

No. 89559

---

In the  
Supreme Court of Missouri

---

|                             |   |  |
|-----------------------------|---|--|
| <b>ICC MANAGEMENT, INC.</b> | ) | <b>On Appeal from the</b>              |
|                             | ) | <b>Missouri Administrative Hearing</b> |
| <b>Appellant,</b>           | ) | <b>Commission</b>                      |
|                             | ) |  |
| <b>v.</b>                   | ) | <b>No. 07-0355RS</b>                   |
|                             | ) |  |
| <b>DIRECTOR OF REVENUE,</b> | ) |  |
| <b>STATE OF MISSOURI</b>    | ) |  |
|                             | ) | <b>Commissioner Douglas M. Ommen</b>   |
| <b>Respondent.</b>          | ) |  |
|                             | ) |  |

---

**BRIEF OF APPELLANT**

---

**TABLE OF CONTENTS**

I. JURISDICTIONAL STATEMENT..... 1

II. STATEMENT OF FACTS..... 1

III. POINTS RELIED ON ..... 4

IV. ARGUMENT ..... 5

The Missouri Administrative Hearing Commission Erred In Ruling That Appellant’s Purchases Of The Inmate Consumables Were Subject To The Missouri Sales/Use Tax, Because Such Purchases Qualified For The “Resale” Exclusion From Tax, In That (A) The Commission Based Its Ruling On Its Conclusion That A Taxpayer Cannot Qualify For The “Resale” Exclusion With Respect To A Particular Purchase If The Taxpayer Subsequently Sells The Purchased Item In A Transaction That Is Exempt From The Sales/Use Tax, and (B) The Commission’s Conclusion Is Not Supported By The Missouri Statutes Underlying the “Resale” Exclusion And The Supreme Court Cases Construing The Same.....5

## TABLE OF AUTHORITIES

### Cases

|  |                  |
|--|------------------|
| <i>Aladdin’s Castle, Inc. v. Director of Revenue</i> , 916 S.W. 2d 196 (Mo. banc. 1996).....       | 7, 8             |
| <i>Greenbrier Hills Country Club v. Director of Revenue</i> , 935 S.W.2d 36 (Mo. banc 1996).....   | 10               |
| <i>McDonnell Douglas Corporation v. Director of Revenue</i> , 945 S.W.2d 437 (Mo. banc) 1997)..... | 8, 9, 10, 11, 12 |
| <i>Westwood Country Club v. Director of Revenue</i> , 6 S.W.3d 885 (Mo. banc. 1999) .....          | 9, 10, 11, 12    |

### Statutes

|                           |                |
|---------------------------|----------------|
| RSMo. 144.010.1(10) ..... | 1, 6           |
| RSMo. 144.020 .....       | 10, 11         |
| RSMo. 144.020.1 .....     | 1, 5           |
| RSMo. 144.030 .....       | 10, 11         |
| RSMo. 144.030.1 .....     | 2, 3, 8, 9, 11 |
| RSMo. 144.030.2 .....     | 1, 6           |
| RSMo. 144.030.2(2) .....  | 1, 6           |
| RSMo. 144.610.1 .....     | 1, 6           |
| RSMo. 144.615(3) .....    | 1, 6           |
| RSMo. 144.615(6) .....    | 1, 6           |
| RSMo. 536.140.2(4) .....  | 5              |
| RSMo. 621.135 .....       | 5              |

### Regulations

|  |    |
|--|----|
| <i>Reg. 12 C.S.R. 10-112.300(3)(B)</i> ..... | 12 |
|--|----|

**Constitutional Provisions**

MO. CONST. art. III § 39(10) ..... 2, 3, 8, 11

MO. CONST. art. V, § 3..... 1

**I. JURISDICTIONAL STATEMENT**

Appellant ICC Management, Inc. sells certain food, clothing and personal hygiene items to certain Missouri and Kansas cities and counties. Before selling these items to the cities and counties, Appellant purchases such items from vendors located in Missouri and other states. Appellant has taken the position that it purchases these items for “resale” to the cities and counties and, thus, that such purchases are not subject to the Missouri sales or use tax. 144.010.1(10), 144.020.1, 144.030.2, 144.030.2(2), 144.610.1, 144.615(3) and 144.615(6), RSMo. In a decision rendered on August 4, 2008, the Missouri Administrative Hearing Commission (the “Commission”) ruled that Appellant’s purchases were subject to the Missouri sales and/or use tax, due to the fact that Appellant’s ultimate resales to the cities and counties were exempt from the Missouri sales tax and use tax. This appeal concerns the validity of the Commission’s decision on the Missouri sales and use tax issue. Under Article V, Section 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction in all cases involving the construction of the revenue laws of this state.

