IN THE
SUPREME COURT OF MISSOURI

No. SC93771

ALBERICI CONSTRUCTORS, INC.,

APPELLANT,

v.

DIRECTOR OF REVENUE,

RESPONDENT.

BRIEF OF APPELLANT

BRYAN CAVE LLP
Edward F. Downey, #28866
Carole L. Iles, #33821
221 Bolivar Street, Suite 101
Jefferson City, MO 65101-1574
Telephone: (573) 556-6622
Facsimile: (573) 556-6630
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

This matter involves the construction of § 144.030.2(5), RSMo. Supp. 2011, a revenue law. Because this appeal involves the construction of a Missouri revenue law, this Court has exclusive jurisdiction under article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

The Parties and the Cement Plant

Holcim (US) Inc. constructed and now operates a large industrial plant that produces cement (the "Plant"). The Plant is located on 3,900 acres adjacent to the Mississippi River about 45 miles south of St. Louis near Bloomsdale. The plant site includes a 2,200 acre conservation area that serves as a buffer. The remaining 1,700 acres consists of 1,620 acres serving as a limestone quarry and 80 acres devoted to the manufacturing site. Holcim employs 230 people to operate the Plant, but Holcim's contractors employed 2,500 people to construct the Plant. The Plant is the largest cement plant in the United States and one of the largest cement plants in the world. The Plant cost more than $1 billion to build. The Plant produces 13,200 tons of cement each day, which cement Holcim sells to others. Tr. 15-17; Exs. 1-3. Exhibits 1 and 3 are aerial photographs and included in the Appendix at A-14 and A-15.

Holcim began construction of the Plant in December 2006 and completed construction in July 2009. It employed a joint venture to serve as the general contractor for the Plant's construction. That venture was between Appellant Alberici Constructors Inc. and the Washington Group. Ex. B. Appellant's role in the construction was to install and construct the steel supports and cement manufacturing equipment furnished by Holcim. Tr. 32.

Production of Cement at the Plant

Cement is different than concrete. Cement is the grey binder, or "glue," that holds the concrete aggregates together to make concrete. The main ingredient in making cement is limestone. Other ingredients are sandstone, aluminous sources like clay, an iron source and gypsum. Tr. 17-21.

Holcim begins the cement production process by mining limestone from the 1,620 acre on-site quarry. It secures the limestone by blasting it off of quarry ledges, collecting the stone that falls to the ground, placing the stone in haul trucks and hauling the stone to a massive industrial primary rock crusher, which reduces the stone size to 6 inches in diameter. From there, a large industrial conveyor transports the stone to a large industrial secondary crusher, which crushes the stone to 4 inches in diameter. Thereafter, the conveyor transports the stone to a limestone dome for temporary storage. The stone is then taken by conveyor from the dome to a row of raw mill feed bins, which inject the stone and some of the other ingredients (iron source, sandstone, and clay) into large industrial raw mills. The raw mills use massive vertical roller grinders to pulverize the mix into the consistency of flour. The pulverized mix is the "raw meal," which is conveyed by industrial conveyor to the raw mill silos. Tr. 21-24; Ex. 3.

The raw meal then begins the calcination process where the ingredients are subjected to extreme heat. The heat causes a chemical reaction in which the limestone's calcium carbonate ($CaCO_3$) is converted to carbon dioxide (CO_2) and calcium oxide (CaO). Tr. 25, 31-32. To begin this process, the raw meal is conveyed from the raw mill

silos to the top of a large industrial preheat tower. The raw meal is exposed to between 1,000 to 1,200 degrees centigrade heat as the meal travels down the tower. The meal then enters a long industrial rotating cement kiln, where the meal is heated to 1,500 degrees centigrade (2,500-2,700 degrees Fahrenheit) and must travel the length of the kiln at that temperature. Under that intense heat, the mixture morphs into a liquid phase, having the consistency of cookie dough. As the product then hardens, it becomes chunks of "clinker." Tr. 25-27.

The hot clinker is then transported by industrial conveyor through the clinker cooler, where fans use ambient air to quickly cool the chunks of clinker. From the cooler, industrial conveyors take the clinker to clinker silos for temporary storage. From the clinker silos, the clinker is transported by an industrial conveyor to massive vertical roller grinding mills that crush the clinker and mix it with gypsum or synthetic gypsum. The resultant final product is the familiar fine grey cement powder. The cement powder is then transported by industrial conveyor to cement silos and ultimately shipped to customers via over-the-road trucks, by rail car (a rail line travels through the plant property), or by barge (the plant site includes a harbor on the Mississippi River). Tr. 27-28.

