

Before the  
Administrative Hearing Commission  
State of Missouri



THE SEYMOUR BANK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 13-1606 RF
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

**DECISION**

We grant the motion for summary decision of the Director of Revenue (“the Director”). The Director is not obligated to refund the overpayments made by the Seymour Bank (“the Bank”) of the “7% tax” imposed by § 148.030.2(2).<sup>1</sup>

**Procedure**

The Bank filed its complaint on September 6, 2013, seeking this Commission’s redetermination of the Director’s final decision denying its claim for a refund of taxes it paid. The Director filed an answer on September 23, 2013, and a motion for summary decision on December 2, 2013. The Bank responded to the motion on December 31, 2013, and the Director filed a response to the Bank’s response on January 13, 2014.

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<sup>1</sup> The 7% tax is a franchise tax imposed by § 148.030.2(2) on banking institutions. See “Statutory and Regulatory Structure” under “Analysis” below. At all relevant times, the Director’s bank franchise tax return form calculated a bank’s obligation under both the 7% tax and a “BF” tax. The BF tax plays no part in this order except as mentioned specifically herein. Statutory references are to RSMo 2000 unless otherwise indicated.

## Findings of Fact

1. The Bank was, at all relevant times, the sole subsidiary of its parent corporation, Cottonrudy Investment Co. (“Cottonrudy”).

2. The Bank was, at all relevant times, located in Webster County, Missouri.

### 2009 Corporate Income Tax/2010 Bank Franchise Tax Returns

3. The Bank filed its 2010 bank franchise tax return with the Director on April 8, 2010.

4. In the 2010 franchise tax return, the Bank reported a 7% tax due of \$14,190.00. That amount was subsequently adjusted to \$14,200.00.<sup>2</sup>

5. The Director examined the Bank’s 2010 franchise tax return on or before April 20, 2010. The Director’s employees who actually conducted the examination made written notations on the returns as they performed the examination.

6. As a result of that examination, the Director notified the Bank on April 20, 2010 that (a) it needed to send copies of portions of the taxpayer’s federal income tax return, and (b) it had adjusted the amount of the BF tax from \$7,156.00 to \$7,146.00.

7. The Bank paid the \$14,200.00 amount due on the 7% tax on or before December 15, 2010.

8. On December 15, 2010, the Director sent \$13,916.00 (98% of \$14,200.00)<sup>3</sup> to Webster County.

9. Webster County did not retain the funds sent to it, but acted as a pass-through entity, distributing those funds to school districts and other local government units.

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<sup>2</sup> The reason for this adjustment was not stated and is not in the record.

<sup>3</sup> See § 148.080, which we discuss further under “Statutory and regulatory structure” in our Analysis below, regarding the 2% of the 7% tax the Director retains for collection. Statutory references are to RSMo 2000 unless otherwise noted.

10. In the 2010 franchise tax return, the Bank failed to state the state income tax credit of \$28,054.00 on Schedule A of that return.

11. Cottonrudy filed its 2009 consolidated corporate income tax return<sup>4</sup> with the Director on April 8, 2010.

12. In that return, Cottonrudy reported it owed total state income tax for 2009 of \$28,054.00, and paid that amount.

2010 Corporate Income Tax/2011 Bank Franchise Tax Returns

13. The Bank filed its 2011 bank franchise tax return with the Director on April 1, 2011.

14. In the 2011 franchise tax return, the Bank reported a 7% tax due of \$35,197.00.

15. The Director examined the Bank's 2010 franchise tax return on or before April 12, 2011. The Director's employees who actually conducted the examination made written notations on the returns as they performed the examination.

16. As a result of that examination, the Director notified the Bank on April 12, 2011 that he (a) had adjusted line 13 of the return, "Other deductions," to zero for the Bank's failure to provide a detailed schedule; (b) had calculated interest on a delinquent payment of \$6.12 through May 3, 2011; and (c) had calculated additions to tax, on line 22B of the return, as \$248.20.

