

SS

WD71019

2010 FEB 18 7 10:36

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

THE CITY OF KANSAS CITY, MISSOURI
AVIATION DEPARTMENT,

90714

Respondent (Petitioner below),

FILED

FEB 18 2010

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI CLERK SUPREME COURT

Thomas F. Simon

Appellant.

Appeal from the Administrative Hearing Commission,
The Honorable John J. Kopp, Commissioner

BRIEF OF APPELLANT

CHRIS KOSTER
Attorney General

JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899

Jefferson City, MO 65102
(781) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

ATTORNEYS FOR APPELLANT

CD

**SERVICE BRIEF
DO NOT REMOVE
FROM FILE ROOM**

SCANNED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS.....	4
A. The City Sells Electricity to Its Tenants at the Airport.....	5
B. The City Paid Sales Tax on the Electricity That it Sold to Tenants Until July 2007.	8
C. The City Appealed the Director’s Tax Assessments to the Administrative Hearing Commission.....	10
POINT RELIED ON.....	11
SUMMARY OF THE ARGUMENT	12
ARGUMENT.....	13
The AHC Erred in Holding That the City of Kansas City is Not Required to Collect Sales Tax on the Sale of Electricity to its Airport Tenants, Because the AHC Incorrectly Interpreted § 144.020.1, RSMo, In That the Statutory Requirement of “In the Business” Includes Sales for Public Purposes Regardless of Profit Motive.	13
A. The Plain Language of the Statute Provides the Controlling Test for What is “In the Business.”	16

B.	The Missouri Supreme Court Has Interpreted the Term “Business” in the Missouri Sales Tax Law Very Broadly.....	18
C.	The City is “In the Business” of Selling Electricity Because it Sells Electricity “With the Object of Gain, Benefit or Advantage.”	21
D.	The City is Not an Agent for Its Airport Tenants.....	25
	CONCLUSION.....	28
	CERTIFICATE OF SERVICE.....	29
	CERTIFICATION OF COMPLIANCE	30
	APPENDIX.....	31

TABLE OF AUTHORITIES

CASES

City of Springfield v. Dir. of Revenue,

659 S.W.2d 782 (Mo. banc 1983) *passim*

Dierkes v. Blue Cross and Blue Shield of Mo.,

991 S.W.2d 662 (Mo. banc 1999) 17, 18

Jones v. Dir. of Revenue, 832 S.W.2d 516 (Mo. banc 1992)..... 15

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

83 S.W.3d 548 (Mo. banc 2002) 14

Martin Coin Co. of St. Louis v. King,

665 S.W.2d 939 (Mo. banc 1984) 26, 27

President Casino, Inc. v. Dir. of Revenue,

219 S.W.3d 235 (Mo. banc 2007) 13

Six Flags Theme Parks, Inc. v. Dir. of Revenue,

102 S.W.3d 526 (Mo. banc 2003) 13

St. Louis Country Club v. Admin. Hearing Comm'n,

657 S.W.2d 614 (Mo. banc 1983) *passim*

State v. Rellihan, 662 S.W.2d 535 (Mo. App. W.D. 1983) 17

STATUTORY AUTHORITY

§ 144.010(11)..... 14

§ 144.010(6)..... 14

§ 144.010.1(2)..... 15, 18, 21

§ 144.020.1 *passim*

§ 144.020.1(2)..... 20

§ 144.020.1(3)..... 14, 17

Mo. Const. Art. III, § 39 (10)..... 17

JURISDICTIONAL STATEMENT

This case came before the Administrative Hearing Commission on a complaint filed by the City of Kansas City Aviation Department challenging the Director of Revenue's assessment of sales tax and additions, plus interest for August, September, and October, 2007. § 144.020.1, RSMo Supp. 2008.^{1/} The question posed in this appeal is whether the City's sale of electricity to its tenants at the downtown airport is subject to sales tax. The case is controlled by the Missouri Supreme Court's decisions in *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782 (Mo. banc 1983) and *St. Louis Country Club v. Admin. Hearing Comm'n*, 657 S.W.2d 614 (Mo. banc 1983). Therefore, it is properly before this Court as the application of existing law.

^{1/} All subsequent statutory citations are to RSMo Supp. 2008. All relevant provisions were in effect at the time period at issue in this case.

