The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
February 10, 2022

2022COA16

No. 20CA0818, *Cap One v. Colo. Dep't of Revenue* — Taxation — Sales and Use Tax — Gross Taxable Sales — Credit for Sales Tax Paid on Certain Uncollectible Debt

Section 39-26-102(5), C.R.S. 2021, provides a credit to retailers who pay sales tax on credit sales and later write off the debt as uncollectible. Plaintiff, Capital One, N.A., financed purchases, including the sales tax, made with various retailers' private label credit cards. When some of the purchasers defaulted, Capital One sought a refund of the sales tax paid by the retailers.

A division of the court of appeals concludes that because Capital One and the retailers are separate and distinct entities and do not act "as a unit" for any purpose other than issuing private label credit cards, the two entities do not constitute a single "person," and therefore Capital One is not a "taxpayer" entitled to

relief under section 39-26-102(5). *See* § 39-26-102(6.3), (17). Accordingly, the division affirms the judgment.

COLORADO COURT OF APPEALS **2022COA16**

Court of Appeals No. 20CA0818
City and County of Denver District Court No. 19CV33529
Honorable A. Bruce Jones, Judge

Capital One, N.A.,

Plaintiff-Appellant,

v.

Colorado Department of Revenue,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE HARRIS
Gomez and Vogt*, JJ., concur

Announced February 10, 2022

Akerman LLP, Melissa L. Cizmorris, Denver, Colorado; Akerman LLP, Michael Bowen, Jacksonville, Florida, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Benjamin Kapnik, Senior Assistant Attorney General, Anne Mangiardi, Senior Assistant Attorney General, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 Under Colorado law, if a retailer pays sales tax on a credit sale and later writes off the debt as uncollectible, the amount of sales tax remitted may be credited against the retailer's subsequent tax obligation. Plaintiff, Capital One, N.A., financed purchases, including the sales tax, made with various retailers' private label credit cards. When some of those purchasers defaulted, Capital One filed claims with defendant, Colorado Department of Revenue (DOR), seeking a refund of the sales tax remitted by the retailers. The DOR denied the claims, and Capital One appealed the denial to the district court. The district court dismissed Capital One's petition for failure to state a claim on which relief could be granted.

¶ 2 On appeal, Capital One contends that its petition states a cognizable claim: in financing certain sales, it acts as a "unit" with the retailers and therefore qualifies as a "taxpayer" entitled to a refund of the sales tax paid on behalf of the defaulting purchasers. We disagree and therefore affirm.

I. Factual and Legal Background

¶ 3 Some retailers offer a private label credit card for customers to use at the retailer's store. Purchases made with those credit cards are financed by the retailers themselves (generally through a wholly

owned subsidiary) or, more commonly, by an outside financing company.

¶ 4 Capital One acts as one such outside financing company. It has entered into contracts with numerous retailers to issue private label credit cards to consumers and to finance the purchases made with those cards.

¶ 5 Consumers must pay sales tax on the purchase of tangible personal property, whether the consumer pays for the property with cash or charges the purchase to a credit card. *See* §§ 39-26-104 to -105, C.R.S. 2021. The loan provided by Capital One through the private label credit cards covered the sales tax, which, in accordance with Colorado law, the retailers remitted to the DOR at the time of purchase. *See* §§ 39-26-104 to -105.

¶ 6 Under the terms of the contracts with the retailers, Capital One paid the retailers the purchase price plus the sales tax and bore the loss if customers failed to repay the loan. Some of the credit card purchasers did fail to repay Capital One, and some of those accounts were charged off as bad debts by Capital One or HSBC Bank, N.A. (a credit card business acquired by Capital One) for federal income tax purposes.

¶ 7 Under section 39-26-102(5), C.R.S. 2021, a "taxpayer" is entitled to a credit for sales tax paid on certain credit sales on which the purchaser defaults:

> Taxes paid on gross sales represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon a subsequent payment of the tax provided in this article, but if any such accounts are thereafter collected by the taxpayer, a tax shall be paid upon the amounts so collected.

