

SC93448

IN THE SUPREME COURT OF MISSOURI

COMMERCIAL BARGE LINE COMPANY and AMERICAN
COMMERCIAL BARGE LINE LLC,

Appellants,

vs.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review From
The Administrative Hearing Commission,
The Honorable Karen A. Winn, Commissioner

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The Appellants' statement of facts leaves out several key facts, and as such, the Director of Revenue provides the following supplemental statement of facts for the Court's consideration, and in accordance with Supreme Court Rule 84.04(f).

A. The Parties and Their Relationships.

Commercial Barge Line Company ("Commercial Barge") is the only member, and, therefore, sole owner of both American Commercial Barge Lines, LLC ("ACBL") and Louisiana Dock Company, LLC ("Louisiana Dock") (collectively "the Taxpayers"). (LF 250-51; *see also* LF 233-34). As single member limited liability companies, both ACBL and its sister company, Louisiana Dock, are disregarded entities under § 7701 of the Internal Revenue Code. (LF 252; *see also* LF 233-34).

By law, ACBL and Louisiana Dock's federal taxable income is included in the federal taxable income of, and reported by, Commercial Barge. (*Id.*). Likewise, under Missouri law (§ 347.187.2^{1/}) – and for purposes of sales and use taxes – "a limited liability company and its members shall be classified and treated on a basis consistent with the limited liability company's

^{1/} All references to the Revised Statutes of Missouri will be to the 2013 Cumulative Supplement, unless otherwise noted.

classification for federal income tax purposes.” Commercial Barge, ACBL, and Louisiana Dock “are all one taxpayer for federal tax purposes, and also under Missouri law pursuant to § 347.187.2” (LF 281).

ACBL and Louisiana Dock provide complimentary roles for their sole owner, Commercial Barge. (LF 250-55). ACBL provides line-haul towboats that do not dock but transport barges up and down the Mississippi River, while Louisiana Dock provides a multitude of services to ACBL, including picking up and delivering the barges from ACBL for customers in Missouri. (Tr. 23-24; LF 251).

1. ACBL operates line-haul towboats in Missouri.

ACBL’s role in the enterprise is to operate line-haul towboats that transport cargo in barges along the Mississippi River. (LF 251; *see also* LF 234). “They will stop and deliver or pick up barges at various locations in Missouri, but they don’t actually dock.” (Tr. 9:5-7). ACBL’s line-haul towboats operate in the State of Missouri as the Missouri border extends to the middle of the Mississippi River. (LF 256-57). Missouri law, § 7.001, specifically proscribes the sovereign boundaries of Missouri as follows:

The enabling act of Congress (March 6, 1820),
authorizing the admittance of Missouri into the
Union, described the boundaries of Missouri as

follows: (Section 2, Act of Admission, RSMo 1959, Volume 5)

Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the St. Francis River; . . . thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning.

Any boat on the western half of the Mississippi River from Iowa to Arkansas is operating within the borders of the State of Missouri. (*Id.*; see also LF 256-57).

In order to continuously operate and maintain the line-haul towboats on the Mississippi River, and within the borders of Missouri, ACBL purchases food and other goods from its sister company Louisiana Dock (St. Louis, Missouri), and two third-party vendors: the Henry A. Petter Supply Company (Paducah, Kentucky), and the Economy Boat Store (Wood River, Illinois). (LF 253-54; see also LF 234-36).

2. Louisiana Dock purchases, stores, and delivers goods for its sister company, ACBL, in Missouri.

With no facilities in Missouri, ACBL relies on its sister company, Louisiana Dock, to not only purchase goods and supplies for it, but also to store and deliver goods to its line-haul towboats on the Mississippi River. (LF 254; *see also* LF 234-35). Louisiana Dock is registered to do business in Missouri and owns property and has approximately six employees in Missouri. (LF 252; *see also* LF 234). Louisiana Dock operates “harbor boats” and assists ACBL “in the pick up and taking out of the barges of the tow when they’re in the St. Louis Harbor.” (Tr. 9:23-25). Louisiana Dock – from its location in Missouri – also performs other services for ACBL, such as “repair work on towboats” and “picking up and delivering crews who might be getting off in St. Louis or getting on in St. Louis.” (Tr. 25:16; Tr. 10:1-3).