STATEMENT OF FACTS

The petitioner below, the City of Kansas City, is a political subdivision of the State of Missouri and an incorporated charter municipality. (Tr. 6.) Respondent below is the duly appointed Missouri Director of Revenue operating in her official capacity. The Kansas City Aviation Department is a division of the City under the supervision of the Director of Aviation. (Tr. 6.) The Aviation Department administers the operations of the City's airports and associated activities, including management and operation of all the buildings and fields owned and operated by the City for the purpose of serving aviation. (Tr. 6-7.)

The Charles B. Wheeler Downtown Airport was Kansas City's first airport. (Resp. Ex. A, Interog. No. 2.) There are multiple general aviation improvements scattered throughout the airport, consisting of numerous corporate hangars, maintenance hangars, storage buildings, general aviation facilities, offices, shops, support buildings, and an air museum. *Id.* The airport reflects a typical corporate-intensive general reliever facility as found in similar communities throughout the United States. *Id.* The airport offers all of the amenities necessary for local and itinerant general aviation activities, including the infrastructure to accommodate larger aircraft and diverse aviation activity as demand warrants. *Id.* Up to 700 aircraft per day take off or land at the airport, and the airport and its traffic control tower are open 24 hours a day. *Id.* The deputy director of aviation in charge of properties and commercial

development for the Aviation Department testified explicitly that “this is a business.” (Tr. 20 & 23).

Executive Beechcraft, Inc. is the fixed-base operator at the airport. (Tr. 27.) A fixed-base operator is an entity that leases a major portion of the airport, conducts day-to-day operations associated with the space, and enters into subleases with other entities. (Tr. 27-28.) As the fixed-base operator, Executive Beechcraft services nearly 300 aircraft based at the airport, as well as itinerant and charter aircraft, offering fuel, full maintenance, aircraft rentals, sales, and flight training. (Resp. Ex. A, Interog. No. 2.) Executive Beechcraft leases airport property and facilities on the east and west side of the airport and subleases portions of the airport property and facilities to Sprint, the Airline History Museum, and Save-A-Connie. (Tr. 10, 28, 57.)

A. The City Sells Electricity to Its Tenants at the Airport.

The facilities on the west side of the airport receive their electricity through a distribution line from a substation at 10 Richards Road. (Tr. 32.; *see also* Exhibit 1 included in the appendix) The substation at 10 Richards Road is partially owned by the City, and the distribution line from that substation is fully owned by the City. (Tr. 32-33.) Kansas City Power and Light provides the City with electricity at the substation and bills the City for the electricity as it enters the substation. (Tr. 55.) Kansas City Power and Light has no control over the electricity after it leaves the substation. (Tr. 56.) Each building on the

west side of the airport has a separate electrical meter that the City uses to meter the usage of its tenants. (Tr. 33.) The City owns all of the electrical meters and is responsible for maintenance of all electrical meters and lines on the west side of the airport. (Tr. 33-34.) On or about the tenth day of each month, City employees read and record the meter reading at each location. (Tr. 50-51.) Tenants such as Executive Beechcraft, as well as subtenants of Executive Beechcraft, are then billed directly by the City for their monthly electricity usage. (Tr. 51.) The City charges tenants and subtenants around nine cents per kilowatt hour for electricity. (Tr. 56.) The City currently pays Kansas City Power and Light about six cents per kilowatt hour for electricity that it purchases to resell. (Tr. 56.)

The facilities on the east side of the airport receive their electricity from a distribution line extending from the Broadway Bridge substation. The distribution line is owned by Kansas City Power and Light (Tr. 11; 13; 32.) However, facilities on the east side are billed in three different ways. First, hanger numbers 2 and 3, which are leased to Executive Beechcraft by the City, are metered and billed for their usage exactly in the same way as tenants on the west side of the airport – by the City. (Tr. 36.) Second, in the terminal building on the east side the tenants are not metered individually by the City because of logistical difficulties in providing individual meters within the building. (Tr. 36-37.) Instead, the City estimates the usage and embeds the estimated cost of

electricity in the tenants' rent. (Tr. 37.) Third, the facilities that are north of the terminal building (i.e. the northeast portion of the airport) receive their electricity directly from Kansas City Power and Light, which is responsible for metering, billing, and collecting sales tax. (Tr. 37-38.)