A "taxpayer" is "any person obligated to account to the executive director of the [DOR] for taxes collected or to be collected" under the sales tax statutes. § 39-26-102(17). "Person," in turn, includes "any individual, firm, limited liability company, partnership, joint venture, corporation, estate, or trust or any group or combination acting as a unit, and the plural as well as the singular number." § 39-26-102(6.3).

¶ 8 After it charged off some of the credit card loans as bad debts, Capital One filed a series of claims under section 39-26-102(5) seeking a refund of the approximately $1.5 million in sales tax that the various retailers paid on the defaulting customers' purchases between 2011 and 2013. Capital One acknowledged that it is not a

retailer and did not remit any sales tax to the DOR. But it argued that it qualified as a "taxpayer" because, together, Capital One and each of the various retailers constitute a "combination" of entities "acting as a unit." The DOR denied the claims, and the director affirmed that decision.

¶ 9 In the final determination, the director found and concluded that

- Capital One had submitted only one contract with a retailer in support of its claims;
- the contract expressly provides that Capital One and the retailer are independent contractors and are not in a relationship of principal and agent, partners, joint venturers, or an association for profit;
- as independent contractors, Capital One and the retailer "are not constituents of a whole" and "are not a unit"; and
- in any event, section 39-26-102(5) does not provide for a tax refund and therefore Capital One would be limited to a tax credit.

¶ 10 Capital One appealed the final determination to the district court, asserting the same grounds for relief — that it is a "taxpayer"

within the meaning of section 39-26-102(6.3) and (17) because "Capital One and the retailers acted as one cohesive 'unit' to provide financing" for the retailers' customers.

¶ 11 The DOR moved to dismiss the petition for failure to state a claim, primarily on the ground that Capital One could not meet the definition of a "taxpayer" entitled to a credit under section 39-26-102(5) because it is not the same "person" as the retailers. Relying on *Montgomery Ward & Co. v. Department of Revenue*, 628 P.2d 85 (Colo. 1981), and case law from other jurisdictions interpreting similar statutory provisions, the district court agreed. It concluded that, as two distinct and unrelated corporations, Capital One and each of the retailers do not constitute a "unit" for purposes of the sales tax credit provision. Moreover, the court determined that, if Capital One and the retailers were a "unit," the "unit" would be the proper party to seek the refund and no retailers were even identified, much less joined as plaintiffs. And finally, the court noted that only a credit, not a refund, is available under section 39-26-102(5).

II. Discussion

¶ 12 On appeal, the central issue is whether Capital One is a "taxpayer" — i.e., a "person" obligated to collect and pay sales tax to the DOR. If Capital One is not a taxpayer, everyone agrees that it is not entitled to any credit for (or refund of) sales tax paid by the retailers. Because we conclude that it is not a taxpayer, we need not determine whether the petition was properly dismissed on other grounds as well. *See Carbajal v. Wells Fargo Bank, N.A.*, 2020 COA 49, ¶ 13 (when the district court dismisses a complaint on several grounds, the court of appeals may affirm on any single ground).

A. Standard of Review

¶ 13 We review de novo an order granting a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim, accepting all factual allegations in the pleading as true and viewing them in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). We do not, however, accept as true conclusory allegations or legal conclusions. *Warne v. Hall*, 2016 CO 50, ¶ 9. Dismissal of a complaint or petition is proper when the plaintiff's factual allegations do not, as a matter of law, support the claim for relief. *Id.*; *see also W. Innovations, Inc. v. Sonitrol Corp.*,

187 P.3d 1155, 1158 (Colo. App. 2008) (A "complaint may be dismissed if the substantive law does not support the claims asserted.").

¶ 14 The district court's order turned on the interpretation of section 39-26-102(5) and the statutory definition of "taxpayer." We review de novo the district court's interpretation of statutes. *Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009).

¶ 15 The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent. *Lewis v. Taylor*, 2016 CO 48, ¶ 20. To do so, we look to the plain and ordinary meaning of the statutory language, and if that language is clear and unambiguous, we enforce the statute as written. *Nowak v. Suthers*, 2014 CO 14, ¶ 20.

