

SC94224

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**IN THE SUPREME COURT OF MISSOURI**

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**FIVE DELTA ALPHA LLC,**

**Petitioner/Appellant**

**vs.**

**DIRECTOR OF REVENUE,**

**Respondent.**

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**Appeal from the Administrative Hearing Commission  
The Honorable Sreenivasa Rao Dandamudi, Commissioner**

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**BRIEF OF RESPONDENT**

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## ARGUMENT

The Administration Hearing Commission decided two issues. First, based on the very particular record before it, the Commission found that the purchase at issue by Five Delta Alpha of an aircraft it then leased to JetSelect was a “sale[] of aircraft to common carriers for storage or for use in interstate commerce,” and thus entitled to claim an exemption under § 144.030.2(21). Initially, the Director filed a cross-appeal, also docketed as No. 94224, regarding that finding. But the Director has dismissed that cross-appeal pursuant to Rule 84.09, and the Court need not and should not address that part of the Commission’s decision.

In the course of hearing taxpayer Five Delta Alpha’s claim that JetSelect is a “common carrier,” the Commission refused taxpayer Five Delta Alpha’s request for admission of particular evidence. In its second “point relied on,” Five Delta Alpha challenges those rulings. Because the Director has dismissed his cross-appeal, reversing the Commission’s evidentiary rulings could have no impact on the disposition of Five Delta Alpha’s claim. The issue in Five Delta Alpha’s second point is moot—and “a challenge to a trial court’s evidentiary rulings excluding evidence as irrelevant does not invoke a question of sufficient public interest to merit review of a moot question.” *M.W. v. Mabry*, 282 S.W.3d 33, 36 (Mo. App. E.D. 2009).

Despite its finding that taxpayer Five Delta Alpha (or more correctly, lessee JetSelect) was a “common carrier,” the Commission held that Five Delta Alpha nonetheless could not avoid the tax because the purchase was not for “resale.” Thus in its first “point relied on,” Five Delta Alpha argues that “the Aircraft is exempt from tax as having been purchased for resale, in that the subsequent lease of the Aircraft to a common carrier is considered a sale.” Though that responds to what the Commission decided, it is not directed to any argument made by the Director below. Thus Five Delta Alpha reasonably says that it “had no reason to anticipate the Commission’s finding that the lease should be considered as anything other than a resale.”

Appellant’s Brief at 16.

The Director agrees that at least in certain circumstances, leases can constitute “sales” for purposes of determining whether a particular purchase—even the purchase of an airplane—was “for resale.” See *Brambles Industries, Inc. v. Director of Revenue*, 981 S.W.2d 568, 570 (Mo. banc 1998); 12 CSR § 10-108.700(3) (A), (C). And for purposes of this appeal, he agrees that if JetSelect is a “common carrier,” Five Delta Alpha’s purchase was “for resale.”

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on the 20<sup>th</sup> day of October, 2014, 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 488 words.

/s/ James R. Layton  
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