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Jurisdictional Statement

This case came before the Commission on a complaint filed by Rose Coffee Company, Inc., seeking a refund of use tax. The Director denied the refund claim. The principal question posed on appeal is whether Rose's contracts with its customers are "leases" as the word is used in §144.020.1(8), RSMo (2000). That requires construction of a revenue law, and thus brings the petition within the jurisdiction of this Court. MO. CONST., art. V, §3.

Statement of Facts

Rose Coffee Company sought a refund of use tax that it paid on the purchase of coffee-making equipment and parts, under §144.615(6), RSMo.¹; the Director of Revenue denied that request.² Rose appealed to the Administrative Hearing Commission, which decided the case on a motion for summary determination.³ The Commission ruled in Rose's favor, allowing a refund of \$135,803.59 plus interest,⁴ and the Director filed the instant appeal to this Court. The record before the Commission reflected as follows:

Rose Coffee Company sells food items – coffee beans (whole and ground), tea, instant coffee products like cappuccino mix, and condiments – to convenience stores, and businesses like law firms and accounting firms that buy the items for resale to or use by their customers, or to “resellers that resell to these businesses.”⁵

¹ All statutory references are to the Missouri Revised Statutes (2000) unless otherwise noted.

² LF 3, ¶9 (Petition); LF 9 (Exhibit B to Petition).

³ LF 127.

⁴ LF 154-155.

⁵ LF 58-59, ¶2 (Affidavit of Darrell Bellm, Ronnoco Coffee Company's Vice President of Finance); LF 71, ¶2 (Affidavit of Eric Bomball, Rose's Vice President and

Chief Financial Officer). Mr. Bellm explains that he performs services for Rose. LF 58,

¶ 1.

During the tax periods at issue, Rose purchased various items of coffee grinding and brewing equipment, and parts (collectively referred to as coffee equipment), from vendors located in and out of Missouri.⁶ All of the purchases on which Rose paid the use tax at issue were purchases of brewing and grinding equipment, and parts for that equipment.⁷ Approximately 85-90% of the purchases were of brewing and grinding equipment and 10-15% were parts.⁸

Rose sold the coffee equipment outright to some of its customers.⁹ Rose put on no evidence of the amount of such sales.

⁶ LF 59, ¶3; LF 71, ¶3.

⁷ LF 73, 74, ¶10 (Bomball affidavit).

⁸ *Id.*

⁹ LF 58, ¶4 (Bellm affidavit); LF 71, ¶3 (Bomball affidavit).

When Rose's customers did not want to buy equipment outright, Rose executed what was denominated as a "loan agreement" with its customers.¹⁰ The loan agreement provided that Rose's customer, or the "Dealer," could use Rose's coffee equipment only for making, storing, and distributing coffee sold to the Dealer by Rose, and for so long as the Dealer purchased Rose coffee.¹¹ The Dealer could not assign the agreement, and could not encumber, sell, or otherwise dispose of the equipment.¹² The equipment remained the property of Rose, and Rose could remove it at any time.¹³ The agreement stated that the Dealer was responsible for maintenance and repair of the equipment.¹⁴

Notwithstanding the language of the agreement form, the evidence showed that Rose purchased replacement parts itself and performed all maintenance.¹⁵ Rose put on evidence that once customers stopped buying coffee beans, i.e., that once customers

¹⁰ LF 59, ¶4 and LF 62 (Bellm affidavit, including Exhibit A (blank "loan agreement")).

¹¹ *Id.*; LF 70, ¶3 (Bomball affidavit).

¹² *Id.*; LF 71, ¶ 3 (Bomball affidavit).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ LF 59-60, ¶5 (Bellm affidavit); LF 71, ¶4 (Bomball affidavit).

could no longer use the coffee equipment under the loan agreement, customers could buy the coffee equipment outright,¹⁶ but Rose did not provide any detail concerning the number of such sales during the tax periods at issue.

¹⁶ LF 71, ¶3 (Bomball affidavit).

Rose did not charge a separately-stated tax on its customers' use of – that is, its “loan” to the customers of – the coffee equipment. Rather, when Rose’s customers used the coffee equipment, Rose’s customers paid more for their purchases of coffee beans and tea.¹⁷ The evidence before the Commission was that the more the coffee equipment cost Rose, “the more Rose’s customers had to pay” for the coffee beans and tea.¹⁸

Of Rose’s customers that used coffee equipment during the tax periods, Rose collected state and local sales tax on 47.4% of their purchases.¹⁹ Rose did not collect sales tax on 52.6% of the purchases, because it accepted written claims of exemption (for resale) from those customers.²⁰

The Rose customers that did not make claims of exemption on their purchases were typically law firms, accounting firms, and similar businesses, that consumed the brewed coffee and tea other than selling it.²¹

¹⁷ LF 60, ¶¶6 (Bellm affidavit); LF 72, ¶¶5 (Bomball affidavit).

¹⁸ *Id.*

¹⁹ LF 74-75, ¶¶12 and 14(Bomball affidavit).

²⁰ *Id.*

²¹ LF 75, ¶¶14 (Bomball affidavit).