The Crane and Welder Rentals at Issue

As indicated, Appellant was charged with installing and constructing the various equipment used at the Plant to manufacture cement ("process equipment"). To install and construct this process equipment, Appellant rented massive industrial cranes that it used

to hoist heavy process equipment and parts and supporting steel into place. It also used welders to weld the metal pieces of the equipment and the steel supports in place. Appellant literally welded miles of such supports and equipment. In particular, it used the cranes and welders to construct and install the raw mill grinding equipment and supporting steel, the limestone reclaiming and transport conveyor, the cement mill equipment and supports, and the Plant's mechanical piping and supports (used to convey liquids for production). Tr. 32-43; Ex. 14.

Appellant rented the cranes and welders either by the day or by the month. The crane and welder rentals at issue in this case were used by Appellant for the sole purpose of installing and constructing the manufacturing process equipment and steel supports for the same. The subject rentals were required to construct and install the manufacturing equipment, as there was no other way to install or construct that equipment. Tr. 41, 44.

Appellant was billed for the welder and crane rentals. Appellant was also separately billed $15,000 as a freight or delivery charge for one of the crane rentals. Ex. 14, line 16, column 7. For that crane rental, Appellant had the option of independently arranging for the transportation of the crane from the vendor's location to the Plant, but elected to employ the vendor to engage in that transport. Tr. 42. The preprinted language on that rental contract provided: "Transportation: Lessee will arrange for and pay all shipping and freight from shipping point to the job site[.]" Additionally, the risk of loss during transportation inured to the lessee, Alberici. *See* Ex. G., paragraphs 6 and 13.1.

The total that Appellant paid for the crane and welder rentals at issue, including the $15,000 separate freight charge, is $440,075.39. Ex. 14, column 11. The earliest billing for the crane and welder rentals and freight charge was June 18, 2008. Ex. 14, column 5. Appellant remitted $18,593.21 in Missouri and local use tax on those charges. Tr. 90; Ex. 14, column 13.

Appellant paid the rental and freight charges at issue, and use tax on the same, and passed those expenses onto Holcim under its contract with Holcim. Tr. 52.

The Refund Claim

On May 19, 2010, well within three years of the first invoice at issue in this matter, Appellant filed a claim for refund of the Missouri and local use tax it remitted on the rentals at issue in this case, and also on other purchases. Appellant later dropped its claim for refund on the other purchases described in that refund claim. Ex. 16. That refund claim asserted two grounds: (1) that the rentals at issue were of materials solely required to install and construct the process equipment at the Plant; and (2) that the $15,000 shipping charge was not taxable because it was optional, separately stated, and not part of the charge for the rental of the crane. Ex. 16. The total refund sought is $18,593.21. Ex. 14. Any refund that Appellant obtains in this matter, it will forward to Holcim under its contract with Holcim. Tr. 52.

Actions After the Refund Claim Filing

The Director denied the refund claim, Appellant appealed that denial to the Commission, which after trial affirmed the denial. This appeal followed.

STANDARD OF REVIEW

The decision of the Commission shall be reversed if: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence upon the whole record; (3) a mandatory procedural safeguard is violated; or (4) it is clearly contrary to the legislature's reasonable expectations. Section 621.193; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996).

This Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

ARGUMENT

I.

The Administrative Hearing Commission Erred In Denying The Exemption From Missouri Use Tax For Alberici's Rentals Of Large Industrial Cranes And Welders Because, Under Section 621.193,[1] That Decision Was Not Authorized By Law In That The Rentals Were Of "Materials" Used Solely To Construct Or Install Manufacturing Equipment At The New Holcim Cement Manufacturing Plant And, As Such, Exempt From Missouri Use Tax Under Section 144.030.2(5).

