

No. SC94224

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IN THE SUPREME COURT OF MISSOURI

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FIVE DELTA ALPHA LLC,  
Petitioner/Appellant/Cross-Respondent,

v.

DIRECTOR OF REVENUE,  
Respondent/Cross-Appellant

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On Petition for Review from the  
Missouri Administrative Hearing Commission

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**APPELLANT/CROSS-RESPONDENT'S INITIAL BRIEF**

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### **Jurisdictional Statement**

This appeal involves construction of the revenue laws of Missouri, and therefore falls within the exclusive jurisdiction of the Supreme Court of Missouri under Article V, Section 3 of the Missouri Constitution.

The question presented on appeal is whether an aircraft purchased outside Missouri for lease to a common carrier in interstate commerce qualifies for the resale exemption from use tax described in §144.018.1(4) RSMo., pursuant to the exemption for sales to common carriers §144.030.2(20)<sup>1</sup> given the definition of “sale” in §144.605(7) and “gross receipts” in §144.010.1(3)<sup>2</sup> RSMo. Resolution of this question requires construction of §§144.010.1(3), 144.018.1(4), 144.030.2(20), and 144.605(7) RSMo., in connection with the revenue laws of Missouri.

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<sup>1</sup> RSMo Supp. 2010. Subdivision (20) was renumbered as (21) by L. 2012, S.B. No. 470 §A.

<sup>2</sup> RSMo Supp. 2010. Subdivision (3) was renumbered as (4) by L. 2011, S356.

## Statement of Facts

The parties stipulated to the facts as submitted in Petitioner's and Respondent's Joint Proposed Findings of Fact. (Record at 00008 – 00111, subject to relevance objections as to Exhibits O, P and Q contained in pages 00066 – 00111, further discussed below).

### The Taxpayer

Five Delta Alpha LLC (“Appellant” or “FDA”) is a Missouri limited liability company with its principal place of business in Kansas City, Missouri. (Record 00008). FDA filed a complaint with the Administrative Hearing Commission, appealing a denial by the Director of Revenue (“Director”) of FDA's use tax refund claim on its purchase and subsequent lease of an aircraft to JetSelect, LLC (“JetSelect”). (Record 00001 - 00004). The Commission found for the Director. (Record 00187, 00211). FDA appeals the Decision of the Commission denying its use tax refund.

### The Purchase for Resale (Lease)

FDA purchased a Bombardier Challenger 300 aircraft (the “Aircraft”) on March 8, 2011 in Wichita, Kansas. (Record 00009). The Aircraft was immediately leased to JetSelect upon its purchase from Bombardier. (Record 00009). JetSelect then moved the Aircraft to Missouri where it has since been based. (Record 00009).

### The Lessee JetSelect

JetSelect is engaged in the business of providing on-demand air transportation to paying customers in accordance with FAA requirements for air carriers contained in Part 135 of the Federal Aviation Regulations (“FARs”) (14 CFR Sections 135.1 and following), and maintains a Part 135 certificate authorizing common carrier operations. (Record 00010, 00020). The company holds itself out to the general public as engaging in the transportation of passengers or property for hire under individual agreements, without refusal if the fare or charge is paid and there is an empty aircraft available to transport the customer or group. (Record 00031).

JetSelect advertises its services and aircraft fleet (including FDA’s Aircraft) to the public using numerous marketing methods. (Record 00010 - 00012). These methods include: (i) JetSelect’s website; (ii) publication and distribution of a full-color brochure of JetSelect’s offerings; (iii) advertisements in various publications such as *The Wall Street Journal* and YouTube.com; (iv) promotion of its services through the National Business Aircraft Association (“NBAA”) Product & Services Directory, specifically through web advertising on the NBAA directory of air charter operators; (v) encouraging word-of-mouth referrals from prior customers; (vi) listings with clearinghouse services such as CharterX (see [www.charterx.com](http://www.charterx.com)) and Avinode (see [www.avinode.com](http://www.avinode.com)); (vii) direct solicitation of charter wholesalers and other charter providers; (viii) press releases and direct emails to prospective customers promoting its fleet; and (ix) promotion of its aircraft through social networking media including Twitter.com and Facebook.com (with

more than 587 customers on Facebook). (Record 00010 – 00012).