The City bills the following tenants or subtenants based on their metered usage: Executive Beechcraft, Sprint, United Management, Civil Air Patrol, the Airline History Museum, Save-A-Connie, and the FAA. (Tr. 51.) Executive Beechcraft is the fixed-base operator to whom the City leases a large portion of the airport property. (Tr. 27-28.) And although Executive Beechcraft is billed by the City for electricity use, the lease actually states that Executive Beechcraft, Inc. must obtain and maintain utility services at its own expense. (Pet. Ex. 4, Sec. 3.4.) The lease states:

Utility services required by Lessee during the Lease term for the Premises must be obtained and maintained by Lessee at its own expense. Lessee may install and construct necessary utility lines or mains across reasonable routes as the City may designate. Any change in, deletion of, or addition to such lines and mains shall be at the sole cost and expense of Lessee.

(Exhibit 4, Section 3.4.)

Executive Beechcraft, Inc. subleases portions of the airport property to Sprint, the Airline History Museum, and Save-A-Connie. (Tr. 10, 28, 57.) The

City bills Sprint, the Airline History Museum, and Save-A-Connie for electricity used by each of these organizations. (Tr. 51.) The City also leases a portion of the airport to the Federal Aviation Administration. (Tr. 25-26.) The FAA lease contains no provision for the purchase of electricity. (Pet. Ex. 3.) The City separately bills the FAA for the electricity it uses. (Resp. Ex. B.)

B. The City Paid Sales Tax on the Electricity That it Sold to Tenants Until July 2007.

The City has a Missouri retail sales tax license. (Tr. 53.) Prior to August 2007, the City reported the amounts collected from its tenants for their electrical usage as taxable. *Id.* For the July 2007 monthly sales tax reporting period, the City reported gross receipts of \$19,363.23 with adjustments of \$4,596.51. (Resp. Ex. A, Interog. No. 6. with attachment.) This resulted in reported taxable sales of \$14,766.74, with a tax rate of 7.475 percent. *Id.* The City reported sales tax due in the amount of \$1,103.83 for the July 2007 tax period. *Id.* The business location for which the gross receipts were received was 400 Richards Road, Kansas City. *Id.* The 400 Richards Road location is the Charles B. Wheeler Airport. (Tr. 8.)

Included in the taxable sales reported in the July 2007 sales tax return were receipts for electricity paid by Executive Beechcraft (\$12,827.91) and Sprint/United Management Co. (\$1,938.82). (Resp. Ex. A, interog. 6.) Included in the adjustments to the July 2007 gross receipts were receipts for electricity

paid by the FAA (\$4,515.91), the Airline History Museum (\$72.72), and the Civil Air Patrol (\$7.88). (Resp. Ex. A, interog. 6.)

The city stopped paying sales tax returns on its sales of electricity starting in August 2007. (Tr. 54.) During the months of August 2007, September 2007, and October 2007, the City's electrical sales at the airport were similar to the amounts reported for July 2007. For August 2007 the City had gross receipts of \$24,844.25 with adjustments of \$5,352.18. (Resp. Ex. A, interog. 5 and 7.) For September 2007 the City had gross receipts of \$23,318.82 with adjustments of \$5,206.75. *Id.* For October 2007 the City had gross receipts of \$22,709.31 with adjustments of \$5,619.04. *Id.* The City does not have a sales tax exemption certificate on file for any of its airport tenants. (Tr. 55.)

On November 27, 2007, the Director issued sales tax assessment no. 200728500002941 to the City for the tax period August 1 through August 31, 2007. (L.F. 5-7.) On January 15, 2008, the Director issued sales tax assessment no. 200733400013908 to the City for the tax period September 1 through September 30, 2007. (L.F. 8-11.) And on January 25, 2008, the Director issued sales tax assessment no. 200734800003564 to the City for the tax period October 1 through October 31, 2007. (L.F. 12-15.)