**II. STATEMENT OF FACTS**

Appellant is a private for-profit corporation that operates a private jail facility located near Holden, Missouri. Commission’s Decision of August 4, 2008 (“Decision”) at p. 2 [R-24].

Appellant contracts with certain municipalities and counties (the “Municipalities”) to hold inmates sent by the Municipalities. Appellant contracted with Wyandotte County, Kansas for part of the period at issue in this case. Otherwise, Appellant contracted with

local governments within Missouri. For certain smaller Municipalities, Appellant does not have written contracts. In this situation, however, Appellant holds the inmates under the same terms and conditions as for the local governments with respect to which there are written contracts. Decision at p. 2 [R-24].

Pursuant to its contracts with the Municipalities, Appellant provides three meals per day, as well as clothing and other consumable items such as soap, shampoo and medical supplies, to the inmates (with the meals, clothing and other consumable items being referred to herein as the “Inmate Consumables”). Decision at p. 2 [R-24].

The Municipalities pay Appellant a specified fee per inmate per day. This fee ranged from \$32.50 to \$50.00 during the periods at issue. Decision at p. 2 [R-24].

Appellant factors the cost of the Inmate Consumables into the fee that it charges the Municipalities. Under 144.030.1, RSMo, and Article III, Section 39(10) of the Missouri Constitution, sales to counties and other political subdivisions are exempt from the Missouri sales tax. Because of this exemption, Appellant does not collect sales tax when it sells the Inmate Consumables to the Municipalities. Decision at p. 2 [R-24].

Appellant has found that providing good quality meals to inmates helps maintain the peace in its facility. Decision at p. 2 [R-24].

Appellant purchases some of the Inmate Consumables from in-state vendors and some from out-of-state vendors. When Appellant purchased Inmate Consumables from January, 2002 through December, 2005, it provided resale exemption certificates to the in-state vendors. Thus, the vendors did not collect sales tax from Appellant on these purchases. Appellant did not file use tax returns for January, 2000 through December,

2005, and did not pay use tax on any of its purchases from out-of-state vendors. Decision at pp. 2-3 [R-24 to R-25].

Respondent Director of Revenue conducted a sale tax audit of Appellant for January, 2002 through December, 2005, and a use tax audit for January, 2000 through December, 2005. Appellant agreed that it was subject to sales/use tax on some items that are not at issue in this case and paid the tax on those items pursuant to the audit. The auditor also concluded, however, that Appellant was liable for Missouri sales/use tax on its purchases of the Inmate Consumables. Decision at p. 3 [R-25].

As a result of the audit, Respondent issued final decisions assessing deficiencies of \$14,056.25 in sales tax and \$5,459.79 in use tax, plus interest, on Appellant's purchases of the Inmate Consumables during the audit period. Decision at p. 3 [R-25].

On March 14, 2007, Appellant filed a petition with the Administrative Hearing Commission challenging the decisions issued by Respondent. The Commission convened an evidentiary hearing on December 6, 2007, and the parties subsequently submitted briefs to the Commission. Decision at p. 1 [R-23].

On August 4, 2008, Commissioner Douglas M. Ommen rendered a decision upholding Respondent's decisions. Decision at pp. 1-12 [R-23 to R-34]. Commissioner Ommen based the decision on his conclusion that in order to claim a "resale" exclusion with respect to its purchases of certain items, a taxpayer must resell those items in a **taxable** sale at retail. Decision at pp. 8-10 [R-32]. In the present case, Appellant's resales to the Municipalities are not subject to tax, due to an exemption provided under 144.030.1, RSMo, and Article III, Section 39(10) of the Missouri Constitution for sales to

governmental entities. Thus, according to Commissioner Ommen, the “resale” exclusion could not apply with respect to Appellant’s purchases of the Inmate Consumables. Decision at p. 10 [R-32].

Respondent filed a Petition for Review with the Missouri Supreme Court on August 28, 2008, challenging the validity of the Commission’s August 4, 2008 decision.

### **III. POINTS RELIED ON**

The Missouri Administrative Hearing Commission Erred In Ruling That Appellant’s Purchases Of The Inmate Consumables Were Subject To The Missouri Sales/Use Tax, Because Such Purchases Qualified For The “Resale” Exclusion From Tax, In That (A) The Commission Based Its Ruling On Its Conclusion That A Taxpayer Cannot Qualify For The “Resale” Exclusion With Respect To A Particular Purchase If The Taxpayer Subsequently Sells The Purchased Item In A Transaction That Is Exempt From The Sales/Use Tax, and (B) The Commission’s Conclusion Is Not Supported By The Missouri Statutes Underlying the “Resale” Exclusion And The Supreme Court Cases Construing The Same.