Potential customers contact JetSelect either directly (by phone, website, email or in person) or through a broker to arrange for air carrier service. (Record 00012). The customer provides the information necessary to determine the price, such as the point of departure, desired destination, number of legs, date and time of departure, and potential passenger list. (Record 00012). Based on the information provided by the customer, JetSelect creates a price quote for air carrier service based on a published hourly rate of \$4,750 for the Aircraft. (Record 00012).

JetSelect accepts all customers who agree to abide by the conditions of carriage and pay the charges as quoted, so long as there is an empty aircraft available to transport the customer or group. (Record 00013 – 00014). The company has never refused to carry any prospective customer once that customer has made payment of the charges quoted. If a customer asks for the flight time to be changed, JetSelect will make every attempt to accommodate the request if possible. (Record 00013 – 00014). JetSelect must comply with Part 135 of the FARs as well as restrictions of the Transportation Security Administration (“TSA”). (Record 00013).

#### Use of the Aircraft

Since its purchase and lease to JetSelect, the Aircraft has been based in Kansas City, Missouri for use in JetSelect’s air carrier operations. (Record 00009). JetSelect and its pilots operate the Aircraft, and the company provides oversight of all mechanics, maintenance, parts and supplies necessary for the operation of the Aircraft in accordance with FAR Part 135 air carrier requirements. (Record 00009). As of December 31, 2011,

JetSelect had operated the Aircraft over 100 hours and 44,000 statute airmiles, and continues to routinely operate the Aircraft in interstate air carrier service. (Record 00012).

### The Complaint

FDA paid Missouri use tax in the amount of \$1,396,083.33 “Under Protest” on April 29, 2011. (Record 00009, 00017 – 00018). FDA filed a Sales Tax Protest Payment Affidavit with the Director on June 15, 2011. (Record 00009, 00017 – 00018). FDA asserts that the purchase of the Aircraft was eligible for exemption pursuant to Section 144.030.2(20), RSMo, as the Aircraft is leased to JetSelect as a common carrier providing charter to the general public pursuant to JetSelect’s FAA Certificate. (Record 00001 – 00003). The Director denied FDA’s refund in a letter dated June 24, 2011. (Record 00010, 00019). FDA appealed the Director’s decision by a complaint with the Administrative Hearing Commission filed August 22, 2011, arguing that it was entitled to the resale exemption based on the Aircraft’s exclusive lease to JetSelect, a common carrier. (Record 00001 – 00004).

### The Commission’s Decision

The Commission rendered its decision on May 13, 2014, denying FDA a use tax refund, because the Commission did not believe FDA’s lease to JetSelect constituted a “sale” for purposes of the resale exemption. (Record 00187 – 00211).

In its Decision, the Commission rejected certain evidentiary documents offered by Petitioner, including Exhibits O, P and Q. (Record 00192 – 193). Those documents had been submitted in Petitioner’s and Respondent’s Joint Proposed Findings of Fact,

(Record at 00014 – 00015, Exhibit O appearing at 00066 – 00068, Exhibit P at 00069 – 00072, and Exhibit Q at 00073 – 00107), subject to relevance objections by Respondent.

## **Points Relied On**

### **Point I:**

The Administrative Hearing Commission erred in ruling that Appellant is not entitled to a refund of use tax paid, because 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.

### **Point II:**

The Administrative Hearing Commission erred in excluding Exhibits O, P and Q from the record, because the evidence is relevant to demonstrate that FDA qualifies for the common carrier exemption to Missouri use tax, in that it tends to prove a fact in issue or corroborate other relevant evidence which bears on the principal issue.

