pursuant to the language of §144.025.1 RSMo. and 12 C.S.R. 10-103.350(G), to the Administrative Hearing Commission. (L.F. 1-7). After hearing on the record, the Commission reversed Appellant's denial and awarded Respondents their tax refund plus interest at the statutory rate. (L.F. 11-17). The Commission found §144.025.1 to be ambiguous on its face, but found that the Director's own regulation, 12 C.S.R. 10-103.350(3)(G), "provided clarity to the statute". (L.F. 16).

ARGUMENT

- I. The Commission did not err in ruling for the Respondents because the ambiguity present in §144.025 was clarified by the Director’s own State regulation, and Respondents met their burden to show they were entitled to a tax refund.**

Appellant essentially argues that because the Administrative Hearing Commission found an ambiguity in §144.025, Appellant was automatically entitled to succeed in the administrative tribunal. Appellant specifically states: “[o]nce the Commission determined that section 144.025 was ambiguous, the Commission was required to rule for the Director.” Appellant’s brief, p. 16. Despite Appellant’s correct assertion that statutes creating exemptions from taxation are strictly construed against the taxpayer, this rule does not stand for the proposition that the tribunal should dispense with all standard principles and procedures of statutory interpretation to actually identify the legislature’s intent, construct the meaning of the statute, and determine the most reasonable interpretation of the ambiguity.

In reference and response to Appellants Point I., we assume, as does the Appellant, that §144.025 is ambiguous. The question for determination, then, is whether Respondents are entitled to succeed in light of that ambiguity.

“Statutes granting exemptions from taxation are strictly, *but reasonably*, construed against the party claiming the exemption.” (Emphasis added). *Rollings v. Shipman*, 341 S.W.3d 777 (Mo. App. E.D. 2011), citing *United Cerebral Palsy Ass’n of Greater Kansas City v. Ross*, 789 S.W.2d 798 (Mo. banc 1990). “When interpreting a statute, the primary goal is to give effect to the legislative intent as reflected in the plain language of the

statute.” *Stiers v. Director of Revenue*, 477 S.W.3d 611 (Mo. banc 2016). If the text of the statute is ambiguous, canons of construction should be used to identify the legislature’s intended outcome. *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670 (Mo. banc 2009). Missouri courts have examined statutes and the corresponding agency regulations together in order to determine legislative intent. See generally, *Stockham v. Missouri Department of Agriculture*, 87 S.W.3d 303 (Mo. App. W.D. 2002); *Spurgeon v. Missouri United Health Care Plan*, 549 S.W.3d 465 (Mo. App. W.D. 2018).

In *Stockham*, the Court sought to interpret statutes and regulations related to the Uniform Classification and Pay System (“UCP”) to determine whether the plaintiff’s employer, a state agency, violated their own regulation adopting UCP statutes. *Stockham v. Missouri Department of Agriculture*, 87 S.W.3d 303 (Mo. App. W.D. 2002). The court impliedly determined that an ambiguity existed in the law when they consulted the stated purpose of the regulation to resolve the issue at hand. *Id.*, 87 S.W.3d at 309. “In this case, the legislative intent of the UCP statutes and regulation is clear *in light of the UCP’s purposes*”. (Emphasis added.) *Id.* “The UCP statutes and regulation indicate that the purpose of the UCP classifications is not just to equalize pay.” *Id.* The court went on to examine the text of the regulation in order to identify the legislative intent on two separate points which ultimately informed their holding. *Id.* *Stockham* supports Respondents’ argument that, even when finding an ambiguity in the statute, the Court is not immediately relieved of the duty to determine legislative intent; employment of traditional procedures of statutory interpretation, including reference to regulations, is required.

