IN THE
SUPREME COURT OF MISSOURI

No. SC93771

ALBERICI CONSTRUCTORS, INC.,

APPELLANT,

v.

DIRECTOR OF REVENUE,

RESPONDENT.

REPLY BRIEF OF APPELLANT

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I.

Alberici's Purchases Were Exempt From Missouri Use Tax as "Materials" Under Section 144.030.2(5).

A. Introduction

In its opening brief, Alberici explained that "apparatus" is included in the dictionary definition of "materials," and that this meaning properly applies to the construction of 144.030.2(5), RSMo. 2000.[1] App. Br. 12-8. The Director agrees that "apparatus" is one of the "potentially applicable definitions for the noun 'materials'" but dismisses it as being merely "secondary." Dir. Br. 12-13. The Director's brief does not dispute that if this Court agrees with Alberici, and applies the "apparatus" definition in this case, then the purchases at issue would be exempt as "materials … solely required for the installation or construction of such [manufacturing] machinery and equipment[.]" Rather, the Director argues that this definition of "materials" should be ignored by this Court. The Director contends that the only dictionary definitions of "materials" that apply to section 144.030.2(5) are those that "describe the type of basic building materials used

[1] Because of the addition of an exemption in section 144.030.2, the statute at issue has, since the tax periods at issue, been recodified as section 144.030.2(6), but the exemption's terms have not changed.

(and most often incorporated) into a larger and more complex structure," which, in the context of section 144.030.2(5), would include only components of such manufacturing machinery, equipment, and parts. Dir. Br. 12. The Director's "responsive" brief fails to address, much less discredit, the following reasons why Alberici's construction is the correct one:

1. Substituting the "apparatus" definition for "materials" in the exemption allows the exemption to make perfect sense (App. Br. 13);

2. Substituting the Director's "component part" definition for "materials" in the exemption causes the exemption to make no sense at all (App. Br. 19);

3. Substituting the "component part" definition for "materials" in the exemption essentially reads the word "materials" out of the exemption since "parts" of manufacturing machinery and equipment are already exempt under the first clause of the exemption (App. Br. 16);

4. Substituting the "component part" definition for "materials" in the exemption causes the "solely required" language of the exemption to be rendered meaningless surplussage since a component part of a machine or equipment is always "solely required" for its installation or construction (App. Br. 16); and,

5. Alberici's construction furthers the exemption's purpose of encouraging the location and expansion of industry in Missouri, as evidenced by the fact that Holcim hired Alberici to build the largest cement plant in North America at a cost of over one billion dollars (App. Br. 17-8).

Without addressing many of Alberici's primary arguments, the Director instead focuses on exemption statutes that are not at issue. Dir. Br. 15-7. As explained below, Alberici's construction is the only one that makes sense in the context of the section 144.030.2(5).

B. Alberici's Construction of Section 144.030.2(5) is the Only Construction that Makes Sense.

The Director agrees with Alberici that 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 (as tools or other articles) necessary for doing or making something[.]

Webster's Third New International Dictionary 1392 (1993); Dir. Br. 12. The Director contends, however, that only part 1(a)1 of this definition applies to the construction of the statute at issue in this case. As explained in Alberici's opening brief, there is no basis for ignoring part 2a of the definition, which is a reasonable meaning for the term "materials" in the statute. Alberici also relies on the dictionary definition of "apparatus": "any compound instrument or appliance designed for a specific mechanical or chemical action or operation; MACHINERY, MECHANISM." *Id.* at 102. The cranes and welder are

obviously apparatuses. Plugging definition 2a into section 144.030.2(5) causes it to read as follows:

> 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**[.]

This reading of the statute makes sense and would exempt the cranes and welder since each perform mechanical actions or operations solely required to install or construct the Holcim cement plant's production equipment.

