
**IN THE
SUPREME COURT OF MISSOURI**

No. SC86912

RONNOCO COFFEE COMPANY,

Respondent,

v.

DIRECTOR OF REVENUE

Appellant.

**Appeal from the Administrative Hearing Commission
The Honorable June Striegel Doughty, Commissioner**

Appellant-s Reply Brief

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Argument

If any statute was drafted in ~~Abelt and suspenders~~ fashion, to borrow ~~Ronnoco~~s phrasing,¹ it is the lease tax statute, ' 144.020.1(8), RSMo. It establishes generally:

\$ when a lease is taxed, and

\$ when the purchase of an item to be leased is taxed.

It establishes specifically:

\$ when the lease of motor vehicles, trailers, boats, and outboard motors is taxed, and

\$ when the purchase of motor vehicles, trailers, boats, and outboard motors to be leased are taxed.

And it establishes finally:

\$ when exemptions apply.

As for ' 144.020.1(8)'s application to leases in general, the statute imposes a tax on lease receipts,

provided that if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of ~~A~~sale at retail~~@~~as defined in subdivision (8) of section 144.010 and the tax was collected at the time of purchase, the lessor or renter shall not

¹ Respondent's Brief, pp. 15.

apply or collect the tax on the subsequent lease or rental receipts from that property.

That is the two-option framework that the Director discussed in her opening brief: The purchaser pays up front on its purchase of the item, or collects tax from its customers on the lease receipts.

But the legislature did not stop there. In ' 144.020.1(8) the legislature specifically addressed taxability of the lease of motor vehicles, trailers, boats, and outboard motors, and the purchase of such items to be leased, reinforcing the tax treatment of such transactions by including explicit reference to ' 144.070² and ' 144.440³, which also address their taxability.

² Section 144.070 is titled, **A**Purchase or lease of motor vehicles, trailers, boats and outboard motors, tax on **B** *option granted lessor* **B** application to act as leasing company.@ [Emphasis added.]

³ Section 144.440 is titled, **A**Use tax on purchased or leased motor vehicles,

The legislature did not stop there, either. Section ' 144.020.1(8) concludes with a sentence that addresses when **B** and which **B** exemptions apply:

trailers, boats and outboard motors **B** *option of lessor*, effect of.@[Emphasis added.]

Tangible personal property which is exempt from the *sales or use tax* under section 144.030⁴ upon a sale thereof is likewise exempt from the *sales or use tax* upon the lease or rental thereof. [emphasis added]

The legislature's inclusion of a reference to *sales or use tax* in ' 144.020.1(8) was not only within its legislative prerogative, but abundantly logical, inasmuch as ' 144.615 B covering use tax exemptions B specifically incorporates ' 144.030, when it exempts from the use tax

Tangible personal property, the sale or other transfer of which, if made in this state, would be exempt from or not subject to the Missouri sales tax pursuant to the provisions of subsection 2 of section 144.030.

' 144.615(3).

In short, the concluding sentence of ' 144.020.1(8) provides B for purposes of *sales or use tax* B when and which exemptions apply to lease transactions, i.e., those contained in ' 144.030. Notably, ' 144.030 does not contain an exemption for resale, and ' 144.020.1(8) provides none elsewhere.⁵

⁴ Ronnoco misquotes this portion of the statute in its brief, at p. 24, by omitting the phrase *under section 144.030.*

⁵ The legislature provided an exemption from use tax for resale, in

' 144.615(6), but the legislature did not choose to import it into ' 144.020.1(8).

This Court in *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.2d 526, 529-530 (Mo. banc 2003), held that where the issue is taxability of fees charged for rental of an item, ' 144.020.1(8) Agoverns such a transaction.@ As discussed in the Director-s opening brief, at pp. 24-25, the Court concluded that because the owner of the machines paid sales or use tax on their purchase (option one), taxation of receipts from rentals of those machines (option two) Awas prohibited.@ *Id.* at 529.

Against that explicit backdrop, the faultiness of Ronnoco-s argument is laid bare. Ronnoco does not dispute the Director-s argument that its transfers of the equipment were leases or loans. Respondent-s Brief, pp. 13 n.3, and 23 n.6. Ronnoco-s overarching argument is that regardless of whether the items were leased, if it purchased the items for Aresale,@then the resale exemption or exclusion applies to that purchase B that is, the lease tax statute simply does not matter. *E.g.* Respondent-s Brief, pp. 13, 17, and 19-20.

The argument contradicts *Six Flags*, in which this Court held that the lease tax statute Agoverns such a transaction.@ *Id.* at 529-530.⁶

⁶ Ronnoco frequently mentions, and attempts to differentiate between, a resale exclusion found in ' 144.010.1(10), and a resale exemption found in ' 144.615(6). Respondent-s Brief, pp. 14, 15, 24, and 25. Because the lease tax statute governs the transaction here, the distinction is of no moment. If it were relevant, the distinction makes no difference. While the Court was not asked in *Kansas City Power and Light v.*

Director of Revenue, 83 S.W.3d 548, 551 (Mo. banc 2002), to draw the fine line between exemption and exclusion for resale that Ronnoco urges here, the Court B in describing the resale provisions in ' 144.010.1(10) and ' 144.605(7) B stated that they provide for an exemption from sales tax[.]@The resale exemption is analyzed similarly under both the use tax and sales tax schemes.@*Id* at 552 (citing *House of Lloyd, Inc. v. Director of Revenue*, 884 S.W.2d 271, 274 (Mo. banc 1994)).

