IN THE
SUPREME COURT OF MISSOURI

No. SC83505

DYNO NOBEL, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

Petition For Review
From The Administrative Hearing Commission,
The Honorable Willard C. Reine, Commissioner

Respondent's Brief

JEREMIAH W. (JAY) NIXON
Attorney General

ALANA M. BARRAGÁN-SCOTT
Missouri Bar No. 38104
Deputy State Solicitor

Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Facsimile: (573) 751-9456

ATTORNEYS FOR RESPONDENT
DIRECTOR OF REVENUE

Table of Contents

Table of Authorities

Cases:

Error! No table of authorities entries found.

Statutes:

Error! No table of authorities entries found.

Jurisdictional Statement

Dyno Nobel accrued and paid use tax to the Director of Revenue on Dyno Nobel's purchase of electricity from Hercules, Inc. The Director denied Dyno Nobel a refund and it appealed. The Administrative Hearing Commission upheld the Director's denial.

There are essentially two issues in this case -- whether Dyno Nobel paid consideration to Hercules, and whether Dyno Nobel presented its sales tax claim to the Director at all. Revenue cases only invoke the exclusive jurisdiction of this Court when they involve: 1) the construction, 2) of the revenue laws of this State. Mo. Const. Art. V, § III. The statutory elements of a taxable sale have been amply explored in prior cases before this Court and should not require construction herein. And whether Dyno Nobel presented a sales tax claim to the Director is a matter that at most involves application, not construction, of a revenue law.

Therefore, the Director does not agree with Dyno Nobel that this Court has original appellate jurisdiction of this matter. Instead, jurisdiction properly lies in the Court of Appeals, Western District.

Statement of Facts

Hercules, Inc. is a manufacturing concern. Up until 1985, Hercules was the sole owner of a manufacturing plant in Louisiana, Missouri. The entire facility is served by an on-site utilities plant, which produces water, steam, and electric power. LF 159.

In 1985, Hercules entered into an asset purchase agreement with Dyno Nobel, through which Dyno Nobel acquired part of Hercules' manufacturing facility. Dyno Nobel acquired those parts of the real property, improvements, and equipment used to produce ammonium nitrate. Though the facility was designed for operation by one owner, the two companies separated their respective portions of the facility with a cyclone fence. *Id.* After the acquisition, Hercules continued to operate its part of the facility for its manufacturing operations, and continued to own and operate the utilities plant, which is on its side of the facility. *Id.* Under the asset purchase agreement, Dyno Nobel has the right to purchase the utilities plant for its actual book value, in the event that Hercules chooses to cease operating the utilities plant. *Id.*

The business relationship

The parties entered into an explicit "Utilities Contract" in 1985. The contract provides, in pertinent part:

PART I

ARTICLE 1. SALE AND PURCHASE OF UTILITIES

1. Subject to the terms, conditions, and limitations of this Contract, HERCULES agrees to supply to [Dyno Nobel][1], . . . and [Dyno Nobel] agrees to **purchase** from HERCULES, [Dyno Nobel's] requirements for steam, electricity, water, and air (collectively, "Utilities"). Such Utilities shall be supplied or distributed from HERCULES' existing facilities located at HERCULES' MCW plant.

* * *

ARTICLE 3. PRICE AND PAYMENT

A. [Dyno Nobel] shall pay HERCULES the charges to be determined in accordance with Part III for Utilities **sold** and delivered hereunder . . .

---

[1] Dyno Nobel, Inc. was formerly known as IRECO, Inc. The name change occurred in 1985, apparently after execution of the contract. LF 67, 150. For the sake of clarity, "Dyno Nobel" is substituted for "IRECO" in the quoted provisions of the contract.

B. HERCULES shall **bill** [Dyno Nobel] monthly for the Utilities **sold** hereunder. Each invoice shall indicate for the month immediately preceding such invoice:

1) The quantity of each of the Utilities delivered and the variable costs therefor;

2) [Dyno Nobel's] portion of the Allocated Utility Cost, and

3) [Dyno Nobel's] portion of the Carrying Charge[.]

* * *

ARTICLE 7. DOCUMENTS FORMING THE CONTRACT

* * *

If anything in Part II or Part III is inconsistent with Part I of this Contract, Part I shall govern.