In response to this common sense reading of the exemption, the Director quibbles with the use of a further dictionary definition for the word "apparatus." Dir. Br. 11, 13-14. The Director cites no authority for his criticism in that regard because his criticism is unfounded. Courts regularly look to the dictionary for the meaning of words used in the dictionary. In *Amway Corp., Inc. v. Dep't of Revenue*, 794 S.W.2d 666 (Mo. banc 1990), this Court analyzed whether Amway's activities were protected from taxation in Missouri under PL 86-272 (prohibiting income taxation in a state unless a minimum level of activity occurs there). This Court held that PL 86-272 did not protect Amway from taxation because it was selling intangible, rather than tangible, personal property. To reach that conclusion, this Court defined "intangible personal property" (citing Black's Law Dictionary) to include a franchise. The Court then defined "franchise" (also citing Black's) as a license from the owner of a trademark or trade name permitting another to sell a product under that trade name or permitting another to sell a product or service

under the mark. The Court held that the distributorships sold by Amway constituted a license, which is a franchise, which is intangible personal property.[2]

The substitution of "apparatus" for "materials" in the exemption makes perfect sense, and the Director is unable to show otherwise. Moreover, the Director fails to address the question of whether his offered definition (component parts of machines and equipment), in the context of the exemption, makes any sense at all. As indicated in Alberici's opening brief, by substituting "components of such machinery and equipment," which is the logical use of the Director's definition 1a(1) for "materials," the exemption would read as follows:

[2] *See* also *BHA Group Holding, Inc. v. Pendergast,* 173 S.W.3d 373 (Mo. App. 2005) (Court of Appeals interpreted the plain meaning of "a ***period*** not in excess of 10 years;" using dictionary definitions, it defined "period" as an "interval of time" and an "interval" as "the amount of time between two events"); *State Highways and Trans. Comm'n of Mo. v. Director of Revenue,* 672 S.W.2d 953 (Mo. 1984) (This Court interpreted the statutory language "revenue ***derived*** from highway users;" using dictionary definitions, it defined "derived" as "formed or developed out of something else; derivative" and then defined "derivative" as "lacking originality; secondary, grows out of or results from an earlier or fundamental state or condition").

> 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 or equipment do not construct or install themselves and, furthermore, this construction of "materials" would duplicate the word "parts" in the first clause of the exemption. Parts of manufacturing machinery and equipment are exempt outright. What would the words "solely required for their installation and construction" add to the exemption? Moreover, the Director's construction of "materials" would render the words "solely required" meaningless surplussage. When would a component of a machine or equipment not be "solely required" for the construction of that machine or equipment? Alberici posed this question in its opening brief, App. Br. 19, but the Director failed to address it.

As indicated above, the definition of "materials" includes, but is not limited to, "apparatus," which includes, but is not limited to, "machinery" and "mechanism[s]." Indeed, the Director concedes, Dir. Br. 15, that "[o]f course, 'materials' in its most basic and generic of definitions – *i.e.* matter – could include machinery and equipment." Nevertheless, the Director contends that such a construction is not reasonable. He argues that had the legislature intended to exempt machinery and equipment "solely required for the installation or construction of such [manufacturing] machinery and equipment," it would have used the words "machinery and equipment" rather than "materials." In an effort to support that argument, the Director notes that in the exemption at issue the

legislature used both the terms "materials" and "machinery and equipment," so had the legislature intended a term that embraced installation or construction machinery and equipment it would have simply used those words rather than a broad word like "materials."

Why might the legislature have chosen the term "materials?" Likely it wanted a broader result, particularly when the word is coupled with the restrictive use "solely required for installation and construction." Likely it wanted to include tools (expressly included under the definition of "materials"), some of which would not be "equipment" because they are not capitalized[3] or not "machinery" because they have no moving parts.[4] Those tools still could be solely required for installation and construction. Perhaps it wanted also to include piping into manufacturing equipment for steam or water, compressed air, or natural gas, again where such piping would not qualify itself as machinery or equipment. But that piping would be an apparatus and still solely required in the installation of exempt manufacturing equipment. All of these items are encompassed in the broad term "materials." While the Director pays lip service to the

[3] *Walsworth Publishing Company, Inc. v. Director of Revenue*, 935 S.W.2d 39 (Mo. banc 1996)(equipment should be capitalized).