B. Capital One Is Not a "Taxpayer" Entitled to a Credit or Refund

¶ 16 Capital One contends that it is a "taxpayer" for purposes of section 39-26-102(5) because, together, Capital One and each retailer constitute a "person" — a "group or combination" of corporations "acting as a unit." *See* § 39-26-102(6.3). Capital One insists that the district court erred by limiting the definition of "person" to a group or combination of business entities that join

together into some organizational whole. According to Capital One, the statute contemplates that two or more distinct and unrelated entities can be a "person" so long as they are "acting as a unit," even for a limited purpose pursuant to a contract.

¶ 17 We turn first, as Capital One urges, to the plain language of the statute. The statute does not define "unit," so we may look to the dictionary definitions of that term to ascertain its plain and ordinary meaning. *See Roalstad v. City of Lafayette*, 2015 COA 146, ¶ 34.

¶ 18 A "unit" is "a single thing . . . that constitutes an undivided whole," or "a single thing . . . that is a constituent and isolable member of some more inclusive whole" or "aggregate." Webster's Third New International Dictionary 2500 (2002); *see also* Merriam-Webster Dictionary, https://perma.cc/2KJE-H7NQ (A "unit" is "a single thing, person, or group.") Thus, giving the statutory words their plain meaning, a "group or combination" of entities is a

"person" when the entities act as one — that is, when they join together to form an "inclusive whole" or an "aggregate" entity.[1]

¶ 19 Reading the language in context supports this interpretation. Under the principle of construction known as *ejusdem generis*, when a general term follows a list of specific things, the general term applies only to things of the same general class as those specifically mentioned. *See Creager Mercantile Co. v. Colo. Dep't of Revenue*, 2015 COA 10, ¶ 15, *rev'd on other grounds*, 2017 CO 41M. The term "group or combination acting as a unit" appears in subsection 102(6.3) at the end of a list of single entities, including "firm," "joint venture," "partnership," and "corporation." The phrase "group or combination acting as a unit," therefore, is best understood as a catchall term for other organizations that do not fit the legal definition of those listed but which, like those listed,

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[1] The inclusion of the phrase "and the plural as well as the singular number" in section 39-26-102(6.3), C.R.S. 2021, does not compel a different interpretation. That phrase simply makes clear that "person" includes any singular individual or entity or any combination or group of singular and/or plural individuals or entities (when acting as a "unit") required to collect and pay taxes to the DOR.

operate as a single organization.[2] *See Circuit City Stores, Inc. v. Dir. of Revenue*, 438 S.W.3d 397, 401 (Mo. 2014) (the phrase "group or combination acting as a unit" was meant to include organizations not listed but that were also single entities operating as one for "all purposes"); *Pemco, Inc. v. Kan. Dep't of Revenue*, 907 P.2d 863, 866 (Kan. 1995) (The statute "was intended to extend 'person' status to groups or combinations acting as a unit even though the group or unit does not fit within the legal definition of any of the specifically designated entities."); *S.C. Dep't of Revenue v. Anonymous Co. A*, 678 S.E.2d 255, 258 (S.C. 2009) (the phrase "any group or combination acting as a unit" is a catchall phrase for single entities like those listed).

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[2] We are not persuaded otherwise by Capital One's argument that, because "joint ventures" and "firms" are not single entities but instead involve two entities that temporarily come together for a limited purpose, the statutory definition of "person" applies to distinct entities, like a financing company and a retailer, that join forces, pursuant to a contract, for a particular purpose. A "joint venture" is a type of partnership, and a partnership is "an association of two or more persons to carry on, as coowners, a business for profit." *Colo. Performance Corp. v. Mariposa Assocs.*, 754 P.2d 401, 405 (Colo. App. 1987) (emphasis omitted) (quoting § 7-60-106(1), C.R.S. 1986)). Thus, a joint venture is a singular "association" or business entity. Likewise, a "firm" is the general term for a partnership or company. *See* Black's Law Dictionary 751 (11th ed. 2019).