The Rose customers that made claims of exemption were typically its customer that sold brewed coffee and tea made with the coffee equipment, and collected state and local sales tax on their own sales.²²

²² LF 75, ¶14 (Bomball affidavit).

The evidence before the Commission suggested that Rose did not – until the Director denied Rose’s resale claims – specifically analyze its sales to determine the breakdown of customers who received Rose’s coffee equipment “as part of their purchases” of coffee beans and tea.²³

In allowing Rose’s use tax refund, the Commission concluded that Rose resold the coffee equipment, qualifying for exemption from use tax under §144.615(6).²⁴ The Commission concluded that §144.020.1(8), addressing tax on rental or lease of tangible personal property, did not apply, primarily because Rose loaned the coffee equipment to

²³ LF 74-75, ¶12 (Mr. Bomball avers that “because of the legal position that the Director has taken in this and related cases, [he] analyzed Rose’s sales to determine which sales were to customers who received coffee equipment as part of their purchases.”).

²⁴ LF 137-138, 150-151, and 155.

its customers, and a loan is different from a lease, and because the general resale exemption under §144.615(6) did apply.²⁵ The Director appealed.

²⁵ LF 145.

The Commission did deny a portion of Rose's refund claim (for the first, second, and third quarters of 1998), holding that it was time-barred under §144.190.2.²⁶ Rose did not appeal that portion of the decision.

²⁶ LF 155.

Points Relied On

I.

The Administrative Hearing Commission erred in granting Rose's resale claim for refund of use taxes that Rose paid on its purchases of coffee equipment and parts that it subsequently "loaned" to its customers. The taxability of the transaction is governed by §144.020.1(8), RSMo, which directs a purchaser such as Rose either to pay tax on the purchase of items to be leased, or to collect and remit tax on the lease transaction; the resale exemption under §144.615(6) does not apply to leases. Rose elected to pay tax on its purchase of the items, and its "loan" transactions qualified as leases. Therefore, Rose was not entitled to a refund on the basis of resale.

International Bus. Mach. Corp. v. State Tax Comm'n,

362 S.W.2d 635 (Mo. 1962)

Federhofer, Inc. v. Morris, 364 S.W.2d 524 (Mo. 1963)

Westwood Country Club v. Director of Revenue,

6 S.W.3d 885 (Mo. banc 1999)

Six Flags Theme Park v. Director of Revenue,

102 S.W.3d 526 (Mo. banc 2003)

§144.020.1(8), RSMo (2000)

§144.070.5, RSMo (2000)

II.

In the alternative, the Administrative Hearing Commission erred in granting Rose’s “resale” claim because no exemption from tax exists for items used to provide a non-taxable service. Rose did not resell the items, but used them itself to provide a support service to its customers, a service that is not subject to tax under Missouri law.

Sneary v. Director of Revenue, 865 S.W.2d 342 (Mo. banc 1993)

III.

The Administrative Hearing Commission erred in granting Rose's resale claim with respect to equipment that Rose claimed to have purchased and then sold outright. The taxpayer who seeks a refund bears the burden of proof under §§136.300 and 621.050, RSMo. Rose did not meet its burden. Rose only put on some evidence that it purchased and then sold an unspecified amount of equipment to its customers for their use, and put on no evidence that would permit the Commission to calculate any tax refund therefor.

Kansas City Power and Light Co. v. Director of Revenue,

83 S.W.3d 548 (Mo. banc 2002)

Dick Proctor Imports v. Director of Revenue,

746 S.W.2d 571 (Mo. banc 1988)

§136.300, RSMo (2000)

§621.050, RSMo (2000)

Standard of Review

Decisions of the Missouri Administrative Hearing Commission are upheld if authorized by law and supported by competent and substantial evidence upon the record as a whole, and when not clearly contrary to the reasonable expectations of the General Assembly. *Becker Elec. Co. v. Director of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988); §621.193, RSMo (2000). The Commission's decisions as to questions of law are matters for this Court's independent judgment. *La-Z-Boy Chair Co. v. Director of Economic Development*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue*, 847 S.W.2d 797, 797 (Mo. banc 1993).

Because Rose filed a refund claim seeking the return of use tax that it paid to the Director, Rose had the burden of proof. §§136.300 and 621.050, RSMo (2000). And Rose was entitled to a refund only if it erroneously paid the use tax. §144.190.2, RSMo (2000) (refund due to taxpayer if tax has been erroneously paid).

Argument

I.

The Administrative Hearing Commission erred in granting Rose’s resale claim for refund of use taxes that Rose paid on its purchases of coffee equipment and parts that it subsequently “loaned” to its customers. The taxability of the transaction is governed by §144.020.1(8), RSMo, which directs a purchaser such as Rose either to pay tax on the purchase of items to be leased, or to collect and remit tax on the lease transaction; the resale exemption under §144.615(6) does not apply to leases. Rose elected to pay tax on its purchase of the items, and its “loan” transactions qualified as leases. Therefore, Rose was not entitled to a refund on the basis of resale.