Appellant relies heavily on *Fidelity Security Life v. Director of Revenue*, 32 S.W.3d 527 (Mo. banc 2000), for the proposition that a quick and easy decision in favor of the Director should be made when an ambiguity is identified. *Fidelity* is not instructive to the instant case for several reasons. First, *Fidelity* did not deal simply with the issue of whether the taxpayer was entitled to a tax deduction or credit under the statute as a basic rule, but whether a deduction surplus from deductions the taxpayer was already entitled to, could be carried over to the next year. *Id.*, 32 S.W.3d at 529. This difference is important because the taxpayer in *Fidelity* was already clearly entitled to the deduction in the year in which it was earned and was attempting to obtain a carry-over deduction despite the legislature's specific choice not to provide carryover language in the statute. *Id.*, 32 S.W.3d at 529. "The General Assembly authorizes the carry-over of a deduction, exemption or credit by including language to that effect...and because the legislature knows how to provide for a carry-over if such is its intent but did not do so here, this Court finds that *Fidelity* is not entitled to carry forward the unused deduction." *Id.*, 32 S.W.3d at 529.

Second, the statute at issue in *Fidelity* did not have a companion State regulation with which to compare *in pari materia*, something the court could otherwise have done during evaluation of the ambiguity it found. The court in *Fidelity* did not find an ambiguity and simply skip to a holding in favor of the taxing authority as Appellant suggests. The court applied principles of statutory interpretation which ultimately informed their construction of the statute in favor of the agency. *Fidelity* does not stand for the proposition that all principles of statutory interpretation shall be abandoned when an ambiguity is found.

Here, the state agency, Appellant, has promulgated its own regulation which provides clarity to the statute in no uncertain terms. As the Commission correctly noted in its Decision, at one time, the Appellant clearly agreed with Respondents' position that they are entitled to claim a credit for more than one vehicle sold. (L.F. 6). The Appellant promulgated a regulation, 12 CSR 10-103.350, which became effective on March 30, 2006. (L.F. 6). The text of this regulation allows for application of more than a single credit in its plain language:

(G) If a person purchases or contracts to purchase a motor vehicle or trailer and ***sells one (1) or more motor vehicles*** or trailers within one hundred eighty (180) days before or after the purchase or contract to purchase, the person owes tax on the difference between the purchase price and the sale price of the respective motor vehicles or trailers. If the person paid the full amount of the tax on the purchase, the person may obtain a refund of the excess tax paid.

(Emphasis added.)

Further, Appellant's stated purpose for the regulation is as follows: "PURPOSE: This rule explains the application of sales tax on the sale of motor vehicles as it relates to sections ... 144.025.1". 12 CSR 10-103.350. "The rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them." *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579 (Mo. banc 2013) citing *State ex rel. Martin-Erb v. Missouri Com'n on Human Rights*, 77 S.W.3d 600 (Mo. banc 2002). Additionally, the Commission's prior decisions have no precedential authority. *Central Hardware Co. v. Director of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994).

For reasons not entirely clear, the Appellant now wishes to abandon the plain language of its own regulation which provides inarguable clarity to the statute at issue. Appellant's repetitive reliance on prior Administrative Hearing Commission decisions, many of which are off-point, none of which presented the AHC with arguments related to the ambiguity of §144.025 and the clarity of Appellant's regulation, is unpersuasive and irrelevant. Instead, assuming an ambiguity in the statute, the Commission and this Court should follow established principles of statutory interpretation. Interpretation in this case should involve examining the plain language of the agency regulation intended to provide clarity to the subject statute. The regulation, as noted by the Commission, provides such clarity. Therefore, the ambiguity should be resolved in favor of Respondents. These issues, in addition to the "four factors" cited by the Commission and discussed at length below, demonstrate that Respondents have met their burden of showing that they are entitled to an exemption.

Last, Appellant briefly argues that Respondents cannot obtain a refund even if the statute entitles them to it. Appellant asserts that no Missouri statute allows refund for the tax erroneously collected from Respondents. This argument is unpersuasive in light of §144.190, which holds in pertinent part: "If any tax ... has been erroneously ... collected, ... the balance, with interest as determined by section 32.065, shall be refunded to the person". §144.190(2). Since a specific and unambiguous statute in the same chapter as the statute at issue, §144.025, unambiguously authorizes a refund, §144.025 does not need to do so duplicatively. Respondents are entitled to a refund plus interest.