* * *

PART II

GENERAL TERMS AND CONDITIONS

ARTICLE 1. TAXES

HERCULES shall pay and bear all taxes, assessments, royalties, charges or fees imposed upon it by governmental authority or for which it is liable with respect to **Utilities to be sold** and delivered hereunder and which are applicable **before title thereto passes to [Dyno Nobel],** and [Dyno Nobel] shall pay and bear all taxes, assessments,

royalties, charges or fees imposed upon it by governmental authority or for which it may be liable with respect to **Utilities to be sold** and delivered hereunder and which are applicable **after title passes to [Dyno Nobel]**.

ARTICLE 2. DELIVERY, INSPECTION AND MEASUREMENT

* * *

(8) **Title to each Utility shall pass to [Dyno Nobel] from HERCULES** at the location of the metering device in the distribution system where measurement of quantities delivered to [Dyno Nobel] is to be taken for such Utility (referred to herein as the Delivery Point).

ARTICLE 3. WARRANTY OF TITLE

HERCULES hereby warrants **title to the Utilities sold** and delivered by it hereunder and the right of HERCULES to sell same, and HERCULES warrants that all **Utilities sold** by it are **owned by HERCULES** free from all liens and adverse claims, including liens to secure payment of royalties, license fees or charges and production taxes, severance taxes and all other taxes.

* * *

ARTICLE 11. MISCELLANEOUS

* * *

D. This Contract consists of PARTS I, II and III, which together constitute the entire understanding between the parties with respect to the subject matter hereof and are intended as a final expression of their agreement and as a complete statement of the terms and conditions concerning the same . . . [N]o custom or practice of the parties or the place of performance of any service hereunder which is at variance with the terms hereof shall have effect.

PART III

SCHEDULE OF UTILITIES

II. ELECTRICITY

A. Description

* * *

Electric power is supplied by two 7.5 MW extracting steam turbo generators. Excess electricity generated is sold through a cogenerating contract to Union Electric. Excess electricity required is purchased through an electrical supply contract from Union Electric.

B. Quantity

HERCULES will **sell** and deliver to the [Dyno Nobel] transformers 13.8 KV/3 phase or 2.4 KV/3 phase:

Maximum total electric power = 2,500,000 KWH/month

Maximum total peak demand = 4.0 megawatt

If additional electric service is required by [Dyno Nobel], [Dyno Nobel] will be responsible for the increase in purchased electricity costs, if any.

* * *

F. Distribution System

* * *

2. In the absence of an operating contract as described above, HERCULES will maintain the electrical distribution system up to the Delivery Point, and all costs will be charged to the electrical cost center. All maintenance obligation for the electrical distribution system after the Delivery Point will be borne by [Dyno Nobel].

* * *

XII. COMPENSATION OF HERCULES

[Dyno Nobel] **shall pay to HERCULES compensation** under this Contract consisting of (1) [Dyno Nobel's] portion of the Allocated Utility Cost, (2) the measured variable costs of steam, electricity, air, water and potable water delivered to [Dyno Nobel], and (3) a Carrying Charge representing an allocation of cost of carrying the coal inventory, the fuel oil inventory and the portion of the utilities spare parts inventory not charged out as purchased under HERCULES' accounting system (Carrying Charge).

* * *

LF 55, 160-167 (emphasis added).

Hercules invoices Dyno Nobel monthly for Dyno Nobel's utility costs. LF 29-32, 168. Those utility costs include electricity as well as steam, air, and water, and other items. LF 65-66. The invoices indicate, at the top, "AQUALON, a division of Hercules, Incorporated, 1313 North Market Street, Wilmington, Delaware 19894-0001." In the "shipped from" space, the invoices indicate, "Wilmington DE." LF 29-32, 168.

In the "item description" section, the invoices indicate, "FOR CHARGES INCURRED BY THE MCW PLANT ON YOUR BEHALF FOR THE MONTH OF [_____]." *Id*. Charges are broken down into different categories, including "power charges," consisting of "operating costs" and energy costs." Operating costs are synonymous with the fixed, or allocated, utility costs.[2] Energy costs are synonymous with variable costs. LF 168. Dyno Nobel typically pays more in fixed costs than variable costs. *Id*. Specifically, for the periods at issue in the instant case, 53.4% of Dyno Nobel's payments to Hercules were for fixed costs of producing electricity; 46.4% were for variable costs. *Id*.