A. Introduction

Point I of this appeal presents a simple issue of statutory construction. Namely, does the singular of the word "materials" as used in section 144.030.2(5)'s reference to "materials … solely required for the installation or construction of such [manufacturing] machinery and equipment" mean an "apparatus?" As demonstrated below, an "apparatus" is a "compound instrument or appliance designed for a specific mechanical … action or operation; MACHINERY, MECHANISM." The massive industrial cranes and welder at issue are each in fact a machine or mechanism designed for a specific mechanical action or operation in connection with the installation of the cement plant's

[1] All citations to section 144.030.2(5) are to RSMo. Supp. 2011. All other statutory references are to RSMo. 2000, unless otherwise indicated. Section 144.030.2(5) has been renumbered section 144.030.2(6), but has not otherwise changed. *See* section 144.030.2(6), RSMo. Supp. 2013.

manufacturing equipment. In the case of the cranes, their function was to hoist heavy objects high into the air for installation. In the case of the welder, its function was to fuse metal pieces together in the installation of the manufacturing equipment. As explained in detail below, this construction of the term "materials" is the only construction that makes sense, is the only construction that does not render words of the statute meaningless or redundant, is the construction that best furthers the intent of the General Assembly, and is the construction consistent with the reasonable expectations of the General Assembly.

B. Applicable Statutes and Standard of Construction

Section 144.610.1 imposes the Missouri use tax on the storage use or consumption of tangible personal property in Missouri. Section 144.615(3) exempts from the Missouri use tax property that is exempt from the sales tax under section 144.030.2. Section 144.696 of the use tax law incorporates section 144.190 of the sales tax law, which provides that the Director is to refund any overpayment or erroneous payment of use tax if the refund claim is made within three years from the date of the overpayment and the specific grounds for overpayment are asserted. Here, Alberici paid all of the tax at issue after the earliest invoice was submitted to it. That date was June 18, 2008. Ex. 14, column 5. Alberici filed the refund claim on May 19, 2010, well within three years of the earliest time any use tax was paid on the purchases at issue. Ex. 16. The refund claim asserted the exemption found in section 144.030.2(5) and, under Point II, the non-taxability of a certain shipping charge. The tax payment is an overpayment if the tax was paid on a transaction that is not subject to tax or is exempt from tax.

Section 144.030.2(5), as an exemption statute, should be construed strictly, but reasonably, against the taxpayer. *City of St. Louis v. State Tax Commission*, 524 S.W.2d 839, 843-4 (Mo. banc 1975) ("Tax exemption statutes are to be strictly but reasonably construed so as not to curtail the purpose and intended scope of the exemption."); *Wetterau v. Director of Revenue*, 843 S.W.2d 365, 367 (Mo. banc 1992) ("The 'reasonable, natural and practical interpretation in light of modern conditions' is applied to the statute.") The exemption's purpose is to encourage the location and expansion of industry in Missouri and encourage the production of products that are in turn taxable. *West Lake Quarry & Material Company, Inc. v. Schaffner*, 451 S.W.2d 140, 142 (Mo. 1970). This Court should construe the exemption in a manner that is not contrary to the reasonable expectations of the General Assembly. Section 621.193. As explained in detail below, Alberici's construction of the statute is a reasonable, natural and practical construction that furthers the legislative intent.

C. <u>The Cranes and Welder are "Materials" Under Section 144.030.2(5)</u>

Section 144.030.2(5) (now 144.030.2(6)) exempts from both the sales and use tax:

> (5) Machinery and equipment, and parts **and the materials and supplies solely required for the installation or construction of such machinery and equipment**, purchased and used to establish new or to expand existing manufacturing, mining or fabricating plants in the state if such machinery and equipment is used directly in manufacturing, mining or fabricating a

product which is intended to be sold ultimately for final use or consumption[.] (emphasis added).

Therefore, the exemption applies if: (1) the massive industrial cranes and welder at issue were "materials" or "supplies;" (2) the lease of those cranes and welder were solely required for installation or construction of manufacturing machinery or equipment; (3) the manufacturing machinery or equipment is used to establish a new, or expand an existing, manufacturing, mining or fabricating plant; and (4) the plant produces a product intended for sale.

As the Commission concluded, the Director did not dispute: (1) that Alberici built the new Holcim cement plant in Missouri; (2) that the plant was a new manufacturing plant (indeed the largest cement manufacturing plant in the United States); (3) that the cranes and welder rentals were solely required for the installation or construction of the manufacturing machinery or equipment at the cement plant; and (4) that the machinery or equipment was to be used directly in manufacturing cement (a product) for sale for final use or consumption. Commission decision at 5; LF 18; App. A-5. Therefore, the sole question considered by the Commission under this point, and on appeal to this Court, is whether the cranes and welder were "materials." The Commission concluded that they were not, but that conclusion is not reasonable and conflicts with the plain meaning of the word "materials" in the context of section 144.030.2(5).