In its first Point, Appellant improperly equates strict construction to automatic victory. In doing so, Appellant ignores established principles of statutory interpretation, the Commissioner's explanation of his ruling and, most interestingly, the *Appellant's own* state regulation which supports Respondents' position. Principles of statutory interpretation, the regulation, its purpose, and the "four factors" set forth below, illustrate that Respondents have met their burden of proof and are entitled to a refund of taxes erroneously collected by Appellant.

II. The Commission did not err in ruling for Respondents because §144.025 is ambiguous, is clarified by principles of statutory interpretation, and the Director's regulation was not inconsistent with the text of §144.025.

In its second point relied upon, Appellant argues that §144.025 is unambiguous both on its face and when considering extrinsic factors relating to the ability of persons of ordinary intelligence to find its meaning plain and clear. Appellant argues that the Commission could not apply Appellant's regulation since the regulation is inconsistent with the statute. Appellant's arguments are misplaced. §144.025 is ambiguous and is not inconsistent with the Appellant's regulation. In fact, it stands to reason that an ambiguous statute cannot be inconsistent with a definite regulation because its ambiguous nature places the meaning of the statute in question and subject to more than one interpretation. Because the statute is ambiguous, it is not inconsistent, but rather, clarified by the Director's state regulation. Examination of the Director's regulation and the clarity it provides to the statute should result in a finding that Respondents are entitled to the refund.

As this matter is reviewed de novo, neither the Court or the parties are constrained by the rulings and arguments set forth by the Commission. Therefore, Respondents believe

that evidence of ambiguity exists even in excess of the “four factors” cited by the Commission, including reference to the “original article” as relied upon by Appellant.

A. §144.025 is ambiguous in its plain language and when considering extrinsic factors.

Appellant argues that the statute at issue is unambiguous in its plain language and that the four factors cited by the Commission in its ruling do not undermine the plain language of the text. Respondents address the arguments advanced by Appellant in subsections A. and B. of their second point relied on simultaneously herein.

Courts hold that a statute is unambiguous if a person of ordinary intelligence would find its meaning plain and clear. See *Wolff v. Dir. Of Revenue*, 762 S.W.2d 29 (Mo. 1988). Courts have also found statutes to be ambiguous when the “plain language does not answer the current dispute as to its meaning, or when there is duplicity, indistinctness or uncertainty of meaning.” *J.B. Vending Co. v. Dir. Of Revenue*, 54 S.W.3d 183 (Mo. 2001). A text is ambiguous only if its language “is subject to more than one reasonable interpretation.” *State v. Liberty*, 370 S.W.3d 537 (Mo. banc 2012).

The canons of interpretation applicable to this case include the “ordinary meaning” canon: “The principle of common sense requires that courts shall understand words as other people would” and other people would not assume that a word bears “a meaning radically different from that which normally attaches to it without some explanation.” *Id.*, 370 S.W.3d 537 at 549; *State v. Plotner*, 222 S.W. 767, 770 (Mo. 1920); Matthew Davis, *Statutory Interpretation in Missouri*, 81 Mo. L. Rev. (2016). The “conjunctive/disjunctive” canon: “And” ordinarily bears its conjunctive sense and means “along with or together

with”. *Stiers v. Director of Revenue*, 477 S.W.3d 611 (Mo. banc 2016). And the “whole text” and “presumption of consistent usage” canons: “Ambiguous statutory language should be read in light of the entire statute as opposed to isolation, and courts presume that a particular word or phrase bears the same meaning throughout a statute.” Matthew Davis, *Statutory Interpretation in Missouri*, 81 Mo. L. Rev. (2016) citing *St. Louis City v. Prestige Travel, Inc.*, 344 S.W.3d 708, 714 (Mo. banc 2011); *Nelson v. Crane*, 187 S.W.3d 868, 870 (Mo. banc 2006).