C. The City Appealed the Director's Tax Assessments to the Administrative Hearing Commission.

The City appealed the Director's sales tax assessments from August, September and October 2007 to the Administrative Hearing Commission ("AHC"). (L.F. 1-3.) On April 22, 2009, the AHC issued its decision finding that the City was not liable for sales tax on electricity sold to its tenants. (L.F. 24-37.) The AHC concluded that the City was not "in the business" of selling electricity because selling electricity was a "necessary incident" of providing a "public service" and that the provision of electricity was "for the purpose of furthering the City's governmental interest in leasing the airport facilities" pursuant to the city charter. (L.F. 34.) Furthermore, the AHC based its decision on a conclusion that the City did not have a "profit motive in mind" in selling electricity. (L.F. 34.)

POINT RELIED ON

The AHC Erred in Holding That the City of Kansas City is Not Required to Collect Sales Tax on the Sale of Electricity to its Airport Tenants, Because the AHC Incorrectly Interpreted § 144.020.1, RSMo, In That the Statutory Requirement of “In the Business” Includes Sales for Public Purposes Regardless of Profit Motive.

City of Springfield v. Dir. of Revenue, 659 S.W.2d 782 (Mo. banc 1983)

St. Louis Country Club v. Admin. Hearing Comm’n, 657 S.W.2d 614 (Mo. banc 1983)

§ 144.020.1, RSMo

SUMMARY OF THE ARGUMENT

All commercial tenants at the downtown airport in Kansas City, Missouri, are required by law to pay sales tax on their purchases of electricity. See § 144.020.1. Yet, because of the AHC's decision in this case, some commercial tenants at the downtown airport no longer have to pay sales tax on their purchases of electricity while others must still pay. The only difference between commercial tenants who pay and those who do not – is who sells the electricity.

According to the AHC, if the City sells electricity to its commercial tenants then there is no sales tax, while if the electricity is sold by Kansas City Power and Light there is a sales tax. The supposed basis for this contradictory conclusion is the City's public purpose in providing an airport and the lack of a profit motive. These conclusions and the AHC's decision are entirely inconsistent with the plain language of the statute and controlling case law.

In *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782, 783-85 (Mo. banc 1983), the Missouri Supreme Court held that a municipality must collect sales tax even when the sales are part of an activity conducted with a public purpose and not for a profit. Likewise, the Court in *St. Louis Country Club v. Admin. Hearing Comm'n*, 657 S.W.2d 614 (Mo. banc 1983), held that “[t]he director does not have to show that the taxpayer has a purpose of maximizing revenue, or of deriving income from the general public.” For these reasons, the AHC should be reversed and judgment entered in favor of the Director of Revenue.

ARGUMENT

Standard of Review

The Administrative Hearing Commission's interpretation of revenue laws is reviewed de novo. *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 527 (Mo. banc 2003). And while taxing statutes are generally "strictly construed in favor of the taxpayer," *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 239 (Mo. banc 2007), the Missouri Supreme Court has held that the language defining "business" in the Missouri Sales Tax Statute is "very broad." *St. Louis Country Club*, 657 S.W.2d at 617.

The AHC Erred in Holding That the City of Kansas City is Not Required to Collect Sales Tax on the Sale of Electricity to its Airport Tenants, Because the AHC Incorrectly Interpreted § 144.020.1, RSMo, In That the Statutory Requirement of "In the Business" Includes Sales for Public Purposes Regardless of Profit Motive.

The statute at issue in this case, § 144.020.1, levies a sales tax "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." Thus, the elements required for sales tax to apply are:

- (1) A seller;
- (2) in the business;

- (3) of selling tangible personal property or rendering taxable service;
- (4) at retail;
- (5) in this state.

§ 144.020.1. Elements (1), (3), (4), and (5) are satisfied and were not the basis of the AHC's decision.^{2/} Instead, the only question under the statute was whether under element (2) the City was "in the business" of selling electricity to its airport tenants.

^{2/} Element 1 is satisfied because the statute defines "seller" as "a person selling or furnishing tangible personal property." § 144.010(11). The statutory definition of a "person" includes a municipal corporation such as the City. § 144.010(6). Element 3 is satisfied because the statute expressly includes "all sales of electricity or electrical current." § 144.020.1(3). Element 4 is satisfied because it is undisputed that the sale of electricity qualifies as a "sale at retail." *See Kansas City Power and Light Co. v. Director of Rev.*, 83 S.W.3d 548, 550 (Mo. banc 2002) ("Missouri statutes ... make clear that sales of electricity can qualify as sales at retail, even though electricity is not tangible personal property."). Element 5 is satisfied because the airport is located in Missouri.