Resales and leases are events that do not overlap for purposes of Missouri tax – the Missouri legislature has chosen to treat them as mutually exclusive. §144.020. The Commission disagreed, holding that §144.020 did not apply, and in any event, the transactions at issue here were not leases at all. The Commission’s decision in this regard is unsupported by fact or law.²⁷

²⁷ As noted in the Statement of Facts, Rose purchased some coffee equipment and never leased it, but sold it to customers outright. The Commission held that Rose “unquestionably purchased” this subset of equipment for resale. LF 137. We address the portion of the decision relating to the equipment that Rose sold outright in

Point III, *infra*.

A. The plain language of §144.020.1(8) demonstrates that Rose is not entitled to a refund on the basis of a resale exemption from tax.

The lease tax statute, §144.020.1(8), is an either-or statute. It affirmatively imposes a tax on Rose, either on its purchase of items to be leased, or on its lease receipts:

1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state ... as follows:

(8) A tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, *provided that if* the lessor or renter of any tangible personal property had previously purchased the property under the conditions of “sale at retail” as defined in subdivision (8) of section 144.010 and the tax was collected at the time of purchase, the lessor or renter *shall not* apply or collect the tax on the subsequent lease or rental receipts from that property. [emphasis added]

In short, the statute gives a purchaser, such as Rose, the option of paying tax at the time of purchase, or of collecting tax on the lease of the items purchased, but not both. If the

purchaser chooses the former, the purchaser “shall not” apply or collect tax on subsequent lease receipts. Nowhere does §144.020 treat leased property as having been “resold” – it is simply treated differently, i.e., as having been leased.

Section 144.070.5, applying §144.020 in the context of vehicle leases, bears out this dichotomy:

A sales tax will be charged to and paid by a leasing company *which does not exercise the option* of paying in accordance with §144.020, on the amount charged for each rental or lease agreement while the motor vehicle, trailer, boat or outboard motor is domiciled in this state.

In enacting §144.070.5, the Missouri legislature provided an example of what §144.020 means: the purchase of tangible personal property for the purpose of subsequent lease is not a purchase for resale.

This Court’s decisions in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), and *Six Flags Theme Park v. Director of Revenue*, 102 S.W.3d 526 (Mo. banc 2003), are consistent with our reading of the lease tax. In *Westwood*, the taxpayer purchased golf carts for rental at its golf course, and paid tax on its purchases. *Id.* at 888. The Director assessed the taxpayer on its lease receipts, on the basis that the leases were taxable under §144.020.1(2), which imposes a tax on fees paid to or in a place of amusement. *Id.* at 888-889. The Court ruled that because

Westwood had purchased the golf carts for lease, and had paid tax on its purchases, the rental fees were not subject to tax. *Id.* at 888-889. If Rose's theory, adopted by the Commission, were applied to Westwood's purchases of the golf carts, those purchases would have been for resale and not subject to tax.

Similarly, in *Six Flags*, the Director denied the taxpayer's request for refund of taxes paid on video game machines in places of amusement. 102 S.W.3d at 527. This Court ruled that because tax was paid on the purchase of the video game machines, tax was not due on the rental receipts. *Id.* at 530. Again, if the Commission's resale concept had been applied to the purchases of the video games that Six Flags leased, the result would have been different – the purchases of the video machines would have been for resale and excluded from tax, and the rental receipts would have been subject to tax, the result that the Director had espoused.

The Commission rejected our reading of the plain language of §144.020.1(8), supported by §144.070.5, *Westwood*, and *Six Flags*, concluding that the transaction does not fall within the plain language of §144.020.1(8) for a couple of reasons. One, the Commission opined that

Rose could not have collected sales tax on the leases of the equipment because it did not have a stated charge for its customers' use of the equipment. Section 144.020.1(8) applies if there is a charge for the lease of the property. That situation is not present in this case. Therefore,

§144.020.1(8) does not apply even if this is regarded as a lease transaction.

LF [p. 19]. But nowhere does §144.020.1(8) require a separately-stated and explicitly labeled “lease” charge. And the evidence before the Commission was that the coffee beans and tea cost more when those customers wanted the coffee equipment and executed the “loan” agreements. LF 60.

The Commission also dismissed the applicability of §144.020.1(8) in a rather backhand way by holding that even if the provision permits a taxpayer two options, and even if the taxpayer elects the option to pay tax on the purchase of its items up front, “it does not mean that once a taxpayer has exercised that option, it cannot obtain a refund.” LF 146. The statute most certainly does mean that. Once a taxpayer elects the first option under §144.020 (paying tax up front on its purchase of the tangible personal property), the taxpayer “shall not” elect the second option (collecting tax on the lease receipts). Under §144.070.5, vehicle leasing companies “will ... charge[]” tax on their leases if they do not pay tax on their purchases of the vehicles up front. The Commission must afford every word in the statutes meaning, *Hyde Park Housing Partnership*, 850 S.W.2d 82, 84 (Mo. banc 1993), including “shall not” and “will not,” which in straightforward fashion state how the options work: once one option is selected, the other “shall not” or “will not” apply.