[4] *Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462 (Mo. banc 2001)(machinery includes the working parts of a machine).

requirement that this Court give the exemption a common sense interpretation, his arguments do just the opposite. The Director's strained construction limits the incentive to businesses to build factories in Missouri.

In *Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462 (Mo. banc 2001), this Court considered the Director's inconsistent letter rulings in relation to the construction of the exemption at issue here. Alberici noted in its opening brief that the Director's letter ruling LR5242 allows as exempt "materials" various tools like hammers, wrenches and ratchets. Those tools can be solely required to construct or install manufacturing machinery or equipment, and thus exempt; that is the holding of the letter ruling. Obviously that ruling is entirely consistent with the "apparatus" definition of "materials," as those tools are "necessary for doing or making something." Do hammers, wrenches and ratchets become a component of the manufacturing machinery and equipment? Of course not. They, like the cranes and the welder, are apparatuses solely required to construct or install the manufacturing machinery and equipment. The Director's only rebuttal to the letter ruling is his claim that the size of the apparatus is relevant ("The letter ruling did not deal with the type of large industrial equipment and machinery at issue in this case"). Dir. Br. 14, n. 2. That is a distinction without a difference. The Director fails to refer the Court to any words in the exemption to support his claim that a small apparatus like a hammer would be exempt, while a large apparatus like a crane would not. That is because there are no words in the exemption to support that differentiation. Moreover, the purpose of the exemption is to encourage the location

and expansion of industry in Missouri. Allowing the exemption for small apparatuses, while denying the exemption for large apparatuses, appears to defeat that purpose. It is highly unlikely that the legislature intended to encourage only the location of small plants in Missouri, but not the largest cement plant in North America.

C. The Director's Focus on Other Exemption Statutes Misses the Mark.

Apparently understanding the weakness of the Director's arguments specific to the exemption at issue, the Director's brief digresses to discuss other exemption statutes not at issue. Dir. Br. 15-18. The Director claims that because the term "materials" and either "equipment" or "machinery" are used in those exemptions, the legislature could not have intended the "apparatus" definition for materials in the exemption at issue. But the legislature used all of those terms in the subject statute, and did not intend for "materials" to mean "components of machinery and equipment" as the Director argues. As explained above, plugging the Director's offered definition into the exemption renders the exemption nonsense in that one respect. That the "component" definition for "materials" makes sense in other exemptions is beside the point.

Three of the exemptions the Director cites use almost identical language as in the subject exemption and provide little guidance in this appeal: section 144.030.2(5) (numbered 144.030.2(4) during the relevant tax periods) which is the "replacement" equipment version of the subject exemption, and sections 144.030.2(15) and (16) for air and water pollution control equipment ("materials and supplies solely required for the installation, construction, or reconstruction" of water and air pollution control property).

Some of the cited exemptions are different, but the difference does not aid the Director. For instance, the Director cites the component part exemption, section 144.030.2(2), discussed extensively in Alberici's opening brief. That section 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 the new personal property[.]" The key to that exemption is that the list of potential exempt purchases must become a component of the manufactured product. In that context, unlike with the subject exemption, only definition 1a(1) could apply due to this additional limitation included in the statute.

Similarly, the Director's listing of sections 144.030.2(3) and (41) is unavailing. Section (3) exempts "[m]aterials, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or manufacture of, motor vehicles, watercraft, railroad rolling stock or aircraft engaged as common carriers of persons or property[.]" Section (41) provides the same exemption for aircraft but without the common carrier requirement. While those exemptions use both the words "materials" and "equipment," as does the exemption at issue, they also use the term "replacement parts." The "component" definition of "materials" offered by the Director here would seem to duplicate the term "replacement parts" in this context. Moreover, by including "materials" in these exemptions, it is likely that the legislature intended to exempt not only repair, maintenance or manufacturing equipment that would be capitalized (under *Walsworth*), but to also provide an exemption for non-capitalized apparatuses like tools

used to repair, maintain or manufacture common carriage vehicles (or aircraft, whether or not used in common carriage), along with components and replacement parts. These exemptions simply do not aid the Director.