Section 144.030.2(5) contains no definition for "materials." To the undersigned's knowledge, the Missouri Supreme Court has never construed the term "materials" as used

in section 144.030.2(4)[2] or (5). The Director's regulation 12 CSR 10-111.010 does not define the term either. "Absent a statutory definition, the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 437–38 (Mo. banc 2010). The plain meaning of a term may be derived from a dictionary. *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). The dictionary definition of "material" is:

> 1a(1): the basic matter from which the whole or the greater part of something physical is made
>
> (2) finished stuff of which something physical is made.
>
> b(1): the whole or notable part of the elements or constituents or substance of something physical.
>
> 2a: apparatus necessary for doing or making something[.]

Webster's Third New International Dictionary 1392 (1993).

If definition 2a applies for the meaning of "materials," then the leases at issue are exempt. That is because the cranes and welder each are an apparatus that was necessary to install and construct Holcim's massive manufacturing equipment at its cement plant.

[2] Section 144.030.2(4) is the counterpart to the provision at issue. It addresses replaced machinery, equipment and parts, while the provision at issue addresses machinery, equipment and parts used to establish a new plant or expand an existing plant.

The definition of "apparatus" is "any compound instrument or appliance designed for a specific mechanical or chemical action or operation; MACHINERY, MECHANISM." *Id.* at 102.

In addition to the plain and ordinary meaning of a term, as derived from either the statutory definition or the dictionary, courts look to the "context of the entire statute in which it appears" to determine its meaning. *See State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007). In determining the intent and meaning of statutory language, "the words must be considered in context and sections of the statutes in *pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *South Metro. Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). Substituting the word "apparatuses" and its definition for "materials," the exemption statute makes perfect sense:

> 5) Machinery and equipment, and parts **and …[apparatuses that perform the "mechanical … action[s] or operation[s]"] solely required for the installation or construction of such machinery and equipment**[.]

The undersigned is aware of only one Missouri Supreme Court opinion to construe the term "materials" in the context of a tax case, and that was *E & B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). But the statute at issue there, section 144.054, RSMo. Supp. 2011,, is similar to, but different from, section 144.030.2(5). Section 144.054.2 is a combination of the component part exemption in section 144.030.2(2) and the manufacturing equipment exemptions in sections

144.030.2(4) and (5) and is broader in a number of senses (for instance, no final product "sale" is required, ingredients can be consumed, and utilities are exempt). Section 144.054 exempts:

> [E]lectrical energy and gas …, chemicals, machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product[.]

At issue in *E & B Granite, Inc.* was whether granite slabs, the key component of installed granite countertops, were "materials used or consumed in the manufacturing … of any product[.]" There, the Director argued that only definition 2a applied ("[t]he Director's urging that … 'materials' in section 144.054.2 **solely** refers to an apparatus"). *Id*. at 318 (emphasis added). This Court rejected the Director's argument. This Court applied definition 1a (which it characterized as a "raw product from which something is made"). *Id*. But this Court certainly did not exclude definition 2a. In fact, after citing the above dictionary definition, this Court stated: "[t]hus 'materials' means either (1) the raw product from which something is made or (2) an apparatus necessary to make something." *Id*.

This Court noted that in none of its many decisions interpreting Chapter 144 did this Court refer to "material" as an "apparatus." *Id*. The Court cited three of its decisions. Two of those decisions addressed section 144.030.2(2), the component part exemption. The Court's consideration of the component part exemption makes sense since E & B was asserting that the granite became a component of its finished product.

And while true that the Court never held that "materials" in that exemption meant "apparatuses," it never had been called to construe the word "materials." The issue simply was never addressed, as evidenced by the decisions that this Court cited. *See Blevins Asphalt Construction Company v. Director of Revenue*, 938 S.W.2d 899 (Mo. banc 1997) (issue was whether installed asphalt was new personal property); and *Ovid Bell Press, Inc. v. Director of Revenue*, 45 S.W.3d 880 (Mo. banc 2001) (issue was whether the new personal property, photo negatives, were "sold"). This court also cited *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 391 (Mo. banc 2002) for the proposition that "raw paper was 'used' to manufacture telephone directories." The term "materials" was not at issue there either. Rather, this Court was called upon to consider "the meaning of the statutory language [of section 144.610.1] 'using ... within this state any article of tangible personal property[.]'"