Hercules never separately charged Dyno Nobel sales or use tax on the payments for electricity. And Dyno Nobel never provided Hercules with an exemption certificate or other evidence of exemption.

---

[2] Pursuant to the Utilities Contract, the fixed utility costs are the costs that remain in the steam, electricity, air, or water accounts after internal power has been allocated and variable costs have been distributed the fixed costs include things such as operations labor, maintenance services, overhead, wage benefits, and chemicals. LF 63-65, 168.

LF 168. Instead, for the tax periods at issue, Dyno Nobel remitted use tax, as well as any applicable local use tax, directly to the Director of Revenue on the payments for electricity, including both the fixed and variable costs. *Id*.

The parties made other agreements in writing. The asset purchase agreement, at §5.16, provides that Hercules and Dyno Nobel "shall . . . agree in writing upon the provision of common services . . . including . . . appropriate sharing of raw materials and utilities." LF 160. One aspect of the sharing of raw materials involved river water. Hercules draws water from the Mississippi River, treats it, and pumps it to Dyno Nobel's part of the facility. Dyno Nobel heats the water and pumps it back to Hercules for use in boilers that produce steam. The steam is ultimately used in different ways. Hercules uses the steam at its utilities plant to drive steam turbines and generators that produce the electricity that Hercules and Dyno Nobel both use at the facility; and both use steam throughout the facility for their production operations. LF 160. No evidence before the Commission reflects that the parties executed a contract, like the Utilities Contract, for the sharing of river water, or any other raw material.

The refund claim

Using Department of Revenue Form 472B, Dyno Nobel filed a refund claim with the Director for taxes paid from October 1994 through September 1997. LF 7, 169. The refund claim stated: "Taxes were incorrectly accrued on purchases that were not taxable to Dyno Nobel, Inc." *Id*.

The Director subsequently sent Dyno Nobel a letter requesting additional invoices and a more detailed explanation as to why the transactions should not be taxable. LF 11, 169. Dyno Nobel replied by letter, explaining:

> Dyno Nobel, Inc. is requesting a refund for use taxes that were incorrectly accrued on purchases that were not taxable. Dyno Nobel entered into a cost sharing agreement with Hercules, Inc. over the electricity generated at the Hercules plant. The agreed-upon percentage set forth in the cost sharing agreement is 45% of fixed costs and a percentage of variable costs based on usage; therefore, Dyno Nobel pays Hercules 45% of the cost to generate electricity at the Hercules plant. **The costs include all inputs such as labor, overhead, and coal. Hercules pays the full amount of use tax on taxable inputs** such as coal and includes those taxes as part of its cost basis. **However,** for the period October 1994 through September 1997, Dyno **Nobel accrued the use tax as well on the full amount of the electricity it used. As a result, tax has been paid on the same items twice.** Dyno Nobel is simply requesting a refund on taxes that should never have been paid.

LF 15, 169 (emphasis added).

About a year later, in September 1999, Dyno Nobel provided the Director with a copy of the Utilities Contract. In November 1999, the Director issued a final decision denying the refund claim, indicating that Dyno Nobel paid the correct amount of tax. LF 26, 39-66, 169-170.

The Commission's decision

The Commission decided this matter on cross-motions for summary determination, denying the refund. The Commission first rejected the Director's argument that Dyno Nobel had failed to raise in its complaint to the Commission the basis on which it sought the refund from the Director. Specifically, while the Commission recognized that it cannot consider grounds for refund that have not first been raised before the Director, the Commission held that Dyno Nobel's labeling of its refund request to the Director as one for use tax, rather than as sales tax (as Dyno Nobel subsequently labeled the claim in its complaint before the Commission), was not fatal to review. LF 171-172.

However, the Commission found that Hercules sold electricity to Dyno Nobel:

> The economic and legal reality is that the electricity is produced on Hercules' property by Hercules' generators operated by Hercules' employees, and that Hercules holds "title" to the electricity until it transmits the electricity to Dyno Nobel at a certain physical point. Hercules' transmission of the electricity to Dyno Nobel, and Dyno Nobel's payment in consideration therefor, constitute a sale. The contract is completely consistent with the economic reality of the transaction.