## Argument

### Standard of Review

This Court reviews the Commission's interpretation of revenue laws *de novo*. *Street v. Dir. of Revenue*, 361 S.W.3d 355, 357 (Mo. banc 2012); *Sw. Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. banc 2005); *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683,686 (Mo. banc 2010); *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 620 (Mo. banc 2012). The Commission's factual determinations will be upheld if supported by the law and by substantial evidence on the record as a whole. *Id.*

**Point I:      The Administrative Hearing Commission erred in ruling that Appellant is not entitled to a refund of use tax paid, because 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.**

In finding, *sua sponte*, that the subject lease is not considered a sale for the purpose of Petitioner's claim for refund, the Commission chose not to follow this Court's holding in *Brambles v. Dir. of Revenue*, 981 S.W.3d 568 (Mo. banc 1998), nor did it consider an earlier decision by the Court of Appeals in *Weather Guard Inc. v. Dir. of Revenue*, 746 S.W.2d 657 (Mo.App.E.D. 1988). Moreover, the Commission chose not to observe the plain meaning of several sections of the Missouri Sales and Use Tax Law, and the Commission failed to observe the Director's regulation providing directly to the contrary, as explained below.

It is further noted that the argument whether the Aircraft lease should be considered a sale was never advanced by Respondent during proceedings before the Commission. Although Respondent's Answer to Petitioner's Complaint below contained a general denial of that allegation (Record 00005 – 00006), the issue did not again appear in any of Respondent's briefing or argument before the Commission. Appellant asserts that Respondent waived this issue below.

A. Purchase for Resale Exemption.

Appellant asserts that the Aircraft is exempt from the use tax, because it was purchased for resale.<sup>3</sup> The resale in this instance was the transfer by lease to a common carrier in interstate commerce before the Aircraft entered Missouri. (Record 00009). The characterization of the lease is explained in later sections, and the resale exemption is explained in this section.

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<sup>3</sup> The case involves application of the use tax and the complementary provisions of the sales tax law. Sales and use taxes are complementary and supplementary. *Star Service & Petroleum Co. v. Administrative Hearing Commission*, 623 S.W.2d 237, 238 (Mo. Banc 1981). Both taxing systems are designed to tax the ultimate purchaser's use or consumption. *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 885 (Mo. banc 2001). While sales tax is imposed on the gross receipts of a sale at retail within the state, use tax is levied for using, storing or consuming tangible personal property within the state. Sections 144.020.1, 144.610.1 RSMo.

Section 144.018.1(4) RSMo. governs the purchase of tangible personal property for the purpose of resale, and provides in pertinent part:

1. Notwithstanding any other provision of law to the contrary, ... when a purchase of tangible personal property or service subject to tax is made for the purpose of resale, such purchase shall be either exempt or excluded under this chapter if the subsequent sale is:  
...  
(4) Subject to tax but exempt under this chapter; ...

Therefore, when the Aircraft was purchased for the purpose of leasing to JetSelect, the purchase was exempt from sales and use taxes under Chapter 144, if the lease of the Aircraft was a resale subject to tax but exempt under §144.018(4).

Another provision for the resale exemption appears at §144.615(3) RSMo., which provides in pertinent part:

- There are specifically exempted from the taxes levied in sections 144.600 to 144.745:  
...  
(3) 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...

Subsection 2 of section 144.030 describes exemptions from state and local sales and use taxes. It provides in pertinent part:

2. There are also specifically exempted from the computation of the tax levied, assessed or payable pursuant to...sections 144.010 to 144.525 and 144.600 to 144.745:

...

