

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC84117**

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**DIRECTOR OF REVENUE  
Appellant,**

**v.**

**KANSAS CITY POWER AND LIGHT COMPANY  
Respondent.**

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**On Petition for Review from the  
Missouri Administrative Hearing Commission  
The Honorable Karen A. Winn, Commissioner**

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**BRIEF OF RESPONDENT  
KANSAS CITY POWER AND LIGHT COMPANY**

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## **INTRODUCTION**

This case addresses the issue of whether the electricity consumed by a hotels guests via individually controlled heating and cooling units located in the guest rooms and banquet rooms are exempt from sales tax as purchases for resale.

## **JURISDICTIONAL STATEMENT**

This appeal involves the construction of a state revenue law. Article V, Section 3 of the Missouri Constitution gives this court exclusive jurisdiction.

## STATEMENT OF FACTS

During the periods at issue the Kansas City Power and Light Company (KCP&L) sold electricity to the Hyatt Regency Crown Center in Kansas City (Hyatt). KCP&L collected and remitted to the Missouri Department of Revenue sales tax for its sales on electricity to Hyatt. KCP&L filed a claim for refund on behalf of the Hyatt on April 19, 1999. The refund was for the period September 1, 1995 through August 31, 1998 in the amount of \$66,806.27. The Appellant denied Petitioner's refund claim (AHC Transcript Petitioner's Exhibit No. 6). KCP&L timely filed an appeal on the denial to the Missouri Administrative Hearing Commission.

The Administrative Hearing Commission overturned the Director's denial stating "We conclude that the resale exclusion applies to those sales because Hyatt transferred control over the use of the electricity to its customer, the consumers." The Administrative Hearing Commission awarded a refund of \$41,589.14 based on the percentage of total space that its customer space represents. ( AHC Findings of Fact and Conclusions of Law, P. 14).

**POINTS RELIED ON**

**The Administrative Hearing Commission did not err in granting Hyatt=s claims for refund. That decision was correct under Section 144.010.1(10) R.S. Mo. which excludes from taxation sales for resales.**

*Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.3d 560, (Mo. banc 2000)

*King v. National Super Markets, Inc.*, 653 S.W.2d 220 (Mo. banc 1983)

*Aladdin=s Castle, Inc. v. Dir. of Revenue*, 916 S.W.2d 196 (Mo. banc 1996).

*Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994).

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*Drury Supply Company v. Director of Revenue, Administrative Hearing Commission*, No.

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Section 144.010.1(10) R.S. Mo.

Missouri Department of Revenue Regulation, 12 C.S.R. 10-110.220

**The Administrative Hearing Commission did not err when it calculated KCP&L=s refund taxes remitted based on the raw square footage of customer space.**

*Kansas City Power & Light Company v. Director of Revenue*, 783 S.W.2d 910 (Mo. banc 1990)

*Dick Proctor Imports, Inc. v. Director of Revenue*, 746 S.W.2d 571, (Mo. banc 1988).

*Ellis Banking Corp. v. Commissioner of Internal Revenue Serv.*, 688 F.2d 1376, 1383 (11<sup>th</sup> Cir.

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## ARGUMENT

### STANDARD OF REVIEW

This Court must uphold the AHC's decision if it was authorized by law and supported by competent and substantial evidence upon the entire record, and if it is not clearly contrary to the reasonable expectations of the General Assembly. *Jones v. Director of Revenue*, 981 S.W.2d 571, 574 (Mo. banc, 1998). Under this standard, this court essentially adopts the AHC's factual findings. *Concord Publishing House v. Director of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996).

**I. The Administrative Hearing Commission did not err in granting Hyatt=s claims for refund. That decision was correct under Section 144.010.1(10) R.S. Mo. which excludes from taxation sales for resales.**

The Administrative Hearing Commission did not err in finding:

Under *King v. National Super Markets* and subsequent cases, a retailer resells property by transferring it for consideration. It does not matter whether the retailer also used the item, or whether every customer actually received the item, or how much the item figured into the retail price. However, it does matter whether there was a transfer. KCP & L has shown that Hyatt transferred the use and control of some of the electricity to its customers by giving them control of the current. We conclude that the resale exclusion applies to those sales because Hyatt transferred control over the use of the electricity to its customers the consumers. . . . (Administrative Hearing Commission Findings of Fact and Conclusions of Law, P. 12)

Section 144.010.1(10) R.S. Mo. states:

ASale at retail@ means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; except

that, for the purposes of sections 144.010 to 144.525 and the tax imposed thereby.