LF 173.

The Commission also denied Dyno Nobel's alternative argument that it should not have to pay tax on the inputs into the electricity generation process, in addition to paying tax on its purchase of the electricity. The Commission said that even assuming Dyno Nobel pays tax on the inputs, that consequence results from the manner in which Dyno Nobel and Hercules structured the transaction in their contract, and the tax arises on separate incidents of taxation. LF 173.

Finally, the Commission concluded that sales tax, rather than use tax, was due on the electricity purchases, because §§ 144.020.1, 144.021, and 144.080.1 impose the sales tax upon sellers, and impose upon the seller the burden to remit the tax to the Director. LF 174-175. Section 144.060 imposes on the purchaser the duty to pay sales tax to the seller, or be subject to misdemeanor charges; therefore, "in economic substance, the burden of the tax is on the purchaser." *Id*. The Commission concluded that because Dyno Nobel had a legal obligation to pay the sales tax, it was not entitled to a refund of the tax paid. *Id*.

The instant appeal followed.

Points Relied On

I.

The Administrative Hearing Commission did not err in granting the Director's motion for summary determination and denying Dyno Nobel's cross-motion on the tax refund claim, because Dyno Nobel contracted to and did purchase electricity -- a taxable sale, in that Dyno Nobel took title, paid consideration, and used and consumed the electricity.

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

House of Lloyd, Inc. v. Director of Revenue, 884 S.W.2d 271 (Mo. banc 1994)

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

Farmers Ins. Exchange v. Director of Revenue, 742 S.W.2d 141 (Mo. 1987)

§144.010.1(10), RSMo

§144.020.1(3), RSMo

§144.605(7), RSMo

§144.605(11), RSMo

§144.610.1, RSMo

II.

The Administrative Hearing Commission did not err in granting the Director's motion for summary determination and denying Dyno Nobel's cross-motion because the decision is authorized by law and supported by competent and substantial evidence in that Dyno Nobel is not entitled to a refund of use tax that it claims it should have paid the vendor as sales tax, where Dyno Nobel never presented that claim for refund to the Director.

Matteson v. Director of Revenue, 909 S.W.2d 356 (Mo. banc 1995)

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

§144.190.2, RSMo

§144.190.3, RSMo

Standard of Review

Review of the Commission's decision is limited to the determination of whether that decision was supported by competent and substantial evidence on the whole record, or whether it was arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction. *J.B. Vending Co., Inc. v. Director of Revenue*, 54 S.W.3d 183, 185 (Mo.banc 2001), *quoting Psychiatric Health Care Corp. of Missouri v. Dep't of Social Services, Division of Medical Services*, 996 S.W.2d 733, 735 (Mo.App. W.D. 1999) (quotations omitted).

Argument

I.

The Administrative Hearing Commission did not err in granting the Director's motion for summary determination and denying Dyno Nobel's cross-motion on the tax refund claim, because Dyno Nobel contracted to and did purchase electricity -- a taxable sale, in that Dyno Nobel took title, paid consideration, and used and consumed the electricity.

Sales of electricity are subject to Missouri sales tax and use tax. §§144.020.1(3), 144.605(11), and 144.610.1, RSMo.[3] A sale at retail is defined for purposes of sales tax as the transfer 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[.]" §144.010.1(10). For purposes of use tax, a sale is similarly defined as "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[.]" §144.605(7), RSMo.

[3] All statutory references are to be Revised Statutes of Missouri (2000), unless otherwise noted.

Dyno Nobel does not dispute that Hercules transferred title or ownership of electricity to it, nor that it used or consumed the electricity. The record established both. Rather, Dyno Nobel complains that it did not pay consideration, instead labeling its arrangement with Hercules as "cost sharing," a phrase not found in the relevant statutes. Whether Hercules and Dyno Nobel have made a business arrangement between them that they find very satisfactory does not mean that the payment flowing from Dyno Nobel to Hercules is not consideration.