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

*McDonnell Douglas Corporation v. Director of Revenue*, 945 S.W.2d 437 (Mo. banc) 1997)

*Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc. 1999)

RSMo. 144.010.1(10)

RSMo. 144.020

RSMo. 144.030.1

RSMo. 144.030.2(2)

RSMo. 144.615(3)

RSMo. 144.615(6)

MO. CONST. art. III, § 39(10)

*Reg.* 12 C.S.R. 10-112.300(3)(B)

#### IV. **ARGUMENT**

The Missouri Administrative Hearing Commission Erred In Ruling That Appellant's Purchases Of The Inmate Consumables Were Subject To The Missouri Sales/Use Tax, Because Such Purchases Qualified For The "Resale" Exclusion From Tax, In That (A) The Commission Based Its Ruling On Its Conclusion That A Taxpayer Cannot Qualify For The "Resale" Exclusion With Respect To A Particular Purchase If The Taxpayer Subsequently Sells The Purchased Item In A Transaction That Is Exempt From The Sales/Use Tax, and (B) The Commission's Conclusion Is Not Supported By The Missouri Statutes Underlying the "Resale" Exclusion And The Supreme Court Cases Construing The Same.

**Standard of Review:** The provisions of Chapter 536, RSMo, apply to and govern the proceedings of the Commission and the rights and duties of the parties involved. 621.135, RSMo. According to 536.140.2(4), RSMo, a court reviewing a decision of the Commission may, among other things, inquire as to whether the decision of the Commission was, for any reason, unauthorized by law. For the reasons set forth below, the Commission's decision in this case was unauthorized by law.

**Detailed Argument:** Under 144.020.1, RSMo, the Missouri sales tax applies to any

"sale" of tangible personal property "at retail" in Missouri. Under 144.010.1(10), RSMo, any sale that is "for resale in any form as tangible personal property" is specifically excluded from the term "sale at retail." Also, under 144.030.2(2), RSMo, the Missouri sales tax does not apply to sales of materials which become an ingredient or component part of new personal property which is intended to be "sold" ultimately for final use or consumption. Thus, in essence, any purchase of an item "for resale" (or any purchase of an item that becomes an ingredient in a new item that will be "resold") is not subject to the Missouri sales tax.

Likewise, under 144.610.1, RSMo, the Missouri use tax is imposed for the privilege of storing, using or consuming within Missouri any article of tangible personal property purchased by the taxpayer. Section 144.615(6). RSMo, states however, that the Missouri use tax does not apply to any tangible personal property held solely "for resale in the regular course of business." Also, under 144.615(3), RSMo, the use of an item in Missouri is not subject to the Missouri use tax if the purchase of such item (in Missouri) would be exempt under 144.030.2, RSMo (cited above). Thus, as with the Missouri sales tax, a purchase of an item "for resale" (or the purchase of an item that becomes an ingredient in a new item that will be "resold") is not subject to the Missouri use tax.

Based on the foregoing, the critical question in this case is whether Appellant purchased the Inmate Consumables "for resale" to the Municipalities. If so, Appellants purchases from its vendors qualified for the "resale" exclusion set forth above and were not subject to the Missouri sales or use tax. In this regard, this Court has stated that in order for a "resale" to exist (and for the statutory "resale" exclusion to apply), a

taxpayer's purported "resale" transaction must contain the following three elements: (1) a transfer, barter or exchange, (2) of the title or ownership of tangible personal property, (3) for a consideration paid or to be paid. *Aladdin's Castle, Inc. v. Director of Revenue*, 916 S.W. 2d 196, 198 (Mo. banc. 1996).

In the present case, Appellant has taken the position that its purported "resale" transactions (i.e., the transfers of the Inmate Consumables to the Municipalities) satisfied the three-part "resale" test set forth in *Aladdin's Castle*; **and the Commission agreed, stating as follows:**

[Appellant] purchased the food, clothing and consumable items from its vendors, and then transferred title or ownership, or the right to use, store or consume the property, for a consideration. . . . The definition of "sale at retail" requires the "transfer . . . to the purchaser, for use or consumption." Each element of a sale is met...