In addition to giving effect to every word in the statute, our reading of the plain language of the statute avoids mischief and best achieves the legislature’s goal of collecting tax on the transaction. If a taxpayer may at some point revoke its election to pay tax up front, there may be no way to recover tax on the lease receipts. A lessee – faced with a subsequent tax collection effort on its lease payments – could argue that §144.020.1(8) is a shield that prevents it, i.e., argue that the statute says tax “shall not” be collected on lease receipts if the purchase price was paid up front.²⁸ And if a taxpayer can revoke its election, it imposes new administrative burdens on the Director, and lessens the likelihood that the entire amount of tax attributable to the leases will ever be collected: Lessees may be difficult or impossible to locate, and difficult or impossible to collect from. Lessors and lessees could structure their lease transactions in such a way that The practical effect of the Commission’s decision is that paying tax on the purchase of items to be leased must always be erroneous.²⁹ But it is never erroneous,

²⁸ That in fact was one of the lessee’s arguments in *Six Flags v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003). The lessee, Six Flags, argued that because the company from which it rented video game machines had already paid tax on its purchases of the machines, §144.020.1(8) barred taxation of Six Flags’ video game receipts. *Id.*

²⁹ A taxpayer is entitled to a refund only if it erroneously paid tax. §144.190.2.

because §144.020.1(8) explicitly establishes two options, paying tax on items purchased for subsequent lease, or paying tax on lease receipts. A taxpayer may choose either. The Commission simply read the plain language of §144.020.1(8) wrong. It should have affirmed the Director's denial of Rose's claim of resale exemption on the basis that §144.020.1(8) controls, by its plain language, and the fact that Rose chose the "pay on its purchase" option.

B. The "loan" agreements are rentals or leases within the meaning of §144.020.1(8).

Obviously, before a transaction is taxable under the lease tax, it must involve a lease or rental of tangible personal property. A separate basis for the Commission's decision that §144.020.1(8) does not apply was that Rose's "loan" agreements are not rentals or leases within the meaning of §144.020.1(8). LF 145. They are.

Although the words "rent" or "lease" are not specifically defined under Chapter 144, the legislature shed some light on the meaning of the words when it defined "gross receipts." §144.010.3. Under this section, taxpayers are required to pay tax on their "gross receipts," which is the "aggregate amount of the sales price of all sales at retail." §144.010.3. The phrase includes lease or rental payments when continuous possession of tangible personal property is granted under a lease or contract:

[Gross receipts] shall also include the lease or rental consideration where the right to continuous possession or use of any article or tangible personal property is granted

under a lease or contract and such transfer of possession would be taxable if outright sale were made, and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid.

Id.

The legislature's definition of gross receipts in §144.010.3 suggests that "lease" and "rent" were not intended to be hypertechnical terms. The word "lease" is used interchangeably with "contract." And the section simply establishes that the relevant components of leases and rentals are consideration and the right to continuous possession or use.

The definition suggested by §144.010.3 is consistent with the words' dictionary definitions, which are also relevant. *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993) (when construing a statute, undefined words are given their plain and ordinary meaning as found in dictionary). To "rent" is "[t]o obtain occupancy or use of (another's property) in return for *regular* payments." THE AMERICAN HERITAGE DICTIONARY 1047 (2d College ed. 1985) (emphasis added). "Rental" is "[t]he act of renting." *Id.*

A "lease" is "a contract granting use or occupation of property during a specified period in exchange for a specified rent." *Id.* at 721. "Rent," used as a noun for

purposes of the definition of lease, is a “[p]ayment, usually of an amount fixed by contract, made by a tenant at specified intervals in return for the right to occupy or use the property of another.” *Id.* at 1047. “When used with reference to tangible personal property, [lease] means a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent.” BLACK’S LAW DICTIONARY 461 (abr. 5th ed. 1983).

The evidence before the Commission was that when Rose’s customers wanted coffee equipment, Rose executed contracts called loan agreements. LF 58, 61. The agreements provided that the equipment remained the property of Rose, and that Rose’s customer could use the equipment for so long as the customer was purchasing Rose coffee. LF 71. The customers who wanted the equipment paid more for their coffee and tea purchases, LF 60, 72, and could continue to use the equipment for so long as they purchased Rose coffee beans, LF 71. The evidence does not explicitly show but logically implies that Rose’s customers paid for coffee and tea periodically.

The Commission held that the loans were not leases merely because Rose’s “customers do not make a specified payment for use of the coffee equipment, and there is no specific time period for its use.” LF 137. As discussed in Section A, above, §144.020.1(8) does not require “specified” payments to transform a transaction into a

lease. And neither the statute, nor the definition in §144.010.3, nor the dictionary definitions, require a specified period of time.³⁰

The “loan” agreements fall within the everyday meaning of rentals and leases as the words are used in §144.020.1(8). The agreements and the definitions found in a companion statute, §144.010(3), are consistent with the dictionary definitions of the words, which involve the making of periodic or regular payments (consideration) and the right of possession. Therefore, the loan agreements are leases or rentals within the meaning of §144.020.1(8).