During the relevant time period, Louisiana Dock purchased goods and supplies for ACBL under a claim of resale. (LF 253; *see also* LF 234). “These were sales made by Louisiana Dock to ACBL” from and within Missouri. (Tr. 10:11-12). Louisiana Dock paid no sales tax on its purchases of the goods or supplies for ACBL. (LF 253; *see also* LF 234). Instead, ACBL provided Louisiana Dock with an exemption certificate claiming the “in commerce” exemption, which the Director of Revenue rejected. (*Id.*).

B. The Purchase and Use of Goods or Supplies by ACBL in Missouri.

In addition to ACBL's purchases directly from Louisiana Dock in Missouri, the typical transactions in this case involved the Petter Supply Company delivering goods and supplies for ACBL to Louisiana Dock in Missouri, for subsequent delivery to ACBL in Missouri. (LF 253-54; *see also* LF 234). ACBL would place its orders (while in Missouri) for supplies with the Petter Supply Company. (LF 254). "[F]or the most part, they're actually ordered from the boat," including repair parts, light bulbs, rigging, and food supplies. (Tr. 30:11-16; LF 253 ("ACBL purchased various food items, non-food supplies, and other tangible personal property such as cleaning products, cooking implements, paper products, and insecticides")).

The Petter Supply Company would then package the ordered supplies on shrink-wrapped pallets and deliver them by common carrier to Louisiana Dock in St. Louis, Missouri. (LF 254; *see also* LF 235). Like purchases from Louisiana Dock, ACBL provided the Petter Supply Company with an exemption certificate claiming the "in commerce" exemption, which the Director of Revenue rejected. (LF 254; 235). The exemption certificate even claimed that goods and supplies were "always" delivered "outside the State of Missouri." (LF 254).

Because the Petter Supply Company cannot physically make deliveries to ACBL's line-haul towboats in Missouri, Louisiana Dock stores the goods and supplies at its facilities in St. Louis. (LF 254; *see also* LF 235). Storage can be up to five days before the goods and supplies can be delivered to ACBL – once the line-haul towboats enter the St. Louis harbor. (LF 254). Louisiana Dock then delivers the goods and supplies to ACBL's line-haul towboats on the Mississippi River via Louisiana Dock's towboat – all while performing other services, such as picking up or delivering barges to ACBL. (LF 254; *see also* LF 235). ACBL pays Louisiana Dock an hourly rate for all the services Louisiana Dock provides to ACBL, including the delivery of supplies. (LF 254; *see also* LF 235). When Louisiana Dock boats are unavailable, a separate and unrelated company, Lewis and Clark Marine, sometimes picks up supplies from Louisiana Dock in Missouri and delivers them to ACBL. (LF 254-55; *see also* LF 235). On these occasions, Louisiana Dock (not ACBL) pays Lewis and Clark an hourly rate for any work it performs, including the delivery of goods and supplies to ACBL. (LF 255; *see also* LF 235).

ACBL purchases the remainder of the goods and supplies it uses from another third party vendor, Economy Boat Store. (LF 255; *see also* LF 236). On most occasions, Economy Boat delivers the goods or supplies directly to ACBL's line-haul towboats in the northern part of the St. Louis Harbor, using

Economy Boat's own boats. (*Id.*). Occasionally, however, Economy Boat delivers the goods or supplies to Louisiana Dock in St. Louis. (*Id.*). Louisiana Dock then delivers the goods or supplies to ACBL's line-haul towboats. (*Id.*).

Pursuant to its agreement with the Illinois Department of Revenue, Economy Boat charges Illinois sales tax on the tangible personal property it delivers to northbound, but not southbound, boats in the St. Louis Harbor. (LF 255). ACBL and Commercial Barge admitted that Economy Boat "charged sales tax and collected it from ACBL." (Tr. 13:6-7). But there is no evidence that ACBL has ever sought a refund from the State of Illinois on the payment of such sales tax. ACBL simply pays Illinois sales tax on all purchases that were designated "northbound deliveries" and recognizes that the taxes at issue in this case are for "deliveries made to the boats going southbound." (Tr. 13:1-3; LF 255).