Decision at p. 8 [R-30]. Thus, having satisfied all of the requirements for treating its purchases of the Inmate Consumables as purchases for "resale," Appellant should have qualified for the "resale" exclusion—and should not have been required to pay Missouri sales or use tax--with respect to such purchases.

Nonetheless, after having found that Appellant met all of the requirements of the three-part *Aladdin's Castle* "resale" test, the Commission ruled that Appellant's purchases did not qualify for the "resale" exclusion. In reaching this result, the Commission essentially added a new fourth part to the *Aladdin's Castle* test. The

Commission held that in order for a taxpayer to purchase items under a valid “resale” exclusion, the purported “resale” transaction must be a **taxable** sale. Decision at pp. 8-10 [R-30 to R-32]. Applying this new element of the “resale” test, the Commission noted that Appellant’s sales to the Municipalities were exempt from the Missouri sales tax under Article III, Section 39(10) of the Missouri Constitution (which, in conjunction with 144.030.1, RSMo, provides an exemption for sales to governmental entities).<sup>1</sup> Decision at p. 10 [R-32]. Thus, according to the Commission, Appellant’s purchases of the Inmate Consumables did not qualify for the “resale” exclusion. Decision at p. 10 [R-32].

The Commission’s decision on this issue is unauthorized by law because it conflicts directly with this Court’s decision in *McDonnell Douglas Corporation v. Director of Revenue*, 945 S.W.2d 437 (Mo. banc) 1997). In *McDonnell Douglas*, this Court, relying on the three-part *Aladdin’s Castle* test, held that a taxpayer’s transfer of personal property to the United States government under a supply/service contract

---

<sup>1</sup> Section 144.030.1, RSMo, provides an exemption from sales tax for “any retail sale which the state of Missouri is prohibited from taxing pursuant to the Constitution or laws of the United States” and for “such retail sales of tangible personal property which the general assembly of the state of Missouri is prohibited from taxing . . . by the constitution of this state.” Article III, Section 39(10) of the Missouri Constitution states that the general assembly shall not have the power to impose a sales tax upon the purchase of property by any county or other political subdivision.

between the taxpayer and the government was a “resale.” Thus, the taxpayer’s prior purchases of the property ultimately transferred to the federal government qualified for the “resale” exclusion and were not subject to the Missouri sales tax. This was true even though the ultimate “resale” transaction with the federal government was exempt from tax under 144.030.1, RSMo.

For purposes of deciding the Missouri sales/use tax issues, the facts in the present case are identical to the facts in *McDonnell Douglas*. Appellant purchased the Inmate Consumables from its vendors and then “resold” the Inmate Consumables to certain local governmental entities in transactions that were exempt from tax under 144.030.1, RSMo. The taxpayer in *McDonnell Douglas* purchased certain items from its vendors and then “resold” such items to the federal governmental in transactions that were exempt from tax under 144.030.1, RSMo. In *McDonnell Douglas*, the Court held that the taxpayer’s purchases from its vendors qualified for the “resale” exclusion and were not subject to the Missouri sales tax, even though the ultimate “resales” were not subject to tax (because the buyer was an exempt governmental entity). Applying *McDonnell Douglas*, the same result should apply in the present case.

In the proceedings below, Appellant cited *McDonnell Douglas* in its brief. Thus, the Commission was aware of the case. The Commission determined, however, that this Court’s decision in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc. 1999) overruled *McDonnell Douglas*. Decision at p. 10 [R-32]. This determination was incorrect. In *Westwood*, the Court did not overrule *McDonnell Douglas*. Instead, the Court simply compared the circumstances in the two cases and determined that the result

in *Westwood* was “not governed by *McDonnell Douglas*.” This distinction is critical in the present case because, in all relevant respects, the circumstances in the present case are identical to the circumstances in *McDonnell Douglas* and different from the circumstances in *Westwood*.

In *Westwood*, the taxpayer/club was a private country club that sold meals only to its club members. The taxpayer took the position that it was entitled to claim a “resale” exclusion with respect to food and drink purchases from its vendors, due to the fact that it ultimately “resold” these items to its members. The taxpayer did not pay sales tax on the ultimate sales to the members because, under the Missouri sales tax statutes, a sale of meals by a country club to a member of the club does not come within the definition of a taxable “sale at retail.”<sup>2</sup> On these facts, this Court held that purchases by a taxpayer do