“Business,” for purposes of the statutory requirement of “in the business,” is defined in § 144.010.1(2) as:

[a]ny activity engaged in by any person, or caused to be engaged in by him, *with the object of gain, benefit or advantage, either direct or indirect*, and the classification of which business is of such character as to be subject to the terms of sections 144.010 to 144.525. . . .

§ 144.010.1(2) (emphasis added). The AHC decided in this case that the City was not “in the business” of selling electricity to its tenants in part because it concluded that the sale of electricity was a “necessary incident” of providing a “public service” and that the provision of electricity was “for the purpose of furthering the City’s governmental interest in leasing the airport facilities” pursuant to the city charter. (L.F. 34.) The AHC also based its conclusion in part on the supposition that the City did not have a “profit motive in mind” in selling electricity. *Id.*

In drawing its conclusions, the AHC did not adhere to the plain language of the statute or apply the test that is required by the statute to determine whether the City was “in the business” of selling electricity. *See Jones v. Dir. of Revenue*, 832 S.W.2d 516, 517 (Mo. banc 1992) (holding that a court must “ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute”).

The statutory test is not whether the sale of electricity to tenants is a “public service” or whether the activity is done with a “profit motive”; the statutory test as set forth in the plain language of the statute is whether the activity is done with the “object of gain, benefit or advantage,” a test that has been interpreted very broadly by the Missouri Supreme Court. *See, e.g., St. Louis Country Club*, 657 S.W.2d at 617.

Because the City’s sale of electricity to its airport tenants resulted in convenience and savings to its tenants, it provided, *at a minimum*, an indirect “gain, benefit or advantage” to the City by making the airport more desirable to its tenants. Thus, the City was engaged “in the business” of selling electricity to its tenants.

A. The Plain Language of the Statute Provides the Controlling Test for What is “In the Business.”

When the legislature defined “business” as activity “engaged in ... with the object of gain, benefit or advantage, either direct or indirect,” it made no mention of any profit motive, nor did it create an exemption for activities engaged in with a public purpose. The AHC in this case essentially added its own words to the statute when it based its decision on its finding that the City did not act with a profit motive but instead acted with a public purpose. Such ad hoc additions to the plain language of the statute constitute an improper invasion of the law-making function of the legislature. *See State v. Rellihan*, 662

S.W.2d 535, 545 (Mo. App. W.D. 1983) (holding that when the language of a statute is clear, a court “cannot read into a statute words not found within the statute”). This Court should therefore reject the test invented by the AHC and apply the one expressed by the legislature in the plain language of the statute.

Furthermore, adopting an interpretation of the statute that would lead to a conclusion that the City’s sale of electricity to its private tenants is not taxable would circumvent the legislature’s express purpose of taxing the sale of electricity and would produce an absurd result in this case. *See Dierkes v. Blue Cross and Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. banc 1999). Section 144.020.1(3) imposes a four percent tax on the “basic rate paid or charged upon all sales of electricity or electrical current ... to domestic, commercial or industrial consumers.”

As it stands under the AHC’s interpretation, the City’s resale scheme allows those commercial consumers whose electric service passes through the City to evade a sales tax burden on the electricity sold to them. Instead of obtaining their electrical service directly from Kansas City Power and Light, which is also in the business of selling electricity subject to sales tax, the tenants metered by the City purchase their electricity from the City, which is itself exempt from sales tax pursuant to Mo. Const. Art. III, § 39 (10).

In effect, the City seeks to pass on its sales tax exemption to private tenants who would otherwise incur the sales tax burden on the electricity sold to

them from Kansas City Power and Light. This scheme, if permitted, would create a contradictory situation: commercial tenants would pay sales tax for electricity purchased for facilities on only parts of the airport. In interpreting the statute, this Court cannot assume that the legislature would intend such an absurd and unreasonable result. *See Dierkes*, 991 S.W.2d at 669.