Neither Economy Boat nor Petter Supply Company bore any further responsibility for ACBL goods or supplies damaged after they were delivered to Louisiana Dock. (LF 255). In a February 14, 2006 e-mail, Judy Hupp, Director of Tax for ACBL, stated that if the goods and supplies purchased from Petter Supply Company are in the possession of Louisiana Dock and are then damaged, that Louisiana Dock would be responsible for the damages. (LF 252; *see also* Audit CC40).

The Administrative Hearing Commission determined, as a matter of fact, and it is undisputed, that the line-haul towboats at issue “were on the Missouri side of the river when title to some of the goods passed, and when some of the goods finally came to rest.” (LF 270). Yet, the Taxpayers argued to the Commission that they should pay no taxes to any state on their purchase of goods and supplies that were delivered to ACBL’s boats when they were in Missouri. (LF 260).

C. The Audit and Assessments.

The Department of Revenue audited Commercial Barge, ACBL, Louisiana Dock, and other companies affiliated with Commercial Barge in 2007-2008 for potential liability for sales, use, and withholding taxes. (LF 257). The audit covered quarterly periods beginning October 1, 2001 and ending December 31, 2006. (LF 257). As part of the audit, Commercial Barge – which is treated as one entity with ACBL and Louisiana Dock for purposes of sales and use taxes – executed waivers of the statutes of limitations for sales and use taxes on March 26, 2007. (LF 257).

Commercial Barge did not file any sales or use tax returns for the applicable periods in which ACBL purchased goods and supplies, and for which the Department of Revenue made assessments. (LF 257). At the conclusion of the audit, the Department of Revenue issued assessments

against ACBL and Louisiana Dock for sales and use tax liabilities for the same period for which it later issued assessments against Commercial Barge. (LF 257-59).

SUMMARY OF THE ARGUMENT

The Taxpayers in this case acknowledge that they pay sales and use taxes to the State of Illinois – albeit grudgingly – for the purchase of tangible personal property delivered to their line-haul towboats going northbound on the Mississippi River (*i.e.*, in Illinois). Yet, for the southbound trips (*i.e.*, in Missouri), the Taxpayers wish to avoid the payment of sales and use taxes to any state whatsoever, including the State of Missouri. The Commission, however, rejected the Taxpayers’ efforts to avoid sales and use taxes on the basis of the Commerce Clause and the Due Process Clause, as it should have.

The State of Missouri’s sales and use taxes are fairly related to the services provided to the Taxpayers in this case, as required by the Constitution. *See Fall Creek Const. Co., Inc. v. Dir. of Revenue*, 109 S.W.3d 165, 171 (Mo. banc 2003). For example, virtually all of the goods and supplies at issue were ordered, purchased, or stored in Missouri. The undisputed evidence was that the goods and supplies – such as food items, light bulbs, paper products, and cleaning products – were ordered from the line-haul towboats while within the borders of Missouri. The goods and supplies were then shipped by common carrier to St. Louis, Missouri, to be stored in anticipation of being delivered to the line-haul towboats when they came into the St. Louis Harbor – in the boundaries of the State of Missouri.

What is more, the principal party that stored and delivered the goods and supplies in Missouri is a limited liability company that is treated as the same entity as the Taxpayers for purposes of federal and state tax law. This limited liability company not only stored and delivered the goods as a sister organization for the Taxpayers, but also provided a multitude of other services to the line-haul towboats – all from its location in Missouri. Each step along the way, the Taxpayers benefited from the services, protections, and benefits of the State of Missouri. As such, the State of Missouri’s sales and use taxes are fairly related to the services provided to the Taxpayers, and, therefore, the Taxpayers’ constitutional claims fail.

Similarly, the Taxpayers’ claim that the sales and use taxes are prohibited by § 5(b) of the Maritime Security Act of 2002 fails. The sales and use taxes at issue are not being “levied upon or collected from any vessel or other water craft, or from its passengers or crew,” as prohibited by federal law. 33 U.S.C. § 5(b). Instead, the sales and use taxes are for the purchase and use of tangible personal property. And finally, the assessments in this case are not barred by the statute of limitations, in whole or in part. The three-year statute of limitations can only attach if there is a tax return filed, and there was not. Accordingly, the Commission’s decision should be affirmed.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission (“Commission”) must be affirmed if: “(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly.” *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435-36 (Mo. banc 2010); § 621.193, RSMo, Cum. Supp. 2010.