---

<sup>2</sup> Section 144.020, RSMo, states that sales “at retail” are subject to the Missouri sales tax and then provides the applicable sales tax rate for the various types of sales “at retail.” The types of transactions described in 144.020 (i.e., “sales at retail”) are subject to the Missouri sales tax unless a particular transaction—despite being characterized as a “sale at retail”—is also identified as an exempt transaction under 144.030, RSMo. In *Greenbrier Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996), this Court determined that a sale by a private club to a member of the club does not come within the definition of a potentially taxable “sale at retail” under 144.020, RSMo, and, as such, is not subject to tax, even if there is no applicable exemption under 144.030, RSMo.

not qualify for the “resale” exclusion unless the taxpayer subsequently resells the purchased items in a transaction that can be characterized as a “sale at retail.” As indicated, the taxpayer/club’s sales to its members were not “sales at retail,” and thus the taxpayer’s purchases did not qualify for the “resale” exclusion.

It is critical to note that in deciding *Westwood*, this Court specifically addressed *McDonnell Douglas*. The Court noted that in *McDonnell Douglas*, the ultimate “resale” transaction with the federal government was classified as a “sale at retail.” That transaction, however--although treated as a “sale at retail”--was not subject to tax because it was exempt under 144.030.1, RSMo. *Westwood*, 65 S.W. 3d at 887-88. In other words, the “resale” in *McDonnell Douglas* was not subject to tax because there was an exemption from tax, rather than because there was no “sale at retail.” By comparison, in *Westwood*, the subsequent “resale” transactions between the private club and its members were not subject to tax because there was no “sale at retail.” Because there was no subsequent “sale at retail,” *McDonnell Douglas*, although still good law, did not apply.

The relevant facts in the present case are identical to the facts in *McDonnell Douglas*. The Commission found specifically (a) that Appellant “resold” the Inmate Consumables to the Municipalities in “sales at retail” (a fact that did not exist in *Westwood*) (Decision at p. 8 [R-30]) and (b) that these “resales” were not subject to tax due to the exemption provided under Article III, Section 39(10) of the Missouri Constitution (Decision at p. 10 [R-32]). Thus, like the taxpayer’s purchases in *McDonnell Douglas*, Appellant’s purchases of the Inmate Consumables should have qualified for the “resale” exclusion.

Finally, the Court should note that Respondent himself has issued regulations indicating that Respondent does not agree with the Commission's decision in this case. As discussed above, the Commission's decision below was based on its conclusions (a) that *Westwood* overruled this Court's decision in *McDonnell Douglas* and (b) that a taxpayer is not entitled to claim the "resale" exclusion with respect to the taxpayer's purchases of certain items unless the subsequent resale of such items is a **taxable** sale. *Reg. 12 C.S.R. 10-112.300(3)(B)*, issued by Respondent in 2000 (subsequent to this Court's decision in *Westwood*), directly contradicts both of these conclusions. *Reg. 12 C.S.R. 10-112.300(3)(B)* states as follows:

The resale exclusion applies to property purchased by government contractors and resold to the United States government. The purchase of property for resale is not subject to tax; and the resale of property by a government contractor to the United States government is also not subject to tax.

Given that Respondent's own regulation directly contradicts the Commission's decision below, it is curious that Respondent apparently is now asking the Court to uphold the Commission's decision. At the very least, Respondent's regulation provides compelling support for Appellant's position that the Commission's decision was incorrect. Also, it is not difficult to imagine the chaos that would ensue if the Court were to uphold the Commission's decision and the Director were then to inform taxpayers across the state that they had improperly relied on his regulation.

For the foregoing reasons, the Commission's decision is unauthorized by law and should be reversed.

Respectfully submitted,

By:

---

John W. Simpson, #35334  
SHOOK, HARDY & BACON L.L.P.  
2555 Grand Boulevard  
Kansas City, Missouri 64108  
Tel: 816-474-6550  
Fax: 816-421-5547  
jsimpson@shb.com

*ATTORNEY FOR APPELLANT*

### **RULE 84.06(c) CERTIFICATION**

I hereby certify that this brief (a) contains the information required by Rule 55.03 of the Missouri Rules of Civil Procedure and (b) complies with the limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2003 and contains 3,185 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

---

John W. Simpson

**CERTIFICATE OF SERVICE**

I hereby certify a copy of the foregoing was sent via First Class Mail, postage pre-paid, this 19th day of December, 2008, addressed to the following:

James R. Layton  
State Solicitor  
Missouri Bar No. 45631  
Supreme Court Building  
207 West High Street  
P.O. Box 899  
Jefferson City, Missouri 65102-0899

*ATTORNEY FOR RESPONDENT*  
*MISSOURI DIRECTOR OF REVENUE*

---

John W. Simpson