B. The Missouri Supreme Court Has Interpreted the Term “Business” in the Missouri Sales Tax Law Very Broadly.

Not only does the plain language of the statute completely undermine the AHC’s conclusions in this case, but the Missouri Supreme Court has also held that § 144.010.1(2) “gives a very special meaning to the term ‘business,’ which is not limited to ordinary commercial enterprises.” *St. Louis Country Club*, 757 S.W.2d at 617. The Court describes the language defining “business” in the statute as “very broad” and “surely designed to make transactions which might not otherwise be covered taxable.” *Id.*

To demonstrate that an entity is “in the business” within the meaning of the statute, the Director of Revenue must show – consistent with the plain language of the statute – that an activity is done “with the object of gain, benefit or advantage, either direct or indirect.” *Id.* Contrary to the AHC’s conclusions in this case, the Missouri Supreme Court in *St. Louis Country Club* held that

“[t]he director does not have to show that the taxpayer has a purpose of maximizing revenue, or of deriving income from the general public.” *Id.*

Municipalities or not-for-profits can be “in the business” within the meaning of the statute even if they are providing services as required by their city charter and even if they do not make a profit on such services. *See, e.g., id.; City of Springfield*, 659 S.W.2d at 783-85. In *City of Springfield*, for example, the Missouri Supreme Court held that a municipality must pay sales tax on taxable goods or services, even when the sales are part of an activity conducted with a public purpose pursuant to the city charter and even if the sales do not produce a profit for the city. *Id.*

The *City of Springfield* case involved admissions fees and sales of concession items that were part of the recreation program established by the city’s park board. *Id.* at 783. The Court recognized that the city charter charged the park board with the responsibility of operating parks, playgrounds and recreational facilities, but the court accorded no legal significance to this public purpose in determining whether the City’s charges for recreational events and concessions were subject to sales tax. *Id.*

Furthermore, the court recognized that the fees in *City of Springfield* “seldom exceed and often do not meet the direct costs of the program” and that “most programs receive subsidies from property taxes.” *Id.* Yet, even though the admission fees and concessions sales were not conducted with a profit motive

and were conducted with a public purpose pursuant to the city charter, the Court concluded that the city was “in the business” within the meaning of the statute and thus subject to sales tax pursuant to § 144.020.1(2). *Id.* at 785.

Similarly, in *St. Louis Country Club*, the Missouri Supreme Court held that a not-for-profit entity was required to pay sales tax on sales of admissions fees even though the sales were not conducted with a profit motive and even though the sales produced only an indirect advantage for the club. *St. Louis Country Club*, 657 S.W.2d at 618. The case involved fees that the not-for-profit club charged to members for bringing non-members as guests. *Id.* at 615.

As a not-for-profit entity (not a charity), the St. Louis Country Club had no intention to make a profit from the fees that it charged to non-members. *Id.* Indeed, the Court stated that “the country clubs do not actively promote the use of their facilities by guests as a source of revenue, but rather substantially limit and burden the introduction of guests.” *Id.* at 618. Yet, the Court concluded that the club was “in the business” of charging for recreational activities because it charged the fee “with the object of gain, benefit or advantage, either direct or indirect.” *Id.* at 617-18. Emphasizing that the statute specifically included *indirect* gain, benefit, or advantage, the Court concluded that the members’ privilege of bringing guests was “an obvious inducement to membership of the clubs” since members “undoubtedly consider the opportunity to entertain guests to be important for social or business reasons.” *Id.* Furthermore, the Court

noted that “[t]here must be some benefit to the clubs in allowing guests to use the facilities, or they would not be received.” *Id.* at 617. Therefore, the admission fee was subject to sales tax. *Id.* at 618.

C. The City is “In the Business” of Selling Electricity Because it Sells Electricity “With the Object of Gain, Benefit or Advantage.”

In light of the broad definition of “business” as set forth in the statute and articulated by the Missouri Supreme Court in *City of Springfield* and *St. Louis Country Club*, the City is “in the business” of selling electricity at the airport within the meaning of the statute. As the AHC recognized, the airport is a public service being operated by the City pursuant to its charter. (L.F. 34.) But as in *City of Springfield*, this public purpose is not dispositive of the question of whether the City is “in the business” of providing a particular service. Rather, the test for whether the city is “in the business” of selling electricity is whether the City sells the electricity “with the object of gain, benefit or advantage, either direct or indirect.” § 144.010.1(2). Correctly applied, the statute establishes that the City is in the business of selling electricity.