As indicated, section 144.030.2(2), the component part exemption, differs from the statute at issue, section 144.030.2(5). Section 144.030.2(2) exempts:

> [m]aterials, manufactured goods, machinery and parts which when used in manufacturing, processing, compounding, mining, producing or fabricating become a component part or ingredient of … new personal property[.] (emphasis added).

Section 144.030.2(5), the manufacturing equipment exemption at issue, applies to:

> [m]achinery and equipment, and parts and the materials and supplies solely required for the installation or construction of such machinery and equipment[.] (emphasis added).

Clearly the component part exemption, just as section 144.054 does, contemplates a situation where the material, machine or part can become a component or ingredient of a final product or new personal property. The operative part of section 144.030.2(5), on the other hand, contemplates that the property in question be "solely required for the installation or construction of such [manufacturing] machinery and equipment[.]" Given that "parts" of manufacturing machinery and equipment are already expressly exempted in the first part of section 144.030.2(5), it makes little sense to construe "materials" to mean only parts of the manufacturing machinery and equipment.[3] That would render the term "materials" redundant with "parts." Moreover, section 144.030.2(5) provides that the materials or supplies at issue be "solely required for the installation and construction" of the exempt machinery and equipment. When would a part of such exempt machinery and equipment not be "solely required" for its construction or installation? The answer is never. Construing "materials" to embrace only definition 1a (parts or components) also renders the "solely required" language superfluous. The legislature is presumed not to

[3] Moreover, there is no reasonable argument in the context of section 144.030.2(5) that "materials" refers to a component of the final product.

insert idle or superfluous language into a statute. *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 85 (Mo. banc 1993).

While the Director's regulation is silent on this issue, at least one of his letter rulings is not. In letter ruling LR5242 (October 31, 2008), the Director was called upon to opine whether a number of different purchases, including apparatuses like hammers, wrenches, and ratchets, were exempt "materials" under section 144.054. App. A-16 . The Director concluded that they were, even though some of the purchases, like the above-listed tools, clearly did not become a component of the finished product:

> Section 144.054 provides an exemption for materials that are 'used and consumed' in the manufacturing process. The items listed … are used by Applicant to manufacture radiators.

The General Assembly adopted section 144.030.2(5) to encourage the location and expansion of industry in Missouri. *West Lake Quarry & Material Co., Inc. v. Schaffner*, 451 S.W.2d 140, 142 (Mo. 1970). Applying only definition 1a for the meaning of "materials" would remove from the exemption all of the expensive apparatus that is solely required to install or construct the admittedly exempt manufacturing equipment at a manufacturing plant that cost over one billion dollars to build and is the largest cement plant in the United States and one of the largest in the world. Tr. 15-17; Exs. 1-3. That could not have been the intent of the Missouri General Assembly. It obviously used a broad term ("materials") because it wanted a broader result, especially when coupled with

the restrictive qualifier "solely required." Dictionary definition 2a applies to materials solely used to install or construct machinery and equipment.

D. The Commission's Analysis is Faulty

The Commission acknowledged the "understandable" position of Alberici given this Court's statement in *E & B Granite* that "'materials' means either (1) the raw product from which something is made or (2) an apparatus necessary to make something." Commission decision at 6; LF 19; App. A-6. However, the Commission concluded that definition 2a ("an apparatus necessary to make something") did not apply because cranes and welders are machines, and the word used in the statute was "materials" and not "machinery." Commission decision at 9; LF 22; App. A-9. That conclusion is belied by the very dictionary definitions the Commission purported to accept. As shown above, the dictionary definition of "materials" includes "apparatus." The definition of "apparatus" is "any compound instrument or appliance designed for a specific mechanical or chemical action or operation: **MACHINERY**, MECHANISM." Webster's Third New International Dictionary 102 (1993) (emphasis added). Obviously, the cranes and welder perform specific mechanical operations. The Commission erred when it denied the exemption to them simply because they could be characterized as machinery, particularly since "machinery" is a synonym for a type of "apparatus" and "apparatus" is an accepted definition for "materials."

