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SC93771

IN THE SUPREME COURT OF MISSOURI

ALBERICI CONSTRUCTORS, INC.,

Plaintiff/Appellant,

vs.

DIRECTOR OF REVENUE,

Defendant/Respondent.

Appeal from the Administrative Hearing Commission
The Honorable Marvin O. Teer, Jr., Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The Director of Revenue provides the following supplemental statement of facts for the Court's consideration in accordance with Supreme Court Rule 84.04(f).

A. Alberici Rents "Large Industrial Cranes" and Welders.

In 2006, Alberici Constructors, Inc. ("Alberici") entered into a joint venture to build a new cement manufacturing plant near Bloomsdale, Missouri, on the Missouri side of the Mississippi River. (Resp'd Appdx. 2). Construction on the plant began in July 2006 and was completed in July 2009. (Tr. 34). Under the construction management agreement for the project, Alberici was responsible for furnishing all construction equipment necessary to complete the project. (Tr. 53, 57; Ex. B, ¶3.6). The construction management agreement also held Alberici responsible for damage or loss to any "Construction Equipment owned, rented or leased by Contractor or its Subcontractors or Sub-subcontractors for use in accomplishing the Work." (Tr. 56; Ex. B, ¶3.6).

In order to perform the work detailed in the construction management agreement, and to complete the project, Alberici used multiple "massive industrial cranes" and welders. (Resp'd Appdx. 2; App. Br. pp. 4-5). To this

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end, Alberici entered into contracts to rent the equipment, including the following cranes:

- Grove RT 9130E, 130 ton crane from Bulldog Erectors, Inc. (Tr. 64-65; Ex. F);
- Grove RT 9130E, 130 ton crane from Bulldog Erectors, Inc. (Tr. 58-60; Ex. G);
- Link-Belt RTC 80100, 100 ton rough terrain crane from Dawes Rigging and Crane Rental. (Tr. 68; Ex. D);
- Manitowoc 777 SII, 175 ton crawler crane from Dawes Rigging and Crane Rental. (Tr. 72; Ex. E); and
- Grove 760E rough terrain crane from Kirby-Smith Machinery, Inc. (Tr. 76; Ex. H).

The contracts with Bulldog – styled "EQUIPMENT RENTAL AGREEMENT" – define the large industrial cranes as "equipment" and repeatedly refer to the cranes as "equipment." (Exs. F & G). Similarly, the other contracts refer to the cranes as "equipment." (Exs. D, E, & H). The contracts with Bulldog further provide that Alberici will pay all taxes, "including but not limited to those regulating to Equipment, its use, operation, transportation or storage." (Exs. F & G, ¶11).

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In addition to the cranes, Alberici rented an SAE 400 Diesel welder from Rod's Service, Inc. (Tr. 2; Ex. 16-A). The welder could be used for jobs other than welding, and had outlets that electric tools could use for power. (Tr. 10, 104; Ex. M). Similar to the crane rentals, the invoice for the welder is styled – "MACHINE RENTALS." (Ex. 16-A).

During the hearing before the Administrative Hearing Commission, witnesses were prompted by Alberici to call the cranes and welders "devices," instead of what they are called under the contracts:

- "Did it own all of that, all of those devices?" (Tr. 35);
- "And what did you do? How did you acquire the devices that you used that you did not own?" (Tr. 35);
- "What are the devices that you rented that are – represented by invoices depicted on Ex. 14?" (Tr. 36); and
- "Do you know whether Alberici had the option of selecting someone else to transport that device to the job site?" (Tr. 42).

But, witnesses universally referred to the cranes and welders as "equipment," just as the contracts do:

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- "As I understand, it's whether or not – whether the equipment that we used to install the process equipment – the cranes, the welders – is exempt from the Missouri use tax." (Tr. 35);
- "Those are the vendors or companies that we rented equipment from." (Tr. 36); and
- "It's how we kept track of where the costs were for the equipment." (Tr. 36).

B. Cranes are Delivered and Paid for Under the Contracts.

Like all of the cranes Alberici rented, the Bulldog cranes were transported to the construction site where Alberici could use the cranes. (Tr. 71). The equipment rental agreements between Alberici and Bulldog set out a separate paragraph for shipping charges as follows:

> **6. Transportation:**
>
> Inbound Transportation: $15,000.00
>
> Outbound Transportation: $15,000.00
>
> ***Receive, unload, assemble, disassemble and load out is by customer.**
>
> Transportation: Lessee will arrange for and pay all shipping and freight from the shipping point to the

job site specified in Article 1 hereof and returned to the return point . . . .

(Exs. F & G).

As set forth in the contracts, Bulldog charged Alberici $15,000 to ship the 130 ton Rough Terrain Cranes to the construction site and Alberici paid for the shipping charge at issue within 16 days. (Tr. 64.; Resp'd Appdx. p. 3). Alberici paid all rental and shipping charges on the cranes and welders it rented, including all taxes, and passed those on to the plant owner. (Tr. 52).