“(20) All sales of aircraft to common carriers for storage or for use in interstate commerce...” (§144.030.2(20)).<sup>4</sup>

Accordingly, the Aircraft is exempted from the use tax law by virtue of §144.615(3), because there was a sale of the Aircraft to a common carrier for use in interstate commerce as described in §144.030.2(20).<sup>5</sup>

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<sup>4</sup> RSMo Supp. 2010. Subdivision (20) was renumbered as (21) by L. 2012, S.B. No. 470 §A. It is further noted that while §144.615 provides certain exemptions from the use tax, that section is not the exclusive source of such exemptions, because additional exemptions appear at §§144.018 and 144.030 RSMo, as discussed herein.

<sup>5</sup> RSMo Supp. 2010. Subdivision (20) was renumbered as (21) by L. 2012, S.B. No. 470 §A. The Commission found that JetSelect was a common carrier, rejecting the Director’s argument to the contrary. (Record 00202, 00206). It is noted that the Respondent/Cross-Appellant contests the finding of the Commission that JetSelect was

Because Appellant did not sell the Aircraft, but rather leased it to JetSelect (Record 00009), the question remains whether such lease is to be considered as a sale for purposes of the exemption from sales and use tax. Appellant asserts that the lease of the Aircraft to JetSelect was a “sale,” and that the Commission erroneously held otherwise.

B. This Court’s Holding in *Brambles Industries, Inc.* Applies to the Lease of the Aircraft for Purposes of the Resale Exemption.

In its *sua sponte* consideration of the lease issue, the Commission considered, but erroneously chose not to apply, this Court’s opinion in *Brambles Industries, Inc v. Director of Revenue*, 981 S.W.2d 568, 570 (Mo. banc 1998).

That taxpayer (doing business as “Chep”) leased pallets to Proctor & Gamble (“P&G”) for use in shipping soap from P&G’s St. Louis plant to its customers. *Id.* at 569. Chep collected tax on the lease proceeds and remitted it to the Department of Revenue. *Id.* Chep then filed for a refund, arguing that an outright sale of the pallets would qualify for the sale for resale exemption to sales tax, and so should leases of the pallets. *Id.* This Court held that proceeds from the lease were exempt from sales tax the same as from outright sales of such property. *Id.* at 570. Accordingly, by the rule in *Brambles*, a lease is a sale for sales tax purposes, and is entitled to the resale exemption.

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a common carrier, and Petitioner’s arguments in that regard will be presented separately and in response to the Brief of Respondent/Cross-Appellant after it is filed.

The Commission improperly attempted to distinguish this Court's ruling in *Brambles* to apply only in situations where a lessor collects and remits sales tax from its lessee. The Commission's rationale is not clear, but seems to be based on the premise that a purchase followed by a lease which is exempt (e.g., a lease to a common carrier), such that the lessee does not pay sales or use tax, should not qualify in the same manner as described in *Brambles*. There is no expressed rationale for this finding and no reasonable basis for this distinction.

In addition, the Missouri Eastern District Court of Appeals had earlier held that rentals of tangible personal property are "sales" for purposes of the resale exemption to use tax in §144.615(6). *Weather Guard Inc. v. Dir. of Revenue*, 746 S.W.2d 657 (Mo.App.E.D. 1988). The Commission herein did not consider the *Weather Guard* case. In that case, insulation blowing machines were purchased outside of Missouri for subsequent rental in retail stores which qualified as sales for purposes of the use tax. They were entitled to the resale exemption. *Id.* at 658.

The facts in this Court's holding in *Brambles Industries*, as well as the earlier court of appeals holding in *Weather Guard*, are not properly distinguishable from this case in which the Aircraft was leased to JetSelect.

C. The Missouri Sales and Use Tax Law provides that the lease of tangible personal property such as the Aircraft is considered a sale.

Leases are considered by statute to be sales for both sales and use taxes. Specifically, a "sale" is defined for use tax purposes at §144.605(7):

The following words and phrases as used in sections 144.600 to 144.745 mean and include: ...

(7) **“Sale”**, any transfer ... and any transaction whether called leases, rentals, ... or otherwise... (underlining added).

