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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

REPLY BRIEF OF APPELLANT

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is an open-and-shut appeal because the taxpayers' argument is self-defeating. The taxpayers vigorously assert that the tax-credit statute is ambiguous about whether a person can obtain more than one tax credit, and they assert that "the ambiguity should be resolved in favor of Respondents." Resp. Br. 12. But they misunderstand that this Court's precedent requires the exact opposite: all ambiguities in tax-credit statutes must be "resolved in favor of taxation." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. banc 2014). The only way the taxpayers could prevail is by proving that the statute unambiguously grants them a credit, but they have conceded that they cannot meet that burden. This Court should reverse.

Reversal is also warranted because the statute unambiguously grants only one tax credit. The Commission has never determined that the text is ambiguous. Just the opposite. At least seventeen times, the Commission has held that the text unambiguously grants only one tax credit. The Commission here did not disagree. It instead held that "extrinsic factors" apart from the text could inject ambiguity into the text. This Court has rejected that argument. Whether a statute is ambiguous depends on the text alone.

The taxpayers argue that the text alone is ambiguous because the statute grants a taxpayer a credit only for the value of "the original article" sold, singular, but then references elsewhere in the same sentence "motor

vehicles," plural. The Commission has never adopted that argument and for good reason. The text simply recognizes that a taxpayer may choose one "original article," singular, from an array of many vehicles, plural. The bare fact that some words are singular and others plural does not create ambiguity when the operative word that grants a tax credit is singular, as even the taxpayers admit.

ARGUMENT

I. The Commission could not resolve ambiguity in favor of the taxpayers because ambiguities must be "resolved in favor of taxation."

Fatally undermining their case, the taxpayers repeatedly assert that section 144.025 is ambiguous. Resp. Br. 13–20. That assertion is self-defeating because this Court's precedent makes clear that whenever a statute about tax credits or exemptions is ambiguous, that ambiguity must "be resolved in favor of taxation." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 125 (Mo. banc 2014); *accord, e.g.*, *Loren Cook Co. v. Dir. of Revenue*, 414 S.W.3d 451, 453 (Mo. banc 2013) ("[D]oubts are resolved in favor of applying the tax.").

The taxpayers misunderstand this well-established law. They concede that ambiguities must be resolved "against the party claiming the exemption." Resp. Br. 8 (quoting *Rollings v. Shipman*, 341 S.W.3d 777, 780 (Mo. App. E.D. 2011)). Yet they immediately contradict this concession by asking this Court to "determine the most reasonable interpretation of the ambiguity" and resolve

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ambiguity "in *favor* of Respondents" if they present a better reading of the statute. Resp. Br. 8, 12 (emphasis added). That contradiction reveals that they simply misunderstand the case law. For tax credit statutes, it does not matter which side has the more reasonable interpretation. If a plausible interpretation favors taxation, this Court resolves any ambiguity "in favor of taxation" regardless of the strength of competing interpretations. *Union Elec. Co.*, 425 S.W.3d at 125.

Contrary to the taxpayer's assertions, the Director does not take the position "that Respondents cannot obtain a refund even if the statute entitles them to it." Resp. Br. 12. The taxpayers can prevail only by presenting "clear and unequivocal proof" that the only plausible interpretation of the statute entitles them to a refund. *Union Elec. Co.*, 425 S.W.3d at 125. But they have not met that burden. In fact, by arguing that the statute is ambiguous, they have conceded that they cannot meet that burden.

The taxpayers do not, because they cannot, cite any case supporting their position. Each of the two cases they cite where they contend that courts resolved ambiguities by looking to clarifying regulations is inapt on its face because neither is a tax case. Resp. Br. 9 (citing *Stockham v. Mo. Dep't of Agric.*, 87 S.W.3d 303 (Mo. App. W.D. 2002); *Spurgeon v. Mo. United Health Care Plan*, 549 S.W.3d 465 (Mo. App. W.D. 2018)). Outside the tax context, courts choose among better plausible interpretations when the text is ambiguous, and

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they sometimes rely on clarifying regulations to do so. But courts do not choose among competing interpretations when considering arguments that a revenue statute creates a tax credit. Instead, all ambiguities "are resolved in favor of applying the tax." *Loren Cook Co.*, 414 S.W.3d at 453.

Nor do the taxpayers respond to the argument that their request conflicts with settled law on sovereign immunity. The rule that all ambiguities about tax credits are resolved in favor of taxation is rooted in considerations of sovereign immunity because the statute allowing the taxpayers to apply for a refund of taxes is a limited waiver of sovereign immunity. Appellant Br. 18–19 (citing cases). So the taxpayers cannot prevail without showing that the legislature unambiguously granted them a tax credit. "[T]he state's sovereign immunity," this Court has held, "shields it from refunding taxes voluntarily paid, even if illegally collected" unless the legislature has plainly and unambiguously waived that immunity. *Insurance Co. of State of Pa. v. Dir. of Revenue*, 269 S.W.3d 32, 36 (Mo. banc 2008). And the universal rule, which the taxpayers make no attempt to rebut, is that courts "must narrowly construe waivers of sovereign immunity in favor of the sovereign and *resolve any ambiguities* in its favor." *E.g.*, *Rutten v. United States*, 299 F.3d 993, 995 (8th Cir. 2002) (emphasis added).