17. The Bank paid the \$35,197.00 amount due on the 7% tax on or before December 15, 2011.

18. On December 15, 2011, the Director sent \$34,493.06 (98% of \$35,197.00) to Webster County.

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<sup>4</sup> The right of an affiliated group of corporations to file a Missouri consolidated income tax return is set out in § 143.431, RSMo Supp. 2013.

19. Webster County did not retain the funds sent to it, but acted as a pass-through entity, distributing those funds to school districts and other local government units.

20. In the 2011 franchise tax return, the Bank failed to state the state income tax credit of \$46,380.00 on Schedule A of that return.

21. Cottonrudy filed its 2010 consolidated corporate income tax return with the Director on April 8, 2010.

22. In that return, Cottonrudy reported total state income tax it owed for 2010 of \$46,380.00, and paid that amount.

2011 Corporate Income Tax/2012 Bank Franchise Tax Returns

23. The Bank filed its 2012 bank franchise tax return with the Director on March 14, 2012.

24. In the 2012 franchise tax return, the Bank reported a 7% tax due of \$48,619.00. This amount was later adjusted to \$48,776.00.<sup>5</sup>

25. The Director examined the Bank's 2012 franchise tax return on or before March 26, 2012. The Director's employees who actually conducted the examination made written notations on the returns as they performed the examination.

26. As a result of that examination, the Director notified the Bank on March 26, 2012 that he (a) had adjusted federal taxable income to match federal form 1120, line 28; and (b) had adjusted line 7A on Form INT-2-1, Bank Franchise Tax Schedule BF, to \$7,146 because the Director's records did not agree with the amount indicated.

27. The Bank paid the \$48,776.00 amount due on the 7% tax on or before December 14, 2012.

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<sup>5</sup> The reason for the adjustment was not given.

28. On December 14, 2012, the Director sent \$47,800.48 (98% of \$48,776.00) to Webster County.

29. Webster County did not retain the funds sent to it, but acted as a pass-through entity, distributing those funds to school districts and other local government units.

30. In the 2012 franchise tax return, the Bank failed to state the state income tax credit of \$58,606.00 on Schedule A of that return.

31. Cottonrudy filed its 2011 consolidated corporate income tax return with the Director on April 8, 2010.

32. In that return, Cottonrudy reported total state income tax it owed for 2011 of \$58,606.00, and paid that amount.

#### The Bank's Amended Returns for 2010-12

33. On March 8, 2013, the Bank filed amended bank franchise tax returns for 2010, 2011 and 2012, reporting overpayments for all the 7% tax it had paid for these periods totaling \$120,205.00. The amended returns were filed to report credits for state income taxes paid that the Bank failed to report on the original returns.

34. The Director examined the amended returns, made adjustments, and determined the Bank had an overpayment of the 7% tax as follows: \$14,200.00 for 2010, \$35,197.00 for 2011, and \$48,776.00 for 2012, for a total of \$98,173.00.

#### 2013 Franchise Tax Return

35. On March 8, 2013, the Bank filed its 2013 bank franchise tax return. Among other matters, it reported an overpayment of the previous year's tax of \$120,205.00.

36. On or before March 19, 2013, the Director examined the Bank's 2013 franchise tax return.

37. As a result of that examination, the Director notified the Bank by letter on March 19, 2013 that he had adjusted the overpayment for the previous year's tax to \$98,173.00 which, when other adjustments were made, resulted in an overpayment of the previous year's tax of \$89,144.00.

38. In his March 19, 2013 letter to the Bank, the Director also advised the Bank that sufficient funds were not available to issue a refund of \$89,144.00 and, pursuant to 12 CSR 10-10.145(6), the Bank would be given a credit for that amount, to be applied to future 7% tax obligations.