When the Commission has interpreted the law or the application of facts to law, the review is *de novo*. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. banc 2003); *Zip Mail Servs., Inc. v. Dir. of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). In addition, the Commission’s factual determinations “are upheld if supported by ‘substantial evidence upon the whole record.’ ” *Concord Publ’g House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 189 (Mo. banc 1996) (quoting *L & R Egg Co., Inc. v. Dir. of Revenue*, 796 S.W.2d 624, 625 (Mo. banc 1990)). This Court can affirm on any basis supported by the record. *See Missouri Bd. of Nursing Home Administrators v. Stephens*, 106 S.W.3d 524, 528 (Mo. App. W.D. 2003). Here,

the Commission's decision is supported by the record and the law, and should, therefore, be affirmed.

I. The Commission Correctly Concluded That the Sales and Use Taxes in This Case are Fairly Related to the Taxpayers' Activities in the State of Missouri – Responding to Appellants' Point I.

This Court in *Fall Creek Const. Co., Inc. v. Dir. of Revenue*, 109 S.W.3d 165, 171 (Mo. banc 2003) set forth the four criteria that must be met in order that a tax not violate the Commerce Clause: “[the tax] (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.” 109 S.W.3d at 171. The Taxpayers in this case, including Commercial Barge and ACBL, do not dispute the first three criteria, including a substantial nexus with the State. Instead, the Taxpayers claim that the sales and use taxes at issue are not fairly related to the services provided by the State. This is incorrect.

The following services, at a minimum, are provided by the State to the Taxpayers and are fairly related to the sales and use taxes:

- Highways and roads in Missouri for the delivery of goods and supplies purchased from companies,

including Missouri companies, and delivered to the Taxpayers in Missouri;

- Docks and facilities in Missouri used by companies, including Missouri companies, for the delivery of goods and supplies to the Taxpayers in Missouri;
- Legal and judicial systems for the protection and support of the Taxpayers in purchasing, storing, and delivering goods and supplies in Missouri;
- Legal systems and infrastructure utilized by the Taxpayers in Missouri, including entities that are disregarded for purposes of taxes under federal and state law; and
- Emergency services, public services, and police protection for goods, employees, and legal entities of the Taxpayers in Missouri.

There are several key facts that the Taxpayers ignore in an effort to avoid sales and use taxes altogether. The first, of course, is the undisputed fact that the sale and use of products in this case occurred within the sovereign boundaries of the State of Missouri. Section 7.001 establishes that the borders of Missouri extend into the middle of the Mississippi River. Any

boat on the western half of the Mississippi River would be within the borders of the State of Missouri.

The court in *Streckfus Steamers, Inc. v. City of St. Louis*, 472 S.W.2d 660, 664 (Mo. App. St. Louis, 1971) held:

When Missouri was admitted to the Union as a State, the Act of Congress authorizing the people of Missouri to form a constitution and state government, (3 U.S.Stat. 545; 1 V.A.M.S. 97; 3 V.A.M.S.Chap. 7, p. 211) set out the boundaries of the proposed state. At St. Louis where Missouri borders the State of Illinois, the boundary line is the middle of the main channel of the Mississippi River. However, the act goes further and gives to Missouri concurrent jurisdiction on the river. This has been construed to mean that the sovereignty of the State of Missouri, having accepted the act, extends anywhere on that river.

This means that any of ACBL's line-haul towboats on the west side of the Mississippi River (*i.e.* southbound), between Iowa and Arkansas, are within Missouri's sovereignty and within the borders of the State of Missouri. Any

deliveries made to boats on the Mississippi River, within Missouri's borders, are the same as deliveries made to a business in Jefferson City, Missouri.

Moreover, the goods and supplies do not magically appear on the line-haul towboats operated by ACBL in Missouri. In most instances, they come directly from the State of Missouri and benefit from the services provided by the State of Missouri. These services are provided to the Taxpayers, including entities that are considered as one for purposes of sales and use taxes. Indeed, because Louisiana Dock has facilities and employees in St. Louis, Missouri, and is disregarded for federal and state tax purposes, the Taxpayers have an actual physical presence in Missouri where the goods and supplies at issue are purchased, stored, and transported.

