

No. SC94224

IN THE SUPREME COURT OF MISSOURI

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

v.

DIRECTOR OF REVENUE,
Respondent/Cross-Appellant

On Petition for Review from the
Missouri Administrative Hearing Commission

APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF

COOLING AND HERBERS, P.C.

James E. Cooling, #21765

Paul V. Herbers, #28536

Chad E. Voss, #63610

1100 Main St., Suite 2400

Kansas City, MO 64105

816-474-0777

Attorneys for Petitioner/Appellant/Cross-Respondent

Five Delta Alpha LLC

Table of Case Cited

Brambles v. Dir. of Revenue,

981 S.W.3d 568 (Mo. banc 1998) 1

Argument

Point I

The Respondent Director has effectively conceded Point I of Appellant’s Initial Brief, that the Commission erred in ruling against the refund. The Director admits that Appellant’s purchase of the Aircraft was “for resale,” if leased to a common carrier. The Director also concedes the applicability of this court’s decision in *Brambles Industries, Inc. v. Director of Revenue*, 981 S.W.3d 568 (Mo. Banc 1998), contrary to the finding of the Commission. As in *Brambles*, the Director has failed to present to this Court evidence that is inconsistent with Appellant’s argument, and the Commission’s finding, that the Aircraft was leased to a common carrier. Indeed, Respondent has dismissed his cross-appeal alleging this issue. Further, Appellant established with substantial evidence, and the Commission so found on the basis of the evidence, that JetSelect is a common carrier.

Accordingly, this Court should reverse the Commission’s decision and find that Appellant is entitled to a refund of use tax, plus interest, because the Aircraft was exempt

from tax as having been purchased for resale, in that the Aircraft was leased to a common carrier.

Point II

The Respondent Director disputes Appellant's Point II on the basis of mootness. If this Court decides to reverse the Commission solely on the issue of whether the Aircraft lease was a "resale" in accordance with Appellant's Point I, then Appellant agrees that Point II is moot. If, however, this Court chooses to reconsider the remainder of the Commission's findings, now undisputed, then the Commission's exclusion of the evidentiary exhibits remains material to this Court's further consideration of JetSelect's status as a common carrier, and Point II remains a valid issue for resolution.

Conclusion

The Commission's error in construing the revenue laws of Missouri appears no longer in dispute by Respondent Director. Appellant requests (i) reversal of the Decision, (ii) a finding that JetSelect is a common carrier for purposes of Missouri's sales and use tax laws, and (iii) remand for an award reimbursing the use tax paid plus interest.

Respectfully submitted,

COOLING & HERBERS, P.C.

By: /s/ James E. Cooling

James E. Cooling, #21765

Paul V. Herbers, #28536

Chad E. Voss, #63610

1100 Main St., Suite 2400

Kansas City, MO 64105

816-474-0777

Attorneys for Petitioner/Appellant

Five Delta Alpha LLC

Certificate of Service

I hereby certify that on October 31, 2014, Appellant's Reply Brief was 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:

CHRIS KOSTER

Attorney General

and

JAMES R. LAYTON

Solicitor General

Missouri Bar No. 45631

P.O. Box 899

Jefferson City, MO 65102-0899

(573) 751-3321

(573) 751-0774 (facsimile)

James.Layton@ago.mo.gov

ATTORNEYS FOR RESPONDENT/CROSS-APPELLANT

DIRECTOR OF REVENUE

with a courtesy copy to:

Spencer A. Martin, Esq.

Missouri Department of Revenue

P.O. Box 475

Jefferson City, MO 65105

spencer.martin@dor.mo.gov

/s/ Paul V. Herbers

Paul V. Herbers