Similarly, the definition of the term “gross receipts” in §144.010.1(3)<sup>6</sup> addresses the consideration of leases as sales. It provides in pertinent part:

(3) **“Gross Receipts”**, ... For the purposes of sections 144.010 to 144.525 the total amount of the sale price ... shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article... §144.010.1(3) RSMo. (underlining added).

Despite quoting these provisions in its Decision, the Commission held that “Section 144.010.1(3) does not state, or even imply, that ‘[a] lease of tangible personal property is considered a sale of such article.’”

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<sup>6</sup> RSMo Supp. 2010. Subdivision (3) was renumbered as (4) by L. 2011, S356. That renumbering revision contained no other pertinent change.

In view of §144.605(7) and the above language in §144.010.1(3), the Commission's interpretation, to the effect that a lease is not to be considered a sale, is clearly erroneous.

D. The Commission's Finding Contradicts the Director's Regulation.

The Director's regulation interpreting Missouri's sales and use tax statutes provides that a lessor such as FDA may claim a resale exemption on property purchased for leasing operations, and that a lease of tangible property is exempt from tax in the same manner as a sale.

That regulation, 12 CSR §10-108.700(3) (A), (C), provides in pertinent part:

12 CSR 10-108.700 Lease or Rental of Tangible Personal Property.

...

(3) Basic Application of the Tax.

(A) When a lessor purchases tangible personal property for the purpose of leasing, the lessor may pay tax on the purchase price or claim a resale exemption based on the intended lease of the tangible personal property.

...

(C) Exemptions – Tangible personal property that is exempt from tax for any reason upon a sale of such property is also exempt from tax upon the lease of such property. (underlining added).

The Commission's Decision failed to address the regulation. Likewise, Respondent failed to argue that the Aircraft lease should be disregarded as a sale for this purpose. The Director's own regulation clearly provides otherwise. The lease of the Aircraft meets the requirements of 12 CSR 10-108.700(3)(A) and (C), and is exempt from use tax. The Commission erred in finding to the contrary.

E. Waiver and Burden of Proof.

Respondent waived the issue of whether the lease of the Aircraft constituted a "sale" under any provision of the Missouri Sales and Use Tax Law. Indeed, to do so would have contradicted the Director's Regulation discussed above.

Merely including a general denial in the answer, and then never raising the issue again cannot be viewed as anything other than waiver. *Kleim v. Sansone*, 248 S.W.3d 599, 602 (Mo. banc 2008) ("A party on appeal generally must stand or fall by the theory on which he tried and submitted his case in the court below.").

Appellant had no reason to anticipate the Commission's finding that the lease should be considered as anything other than a resale, given the clear statutory language in Chapter 144, and this Court's prior holding in *Brambles*. Moreover, this Court in the *Brambles* case addressed the taxpayer's burden of proof, stating:

If there is evidence inconsistent with the theory put forth by the taxpayer, the Director did not present it to the AHC, and [the taxpayer] adduced sufficient evidence to establish a prima facie case that it is entitled to the

packaging materials exclusion described in *Sipco*. 981 S.W.3d at 571 (discussing *Sipco, Inc. v. Dir. of Revenue*, 875 S.W.2d 539 (Mo. banc 1994)).

**Point II: The Administrative Hearing Commission erred in excluding Exhibits O, P and Q from the record, because the evidence is relevant to demonstrate that FDA qualifies for the common carrier exemption to Missouri use tax, in that it tends to prove a fact in issue or corroborate other relevant evidence which bears on the principal issue.**

The Commission erroneously sustained Respondent's objections regarding the admissibility of Exhibits O, P and Q, because they were relevant to the common carrier issue. Appellant's purpose in submitting and relying upon these exhibits was to show that JetSelect is a common carrier for purposes of Missouri sales and use tax. In contested cases, "[e]vidence is relevant when it 'tends to prove or disprove a fact in issue or corroborates other relevant evidence which bears on the principal issue.'" *Kendrick v. Board of Police Com'rs of Kansas City, Mo.*, 945 S.W.2d 649, 654 (Mo.App.W.D. 1997), citing *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 116 (Mo.App.W.D. 1995). Each exhibit is considered in turn.