The parties' contract plainly describes their relationship as that of vendor and vendee. The contract states in Part I, Article I, that Hercules agrees to supply Dyno Nobel and Dyno Nobel agrees to "purchase" from Hercules, Dyno Nobel's requirements for utilities, including electricity. Further, Part I, Article III A provides that Dyno Nobel shall "pay" the charges to Hercules for utilities "sold" and delivered to Dyno Nobel. Article III(B) provides that Hercules shall bill Dyno Nobel monthly for the utilities "sold."

Part II continues in the language of sales, and expresses the parties' affirmative contemplation of tax liabilities. It provides, at Article I, that Hercules is responsible for all taxes with respect to utilities to be "sold" and delivered under the contract, at least with respect to taxes that apply before title passes to Dyno Nobel; and Dyno Nobel "must pay and bear all taxes" for utilities "sold" and delivered under the contract, that are applicable after title passes to Dyno Nobel. Part II, Article II(8) explicitly provides for the passage

of title: Title passes from Hercules to Dyno Nobel at the meter, also known as the delivery point.

And in Part III, Section 11B, the parties again indicate that Hercules "will sell and deliver" electricity to the Dyno Nobel transformers, and that if Dyno Nobel requires additional electric service, then Dyno Nobel will be responsible for any increase in "purchased electricity costs[.]"

As Dyno Nobel observes, this Court has held that it may look behind the parties' characterization of a transaction to make its determination as to taxability. Appellant's Brief, p. 28, citing *e.g., Scotchman's Coin Shop, Inc. v. Administrative Hearing Comm'n,* 654 S.W.2d 873, 875 (Mo. banc 1983).[4] But this Court has never held that the parties' characterization of a transaction is entirely irrelevant.

[4] Though in *Scotchman's Coin Shop*, there was no reference, whether in the Court's opinion or the Commission's underlying decision, to any evidence that the vendor and vendees had even considered taxability issues. *See also Scotchman's Coin Shop,*

Inc. v. Director of Revenue, 1982 Mo. Tax LEXIS 46, case no. RS-81-0644 (AHC 11/30/82).

Here, Dyno Nobel and Hercules made abundantly clear in their contract that they intended to establish a vendor-vendee relationship with respect to the sale of utilities, including electricity. They appear to have affirmatively considered the matter and elected to structure the transactions as sales, a business decision that is entirely consistent with other facts of record. Hercules and Dyno Nobel are two separate business entities. Hercules sold a portion of its physical plant to Dyno Nobel's predecessor. Hercules kept the means of producing electricity to itself, giving Dyno Nobel an option to purchase those means. They ran a cyclone fence through the plant to separate their physical operations. The reality of the utilities transaction is precisely what the parties said it was in their contract -- a sale.

Dyno Nobel's analogy to college roommates sharing pizzas or chipping in on phone bills does not advance its argument to the end that it desires. The essential problem with the analogy is that the statutory inquiry into the existence of a taxable sale is not whether two parties "shared costs," it is whether there was a transfer of title or ownership to the purchaser, or the right to use, consume, or store, tangible personal property, for valuable consideration. For example, it is possible for a student to purchase a pizza, gain title or ownership to it, and resell half of it to another student, a transaction that is theoretically taxable.[5] If, on the other hand, the two students met the delivery driver at the door and

[5] Whether the transaction ultimately qualifies as a sale at retail depends on other

each handed him some cash in exchange for the pizza, neither student could have made a sale to the other.

In this case, Dyno Nobel did not gain title to or ownership of the raw materials for the production of electricity. Hercules, and not Dyno Nobel, had ownership of the raw materials and used them to create the electricity. In addition, Hercules was the owner of the electricity manufacturing facility. Only after the electricity was manufactured did Dyno Nobel take title to the electricity. This transfer took place at a specific location, the meter, and in exchange, Dyno Nobel paid a fee. The transactions constitute sales of electricity under §144.020.1(3).

Dyno Nobel also argues that the fact that a large percentage of its electricity costs is attributable to fixed costs, rather than variable costs, somehow demonstrates that its electricity payments are not consideration. Appellant's Brief, pp. 24-25. The argument fails on different levels. First, the contract nowhere states that Dyno Nobel must pay whether it receives electricity or not. And, as Dyno Nobel admits, "[e]ach invoice includes detailed accounting records that Dyno [Nobel] can, and has, audited to ensure

---

factors, such as whether the first student is engaged in "business" and whether the transaction is an "isolated or occasional sale." §144.010.1(2) and (10), RSMo.

proper allocation of the costs. (L.F. 168)." Appellant's Brief, p. 25. Dyno Nobel purchases and pays for what it has contracted to purchase and pay for.