D. This Court's Decisions Addressing Other Exemption Statutes Are Inapposite.

As explained in Alberici's opening brief, *E & B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011), and the cases cited therein, do not aid the Director. App. Br. 13-7. The Director's brief does not respond to any of those arguments. Rather, the Director parrots the Commission's holding, which Alberici discredited in its opening brief. To reiterate, the statute under consideration in *E & B* was section 144.054, RSMo. Supp. 2011, which is different from, and broader than, section 144.030.2(5). ....At issue in *E & B* was whether granite slabs, the key component of installed granite countertops, were "materials used or consumed in the manufacturing … of any product[.]" Demonstrating how flexible the Director can be, in that appeal 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, under section 144.054, or under any other exemption statute. 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*. (emphasis added). As noted in Alberici's opening brief, the cases cited by this Court in *E & B* did not construe the word "materials."

To be clear, unlike the Director in *E & B*, Alberici does not contend that the word "materials" can have only one meaning under the sales tax exemption statutes. In some contexts (such as sections 144.030.2(2) and 144.054.2), it can mean a component from which something is made. In other contexts (such as sections 144.030.2(3), (5), (6), (15), (16), and (41), RSMo Supp. 2013) it can mean "an apparatus (as tools or other articles) necessary for doing or making something[.]" And in some of those statutes both meanings of "materials" could apply. In this case, however, it is clear that definition 2a applies. That definition causes the exemption in this one respect to make sense. That definition preserves the significance of other terms ("parts" and "solely required") of the exemption statute. And that definition is consistent with the reasonable expectations of the legislature.

E. Alberici's Construction of "Materials" Will Not Lead to Absurd Results.

Relying on facts not in the record,[5] the Director last argues that Alberici's construction of the exemption will lead to "absurd results." The Director's apparent

[5] The Director cites an internet search that is both referenced in his brief to the Commission and his brief herein. Dir. Br. 19-20. He alleges that approximately $650,000 of tax is at issue since "numerous taxpayers" have similar claims. *Id*. Since the Director is apparently unfettered by the record, Alberici should not be either. In fact, to

definition of an "absurd result" defies comprehension. Here, it is undisputed that the exemption at issue was intended to encourage the location and expansion of industry in Missouri. It is also undisputed that the taxpayer attempting to avail itself of the exemption, Holcim, built one of the largest cement plants in the world and the largest in North America, at a cost of over $1 billion. What is absurd is the Director's attempt to frustrate the clear policy of the legislature by misreading the applicable statute, even when contrary to his own letter ruling. Alberici encourages this Court to take judicial notice of the Director's opening brief in the *E & B Granite* case. There, this Court will see that on pages 11 and 29 thereof the Director argued that this Court's failure to accept the Director's argument there, namely that "materials" can solely mean "apparatus[es]," would also lead to an "absurd consequence" and an "absurd result."

To support his dubious claim here, the Director argues that if this Court adopts definition 2a "anything could constitute materials." He claims that "a work truck used by employees while constructing some machinery and equipment" would be exempt. Dir. Br. 19. The statute requires, as a condition of exemption, that the materials be "solely required for the installation and construction" of the exempt manufacturing machinery or equipment. Section 144.030.2(5) (emphasis added). That strict condition hardly opens

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the undersigned's knowledge, these taxpayers, like Alberici herein, have made their claims on behalf of Holcim, the only taxpayer with a financial interest in these cases. Holcim is the only real taxpayer here; any refund will ultimately go to it and it alone.

the door for "anything." And if a "work truck," say a forklift, is solely required for the installation or construction of exempt manufacturing machinery or equipment, it should be exempt, because that function is within the parameters of the exemption. To deny the exemption in that instance would be inconsistent with the legislature's intent in enacting the statute.

II.

The $15,000 Shipping Charge Is Not Subject to Missouri Use Tax.