It is well settled Missouri law that in order to determine whether there has been a resale it must be found that there has been: 1) a transfer, barter, or exchange; 2) of the title or ownership of tangible personal property or the right to use, store, or consume the same; 3) consideration paid. *Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.3d 560, (Mo. banc 2000) *Aladdin's Castle, Inc. v. Dir. of Revenue*, 916 S.W.2d 196 (Mo. banc 1996). *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994).

This Court, just last year, in *Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.3d 560, (Mo. banc 2000) stated:

Tangible personal property held . . . solely for resale in the regular course of business is also exempted from the use tax provision. Sec. 144.615(6).

To determine whether there has been a resale, a court must find that there has been (1) a transfer, barter, or exchange (2) of the title or ownership of tangible personal property or the right to use, store, or consume the same (3) for consideration paid. Sec. 144.605(7), R.S. Mo. 1994; *Aladdin's Castle, Inc. v. Dir. of Revenue*, 916 S.W.2d 196, 198 (Mo. banc 1996) . . . This Court has repeatedly considered the question of whether consideration has passed from one party to another so as to come within the meaning of a section 144.615(6) resale. This line of cases began with *King v. National Super Markets, Inc.*, 653 S.W.2d 220, 221-22

(Mo. banc 1983), in which this Court decided that National Super Markets was not obligated to pay use tax on paper bags because National's customers were paying an increased price for their groceries in exchange for the quantity of bags used to hold their purchases. Because National included the cost of the paper bags in the price charged for their groceries, consideration moved from the customers to National.

Electricity should be treated the same as a sale of tangible personal property. There should not be a distinction made between the sale of the tangible personal property and of electricity. The Legislature has seen fit to eliminate this distinction. Section 144.010.1(10) states:

ASale at retail@ means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; . . . Where necessary to conform to the context of sections 144.010 to 144.525 and the tax imposed thereby, the term >sale at retail= shall be construed to embrace . . . (b) Sales of electricity, electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers;

In *United States v. Wagner*, 1992 WL 427478 (W. D. Mo.) the United States District Court held:

There is no meaningful basis for distinction between the tangible personal property sold in *Benton* (*United States v. Benton*, 772 F. Supp. 453 (W. D. Mo. 1990), the Court dealt with tools, materials, construction supplies and equipment, supplies and materials used to operate and maintain an ammunition plant **B** citation and explanation added) and the intangible electrical power sold in the instant case. The Missouri sales tax statutes explicitly include retail sales of electrical power as taxable to the same extent as retail sales of tangible personal property. Likewise, the Aresale@ of electrical power should be exempt for the Missouri sales tax just as the resale of tangible personal property as concluded in *Benton*.

The electricity, used in the guest rooms and banquet rooms is resold to hotel guests in the same manner as any other consumables. In *Drury Supply Company v. Director of Revenue, Administrative Hearing Commission*, No. 95-000870RV, the Administrative Hearing Commission held that hotels purchased guest consumables for resale to their customers:

The hotels transferred ownership of these items to their customers. As is the case with the breakfast foods and supplies, the customers gave consideration for these items because the cost was included in the price of the rooms and directly increased the price.

In this particular case the electricity is (1) transferred to the Hyatt's guest via individually controlled heating/cooling units located in the guest rooms (2) the guest has the right to use as little or as much of the electricity as desired and (3) the cost of the electricity is factored into the selling price of the room.

Therefore, the electricity consumed by the hotel should be exempt as a sale for resale. Electricity is no different than the breakfast foods. In the case of breakfast food and supplies there is no direct correlation between each guest and the amount of food consumed. Also, the guest would not have direct control over the food and supplies. However, the cost is included in the price of the rooms and directly increased the price. Some guests may choose not to consume the food or the soap and shampoo in the rooms but they are charged the same as every other guest.

Appellant has raised the issue of the true object or true purpose of a transaction. The Appellant is confusing the issue of the true object test and a sale for resale. The issue here is whether there has been a resale and if there has been: 1) a transfer, barter, or exchange; 2) of the title or ownership of tangible personal property or the right to use, store, or consume the same; 3) consideration paid.