In a related vein, it is undoubtedly true that any sale can and may have a component of fixed costs included in the sales price. This Court has repeatedly held that factored-in costs (costs included in a sales price) can be consideration, even if the specific amount factored in is not proved. *E.g. Kansas City Royals Baseball Corp. v. Director of Revenue,* 32 S.W.3d 560 (Mo. banc 2000) (cost of purchasing promotional items, though items are ostensibly given away, is factored into price charged for each ticket of admission to baseball game; the factored in cost is consideration); *House of Lloyd, Inc. v. Director of Revenue,* 884 S.W.2d 271 (Mo. banc 1994) (court assumed that the cost of packing material was factored into price charged to the end purchaser); and *Sipco, Inc. v. Director of Revenue,* 875 S.W.2d 539 (Mo. banc 1994) (court assumed that value of dry ice used to preserve pork products during shipping was factored directly or indirectly into total consideration paid for the products).

Conversely, any business might separate fixed costs from other costs that compose the sale price. But such an accounting procedure does not change the reality of a sale, nor the determination of the sale price. The parties here have simply calculated the price based on two components. That fact does not make the sale of electricity any more taxable or less taxable of a transaction, particularly when compared to a taxable transaction where the seller has not separated out components of the costs -- whether

because the seller would not, or could not, separate them out. *C.f. Sneary v. Director of Revenue,* 865 S.W.2d 342, 347-378 (Mo. banc 1993) (Missouri's sales tax scheme does not contain *de minimis* exception to taxability where services dominate cost, in relation to materials cost); *Universal Images, Inc. v. Mo. Dep't of Revenue,* 608 S.W.2d 417, 419 (Mo. 1980) (same; use tax case).

Finally, Dyno Nobel implies that because an auditor for the Director concluded that the transactions are not taxable sales, then this Court should draw the same conclusion. Appellant's Brief, p. 27. The Commission rejected a similar argument, noting that the Director's auditor (who was not auditing the transaction at issue in this case) did not have the parties' Utilities Contract before him at the time that he drew the conclusion. LF 170, 173. Even if Dyno Nobel and the Director disagree as to what conclusion the auditor drew, when he drew it, and why, Dyno Nobel's implication, that estoppel somehow applies, fails. Estoppel does not normally apply to acts of a governmental body. *Farmers Ins. Exchange v. Director of Revenue*, 742 S.W.2d 141, 143 (Mo. 1987).

Dyno Nobel also argues that "Ameren" determined the parties were not engaged in the sale of electricity. Appellant's Brief, pp. 26-27. The evidence generally suggests that Union Electric "reviewed the relationship," LF 88-90, 96, 102, but does not reveal what Union Electric reviewed (whether the Utilities Contract or any other particularly documents) or the standards by which it made that determination. And Dyno Nobel does

not cite any authority for the proposition that Union Electric's "review of the relationship" could bind the Director, the Commission, or this Court.

Dyno Nobel's characterization of its business relationship with Hercules regarding the purchase of electricity as "cost sharing" flies in the face of the contract and the economic reality of the transaction. The Commission correctly found, as a matter of law and fact, that parties engaged in taxable sales transactions.

II.

The Administrative Hearing Commission did not err in granting the Director's motion for summary determination and denying Dyno Nobel's cross-motion because the decision is authorized by law and supported by competent and substantial evidence in that Dyno Nobel is not entitled to a refund of use tax that it claims it should have paid the vendor as sales tax, particularly where Dyno Nobel never presented that claim for refund to the Director.

Dyno Nobel also argues that it must be entitled to a refund of the use tax paid because the transaction was at most subject to sales tax. Dyno Nobel did not make that claim to the Director. When Dyno Nobel initially applied to the Director for a refund, its stated reason for the alleged overpayment was so broad as to be of very little use to the Director in examining the basis for the application. Dyno Nobel simply declared: "Taxes were incorrectly accrued on purchases that were not taxable to Dyno Nobel, Inc." LF 27 (Form 472B, Application for Tax Refund/Credit, dated 11-14-97).