Relying on *E & B Granite*, the Commission stated that "prior cases [of this Court] interpreting 'material' for Chapter 144 purposes did not use the term 'material' to refer to

an apparatus." Commission decision at 7; LF 20; App. A-7. In fact, in *E & B Granite*, this Court did not represent that its prior cases "interpreted" the term "material." Rather, it said that "prior courts did not … use the term 'material' to refer to an apparatus." As explained above, those prior cases did not construe the word "materials" at all, as its construction was not at issue. The first and only construction of that term in a tax case of this Court appears in *E & B Granite*.

If dictionary definition 2a did not apply, then presumably the Commission concluded that definition 1a applied, since it is the only other definition that could arguably apply. The Commission understandably never applied that definition in the context of the subject statute. Had it done so, the error of its analysis would be apparent. In the context of the subject exemption, using dictionary definition 1a, only substituting "components of such machinery and equipment" for "the raw product from which something is made," the exemption reads as follows:

> 5) Machinery and equipment, and parts **and the … [components of such machinery and equipment] solely required for the installation or construction of such machinery and equipment[.]**

Obviously, this construction makes no sense as components of machinery do not construct or install themselves, and for the reasons stated above: (1) "materials" would then duplicate "parts;" and (2) a component of a machine or equipment would always be "required" for that machine or equipment, thus rendering the word "solely" meaningless.

For the foregoing reasons, this Court should reverse the Commission and correctly apply the plain meaning of "materials" in section 144.030.2(5).

II.

The Administrative Hearing Commission Erred In Imposing Missouri Use Tax On The Delivery Charge For One Of Alberici's Rentals Of Large Industrial Cranes Because, Under Section 621.193, That Decision Was Not Authorized By Law And Not Supported By Competent And Substantial Evidence In That The Delivery Charge Was Not Part Of The Charge For Rental Of Tangible Personal Property Under Sections 144.605(8) and 144.010.1(3).

A. Introduction

This point presents the issue whether one separately stated $15,000 shipping charge by Bulldog Erectors to Alberici of a massive crane was taxable as a part of the crane rental. This issue is moot if this Court concludes under point I that the cranes were "materials … solely required for the installation or construction of such [manufacturing] machinery and equipment."

The undisputed testimony was that the freight charge was separate from the crane rental charge and that Alberici had the option to choose, and did choose, who it would pay to transport the crane to the job site. Tr. 41-42. In addition, the lease at issue, in paragraph 6, entitled "TRANSPORTATION," set forth the transportation charge should the lessor transport the crane to the job site, but expressly provided:

> Transportation: Lessee will arrange for and pay all shipping and freight from the shipping point to the job site[.] (emphasis added).

See Ex. G. Last, paragraph 13.1 of the lease provides that all risk of loss shall be on lessee during transportation. *Id.* That is consistent with the lessee having the responsibility to choose the shipper.

B. <u>The Freight is Not Taxable Even if the Crane Rental is Not Exempt</u>

The law provides that if the shipping charge is not part of the sale of property, it is a nontaxable charge. That is because the sales and use tax laws do not separately tax the service of shipping property. Thus, to be taxable the shipping charge must be a part of the sale of property. This is grounded in the definition of "gross receipts" in section 144.010.1(3): "the total amount of the sale price of the sales at retail including any services … that are a part of such sales[.]" That definition echoes the definition of "sales price" in the use tax law. *See* section 144.605(8) and *Brinson Appliance, Inc. v. Director of Revenue*, 843 S.W.2d 350, 352 (Mo. banc 1992).

In *May Department Stores v. Director of Revenue*, 791 S.W.2d 388, 389 (Mo. banc 1990), this Court determined that the intent of the parties controlled whether the shipping charge was part of the sale of property. If the parties did not intend the shipping charge to be a part of the sale of the property, then the charge was not taxable. In *Brinson Appliance*, *supra*, the Director argued that the shipping charges for appliances were taxable because they were charges made by the seller, prior to the passage of title. This Court rejected that argument:

> In this case, the cost and means of delivery of the appliances were entirely up to the customer. The customer had the option to take the appliance from

the store, hire a carrier, or use a carrier selected by Slyman Bros. At the same time, the seller derived no financial benefit from the delivery and undertook no risk for damage or loss during delivery.