C. The history behind §144.020.1(8) supports its applicability.

The history of the taxation of leases in Missouri supports the conclusion that a lease is not a resale, inasmuch as this Court has held – albeit under a different version of the statute – that a lease is not a sale at retail. See *State ex rel. Frisby v. Stone*, 152 Mo. 202, 53 S.W. 1069, 1070 (1899) (“The history of the evolution of the law into its present shape throws light upon the intention of the lawmakers, and aids in arriving at the

³⁰ That is assuming that by “specified,” the Commission meant a *finite* period of time. The agreement in fact specified *some* period of time – for so long as Rose’s customers continue to buy Rose coffee. LF 62.

true meaning” of a statute); see also *Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920, 925 (1933) (“the manifest purpose of the statute, considered historically, is properly given consideration”).

Beginning in 1935, just after the passage of the sales tax act, a dispute arose concerning whether transactions involving the lease or rental of tangible personal property that required servicing were taxable. *International Bus. Mach. Corp. v. State Tax Comm’n*, 362 S.W.2d 635, 637 (Mo. 1962). That controversy abated in 1946 with an agreement between a taxpayer, IBM, and the taxing authorities, providing that only 50% of the rental receipts would be taxed. *Id.* But in 1959, the Department of Revenue advised IBM that only amounts directly attributable to servicing rented machines could be deducted and that IBM must report amounts received from rentals and service separately. *Id.* IBM refused, claiming that no part of its rental or lease receipts were taxable. *Id.*

The transactions at issue involved written contracts entered into between IBM and its customers “for the use or rental of . . . various office and business machines.” *Id.* Under the agreement, IBM agreed both to furnish its customer a machine manufactured by IBM and to keep that machine in good working order. *Id.* The agreement, which lasted for at least one year and could thereafter be terminated by either party on 30 days notice, provided for monthly payments to use the machines. *Id.* The agreement also contained other provisions concerning the amount of time the customer could use the

machine, the payment of taxes, use of additional machines and other equipment, and the customer's payment of drayage (shipping) charges. *Id.*

The Court held that neither the definition of sale at retail, nor the provisions of § 144.020 then in effect, allowed the taxation of proceeds from rental or lease transactions other than the types expressly identified under the law. *Id.* at 639. The Court suggested that if the legislature wanted to tax all rental or lease transactions, then it must amend the sales tax law:

In short, had the legislature desired or intended to impose a sales tax on any and all lease transactions it would have been a very simple matter to plainly manifest that purpose by express provision in the act. By carefully defining "sale at retail" and purposefully embracing in the definition and the tax certain rental-type transactions, it would appear that other rentals and leases were not embraced.

Id.

The Court reached a similar result in *Federhofer, Inc. v. Morris*, 364 S.W.2d 524 (Mo. 1963). *Federhofer* involved the lease or rental of automobiles under written contracts. *Id.* at 525. These contracts provided for the lease or rental of the described vehicle for a period of at least one year, with the lessee making payments on a regular basis. *Id.* at 525-26. The contracts also contained numerous provisions relating to

vehicle maintenance, depreciation, repossession, insurance, and other matters. *Id.* The Director determined that these transactions were taxable and that sales tax should be collected on the consideration paid for the lease or rental of the vehicles. *Id.* at 525. The Court, relying on its one-year old decision in *IBM*, held that the lease or rental of motor vehicles was not a taxable event under § 144.020. *Id.* at 528.

In 1963, the General Assembly responded to the holdings in these two cases by enacting § 144.020.1(8), the lease tax, which imposed a tax on “the amount paid or charged for rental or lease of tangible personal property.” 1963 Mo. Laws 196.

Three years later, this tax was tested in *International Bus. Mach. Corp. v. David*, 408 S.W.2d 833 (Mo. banc 1966). There, IBM contended that the proceeds it received on the rental of its business machines were not taxable despite the passage of the lease tax. *Id.* at 836. Rejecting the argument, the Court held that the legislature had accepted the invitation that the Court extended in the 1962 *IBM* case and in *Federhofer* to amend the statute. *Id.* at 836-37. The Court also held that the amendment to §144.020.1 specifically made these types of lease and rental transactions taxable. *Id.*

Though the Commission held that the *IBM* and *Federhofer* cases are inapposite because they were decided before the enactment of §144.020.1(8), LF 145, they are authority directly on point for the proposition that leases are not sales at retail. The legislature’s subsequent enactment of §144.020.1(8) did not undo those holdings. The legislature simply established a new service subject to tax under certain circumstances,

and left in place the divide that the Court had already established between leases and sales (and, logically, resales).