The Administrative Hearing Commission recognized that they were applying the resale doctrine to a new type of commodity:

The packaging cases dealt with discrete units of tangible personal property like dry ice and Styrofoam peanuts. Even without sophisticated accounting techniques, it was clear that the cost of those items was factored into the price of the goods just as Hyatt included the cost of electricity in its room charges. It was also clear that the transaction required the seller to physically transfer those items to the buyer for the buyer's benefit. The physical transfer is more perfectly analogized from styrofoam peanuts to dry ice than from dry ice to electricity. However, Hyatt included the cost of electricity in its room charges and put the control of electricity used for climate control, lights, and other applications in its customers' hands. This

is as close as one can safely come to transferring possession of electricity. We conclude that, as to the electricity it put under its customers' control, Hyatt fulfilled the statutory requirement of transferring the electricity. (AHC Findings of Fact and Conclusions of Law, P.10)

The Missouri Department of Revenue Regulation, 12 C.S.R. 10-110.220, (Adopted effective December 30, 2000.) states:

(3) Basic Application of the Tax . . . (F) Persons providing complimentary meals and drinks or non-reusable tangible personal property as part of the room accommodation should not pay tax on the purchases. Non-reusable items include soap, shampoo, tissue, and food or confectionery items offered to the guests without charge . . . (4) Examples. (A) A hotel rents a room to a guest for a night. The soap and shampoo are included in the price of the room and may be purchased tax exempt by the hotel under a resale exemption. The complimentary breakfast provided to the guest is also included in the price of the room, and the hotel may purchase the food under a resale exemption.

The Appellant would like to be able to tax electricity as any other consumable but then wants to exclude the electricity from legislatively granted exemptions. The electricity is taxed as a consumable and should be treated no differently than the consumable items the Missouri Department of Revenue already considers to be entitled to the resale exemption.

**II. The Administrative Hearing Commission did not err when it calculated KCP&L=s refund taxes remitted based on the raw square footage of customer space.**

The Administrative Hearing Commission did not err in finding that a refund was due based on the square footage of customer space. The use of square footage is a reasonable method to determine the amount of resold electricity. The Commission stated that Apportionment is an issue of fact, which the statutes commit to us. (Administrative Hearing Commission, Findings of Fact and Conclusions of Law, P. 13). This Court in *Kansas City Power & Light Company v. Director of Revenue*, 783 S.W.2d 910 (Mo. banc 1990) held:

The director must sometimes use allocation and computations in auditing returns and assessing deficiencies. This presents an evidentiary problem. Whether the method is proper is a matter of fact on which we defer to the Administrative Hearing Commission. The Commission found the method to be reasonable and it should be upheld.

The Administrative Hearing Commission found the square footage formula to be reasonable and therefore since it is a matter of fact should be upheld. The Administrative Hearing Commission also relied on *Dick Proctor Imports, Inc. v. Director of Revenue*, 746 S.W.2d 571, (Mo. banc 1988). This Court in *Dick Proctor Imports* held:

If the taxpayer does not provide sufficient data for the AHC to calculate precisely the tax advantage, the law provided, the Commission shall make as close an approximation as it can. (*Id.* at 575)

Appellant is attempting to deny Respondent the right to an exemption, granted by the legislature, by imposing an unrealistic standard. This Court in *Dick Proctor Imports Inc.* held:

Although appellant's evidence did not establish the precise amount of its sales which were partly within and partly without Missouri, it did unequivocally establish that a large portion of the sales appellant reported as being transactions partly within and partly without Missouri were, in fact, properly reported. Thus appellant fulfilled its burden of proving its entitlement to some benefit from the single factor apportionment formula. Because appellant carried this burden of proof, it must be permitted to include some portion of its sales in the formula at fifty percent. Cf. *Ellis Banking Corp. v. Commissioner of Internal Revenue Serv.*, 688 F.2d 1376, 1383 (11<sup>th</sup> Cir. 1982) (taxpayer entitled to some deduction for business expenses despite its failure to prove exact amount of expenses), cert. denied, 463 U.S. 1207 (1983).

The use of square footage is a reasonable method. Respondent fulfilled its burden of proof at the Administrative Hearing Commission in regard to the factual question of apportionment of the electrical expense and therefore is entitled to the exemption.

### **CONCLUSION**

The AHC's decision was authorized by law and supported by competent and substantial evidence. In addition, the apportionment formula was a quest of fact for the foregoing reasons. This Court should uphold the decision of the Commission.

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 22<sup>nd</sup> day of April, 2002, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed, overnight mail, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2992 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.

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RICHARD E. LENZA