39. The Bank requested a refund from the Director by letter dated June 28, 2013.

40. On August 9, 2013, the Director issued a final decision denying the Bank's request for refund.

41. The Bank also sought a refund from Webster County, which had received 98% of the tax paid. On August 23, 2013, the Webster County Clerk advised the Bank that Webster County had acted only as a pass-through entity for funds paid by the Director to the county, and that those funds had already been distributed to school districts and other local governmental units.

42. On September 6, 2013, the Bank appealed the Director's decision denying its request for a refund.

### **Conclusions of Law**

This Commission has jurisdiction over appeals from the Director's final decisions.<sup>6</sup> The Bank has the burden to prove that it is entitled to a refund.<sup>7</sup>

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<sup>6</sup>Section 621.050.1.

<sup>7</sup>Section 621.050.2.

Are there any factual disputes?

The Bank asserts there are factual disputes, and, therefore, summary decision is unwarranted. Our review of those asserted facts, however, shows otherwise. The Bank admitted all of the facts asserted by the Director save one (when tax monies were transferred by the Director to Webster County), and there, the Bank only denied knowledge of when the transfers were made, not whether they were made.

The Director denied all or part of ten of fourteen of the Bank's proposed additional findings of fact. On its face, therefore, there could be factual disputes precluding summary decision. When we look at the Bank's proposed additional facts, however, we conclude they are either inaccurate statements of fact (additional facts 1-3), mixed assertions of law and fact (additional facts 4-6), partially inaccurate factual statements (additional facts 11 and 12), or assertions of legal conclusions (additional facts 7-9 and 14). We incorporated two of the bank's proposed additional facts (10 and 13) into our findings of fact, as they were both admitted by the Director and are relevant to the case.

We conclude there are no disputes as to the material facts.

Statutory and Regulatory Structure

The 7% tax is imposed, and the credits that may be applied to that tax are granted, by § 148.030 of the Banking Institution Law,<sup>8</sup> which provides:

1. Every banking institution shall be subject to an annual tax for the privilege of exercising its corporate franchises within the state determined in accordance with subsection 2 of this section.
2. The annual franchise tax imposed by subsection 1 of this section shall be the sum of the amounts determined under subdivisions (1) and (2) of this subsection:

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<sup>8</sup> Sections 148.010-.110.

(1) For taxable years beginning after December 31, 1986, the amount determined under this subdivision shall be determined in accordance with section 147.010, RSMo;

(2) The amount determined under this subdivision shall be seven percent of the taxpayer's net income for the income period, from which product shall be subtracted the sum of the amount determined under subdivision (1) of this subsection and the credits allowable under subsection 3 of this section. However, the amount determined under this subdivision shall not be less than zero.

3. For purposes of subdivision (2) of subsection 2 of this section, the allowable credits are all taxes paid to the state of Missouri or any political subdivision thereof during the relevant income period, including, without limitation, state and local sales and use taxes paid to seller's, vendors, or the state of Missouri with respect to the taxpayer's purchases of tangible personal property and the services enumerated in chapter 144. However, a taxpayer shall not be entitled to credits for taxes on real estate and tangible personal property owned by the taxpayer and held for lease or rental to others, contributions paid pursuant to the unemployment compensation tax law of Missouri, taxes imposed by this law, taxes imposed under chapter 147, RSMo, for taxable years after 1985, or state and local sales and use taxes collected by the taxpayer on its sales of tangible personal property and the services enumerated in chapter 144, RSMo.

Section 148.050 sets out the requirement that every banking institution governed by the Banking Institution Law must file a franchise tax return on or before April 15 of the taxable year.

Section 148.060.1 sets out the Director's obligations regarding the examination of such returns, as follows:

As soon as is practicable after the return is filed, the director shall examine it to determine the correct amount of tax.

Sections 148.060.1 and 148.074.1 set out the Director's obligation to either credit or refund overpayments, as follows:

(§ 148.060.1) . . . If the director finds that the amount of tax shown on the return is less than the correct amount, he shall notify the taxpayer of the amount of the deficiency proposed to be assessed. If the director finds that the tax paid is more than the correct amount, he shall credit the overpayment against any taxes

due under sections 148.010 to 148.110 from the taxpayer and refund the differences. No deficiency shall be proposed and no refund shall be made pursuant to this or any section of sections 148.010 to 148.110 unless the amount exceeds one dollar.