D. Section 144.615(6) does not control.

The Commission essentially held that §144.615(6), establishing an exemption from use tax for tangible personal property held solely for “resale” in the regular course of business, trumps §144.020.1(8). LF 137-137, 146, 150-151. Looking to the definition of “sale” in §144.605(7), which includes “the right to use, store, or consume tangible personal property,” and “any transaction whether called leases, rentals, bailments, loans, conditional sales or otherwise,” the Commission concluded that because Rose’s customers could “use” the coffee equipment, the equipment was resold within the meaning of §144.615(6), and therefore exempt from tax, regardless of §144.020.1(8). *Id.*

First, the Commission impermissibly construed the sales and use tax statutes disjunctively, when the resale exemptions of the sales and use tax schemes must be analyzed the same. *Kansas City Power and Light Co. v. Director of Revenue*, 83 S.W.3d 548, 552 n.4 (Mo. banc 2002), *citing House of Lloyd Inc. v. Director of Revenue*, 884 S.W.2d 271, 274 (Mo. banc 1994). *See also Baldwin v. Director of Revenue*, 38 S.W.3d 401, 405 (Mo. banc 2001) (statutory provisions relating to same subject matter must be construed together and read consistently). In other words, the Commission must construe §144.615(6) to the same effect as §144.020.1(8): a lease

simply is not a “resale.” Rose had the option of paying tax at the time that it made the purchase – the option that it elected, or of collecting tax on its rentals – the option that it did not.

In addition to the rule that the sales and use tax statutes must be construed to the same effect, a complementary rule of construction requires a court to presume that the legislature intended every word in a statute to have effect, and “that the legislature did not insert idle verbiage or superfluous language in a statute.” *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). Applying the resale concept to leases violates that rule, inasmuch as that application renders much of §144.020.1(8) meaningless.

If the statutes cannot be read together, which they can be, then they conflict. In that case, the more specific statute controls over the more general. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001). Where the issue is the taxability of items purchased under conditions of sale at retail (i.e., tax was paid on the purchases at the time) and receipts for the subsequent lease thereof, obviously a tax statute that speaks to exemption from tax for “resales” – §144.615(6), is less specific than a tax statute that speaks to exemption from tax for items purchased under the condition of sale at retail and receipts for the subsequent lease thereof – §144.020.1(8).

The Commission’s conclusion that §144.615(6) trumps §144.020.1(8) also reveals an inconsistency in the Commission’s rationale. In simple terms, a use tax is a tax on the

use of something. Well enough. The Commission held that no lease existed, repeatedly noted that Rose's customers had the right to use the coffee equipment, and thus concluded that Rose "resold" the equipment, qualifying for the resale exemption under §144.615(6). LF 137-138, 146, 150-151. If, as the Commission held, there was no lease, and the transactions were resales because Rose was "reselling" to its customers the right to use the equipment, Rose should have collected use tax from all of *its customers*. But Rose did not collect tax on all of these transactions – Rose accepted written claims of tax exemption even from its customers who claimed that they in turn were making *their* purchases for resale. The Commission failed to acknowledge that Rose cannot have it both ways, i.e., Rose cannot claim that it made a resale to its customers that is tax-exempt because the customers will themselves "use" the equipment, when Rose simultaneously accepted resale exemption certificates from those same customers who claimed that they were merely "reselling" the items that they obtained from Rose. The Commission failed to recognize – let alone reconcile – this inconsistency.

Section 144.615(6) simply does not apply to these facts. Our reading of this section, and §144.020.1(8), is the reading that properly construes the statutes together, and gives effect to all parts of the statutes.

E. The Commission's authority was inapposite.

The Commission cited a number of inapposite cases in holding that a resale occurred.

1. “Factoring in” cases do not apply.

One line of cases that the Commission cited stands for the proposition that if costs are factored in, even if not separately stated, and title or ownership is transferred, a sale at retail can occur. LF 138-140.³¹ None of those cases involved leases, and in all of them, the customers kept the items that were transferred to them, unlike Rose’s customers who leased the items and were never entitled to keep the coffee equipment under the written agreements.

It is also somewhat disturbing that the Commission relied on “factoring in” cases because the evidence was that about half of Rose’s customers gave Rose resale exemption certificates on the transactions. LF 75. The customers presumably considered the transactions to be the purchase of food items (coffee and tea) that they were going to resell to their own patrons. But if the “resold” equipment costs were factored into the coffee bean cost, that means that those customers were allowed to

³¹ See *Kansas City Power and Light v. Director of Revenue*, 83 S.W.3d 548 (Mo. banc 2002) (electricity sold to hotel guests); *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994) (dry ice used in packaging shipments of pork); *House of Lloyd v. Director of Revenue*, 824 S.W.2d 914 (Mo. banc 1992) (styrofoam packing peanuts used to cushion products during shipping); and *King v. National Super Markets, Inc.*, 653 S.W.2d 220 (Mo. banc 1983)(paper grocery sacks given to grocery store customers).

exempt the equipment for resale, too. That result is akin to saying that if the cost of a grocery store shopping cart is factored into the cost of the food that is resold, then the shopping cart gets the same resale exemption that is afforded to the wholesale purchase of the food; or the microwave on the counter at the convenience store that is used to heat the burrito; or the Sub-Zero refrigerator at the restaurant that is used to keep the perishables cold before they are served.

In other words, if it is alright to so loosely exempt factored-in costs, the logical extension of that approach is that anything used to prepare a food product for sale at retail is exempt from tax.

2. The cited lease cases do not address §144.020.1(8).

The Commission also cited two lease cases in support, *Weatherguard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App. ED 1988), and *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998). LF 142-144. These cases do not apply, either.