In *Southern Red-E-Mix Co. v. Director of Revenue*, 894 S.W.2d 164, 167 (Mo. banc 1995), the Missouri Supreme Court explained that the fundamental question for determining the taxability of delivery charges is whether the parties intend for delivery to be part of the sale of tangible personal property. Several factors are relevant to determining the parties' intent: (1) when title passes from the seller to buyer; (2) whether the delivery charge is separately stated; (3) who controls the cost and means of delivery; (4) who assumes the risk of loss during delivery; and (5) whether the seller derives financial benefit from delivery. *Id.*

Here, since this was a lease, title never passed from lessor to lessee. The only witness to address this issue testified that it was up to Alberici, the lessee, to determine who shipped the crane to the job site and who was paid for that shipment. Tr. 42. That testimony is consistent with the contract Alberici entered into with the lessor, that "[l]essee will arrange for and pay all shipping and freight from the shipping point to the job site." Additionally, the risk of loss during transportation inured to the lessee, Alberici. *See* Ex. G., paragraphs 6 and 13.1. While Alberici chose to have the lessor ship the crane, and the lessor was indeed paid $15,000, that does not make the shipping cost a part of the lease of the crane.

The above analysis is consistent with the Director's regulation 12 CSR 10-103.600(3). That regulation provides:

> (3) Basic Application.
>
> (A) Shipping, Handling, Minimums, Gratuities and Similar Charges.
>
> 1. If the purchaser is required to pay for the service as part of the sale price of tangible personal property, the entire sale price is subject to tax.
>
> 2. If the purchaser is not required to pay the service charge as part of the sale price of tangible personal property, the amount paid for the service is not subject to tax if the charge for such service is separately stated. If the charge for the service is not separately stated, the entire sale price is subject to tax.
>
> App. A-19.

Here, the shipping charge is separately stated and the undisputed evidence is that Alberici was free to select and pay whomever it wanted to ship the crane. The subject shipping charge is thus not taxable even if the underlying lease is not exempt.

The Commission did not correctly apply the law in finding against Alberici on this point. The Commission concluded that because Alberici elected to use the lessor as the shipper, and because the cost of that shipping was set forth in the contract with the lessor, the shipping charge was taxable. Commission decision at 12; LF 25; App. A-12. Nothing in the statutes, case law, or the Director's regulation supports that conclusion. Indeed, in *Brinson Appliance*, the very shipping charges at issue were for shipping that

the customer elected to have Brinson handle. Obviously, Brinson and its customers contracted for Brinson to handle shipment of the goods. The key is the parties intent, and ultimately, it was Alberici that decided who would ship the crane and who it would pay for that shipping. The shipping charge was therefore not part of the lease price.

Moreover, the Commission cannot do what the Director cannot do since the Commission serves the function of remaking the Director's decision. *See J. C. Nichols v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990). Section 32.053 provides that any change of policy should apply prospectively. The Commission imposed a requirement for non-taxability that is not found in the regulation, namely that the shipping charge must not appear in the sale contract. That new requirement is a change of policy and should not apply for any periods prior to that change in policy. The statute recognizes that taxpayers rely on the Director's policy interpretations and should not be blindsided by changes in policy. The periods at issue are long prior to the Commission decision date. Additionally, that change in policy should not be effective until after the Director complies with Chapter 536 and amends the above regulation.

CONCLUSION

For all of the foregoing reasons, Alberici overpaid use tax on the crane and welder rentals because those rentals were exempt from tax under section 144.030.2(5) and overpaid tax on the shipping charge since it was not subject to tax at all. Accordingly, the Decision of the Commission must be reversed and remanded with instructions to grant the subject refund claim.

Respectfully submitted,

BRYAN CAVE LLP

/s/ Edward F. Downey

Edward F. Downey, #28866
Carole L. Iles, #33821
221 Bolivar Street, Suite 101
Jefferson City, MO 65101-1574
Telephone: (573) 556-6622
Facsimile: (573) 556-6630
Attorneys for Appellant

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the foregoing was electronically mailed to James Layton, Solicitor General, Missouri Attorney General's Office, Supreme Court Building via james.layton@ago.mo.gov and Thomas A. Houdek, Senior Counsel, Missouri Department of Revenue, Truman State Office Building via Thom.Houdek@dor.mo.gov on March 21, 2014.

I also hereby certify that the foregoing brief complies with Rule 55.03 and with the limitations in Rule 84.06(b) in that it contains 6,420 words.

/s/ Edward F. Downey