The Taxpayers rely heavily on an Illinois case, *American River Transp. Co. v. Bower*, 813 N.E.2d 1090 (Ill. App. 2004), for their argument. *American River* does not support the Taxpayers' claims. The case involved boats moving up and down the Mississippi River, similar to this case. In contrast, however, the barge line challenged the imposition of use taxes on goods its line-haul boats purchased and loaded from Missouri and then used while plying the Mississippi River. The Illinois Appellate Court found that the goods received by the line-haul boats from Missouri were not closely related enough to the

services received in Illinois, and held that the imposition of tax violated the Commerce Clause.

This case differs from *American River* in several respects. The goods and supplies in this case are almost exclusively purchased, stored, and received in and from Missouri. The goods are not simply being used while in Missouri's borders. The Taxpayers are also treated as one entity for purposes of federal and state law. The Taxpayers, therefore, enjoy the benefit and protection of Missouri public services through Louisiana Dock, a wholly owned limited liability company. In this respect, the dissent in *American River* provides a better analysis – noting that “it is incorrect to look at the line haul tugboats in isolation.” *American River*, 813 N.E.2d at 1095 (Bowman, J. dissenting). The majority of the court in *American River* also recognized that the company paid for services from the State of Illinois through the use taxes its harbor boats paid on their fuel obtained from Illinois.

Continuing their reliance on *American River*, the Taxpayers take up the court's analogy concerning aircraft that merely fly over a state. This is not at all persuasive here. To be even close to comparable, the aircraft in the analogy would not only need to be within the sovereign borders of the State of Missouri, but it would have to receive goods and services from another

aircraft originating from Missouri and received while in Missouri. Furthermore, the goods would have to be ordered from Missouri, transported or stored in Missouri, and in most instances purchased, stored, or transported by a company that is not only physically and legally in Missouri, but is treated as one company with the company flying the aircraft in Missouri. Indeed, the court in *American River* conclusively answered this question when it wrapped up the analogy by stating that “aircraft that do use ground facilities and fuel purchased in Illinois do pay the appropriate taxes.” *American River*, 813 N.E.2d at 1094. Such is the case here – the Taxpayers use facilities, goods, and supplies purchased in Missouri.

As the Commission concluded, the case of *TECO Barge Line, Inc. v. Wilson*, 2010 WL 2730591 (Tenn. App. 2010), provides the better analysis. In *TECO Barge*, the court found a fair relation for a company operating tugboats and barges in Tennessee. TECO was not domiciled in Tennessee and did not own or lease any real property within Tennessee. In fact, the company asserted that it derived “no benefits from state and local governments in its Tennessee operations with very few exceptions,” and that it did not stop, take on crew or provisions, or receive repair or maintenance services in Tennessee. *Id.* at 7. Nevertheless, the court found that TECO’s “actual use or nonuse of these services is irrelevant to the inquiry. So long as there is some service or

benefit provided by the State and the tax levied is apportioned to the extent of the contact with the State the tax does not run afoul of the Commerce Clause.”

Here, the benefits and services are much more compelling than in *TECO Barge*. Not only did the Taxpayers purchase, store, and receive goods and supplies in and from Missouri, but they also took on crew and received repair and maintenance services in Missouri. As such, the sales and use taxes in this case are fairly related to the Taxpayers’ activities in the State of Missouri.

II. Section 5(b) of the Maritime Security Act of 2002 Does Not Prohibit Imposition of Missouri Sales or Use Taxes – Responding to Appellants’ Point II.

The Taxpayers next argue that § 5(b) of the Maritime Security Act of 2002 prohibits Missouri from imposing sales or use taxes on the purchase of goods at issue in this case. 33 U.S.C. § 5(b) provides:

No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any

navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for—

- (1) fees charged under Section 2236 of this title;
- (2) reasonable fees charged on a fair and equitable basis that—
 - (A) are used solely to pay the cost of a service to the vessel or water craft;
 - (B) enhance the safety and efficiency of interstate and foreign commerce; and
 - (C) do not impose more than a small burden on interstate or foreign commerce;

Having no support for their position in the language of the statute, the Taxpayers attempt to rely on statements from individual legislators or proposed amendments to § 5(b) that were never adopted. The plain language, however, controls. In accordance with the plain language, § 5(b) only prohibits taxes on any vessel, passengers, or crew. Missouri sales and use taxes are not taxes on a vessel, passengers, or crew. Instead, the sales and use taxes at issue are on the purchase of goods. Thus, § 5(b) does not apply to Missouri sales and use taxes.