(§ 148.074.1) The director within the applicable period of limitations may credit an overpayment of the tax imposed by sections 148.010 to 148.110, and interest on such overpayment, against any liability in respect of any tax imposed by the tax laws of this state on the taxpayer who made the overpayment, and the balance shall be refunded if it exceeds one dollar.

The Director's regulation 12 CSR 10-10.145(6)<sup>9</sup> sets out when overpayments made by banking institutions may be refunded, as follows:

Overpayments resulting from the calculation of tax in accordance with section 148.030.2(2), RSMo will be refunded if funds are available from the political subdivision(s) in which the institution is located. If funds are not available, the institution will be given a credit or it must apply for a refund of the overpayment from the political subdivision(s) in which the institution is located.

Section 148.080 sets out how the Director is to distribute the tax proceeds thus obtained, in relevant part as follows:

The portion of the tax determined under subdivision (2) of subsection 2 of section 148.030 which is collected by the director under the provisions of sections 148.010 to 148.110, and all taxes collected by the director under sections 148.120 to 148.230 and under section 148.540, shall be returned by him, less two percent thereof which shall be retained by the state for collection, to the county treasury of the county in which the taxpayer is located on or before December fifteenth of each year.

#### Did the Director examine the returns?

The Bank alleges the Director failed to examine the returns at all. The Bank's allegation, however, is easily negated by the Director's supporting documentation, which make it clear that the Director's personnel did conduct such an examination. Not only did the examinations take

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<sup>9</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

place no later than twelve days after the returns were filed, but the actual returns show marks made by the Director's personnel in the examination process.

Did the Director **properly** examine the returns?

The Bank's argument that the Director failed to examine the returns is only a metaphor for its real argument—the Director failed to *properly* examine those returns when he limited his examination to “the four corners of the [bank franchise tax] return.” Specifically, the Bank's brief alleges that the Bank's franchise tax returns were (a) filed simultaneously with Cottonrudy's income tax returns, and both were in the Director's hands before their due dates; (b) the Bank failed to claim a credit for Missouri income taxes paid on its franchise tax returns, but that figure was clearly shown on Cottonrudy's income tax returns; and (c) in each of the three years, the Bank's income tax credit far exceeded the total of the other two credits claimed on line 8 of the franchise tax returns. It sums up its argument as follows:

Had the Director examined *the two tax returns filed each year*, it would have been obvious that the tax credit claimed on line 8 of the franchise tax returns was considerably less than the available income tax credit from line 16 [of Cottonrudy's income tax return], the Director could have referred to Schedule A where it is immediately apparent that the Bank did not claim its income tax as a credit.

(Emphasis added.) The reference to “the two tax returns filed each year” can only mean the Bank's franchise tax return for that year and Cottonrudy's income tax return for the prior year. The Bank, however, misapprehends the Director's statutory duty, which is set out in § 148.060.1 as follows:

As soon as is practicable after the return is filed, the director shall examine *it* to determine the correct amount of tax.

(Emphasis added.) The duty is to examine *the return*, not to seek out any other potentially related documents not filed as part of the return, and examine them as well. At its core, what the

Bank complains of is the Director's failure to catch the mistake the Bank made in each of the three returns by also reviewing Cottonrudy's income tax returns as part of its review of the Bank's franchise tax returns. But, had the legislature intended for the Director's duty to include examining anything besides the "four corners of the return" itself, it would have said so—by substituting, for instance, language such as *the return and any other relevant documents in the Director's possession or control* for the simple pronoun *it*—the return, bounded by its four corners.