Based on the vagueness of the claim, the Director, instead of immediately denying it, requested additional information and Dyno Nobel responded by sending, among other things, a letter that the Director received on January 16, 1998, explaining that Dyno Nobel was requesting a refund for use taxes. LF 39. In that letter, Dyno Nobel explained its belief that it had paid use tax twice on materials purchased to manufacture electricity. *Id.* More than a year later, in September 1999, Dyno Nobel supplied to the Director a copy

of its Utilities Contract with Hercules, indicating by cover letter that it was "the cost sharing agreement." LF 40-42.

Dyno Nobel never stated to the Director that a ground for its refund application was a claim that its purchases of electricity should have been subject to sales tax instead of use tax. That failure is fatal to the refund claim.[6] When claiming a refund, a taxpayer is required to follow the statutory procedures precisely. This is so because, "[w]hen a state consents to be sued, it may be proceeded against only in the manner and to the extent provided by statute[.]" *St. Louis Southwestern Railway Co. v. Director of Revenue,* 713 S.W.2d 830, 832 (Mo. banc 1986), *citing Ellsworth Freightlines, Inc. v. Mo. Highway Reciprocity Comm'n,* 568 S.W.2d 521, 524 (Mo. banc 1978). Because Dyno Nobel did not first present this issue to the Director, the Commission did not have authority to rule on it. *Matteson v. Director of Revenue,* 909 S.W.2d 356, 360 (Mo. banc 1995). Moreover, equity is not an exception to the bright line of sovereign immunity. *McGhee v. Dixon*, 973 S.W.2d 847, 849 (Mo. banc 1998).

---

[6] The Director made the same argument to the Commission below. Though the Commission ultimately and correctly concluded that the Director had appropriately denied the refund, the Commission did disagree with the Director with respect to this argument. LF 170-172.

Specifically, §144.190.3, RSMo requires that every claim for a refund must be in writing, under oath and must state the specific grounds upon which the claim is founded. Because the refund statute is a narrow waiver of the State's sovereign immunity, §144.190.3 "has been read to require that 'the Director of Revenue be apprised of the grounds for the taxpayer's claimed refund in a manner which allows him to make a meaningful determination of the issues presented by the taxpayers.'" *Kansas City Royals Baseball Corp. v. Director of Revenue,* 32 S.W.3d 560, 563 (Mo. banc 2000), *quoting Matteson v. Director of Revenue,* 909 S.W.2d 356, 360 (Mo. banc 1995). Dyno Nobel initially submitted an extraordinarily broad application for a refund, and subsequently claimed that it had improperly paid use tax not once, but twice. Dyno Nobel submitted invoices to the Director indicating a foreign "ship from" location. The first page of the utilities contract describes both Hercules and Dyno Nobel's predecessor in interest (IRECO) as Delaware corporations. LF 42. On that same page, the facility is described as being "near Louisiana, Missouri," a town that is located nearly on the Missouri-Illinois border.

This Court has previously explained that the requirement that the Director be apprised of the grounds for a taxpayer's claim of refund is to avoid requiring the Director to guess at the basis therefor, and to allow the Director to promptly investigate the merits of the claim. *St. Louis Southwestern Railway,* 713 S.W.2d at 832. That the Director

might have guessed that Dyno Nobel wished to make an alternative claim of refund based on a sales tax argument does not mean that the Director was required to do so.

The caselaw certainly does not require such guess work. This Court has repeatedly rejected taxpayers' claims arising, belatedly, before the Commission where the taxpayers had presented no more than a broad and general claim to the Director in the first instance. In *DST Systems, Inc. v. Director of Revenue*, 43 S.W.3d 799, 804 (Mo. banc 2001), the taxpayers did not make a claim of exemption to Director under §144.030.2(4), whether in their protest payment affidavit or refund claim, nor in complaints before Commission. Therefore, the Court held, the Commission was barred from considering such a claim. In *Kansas City Royals,* 32 S.W.3d at 563, the Court held that a refund application mentioning "incentive items" and referring to "additional documentation . . . in the form of spreadsheets, which contain the details of the use tax paid on purchases of incentive items," was not specific enough to preserve a refund claim for a particular item (yearbooks). And in *International Business Machines, Corp. v. Director of Revenue*, 765 S.W.2d 611, 612-613 (Mo. banc 1989), the Court held that a broad claim for refund, simply citing a case as the basis therefor, precluded determination of issues not raised in that case.