§144.025.1 is ambiguous in its plain language not only in the manner identified by the Commission related to the use of “subsequent” and “before or after”, but also its use of a singular term in direct reference to a plural term. The legislature also used these plural terms in reference to the “original article” when it had specifically chosen to use singular terms in a preceding portion of the same statute. In pertinent part, the statute states:

Where the purchaser of ***a motor vehicle, trailer, boat or outboard motor*** receives a rebate from the seller or manufacturer, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price which exceeds the amount of the rebate, if there is a bill of sale or other record showing the actual rebated given by the seller or manufacturer. ... This section shall apply to ***motor vehicles, trailers, boats and outboard motors*** 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 the sale of the ***original article*** and a bill of sale showing the paid sale price is presented to the department of revenue at the time of licensing.

(Emphasis added) §144.025.1 RSMo.

Appellant relies only on the definition of “original article”, its singularity, and repeated references to nonbinding prior Administrative Hearing Commission decisions, to flatly conclude that this term means that only one credit may be applied. Appellant ignores

the fact that the singularity of “original article” actually creates an ambiguity in and of itself. This singular term refers directly to a plural and conjunctive phrase: “motor vehicles, trailers, boats and outboard motors”. Moreover, the legislature specifically chose to use this plural and conjunctive phrase when it had the option to use a singular and disjunctive phrase which it had specifically used at a prior point in the statute: “a motor vehicle, trailer, boat, or outboard motor.” Although the prior phrase references the item purchased as opposed to the item sold, verbatim use of the singular and disjunctive phrase in the portion of the statute referenced by “original article” would have absolutely accomplished the result which Appellant argues for. Instead, the legislature specifically chose to use a plural and conjunctive phrase. This choice evidences both an ambiguity as well as an ambiguity which can be resolved *in favor* of Respondents. Viewing the statute in light of our mandatory principles of statutory interpretation, an ambiguity is evident. Interestingly and alternatively, even if this Court disagrees and finds no ambiguity in the differing uses of singular and plural phrases, the unambiguous language favors Respondents for the reason set forth herein.

Further evidence exists to inform us as to the legislature’s intent to allow more than one credit.

Prior versions of §144.025.1 utilized the following language: “This section shall also apply to motor vehicles, ... sold by the owner if the seller purchases ... a **replacement motor vehicle** ... before or after the date of the sale of the original article”. See generally, 1998 Mo. Legis. Serv. S.B. 936 (Vernon’s). In 1998, the legislature replaced “replacement motor vehicle” with “subsequent motor vehicle”. *Id.* The word “replacement” more closely

indicates a one-for-one scenario where the owner sells one motor vehicle and *replaces* it with another. The legislature's choice to remove this word and put a different word in its place evidences their intent to allow more than one credit. Appellant fails to consider this clear evidence of legislative intent.

Next, Appellant argues that the "four factors" cited by the Commission to determine ambiguity do not actually create such an ambiguity. The Director inaccurately and without basis other than prior nonbinding AHC decisions continually argues that the Commission failed to first consider the language of the statute before finding ambiguity. "The Director argued that the Commission should follow its previous decisions and hold that the plain text ... prohibits crediting more than one sale against the purchase of a replacement vehicle." See Appellant's Brief, p. 20. Appellant repeatedly claims that the "original article" phrase is plain and clear in its favor without reasoning or support. The number of times the Commission has agreed with that argument in cases where taxpayers do not advance evidence related to statutory interpretation, the Director's regulation, and extrinsic factors, is irrelevant and nonbinding. The Commission, in this case, finally reached the proper conclusion. Appellant fails to provide any arguments in excess of those points.