Even assuming that § 5(b) did apply to Missouri sales and use taxes, the exception in subsection (C) applies. The Missouri sales and use taxes in this case do not impose any burden on interstate or foreign commerce and no reasonable argument could be made that it does. A general excise tax (“GET”), for example, does not violate 33 U.S.C. § 5. *Reel Hooker Sportfishing, Inc. v. State Department of Taxation*, 236 P.3d 1230 (Hawaii App. 2010). In *Reel Hooker Sportfishing* the court held “that 33 U.S.C. § 5(b) does not preempt the assessment of Hawaii GET on the charter fishing revenue of these Hawaii businesses because GET is a tax assessed on gross business receipts for the privilege of doing business in Hawaii, and is not a tax on their vessels or passengers.”

Similarly, § 144.020 provides “[a] tax is hereby levied and imposed 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.” In addition, § 144.610 provides that: “[a] tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of Sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in Section 144.020.” Like Hawaii’s general excise tax,

Missouri's sales and use taxes are not taxes on a vessel, passenger, or crew, and cannot reasonably be construed as such.

The two cases cited by the Taxpayers, *High Country Adventures, Inc. v. Polk County*, 2008 WL 4853105 (Tenn. App., Nov. 10, 2008) and *Moscheo v. Polk County*, 2009 WL 2868754 (Tenn. App., Sept. 2, 2009), involve the imposition of a "privilege tax" on passengers which is entirely different than sales and use taxes in Missouri. Again, Missouri's sales and use taxes are not a tax on a vessel, passenger, or crew and do not violate 33 U.S.C. § 5(b). The Commission relied on a Hawaii case, *Reel Hooker Sportfishing*, which concerned Hawaii's excise tax imposed on the privilege of doing business in the state – regardless of the nature of the business. It is thus closer to Missouri's sales and use taxes, which are taxes upon the privilege of engaging in the business of selling, or of storing, using or consuming, tangible personal property within this state.

Missouri's sales and use taxes are not "taxes, tolls, operating charges, fees, or other impositions" on the Taxpayers'. They are taxes on tangible personal property purchased or used in Missouri. The Maritime Security Act does not bar these assessments.

III. The Sales and Use Tax Assessments at Issue are Not Barred by the Statute of Limitations – Responding to Appellants’ Point III.

Finally, the Taxpayers stretch to assert a statute of limitations claim. Yet, § 144.220.1 provides: “In the case of a fraudulent return or of neglect or refusal to make a return with respect to any tax under this chapter, there is no limitation on the period of time the director has to assess.” Section 144.720 further provides: “Sections 144.170, 144.220, 144.230, and 144.240, pertaining to interest on delinquent taxes, the time within which additional assessments shall be made, the time within which assessed penalties and taxes shall be paid and the procedure for requesting review of additional assessments are applicable to the assessment and payment of the tax levied by this law.”

In *Hewitt Well Drilling & Pump Service, Inc. v. Dir. of Revenue*, this Court noted that: “...in *Bridge Data Co. v. Dir. of Revenue*, 794 S.W.2d 204 (Mo. banc 1990), this Court held that failure to file does constitute neglect, regardless of the taxpayer’s belief that no tax was due, at least where the taxpayer did not otherwise disclose its operations to the Department and could not rely on previous decisions and policy of the Department as an excuse for nondisclosure.” 847 S.W.2d 795, 798 (Mo. banc 1993).

Furthermore, § 144.220.1 applies in cases of a fraudulent return or of neglect or refusal to make a return. Section 144.220.3, in turn, provides: “In other cases, every notice of additional amount proposed to be assessed under this chapter shall be mailed to the person within three years after the return was filed or required to be filed.” The three-year statute of limitations can only attach if there is tax return filed. If there was no return filed, there is no three-year period for the statute of limitations to attach. This is the case here, and as such the Director of Revenue’s assessments are not barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on this 16th day of December 2013, a copy of the foregoing brief was served electronically via Missouri CaseNet e-filing system to:

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I further certify that a true and correct copy of the foregoing was served via Inter-Agency mail on December 16, 2013, to:

Administrative Hearing Commission
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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 5,257 words.

/s/ Jeremiah J. Morgan
Deputy Solicitor General