Moreover, the Commission has in the past acknowledged that a taxpayer's failure to meticulously follow statutory procedures for refunds is a jurisdictional defect, *International Business Machines Corp. v. Director of Revenue*, 1988 Mo. Tax LEXIS

81, *18-*22, case no. RS-83-0380 (AHC March 8, 1988). Therefore, the Commission's analysis and rejection of the sales tax claim could have and should have begun and ended with the recognition that Dyno Nobel had not presented the claim to the Director in the first instance. This Court's analysis may similarly conclude here.

Although the Court need not proceed further in its analysis of Dyno Nobel's second point, the point nevertheless fails. The plain language of §144.190.2 indicates that Dyno Nobel is not due a refund:

> [I]f any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to §§144.010 to 144.510, and the balance, with interest . . . shall be refunded to the person legally obligated to remit the tax, ...

The purchases of electricity were subject to tax, as discussed in Point I, and as the Commission found. Dyno Nobel paid tax on those purchases, not on the raw materials purchased and used, by Hercules, in producing the electricity. There is no evidence that Dyno Nobel has paid tax on its purchases of electricity more than once. It follows that the Director has not erroneously or illegally collected any tax, nor has the Director or Dyno Nobel erroneously or illegally computed any tax. Dyno Nobel simply -- and

voluntarily -- paid the use tax. Having done so voluntarily, it cannot now complain. *See Ring v. Metropolitan St. Louis Sewer District,* 969 S.W.2d 716, 718 (Mo. banc 1998) (sovereign need not refund taxes voluntarily paid).

Moreover, the refund statute is not drafted to -- in the first instance -- cause the Director to generate a refund check if a refund is due. Rather, the statute is drafted in terms of offset as the first resort: If a refund is due, "such sum shall then be credited on any taxes then due from the person legally obligated to remit the tax[.]" Based on this language, if Dyno Nobel is due a refund because the transactions were subject to sales tax instead of use tax, no money should be refunded to Dyno Nobel. Instead, any use tax amounts that were paid should be applied to the sales tax that was due on the transaction. As discussed in Point I above, Dyno Nobel's electricity purchases were taxable. Dyno Nobel was obligated to pay tax on the purchases, and had it paid sales tax to Hercules, then Hercules would have been required to remit the tax to the Director. Since sales tax was never remitted on these transactions, no refund may be paid to Dyno Nobel. As refund statutes are limited waivers of sovereign immunity, they must be narrowly and strictly construed. *Charles v. Spradling,* 524 S.W.2d 820, 823 (Mo. banc 1975). Nothing in the refund statute provides for a refund to a purchaser who accrues and voluntarily, if mistakenly, pays use tax on a transaction that is subject to sales tax, where no sales tax has been paid.

The Commission's decision denying Dyno Nobel's refund claim is supported by law, and competent and substantial evidence.

Conclusion

Though the Commission incorrectly concluded that Dyno Nobel had preserved its claim that it was entitled to a refund of the use tax paid because the transaction was subject to sales tax, the Commission correctly concluded that Hercules "sold" electricity to Dyno Nobel and that the transaction was subject to tax. The Commission also correctly agreed with the Director that Dyno Nobel was not entitled to a refund of the tax that it paid. Therefore, the Commission's decision denying the refund should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ALANA M. BARRAGÁN-SCOTT
Missouri Bar No. 38104
Deputy State Solicitor

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321 (telephone)
(573)751-9456 (facsimile)

ATTORNEYS FOR RESPONDENT DIRECTOR OF REVENUE

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

The undersigned hereby certifies that on this 21st day of December, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Edward F. Downey
Bryan Cave, LLP
221 Bolivar Street, Suite 101
Jefferson City, MO 65102

Juan D. Keller
B. Derek Rose
Bryan Cave, LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,274 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.

_____
Deputy State Solicitor