The argument also contradicts this Court's line of cases beginning with *Int'l Business Machine Corp. v. State Tax Comm'n*, 362 S.W.2d 635, 639 (Mo. 1962) and *Federhofer, Inc. v. Morris*, 364 S.W.2d 524, 528 (Mo. 1963), in which this Court held that lease transactions were not sales at retail.⁷ The legislature responded to the decisions in 1963, not by changing the definition of sale at retail, but by enacting the lease tax statute, § 144.020.1(8), imposing tax on a new service, leases. 1963 Mo. Laws 196.

The *IBM* and *Federhofer* cases to which Ronnoco makes little more than passing reference, Respondents' Brief, p. 23 B remain good law on this point. Instead of confronting *IBM* and *Federhofer*, Ronnoco makes much in its brief of *Weather Guard Inc. v. Director of Revenue*, 6 S.W.3d 588 (Mo. App. 1988), and *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), but those cases do not carry its argument.

Weather Guard involved a wholesaler that purchased insulation machines out-of-state, and on which it paid use tax. 6 S.W.3d at 657. The wholesaler loaned the machines to a retailer, who sold home insulation kits to customers. *Id.* The customers

⁷ The Director discussed this line of cases in detail in her opening brief, pp. 32-35.

could use the machines if they paid extra. *Id.* The wholesaler was entitled to a refund, the court held, because the rental qualified as a sale under ' 144.605(5). *Id.* at 658. The *Weather Guard* court never addressed the lease tax statute.

And ten years later, this Court in *Brambles* did not mention *Weather Guard*. In *Brambles*, the taxpayer leased pallets to P&G, which in turn transferred the pallets to its own customers. *Id.* at 571. The Court noted that to the degree that a lease could be a sale for resale if an outright sale had been made, section 144.010(3) requires that the proceeds from such a lease be excluded from gross receipts. *Id.* at 570. Well enough. But the reason that the Court identified for the tax payer prevailing on its refund claim, for taxes paid on its original purchase of the pallets, was that the taxpayer had adduced sufficient evidence to establish a prima facie case that it [was] entitled to the *packaging exclusion* described in *Sipco [Inc v. Director of Revenue, 875 S.W.2d 539 (Mo. banc 1994).]* *Id.* at 571 (emphasis added). The Court could not address the lease tax statute because there was no evidence before the Commission inconsistent with the taxpayer's theory, *id.*, such as the lease.

Even if *Brambles* did apply here, which it does not, it favors the Director's position. Ronnoco argues that the key to the *Brambles* decision is that a lease which would qualify as a sale for resale if an outright sale had been made is not subject to tax. Respondents' Brief, pp. 16-17. As discussed above, in *Brambles*, the taxpayer leased the items to another entity, P&G, which in turn conveyed the items to its own customers.

But here, Ronnoco leased equipment to its customers who B under the terms of the lease B could not convey the equipment to anyone else. The contracts between Ronnoco and its customers explicitly provided that the customers could not sell, or otherwise lose possession of, Ronnoco's equipment. LF 46. If *Brambles* applied, it would support the Director's position.

Ronnoco also argues that the lease tax statute cannot apply to its out-of-state purchases (those on which the Director assessed use tax) because they are A governed by the use tax law.@ Respondent's Brief, p. 19. The argument is hard to follow. For obvious reasons, the legislature has not sought to tax a *lease* that occurs out-of-state. But insofar as the *items to be leased* go, the statute does explicitly cover purchases made subject to A sales or use tax,@ and the taxability of the lease of such items. ' 144.020.1(8).

The companion case before this Court, *Ronnoco Coffee Co. v. Director of Revenue*, Case no. SC86724, involved a claim for a use tax refund, only. There, Ronnoco argued that the lease tax statute could not apply because it is a sales tax statute that applies to in-state sales transactions. Respondent's Brief, Case no. SC86724, pp. 17. Here, where there are sales tax assessments at issue, Ronnoco does not make that argument. Instead, Ronnoco points to ' ' 144.010.1(3) and (10), concerning sales for resale, and *Brambles*. Respondent's Brief, pp. 19-20. As we discussed in our opening brief and herein, the lease tax statute covers purchases of items to be leased B whether

those purchases are subject to sales or use tax makes no difference. And *Brambles* does not support Ronnoco.