The issue in *Weatherguard* was whether insulation-blowing machines provided to the taxpayer's customers, along with sales of its insulation to those customers, were items purchased for resale. 746 S.W.2d at 657. But the Eastern District never considered whether §144.020.1(8) even applied, instead resolving the case by asking whether a "sale" occurred within the meaning of §144.615(6) (exemption from use tax for resales) and §144.605(5) (definition of "sale") *Id.* at 658. Therefore, the case cannot be "directly

controlling.” LF 141. *Weatherguard* (which has never been cited by any court) simply is not useful in resolving this case.

In *Brambles*, the taxpayer leased pallets, portable platforms. 981 S.W.2d at 569. The taxpayer’s customers in turn stacked their products (soap) onto the pallets, shrink-wrapped everything (products and pallet), and shipped the entire package to the retailers. *Id.* The taxpayer argued that its customers leased the pallets with the intent to re-lease or sublease to the retailers, and that the transfers qualified as resales. *Id.* at 570. This Court agreed with the taxpayer, basing its decision on §144.010.1(8), the definition of sale at retail³² and §144.010(3), the definition of “gross receipts.” *Id.* at 571. But like the court in *Weatherguard*, this Court did not consider §144.020.1(8). That was perhaps because the Director’s argument was focused elsewhere, i.e., on exploring the sufficiency of the taxpayer’s proof of consideration. *Id.* at 570-571.

Brambles was therefore simply resolved as any other packaging materials case. The Court ruled that the pallets should be treated the same as the dry ice in *Sipco* that was used to preserve the pork products being shipped. *Id.* at 571. The cost of the

³² The definition of “sale at retail” has since been renumbered from §144.010.1(8) to §144.010.1(10).

pallets, like the dry ice, was factored into the prices customers paid; the items were transferred to the customer; and the customers had the right to use them. *Id.*

Weatherguard and *Brambles* do not support the Commission's decision, either.

II.

In the alternative, the Administrative Hearing Commission erred in granting Rose’s “resale” claim because no exemption from tax exists for items used to provide a non-taxable service. Rose did not resell the items, but used them itself to provide a support service to its customers, a service that is not subject to tax under Missouri law.

The Director’s first point largely turns on the premise that Rose leased its coffee equipment to its customers. As discussed under Point I, the Commission incorrectly rejected that premise, in holding that the two-option election under §144.020.1(8) could not apply. But even if §144.020.1(8) did not apply, Rose’s purchases would not qualify as having been made for resale for another reason: Rose used them itself to provide a non-taxable service. No exemption from tax exists for Rose’s use of the equipment to provide this service.

We are not aware of an appellate court decision directly on point. Analogous cases are those in which a taxpayer performs a service and in the course thereof, gives the customer tangible personal property, which the customer keeps. Generally, in those cases, the reviewing courts look to whether the tangible personal property serves exclusively as the medium of transmission for an intangible service. *Sneary v. Director of Revenue*, 865 S.W.2d 342, 345 (Mo. banc 1993). If the intangible component (the service) is the “true object” of the transaction, and the tangible component is of little value to the buyer after the buyer has used it or obtained the intangible component, the sale is

nontaxable. *Id.* See, e.g., *Sneary*, 865 S.W.2d at 348 (architectural illustrations were true object of sale, and taxable); *Gammaitoni v. Director of Revenue*, 786 S.W.2d 126 (Mo. banc 1990)(original and duplicate videotapes of depositions, accident reconstructions, etc. were true object of sale, and taxable); *Travelhost of Ozark Mountain Country v. Director of Revenue*, 785 S.W.2d 541, 545 (Mo. banc 1990)(magazines containing customer's advertising are true object of transaction, and taxable); and *Gutknecht v. Director of Revenue*, 867 S.W.2d 709 (Mo. App. ED 1993)(architectural illustrations were true object of sale, and taxable).

Though tax cases from other jurisdictions are of no precedential value here, and are of limited persuasiveness given that other states' taxing schemes are inevitably different from Missouri's, we note two cases that are at least analogous. In *Sanitary Services Corp. v. Meehan*, 665 A.2d 895, 895-896 (Conn. 1995), the Connecticut Supreme Court considered whether a trash removal company's purchase of waste containers for lease to its customers were purchases for resale. The containers were necessary to the trash company's provision of waste removal services. *Id.* at 896. The court held that the true object of the trash company's contracts with its customers was the waste removal services, not the rental of the containers. *Id.* The purchases were therefore not purchases for resale, and were subject to tax. *Id.* at 896-897.

In *Atlas Linen Supply Co. v. Chu*, 540 N.Y.S2d 347, 348 (N.Y. App. Div. 1989), the New York Supreme Court, Appellate Division, considered whether linens – supplied to

hospitals by a company in the course of providing a non-taxable laundering service – were purchased for resale. The court held that they were not. *Id.* at 349. The primary or essential aspect of the laundering service arrangement, and of the company’s business, was laundering, not the rental of linens. *Id.*

Rose’s non-taxable service is providing its customers with the ability to have freshly-ground and -brewed coffee on demand. Rose provides this service by putting equipment on-site and taking care of its customers’ every service and maintenance need. LF 59-60, 72. The equipment remains Rose’s property, and Rose can remove it from a customer’s store at any time. LF 61, 70. Rose will only leave equipment with a customer for so long as the customer is buying Rose coffee beans. *Id.* In short, the customers who have “loan” agreements with Rose do not want the coffee equipment for the sake of having their own coffee equipment – they can buy it from Rose if they do. LF 59, 71. Indeed, the Commission’s observations that “Rose receives a great benefit” from the transaction – increased sales of its coffee, LF 147 – proves too much. The purpose of providing service and equipment is to support the sale of Rose coffee – a benefit for Rose and customer.