The Bank's carefully worded argument that Cottonrudy's returns were filed *contemporaneously* with the Bank's franchise tax returns changes nothing; the two types of returns were filed separately, by two different taxpayers, with no indication that they were to be examined together. The Director conducted the examination he was required to perform on each of the three franchise tax returns in question, and the Bank cannot complain of his not doing more than that. We have no power to superintend the Director's procedures,<sup>10</sup> which is what, ultimately, the Bank asks us to do.

12 CSR 10-10.145(6) says that the Bank is entitled to a refund if the county still has the funds. Does the regulation apply and, if so, how?

As stated above, 12 CSR 10-10.145(6) provides that overpayments of the 7% tax will be refunded "if funds are available from the political subdivision(s) in which the institution is located." An administrative regulation is entitled to a presumption of validity.<sup>11</sup> Because we apply the regulation, we conclude there is no fund from which to pay the Bank's refund. As the regulation says:

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<sup>10</sup> *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445, 450 (Mo. banc 1985).

<sup>11</sup> *State ex rel. Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 602 (Mo. banc 2012).

Overpayments resulting from the calculation of tax in accordance with section 148.030.2(2), RSMo will be refunded *if funds are available from the political subdivision(s) in which the institution is located*. If funds are not available, the institution will be given a credit or it must apply for a refund of the overpayment from the political subdivision(s) in which the institution is located.

(Emphasis added.) In this case, Webster County, the political subdivision in which the Bank is located, has no funds available to make a refund; therefore, the Bank is not entitled to the refund it seeks and must accept a credit from the Director against future tax liabilities.

Is the Director obligated to refund the 2% he retained for collection?

The Bank’s alternative argument is that, even if it is not entitled to a refund of the entire amount, it is at least entitled to a refund of the two percent of the funds that were retained by the Director for collection in accordance with § 148.080. The Director disagrees because “the collection fee represents the payment of an obligation of the county. It is not money awaiting distribution to the county—it was a payment by the county.”<sup>12</sup>

While we do not necessarily agree with the Director’s argument, the result is the same: the Bank is not entitled to a refund of *any* amount. Regulation 12 CSR 10-10.145(6) conditions the refund on the availability of funds from the political subdivisions; it specifies no other source from which a refund may be made.<sup>13</sup>

Does it matter whether the duty to examine in § 148.080 is mandatory or directory?

The parties argue as to whether the Director’s duty to examine the returns, as set out in § 148.080, is mandatory or directory. Given our conclusion that the Director complied with his

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<sup>12</sup> Respondent’s response to Petitioner’s response to Respondent’s motion for summary decision, p. 9.

<sup>13</sup> By contrast, 12 CSR 10-10.145(5) permits the Director to refund from the state’s General Revenue fund overpayments of tax calculated based on § 148.030.2(1). Employing a maxim of statutory construction, *expressio unius est exclusio alterius* (“the express mention of one thing excludes all others”), we interpret 12 CSR 10-10.145(6) to exclude the possibility of a refund from the General Revenue fund or other sources for overpayments of the 7% tax under § 148.030.2(2).

statutory duty to examine the Bank's returns, because that duty did not include examining Cottonrudy's returns as part of the examination of the franchise tax returns, we think it unnecessary to consider whether a breach of that duty authorizes us to grant the Bank the relief it seeks. Therefore, there is no need to decide whether the Director's duty as imposed by § 148.080 is mandatory or directory.

### **Summary**

We conclude from the evidence and arguments presented that the Director performed his duty of examining the Bank's franchise tax returns, and had no duty to examine the corporate parent's income tax returns to find the errors the Bank's tax preparer committed. Because there was no breach of duty, we need not analyze whether the Director's duty under § 148.080 is mandatory or directory. Furthermore, 12 CSR 10-10.145(6) precludes payment of any refund because no funds are available from Webster County, the political subdivision in which the Bank is located.

Therefore, we grant the Director's motion for summary decision and cancel the hearing.

SO ORDERED on April 8, 2014.

\s\ Mary E. Nelson  
MARY E. NELSON  
Commissioner