Finally, Ronnoco argues that its interpretation avoids multiple taxation. *E.g.* Respondent's Brief, pp. 17, 22, 23, and 25. Its interpretation actually avoids *any* taxation B on about 90% of its sales. The record reflects that Ronnoco accepted exemption certificates from most of its customers. LF 26, &9.⁸ If Ronnoco's theory carries the day, then no tax was ever collected on most of the coffee equipment that Ronnoco claims

⁸ Ronnoco quarrels with the Director's description of these certificates as Aresale® exemption certificates, arguing that the record does not show what kind of certificates they were. Respondent's Brief, pp. 21 n.6. But the record reflected that they were just that: Ronnoco submitted an affidavit to the Commission, explaining that its customers who make claims of exemption are typically restaurant customers that brew and sell liquid coffee and tea, and grocery store customers that do the same, or sell whole or ground coffee beans to their customers, and who collect Missouri and local sales tax on such sales. LF 27, &10. And though Ronnoco twice mentions *McDonnell Douglas Corp. v. Director of Revenue*, 945 S.W.2d 437 (Mo banc 1997) and the federal government's exemption from state tax, Respondent's Brief, pp. 20-21, and 28, Ronnoco's evidence below did not reflect any of the transactions at issue involved the federal government as a customer.

to have Aresold@to its customers, and Ronnoco will be refunded the tax that it paid on the purchase of that coffee equipment.

Ronnoco seemingly grasps that problem, because it carefully argues that the cost of the coffee equipment is Abundled@together with the cost of the coffee. Respondent's Brief, pp. 13, 14, and 30. Plainly, the reason that Ronnoco's customers gave Ronnoco the exemption certificates was because Ronnoco's customers were reselling the *coffee*, not the coffee equipment. Again, the evidence showed that they could not, because of the loan agreements. LF 46. With respect to the 10% of the transactions for which Ronnoco was *not* provided exemption certificates, and on which it *did* collect tax, Ronnoco could claim that it already collected and remitted tax on that portion of the transaction which was a lease of equipment (rather than a sale of coffee), i.e., that it had exercised option two under the lease tax statute. But Ronnoco has not taken that position here.

* * * * *

Finally, Ronnoco notes that the Commission declined to rule on Ronnoco's statute of limitations defense, because the Commission disposed of the case in its entirety on Ronnoco's resale argument. See LF 124-125. But Ronnoco argues that this Court could affirm even on the basis of the time bar, at least in part. Respondent's Brief, pp. 32-33. The Court should reverse because this case is controlled by the lease tax statute. But the statute of limitations argument misses the mark in any event.

To be clear, Ronnoco raised the defense below, only in connection with the use tax assessments, LF 3 (Amended Complaint), not the sales tax assessments.

As the Commission found, the use tax assessments covered the periods March 1998 through December 2000. LF 105, &26 (Commission's Findings of Fact). And as Ronnoco noted in its Statement of Facts, Respondent's Brief, p. 8, the Director conceded below that a 1998 portion of the use tax assessments fell outside the statute, LF 74. During the Director's audit, the Director and Ronnoco executed a series of waivers, under ' 144.746, RSMo, of the statute of limitations for assessment of use tax. LF 101-103. But due to the expiration of one waiver, and the three-day gap before the execution of the succeeding waiver⁹, the Director agrees with Ronnoco, Respondent's Brief, p. 32, that the waivers for March, June, and September 1998 became time barred.

⁹ One waiver expired on December 25, 2001, and the taxpayer and Director did not execute the next waiver until December 28, 2001. LF 102, && 18-19. Section 144.746 provides that a waiver can only be successfully extended if a new one is entered before the first expires.

But Ronnoco also argues that a majority of the amounts of use tax assessed are time barred because the assessments covered only the *last* month of each quarter.⁶ Respondent's Brief, p. 32 (citing LF 105, Commission's Findings of Fact). The use tax assessments are not in the Legal File, but the Commission's Findings of Fact recite the *Period* covered by each *Month* March 1998, June 1998, September 1998, December 1998, March 1999, June 1999, September 1999, December 1999, March 2000, June 2000, September 2000, and December 2000 *Month* along with the amount of tax assessed for each period, ranging between \$1,377.90 and \$1,512.80. LF 105, ¶26.

If Ronnoco wished to claim that it did not *use* in the respective months listed *Month* store, use, or consume the items on which the Director assessed use tax, then Ronnoco should have put on such proof, which was its burden. ' ' 136.600 and 621.050, RSMo. It put on no such proof. Ronnoco's evidence went only to *when* it made out-of-state *purchases*, Respondent's Brief, p. 32 (citing LF 28, Affidavit of Eric Bomball), which is not relevant to this issue. Use tax liability does not accrue on the purchase of an item, but upon its storage, use, or consumption. ' 144.610, RSMo. Moreover, Ronnoco's evidence only went to purchases made in 2000, LF 28, ¶12, even though the use tax assessments covered periods from 1998 to 2001.

Ronnoco failed to meet its burden of proof on its statute of limitations defense. The Court cannot sustain the Commission's decision in part, as Ronnoco requests, on the basis of such a bar.

Conclusion

The Administrative Hearing Commission's decision, finding that Ronnoco established its resale claim and is not liable for the assessments of sales and use tax, should be reversed.

Respectfully submitted,

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

The undersigned hereby certifies that on this 28th day of October, 2005 one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,043 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 Solicitor