Contrary to Appellant's argument, the Commission did consider the plain language of the text in the context of the contradicting terms "subsequent" and "before or after"; "[T]he Director does not argue this point." (L.F. 4-5). Now that the Director has lost based partially on this argument, it pays more attention to the issue. Perhaps the Director failed to argue this point to the Commission because its only argument presented actually undermines the rest of its brief. While Appellant correctly encourages this Court to assign

the plain and ordinary meaning of words contained at other points in the text of the statute, with respect to “subsequent”, it now urges this Court to reach and adopt an uncommon meaning of the term: “place”. Although the meaning of “subsequent” may sometimes be used in this manner, it is certainly not the plain and ordinary meaning of the word. Even more persuasive, had the legislature intended “subsequent” to mean “take the ‘place’ of another”, as Appellant argues, it would not have removed the original term in the statute which actually takes on that plain and ordinary meaning: “replacement”. 1998 Mo. Legis. Serv. S.B. 936 (Vernon’s). If one adopts Appellant’s argument regarding the meaning of “subsequent”, one must also find that the language is subject to more than one reasonable interpretation, thereby creating an ambiguity. The Commission did review the text of the statute and found an ambiguity. Appellant’s choice not to argue that issue during the Commission proceedings does not render the Commission’s decision improper or unsupported.

Last, Appellant fails to consider extrinsic factors which clearly support the most basic test for ambiguity: whether a person of ordinary intelligence would find the meaning plain and clear. Appellant shrugs off the fact that its own agent failed to understand the agency’s purported meaning of the statute, choosing to question whether this person of presumably ordinary competence and intelligence “ever picked up a dictionary”. See Appellant’s Brief, p. 28. While this extrinsic factor may not provide *prima facie* evidence of an ambiguity, it need not do so. It does, inarguably, provide highly persuasive evidence that persons of ordinary intelligence do not find the meaning of §144.025 plain and unambiguous. The same persuasive effect is possessed by the Commission’s third factor:

that the Appellant had already allowed Respondents to apply credits of more than one vehicle sale to offset the taxes owed on the 2016 Dodge. The fourth factor, Appellant's regulation, has been addressed at length above, and is once again discussed below.

Overall, applying principles of statutory interpretation and reviewing the text of the statute and extrinsic evidence identified, there exists sufficient evidence to find an ambiguity within §144.025. The Commission did not err in ruling as such.

B. Appellant's regulation is not inconsistent with the statute and it was not improper to review that regulation with the statute.

Appellant argues that the Commission erroneously found that Respondents were entitled to relief as the result of Appellant's regulation, and that such consultation of the regulation was erroneous because the regulation is inconsistent with the statute. This argument is misplaced for several reasons. Respondents do not contend that the regulation supersedes the statute. Rather, when an ambiguity in the statute is found, this Court and others have the opportunity and obligation to consult the companion regulation. Appellant improperly argues that the Commission found that the regulation is inconsistent with the statute. See Appellant's Brief, p. 30. To the contrary, the Commission found that the regulation "provides clarity to the statute" and specifically disagreed with Appellant's argument that the regulation was contrary to the plain language of §144.025. (L.F. 16).

In light of the fact that 12 CSR 10-103.350 remains a regulation in force in this State, and one that the Director has apparently taken no steps to withdraw, it is compelling that the agency now seeks to completely abandon the regulation and its plain meaning. In refusing to allow the Director to invalidate its own regulation, the Commission

appropriately noted that: “the Director has preserved the right to argue before the Supreme Court why he has not rescinded a regulation that he believes is contrary to the statutes.” (L.F. 16). In its brief before this Court, the Appellant continues to avoid such explanation, choosing to rely only repetitive vague references to principles of statutory interpretation.

As noted above, it is difficult to imagine how an ambiguous statute could be “inconsistent” or “contrary” to a regulation. If the statute is ambiguous, it could reasonably be understood to have more than one meaning and/or an overall meaning which is indiscernible or unclear. Appellant provides no argument related to how (or why) its own regulation is inconsistent or contrary to the statute. If a finding of ambiguity is made, inconsistency with the regulation is impossible.

Appellant’s argument is based on a finding which the Commission did not make. Appellant does not advance any argument with respect to how the regulation is inconsistent or contrary to the statute, or why he has not withdrawn it. The Director’s regulation provides clarity to an ambiguous statute. Ruling in favor of Respondents should be sustained.

CONCLUSION

The decision of the Commission should be sustained, and judgment should be entered in favor of Respondents.

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 November 6, 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 4637 words.

/s/ Scott D. Kehlenbrink