**Exhibit O**

Exhibit O (Record 00066 – 00068) is an FAA Advisory Circular discussing Common Carriage. The Commission excluded the exhibit because it felt that the Circular did not address whether JetSelect is a common carrier for purposes of Missouri law. Contrary to the Commission's ruling, the FAA's Advisory Circular provides relevant

guidance on whether “air transportation” is private or common carriage, and particularly whether the “holding out” requirement for common carrier classification is met.

#### Exhibit P

Exhibit P (Record 00069 – 00072) is a screenshot from the website of Priceline.com. The exhibit was offered to show that airlines do not lose their common carrier status simply by negotiating prices with passengers. In other words, negotiability of an airline ticket price does not change the nature of the airline’s service from common carriage to contract carriage, nor does it disqualify an airline from its status as common carrier. Accordingly, negotiability of price in JetSelect’s agreement with its customers does not disqualify JetSelect as a common carrier.

The Commission erroneously excluded the exhibit because it believed price negotiation is irrelevant to a “common carrier” analysis. This misstates FDA’s purpose for offering the exhibit.

#### Exhibit Q

Exhibit Q (Record 00073 – 00107) is Southwest Airline’s published Contract of Carriage, and applies to every ticket sold by Southwest Airlines to its passengers (Record 00076). Appellant offered the exhibit to refute the Director’s assertion that JetSelect could not be a common carrier because it entered into individual agreements with its customers. The Commission excluded the exhibit because it agreed that JetSelect is a common carrier and found the exhibit unnecessary.

The Exhibit demonstrates that a common carrier may adopt rules and conditions which its passengers must obey, and refuse passengers who do not obey. The airline’s

Contract of Carriage with its customers does not invalidate its status in Missouri as a common carrier, despite the regulatory provision that a common carrier "... transport passengers ... without refusal if the fare or charge is paid." 12 CSR 10-110.300(2) (A).

Accordingly, these exhibits should have been admitted into evidence in support of the argument that JetSelect qualifies as a common carrier and is not otherwise disqualified.

### **Conclusion**

The Commission erred in construing the revenue laws of Missouri. Appellant is entitled to a refund of use tax paid, plus interest. Appellant purchased the Aircraft in Kansas for the purpose of leasing it to JetSelect, and Appellant immediately entered into that lease before JetSelect brought the Aircraft into Missouri. That lease is considered a sale for purposes of the use tax.

Therefore, the Aircraft is considered as purchased for resale, and exempt from use tax if otherwise exempt. JetSelect has exclusively used the Aircraft in interstate commerce as a common carrier. The use by JetSelect as common carrier is exempt from sales or use tax, and because of that, the purchase and lease of the Aircraft by Appellant are exempt from use tax.

Accordingly, Appellant requests this Court reverse the Commission's Decision and remand this case to the Commission for the sole purpose of determining the refund due to Appellant with interest accrued.

Respectfully submitted,

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**Certificate of Compliance**

1. This brief complies with the limitations contained in Rule 84.06(b) because it contains 4,704 words. This word count does not exclude the parts of the brief subject to exemption under said rules.
2. This brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in at least 13-point font.
3. Pursuant to Local Court Rule No. 1 for this Court, this brief was electronically filed. The document was scanned for viruses and is virus-free.

*/s/ Paul V. Herbers*  
Paul V. Herbers

**Certificate of Service**

I hereby certify that on August 15, 2014, Appellant's Brief and the Appendix to Appellant's Brief were filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system, and pursuant to Rule 84.05(a), to the following counsel of record:

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