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II. The statute allows taxpayers to credit only one sale against the purchase price of a replacement vehicle, and no "extrinsic factor" can inject ambiguity.

This Court's case law makes clear that the only way the taxpayers could prevail is if they proved that section 144.025 unambiguously grants them more than one credit. *Union Elec. Co.*, 425 S.W.3d at 125. But they have not made that argument. They make only the self-defeating argument that the statute is ambiguous. That argument is incorrect. The statute unambiguously grants taxpayers only one credit. This unambiguous meaning provides this Court with an additional, independent basis to reverse.

The relevant text is straightforward. The statute provides that a taxpayer can obtain a credit only for the value of "the original article" sold. § 144.025, RSMo, App. 8. The taxpayers admit that "the original article" is a "singular term." Resp. Br. 16. Dictionaries and case law confirm the same. Appellant Br. 22–23. This term is clear enough that the Commission has held at least seventeen times that this phrase unambiguously grants taxpayers only one credit. Appellant Br. 22–24 (citing cases). The Commission in this case did not disagree. Unlike its previous decisions, it declined to interpret the text alone and instead held that extrinsic factors such as the regulation injected ambiguity into the text, even if the text, read alone, would have been unambiguous. LF 14–15, App. 4–5.

Like the Commission, the taxpayers argue that even unambiguous text can be rendered ambiguous when considered in the light of "extrinsic factors." Resp. Br. 14–19. But this Court's precedent rejects that position. Ambiguity is determined by the text of the pertinent provision alone, not factors extrinsic to that text. *E.g.*, *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[I]nquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citing cases). The taxpayers heavily rely, for example, on the regulation that they assert allows for more than one credit. They contend that this extrinsic regulation injects ambiguity into the text. Resp. Br. 11. But under this Court's precedent, "a statute cannot be made ambiguous by administrative interpretation." *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). The Commission could only "ascertain the intent of the legislature from the language used." *Id.*; *accord Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009) ("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."). None of the four "extrinsic factors" identified by the Commission and the taxpayers can inject ambiguity into the statutory text.

For this reason, the taxpayers' arguments about the separate timing provision in the same statute are irrelevant. The taxpayers argue, and the Commission determined, that the timing provision was ambiguous because it

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allows a taxpayer to credit a sale against the purchase price of "a *subsequent* motor vehicle . . . within one hundred eighty days *before or after* the date of the sale of the original article." Resp. Br. 17; App. 4–5 (citing § 144.025.1, RSMo, App. 8 (emphases added)). Although that provision lies within the same statute, the timing provision has nothing to do with the separate provision that concerns the number of credits available. Indeed, the taxpayers admit that the provision is just another "extrinsic factor" that they assert can externally taint the pertinent text. Resp. Br. 14, 17. Because that provision is extrinsic to the provision that creates a tax credit for the value of "the original article," it is irrelevant.

The taxpayers also argue that, even without considering extrinsic factors, the pertinent sentence of the statute that concerns the number of possible tax credits is ambiguous because it includes both singular and plural terms, but that argument also fails. The Commission has never strayed from its consistent holding, in at least seventeen decisions, that the text, considered alone, is unambiguous. Appellant Br. 22–24. The taxpayers dismiss this unbroken line of interpretations as "irrelevant" and insist that the phrase "the original article" itself "actually creates an ambiguity." Resp. Br. 16–17. They assert that the pertinent text is ambiguous because the statute grants a taxpayer a credit only for the value of "the original article" sold, singular, but then includes earlier in the same sentence the plural phrase "motor vehicles,

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trailers, boats and outboard motors." Resp. Br. 16.* But juxtaposition of plural and singular terms in the same sentence does not by itself create ambiguity. The taxpayers overlook that these two phrases operate differently. The phrase "original article" refers to the item sold that grants a taxpayer a credit. The plural phrase "motor vehicles, trailers, boats and outboard motors" refers not to the item sold, but the class of items eligible to be sold. In other words, the statute recognizes that the taxpayer can pick from many different kinds of vehicles, plural, but that he must choose only one "original article."

* The pertinent text states:

> This section shall also apply to motor vehicles, trailers, boats, and outboard motors sold by the owner or holder of the properly assigned certificate of ownership if the seller purchases or contracts to purchase a subsequent motor vehicle, trailer, boat, or outboard motor within one hundred eighty days before or after the date of the sale of the original article . . . .

§ 144.025.1, RSMo, App. 8.

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CONCLUSION

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

November 30, 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 November 30, 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 1,867 words.

/s/ *Joshua M. Divine*
Deputy Solicitor

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