The City chose the most advantageous and beneficial option for itself when it decided to sell electricity to certain tenants by maintaining the electrical lines from the substation to the tenants, metering each tenant’s individual usage, and billing each tenant three cents per kilowatt hour more than it pays for the

electricity it purchases from Kansas City Power and Light. (Tr. 34, 50-51, 56) Obviously the airport facilities would have been unattractive to potential tenants if there were no way to access electricity from those facilities. However, the City had several options for making electricity accessible to the tenants. The evidence presented by the City shows two alternatives to the resale scheme that the City chose to adopt, each of which was less beneficial than the adopted scheme. As the most beneficial and advantageous alternative, the resale scheme thus provided a “gain, benefit or advantage” for the City within the meaning of the statute.

The first alternative available to the City was to transfer ownership of the substation serving the west side of the airport to Kansas City Power and Light. In his testimony at trial, David Long, the Deputy Director of Aviation, stated that the City had had discussions with Kansas City Power and Light “a few years ago” about transferring ownership of the substation. (Tr. 40.) Kansas City Power and Light owned the substation that provided electricity for the east side of the airport, where some tenants were billed directly by Kansas City Power and Light. (Tr. 13; 37-39.) Had Kansas City Power and Light owned the substation supplying the west side of the airport, it presumably could have billed the tenants on the west side directly as well. However, according to Long, Kansas City Power and Light expressed concerns about being “responsible for

something that they really haven't had an opportunity to maintain or look at for a long time." *Id.*

By retaining ownership of the substation and power lines from the substation to the tenants, the City avoided any costs to the City associated with upgrades or maintenance that would be necessary prior to a transfer to Kansas City Power and Light. Furthermore, Long admitted that the rate charged to tenants for electricity resold by the City has not been calculated to help the City pay for any upgrades to the distribution line that would be necessary for the substation to be transferred to Kansas City Power and Light. *Id.* Therefore, the City also avoided passing on such costs to tenants in the form of increased rates, which provided an indirect advantage to the City in terms of maintaining good relationships with current tenants and making the location more attractive to potential tenants.

The second alternative available to the City was to require the tenants to supply their own lines to the substation. The City reserved this option with regard to its largest tenant, Executive Beechcraft. The lease with Executive Beechcraft expressly required it to obtain all utility services at its own expense. The lease states:

Utility services required by Lessee during the Lease term for the Premises must be obtained and maintained by Lessee at its own expense. Lessee may install and construct necessary utility lines or

mains across reasonable routes as the City may designate. Any change in, deletion of, or addition to such lines and mains shall be at the sole cost and expense of Lessee.

(Pet. Ex. 4, Sec. 3.4.)

Despite the fact that the lease imposed no requirement on the City to provide electrical services to Executive Beechcraft, the City chose to own and maintain a part of the substation, to provide lines from the substation to Executive Beechcraft, meter Executive Beechcraft's usage of electricity, and charge Executive Beechcraft for its service. (Tr. 34, 50-51.) The City's choice to provide this service in the absence of any requirement to do so speaks for itself. To paraphrase the Missouri Supreme Court in *St. Louis Country Club*: there must be some benefit in reselling the electricity; otherwise the City would not do it. *See St. Louis Country Club*, 657 S.W.2d at 617. Just as providing the privilege of inviting guests likely helped the St. Louis Country Club recruit members, common sense would suggest that the provision of electricity by the City to space rented by its tenants helped the City recruit and maintain tenants at its airport because it would spare them the inconvenience and expense of providing their own lines and substation.

In light of the other alternatives available to the City, it is clear that the city chose to resell electricity to its tenants and subtenants because the resale scheme was the most advantageous and beneficial alternative for the City. As

such, the City's object in reselling electricity was one of "gain, profit or advantage, either direct or indirect," and the City was therefore "in the business" of selling electricity within the meaning of the statute. While the City is free to choose whether or not to resell electricity, once it inserts itself as an intermediary by buying from Kansas City Power and Light and reselling to tenants and subtenants, it cannot evade the requirements imposed by Missouri law on the privilege of selling services at retail in the State of Missouri.