Rose will presumably argue that the “true object” cases are distinguishable from the instant case, because of the courts’ occasional description of the tangible items transferred as being disposable conduits, or as having negligible value, after the service is rendered. *E.g. Gutknecht*, 867 S.W.2d at 711. And, presumably, the coffee equipment here is of more than negligible value. But that fact is simply a corollary to the

fact that in the true object cases, the customers keep the tangible items provided by the service provider. Keeping tangible personal property that is itself of negligible value after the service ends is consistent with the conclusion that the true object of the transaction was the service, not the item.

The fact that Rose's customers gave Rose resale exemption certificates is also consistent with the conclusion that the true object of the transaction was not the equipment but the service. The customers did not think they were bargaining for equipment, they were paying for a non-taxable service when they bought the coffee and tea for resale.

Because Rose used the equipment in providing a non-taxable service to its customers, and no exemption (including any resale exemption) applies to its purchase of equipment that it used for that purpose, Rose's claim for exemption could have been denied on that basis as well.

III.

The Administrative Hearing Commission erred in granting Rose’s resale claim with respect to equipment that Rose claimed to have purchased and then sold outright. The taxpayer who seeks a refund bears the burden of proof under §§136.300 and 621.050, RSMo. Rose did not meet its burden. Rose only put on some evidence that it purchased and then sold an unspecified amount of equipment to its customers for their use, and put on no evidence that would permit the Commission to calculate any tax refund therefor.

The Commission held that Rose purchased some coffee equipment and never leased it, but sold it to customers outright, and held that Rose “unquestionably purchased” this subset of equipment for resale. LF 137. Rose did not put on any evidence of the amount of its sales that fell into this category. The only evidence that it

put on in this regard were the identical, conclusory averments in two affidavits that it “sold the coffee equipment outright to some customers seeking the same.” LF 59, 71.³³

Rose bore the burden of proof to establish its claim of purchase for resale. §§136.300 and 621.050. “Doubt may be resolved against [the taxpayer] at whose door the uncertainty can be laid.” *Kansas City Power and Light Co. v. Director of Revenue*, 83 S.W.3d 548, 553 (Mo. banc 2002), quoting *Dick Proctor Imports v. Director of*

³³ The evidence does generally show that Rose accepted written claims of exemption for resale from its customers on about 53% of its sales, and collected tax from its customers on about 47% of its sales. LF 74-75. But the evidence regarding the 53% - 47% breakdown only shows that those customers from whom Rose collected tax were customers who consumed and did not sell brewed coffee and tea, LF 75, not that any percentage of sales were to customers who were paying tax to Rose on their outright purchases of equipment.

Revenue, 746 S.W.2d 571, 575 (Mo. banc 1988). Here, doubt must be resolved against Rose, which simply provided no evidence to permit the Commission to calculate any tax refund due on this category of transactions.

The Commission's conclusion that Rose was entitled to a refund on the subset of equipment that Rose claims to have sold outright is unsupported by fact or law.

Conclusion

The Administrative Hearing Commission's decision, granting Rose's request for a refund of use tax paid on coffee equipment and parts should be reversed.

Respectfully submitted,

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**Certification of Service and of Compliance
with Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 4th day of August, 2005, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 8,496 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Alana M. Barragán-Scott

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§144.010.3, RSMo.

(3) “**Gross receipts**” ... shall also include the lease or rental consideration where the right to continuous possession or use of any article or tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made, and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid.

§144.020.1(8), RSMo

1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state ... as follows:

(8) A tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, provided that if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of “sale at retail” as defined in subdivision (8) of section 144.010 and the tax was collected at the time of purchase, the lessor or renter shall not apply or collect the tax on the subsequent lease or rental receipts from that property.

§144.070.5, RSMo.

5. A sales tax will be charged to and paid by a leasing company which does not exercise the option of paying in accordance with §144.020, on the amount charged for each rental or lease agreement while the motor vehicle, trailer, boat or outboard motor is domiciled in this state.

§144.605(7), RSMo.

(7) “**Sale**”, any transfer any transfer, barter or exchange of the title or ownership of tangible personal property, or the right to use, store or consume the same, for a consideration paid or to be paid, and any transaction whether called leases, rentals, bailments, loans, conditional sales or otherwise, and notwithstanding that the title or possession of the property or both is retained for security. ...

§144.615(6), RSMo.

Exemptions. – There are specifically exempted from the taxes levied in sections 144.600 to 144.745:

(6) Tangible personal property held by processors, retailers, importers, manufacturers, wholesalers, or jobbers, solely for resale in the regular course of business[.]