As explained in Alberici's opening brief, the undisputed testimony was that the freight charge was separately stated from the crane rental charge and that Alberici had the option to choose, and did choose, who it would retain and pay to transport the crane to the job site. Tr. 41-42. That Alberici had the option to choose the shipper is further evidenced in the lease at issue, particularly paragraph 6, entitled "TRANSPORTATION." That section 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. Moreover, paragraph 13.1 of the lease provides that all risk of loss during transportation shall be on lessee, Alberici. *Id.*

In spite of this evidence, which the Director does not dispute because there is no contrary evidence in the record, the Director argues that the Commission relied on "extrinsic evidence" to establish the parties' alleged intent that the shipping charge was intended as a part of the lease of the crane. What extrinsic evidence does the Director cite? Only that Alberici elected to have the lessor, Bulldog Erectors, ship the crane rather than retain someone else to ship it. Dir. Br. 24. But, as explained in Alberici's opening brief (App. Br. 24-5) and below, that fact is not dispositive.

Alberici cited and discussed *Brinson Appliance, Inc. v. Director of Revenue*, 843 S.W.2d 350, 352 (Mo. banc 1992) in its opening brief. App. Br. 24-5. Just as in this

case, the customers in *Brinson* elected and contracted to pay the vendor to ship the purchases to them:

> The practice was for the customer to request delivery of the appliance to a specific address. The salesperson would then check the list of charges for each type appliance. The delivery charge would be stated separately and added to the sales invoice. The amount of the purchase price and delivery charge would be collected by Slyman Bros. The entire amount of the delivery charge would then be paid to the carrier selected.
>
> The contracts between Slyman Bros. and the various carriers provided that the carriers would be insured against damage to the appliances during delivery. The carrier assumed any risk of loss after the appliance was picked up at the store. Any claim for damage during transit was "between the customer, the carrier and the carrier's insurance company." On this evidence, the AHC held that there was no sales tax due on the delivery charges collected by Slyman Bros.

Id. at 351.

The fact that the customer chose to have the vendor ship the appliance and charge for shipping—the very fact on which the Commission and Director rely to hold the subject shipping charge taxable here—did not change the outcome of *Brinson;* this Court still held that the shipping charges were not taxable. Why? Because similar to the facts here:

> [T]he cost and means of delivery of the [purchase] were entirely up to the customer. The customer had the option to take the [purchase] from the store, hire a carrier, or use a carrier selected by [seller]. At the same time, the seller derived no financial benefit from the delivery and undertook no risk for damage or loss during delivery.

Id. at 352. Here, the undisputed facts establish that the cost and means of delivery were entirely up to Alberici and that it, rather than the vendor, bore the risk of loss during shipment. The only difference between the facts here, and in *Brinson*, is that the record is silent here as to whether the vendor, Bulldog Erectors, derived any benefit from shipping the crane to Alberici. Alberici clearly met the preponderance of elements establishing that the subject shipping charge was not part of the sale.

Moreover, as explained in Alberici's opening brief, App. Br. 25, the above analysis is consistent with the Director's regulation 12 CSR 10-103.600(3) providing that "[i]f 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." Alberici clearly met the terms for nontaxability in that regulation as it established that it had the option to hire whom it wanted to ship the crane and that the shipping charge was separately stated. Alberici noted in its opening brief that the Commission cannot do what the Director cannot do, and the Director cannot retrospectively change his policy as set forth in his regulations. *See J.C. Nichols v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990) and section

32.053 ("Any final decision of the department of revenue which is a result of a change in policy or interpretation by the department effecting a particular class of person subject to such decision shall only be applied prospectively.") The Director's "responsive" brief fails to address *J.C. Nichols* or section 32.053. Rather, the Director appears to disavow his own regulation ("the regulation does not consider all of the relevant factors"). Dir. Br. 24-5. But the Director provides no rebuttal to section 32.053's recognition 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, meaning that this change in policy would not be prospective for Alberici. Additionally, any change in policy from that set forth in the Director's regulation should not be effective until after the Director complies with Chapter 536 and properly amends the regulation.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the foregoing was electronically mailed via Missouri Case.net e-filing to Jeremiah J. Morgan, Deputy Solicitor General, Missouri Attorney General's Office, Supreme Court Building via Jeremiah.Morgan@ago.mo.gov and Thomas A. Houdek, Senior Counsel, Missouri Department of Revenue, Truman State Office Building via Thom.Houdek@dor.mo.gov on July 9, 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 4,466 words.

/s/ Edward F. Downey