¶ 20 To "act as a unit," the constituent members must act as a unit for all purposes. Capital One cannot enjoy the benefits of its separate corporate identity for all other purposes and then declare itself a "unit" with various unrelated retailers for the sole purpose of obtaining a tax refund from the DOR. *See, e.g.*, *Pemco*, 907 P.2d at 867 ("We find no reason why [the corporation seeking tax relief under a similar statute] should be able to deny the corporate structure it has chosen in order to gain a tax advantage."); *S. States Coop., Inc. v. Dailey*, 280 S.E.2d 821, 827 (W. Va. 1981) ("Having taken advantage of the benefits of incorporation, a corporation cannot decline to accept the liabilities of the corporate form in order to reduce the incidence of taxation.").

¶ 21 At a minimum, though, the constituent members must act as a "unit" for purposes of paying sales tax. To be a taxpayer, the "person" — whether an individual, a single entity, or a combination of entities "acting as a unit" — must be obligated to "account to" the DOR "for taxes collected" under the sales tax statute. § 39-26-102(17). In other words, if Capital One is a "person" because it is a "unit" with each of the retailers, then, as a "person," it must be responsible for paying taxes. This reading aligns with the

provision's remedy of a credit, rather than a refund. A credit against the future obligation to pay taxes is only useful to a "person" who pays sales tax — i.e., a taxpayer. Capital One, however, has never alleged that as a "person" (a "unit" with each retailer) it has an obligation to pay sales tax to the DOR. To the contrary, it concedes that only the retailers have that obligation.

¶ 22 Our interpretation is supported by *Montgomery Ward*, a case in which our supreme court rejected an argument nearly identical to the one advanced by Capital One. In that case, Montgomery Ward argued that its obligation to pay accrued sales tax on credit purchases was not triggered by its sale of the accounts receivable to its wholly owned subsidiary because the two corporations were a single "person" under section 39-26-102. *Montgomery Ward*, 628 P.2d at 87, 91. The district court rejected this argument on the sole ground that Montgomery Ward and its wholly owned subsidiary were distinct corporations. *Id.* at 91. In affirming, the supreme court concluded that the two entities were not "acting as a unit" because they were "separate corporations." *Id.*

¶ 23 True, as Capital One highlights in its briefing, the supreme court also noted that the wholly owned subsidiary was not the

exclusive purchaser of Montgomery Ward's accounts receivable. According to Capital One, *Montgomery Ward* is therefore distinguishable: because it is the exclusive financer of the various retailers' private label credit cards, Capital One argues, its relationship to each of the retailers is more significant than the relationship between Montgomery Ward and its wholly owned subsidiary.

¶ 24 But to the extent a lack of exclusivity was a factor contributing to the court's holding, that same factor is present here. Capital One has only one-sided exclusivity with the other member of the supposed "unit." Though the retailers may not have contractual relationships with other financing companies, Capital One has contractual relationships with potentially hundreds of retailers. Thus, no single retailer has an exclusive relationship with Capital One. Regardless, we disagree that the limited contractual arrangement between Capital One and the various retailers creates a closer legal bond than the one between Montgomery Ward and its wholly owned subsidiary.

¶ 25 Taking our lead from the supreme court in *Montgomery Ward*, we conclude that Capital One and the retailers, as entirely separate

and distinct entities, are not "acting as a unit" and are therefore not "one 'person' as defined by section 39-26-102[(6.3)]." *Id.*; *see also S. States Coop.*, 280 S.E.2d at 823-24 (construing similar statute and concluding that a larger cooperative and smaller cooperatives were not a "person," even though the larger cooperative performed the purchasing, accounting, auditing, merchandizing, personnel training, and publicity for the smaller cooperatives, because the larger and smaller cooperatives were "separate legal entities, with their own articles of incorporation and by-laws"); *State v. Cap. City Asphalt, Inc.*, 437 So. 2d 1288, 1289-91 (Ala. Civ. App. 1983) (two corporations that had the same stockholders, officers, and directors, and used employees and equipment interchangeably, were not one "person" under the state's sales tax statutes because they were two "separately incorporated entities").

¶ 26 Because Capital One is not a "person" for purposes of section 39-26-102(6.3), it is not a "taxpayer" under section 39-26-102(17). And because it is not a "taxpayer," it is not eligible for a credit (or a refund) under section 39-26-102(5).

III. Conclusion

¶ 27 The judgment is affirmed.

JUDGE GOMEZ and JUDGE VOGT concur.