D. The City is Not an Agent for Its Airport Tenants.

In its conclusions of law, the AHC also stated that the City was "merely passing on the electrical service provided by [Kansas City Power and Light]." (L.F. 33.) In drawing this conclusion, the AHC appears to suggest that the City is not in the business of selling electricity because it is merely acting as an agent for the airport tenants. If the AHC based its conclusion that the City was not in the business of selling electricity on a finding that the City was an agent for its tenants, its finding was in error. The AHC failed to apply the test established by the Missouri Supreme Court for such an agency exception in the context of sales tax obligations.

The Missouri Supreme Court has held that when a business buys goods from a supplier and sells them to a customer, that business is not acting as an agent for the customer in its purchase from the supplier if the customer exercises no control over the business's transactions with the supplier. *Martin*

Coin Co. of St. Louis v. King, 665 S.W.2d 939, 942 (Mo. banc 1984). In *Martin Coin*, a coin dealer took the customers' orders for coins, quoted the customers a fixed price and then ordered the coins from other coin dealers with whom it had a line of credit. *Id.* at 941. When it received the coins from another dealer, it would deliver the coins after the customer paid the balance due to Martin Coin. *Id.* The other coin dealers looked only to Martin Coin for payment and Martin Coin bore the risk of non-payment by its customers. *Id.* at 942.

In analyzing whether Martin Coin acted as an agent for its customers, the Missouri Supreme Court held that “a fundamental and essential element of an agency relationship is the principal’s right to control the conduct of the agent with respect to matters entrusted to him.” *Id.* (citing 2A C.J.S. Agency § 6 (1972)). “The relationship of principal and agent cannot be presumed but must be proved by the party asserting the existence of such relationship.” *Id.* Thus the Court held that Martin Coin was not an agent for its customers in its purchases of the coins from other dealers because “[t]he record is wholly devoid of any facts or circumstances indicating any right to control by the customers in Martin Coin’s acquisition and delivery of the coins.” *Id.*

The Court in *Martin Coin* concluded that because Martin Coin had complete control over its transaction with the other coin dealers, it was “a party to two separate transactions: (1) as a purchaser of coins from suppliers, and (2)

a seller of coins to its customers.” *Id.* Thus, Martin Coin’s sales to customers were “sales at retail” and subject to sales tax. *Id.*

Like Martin Coin, the City in this case engages in two separate transactions with regard to the electricity at the airport. First it purchases electricity from Kansas City Power and Light. Then it resells the electricity to the tenants over lines that it maintains and controls, at a price that it determines (and that is higher than the purchase price). And as in *Martin Coin*, the supplier (Kansas City Power and Light) looks to the business (the City) for payment and not to the customer (the airport tenants). The record is devoid of any facts whatsoever that would indicate that the airport tenants control the City’s business relationship with Kansas City Power and Light, which essentially ends when Kansas City Power and Light delivers the electricity to the substation at the airport. (Tr. 56.) Therefore, the City has failed to meet its burden of proof that it was an agent for the tenants.

In the absence of such an agency relationship, a conclusion that the City was “merely passing on” the services of Kansas City Power and Light is not legally cognizable. The City buys the electricity from Kansas City Power and Light and sells it to its tenants for their final use and consumption. As a seller at retail it has an obligation to collect the sales tax from its tenants.

CONCLUSION

For the reasons stated above, the judgment of the Administrative Hearing Commission should be reversed and judgment entered in favor of the Director of Revenue.

Respectfully submitted,

CHRIS KOSTER
Attorney General

By: 
JEREMIAH J. MORGAN
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

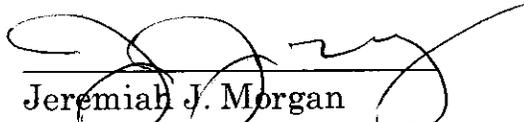
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, postage prepaid, via United States mail, on August 6, 2009, to:

Mark W. Comley
Newman, Comley & Ruth
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102

Melody L. Cockrell
Attorney at Law
1101 Locust
Kansas City, MO 64106



Jeremiah J. Morgan
Deputy Solicitor General

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,015 words.

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

Jeremiah J. Morgan
Deputy Solicitor General