C. Alberici's Tax Refund Claims.

Nearly two years after Alberici had paid for the rental, shipping, and taxes under the contracts, and after the plant had been completed, on May 11, 2010, Vickie Hurst, signed an exemption certificate for "rental cranes used solely for the installation and construction of manufacturing machinery and equipment." (Tr. 98; Ex. 16). Eight days later, relying on this same exemption certificate, Alberici sought a use tax refund from the Missouri Department of Revenue. (Ex. 16).

The refund request listed numerous crane rentals, but only one delivery charge for a single crane. (Exs. 14 & 16). And the one charge for delivery of a single crane was only for the delivery charge to the construction site and not for the delivery charge to return the crane. (Ex. 14). The Director denied the refund request and Alberici appealed to the Commission. (Ex. 15).

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The Commission held that Alberici is not entitled to a refund because large industrial cranes and welders are "not 'materials' exempt from taxation pursuant to § 144.030.2(5),"[1/] and because "the parties intended at the time of contracting that Alberici would purchase transportation services . . . [as] part of the sale price." (Resp'd Appdx. pp. 9 & 12).

[1/] All statutory references are to the 2013 Cumulative Supplement to the Missouri Revised Statutes, unless otherwise noted. The provision at issue in this appeal – § 144.030.2(5) – is now numbered at § 144.030.2(6). For ease of reference, however, the Director will refer to the provision under its prior number, § 144.030.2(5), as the Appellant did in its brief.

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SUMMARY OF THE ARGUMENT

"Massive" industrial cranes and welders are not simply "materials" for purposes of a tax exemption in § 144.030.2(5). That is because words used in a statute are to be given their "plain and ordinary meaning," not some strained or obscure definition that would defy the legislature's intent and violate strict construction. *Farmers' and Laborers' Co-op Ins. Ass'n v. Dir. of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987). Similarly, it is the intent of the parties to a contract that controls, not some after-the-fact effort to obtain a refund. In short, common sense and controlling principles should prevail.

The word at issue in this case – "materials" in § 144.030.2(5) – does not include, and thereby exempt from taxes, the rental of what Alberici aptly describes as "massive" industrial cranes and welders. This is consistent not only with the plain and ordinary meaning of the word, but also the dictionary, the surrounding statutory provisions, and even the contracts and witnesses. All acknowledge the obvious differences between "materials" on the one hand and "machinery and equipment" on the other.

In § 144.030.2(5), the words "materials" and "machinery and equipment" are used in the same sentence – only 4 words apart – evidencing the legislature's intent to distinguish between them. In the surrounding statutory provisions, the legislature likewise differentiated between "materials" and "machinery and equipment." And it did so repeatedly.

Furthermore, the dictionary defines cranes and welders as "machines" and not merely as "materials." Even the contracts and witnesses described the cranes and welders in this case as "machinery and equipment," and not simply as "materials." Guided by these principles, the Commission correctly concluded that industrial cranes and welders are not "materials" exempt from taxes under § 144.030.2(5).

The Commission also applied common sense and controlling principles to the contract in this case, to determine that a delivery charge under the contract is not exempt from taxes. The form contract at issue provided a charge of $15,000 for shipping of a crane each way, but also indicated that Alberici "will arrange for and pay all shipping." (Exs. F & G). To determine whether the shipping was part of the contract, the Commission looked to extrinsic evidence to determine the parties' intent.

The parties' performance of the contract is conclusive as to intent. Alberici was actually charged $15,000 for shipping, the exact amount in the contract. It paid the charge 16 days after shipment of the crane, and it would be 18 months before Alberici would claim that the shipping was not part of the contract. Moreover, Alberici made no other claim for the multiple shipments of cranes. As such, the Commission correctly interpreted the contract and its decision should be affirmed.

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ARGUMENT

The taxpayer in this case, Alberici Constructors, Inc., seeks a refund relating to the use and delivery of industrial cranes and welders. The Director assumes that Appellant's Part I and Part II constitute its points relied on. Both fail, however, and the Commission should be affirmed.

I. The Statutory Language and Caselaw Do Not Support a Refund Claim for the Use of Large Industrial Cranes and Welders Because They are Machinery or Equipment and Not Merely "Materials" Under § 144.030.2(5). – Responding to Appellant's Part I.

Standard of Review

The only issue in Part I is a legal issue concerning the interpretation of a revenue law – § 144.030.2(5). This Court reviews the Commission's interpretation of revenue laws *de novo*. *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 436 (Mo. banc 2010) ("Statutory interpretation is an issue of law that this Court reviews *de novo*."); *Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008).

Section 144.030.2(5) is not just any revenue law, but an exemption from sales and use taxes. Tax exemptions are "strictly construed against the taxpayer." *Branson Props. USA, L.P. v. Dir. of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003); *Dir. of Revenue v. Armco, Inc.*, 787 S.W.2d 722, 724 (Mo.

banc 1990). Indeed, an exemption is allowed "only upon clear and unequivocal proof, and doubts are resolved against the party claiming it." *Id.* As such, the burden is on the taxpayer "to show that it fits the statutory language exactly." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006).

In order to establish that it fits exactly the exemption in this case, Alberici must show that equipment rentals, described by Alberici as "massive" or "large industrial cranes" and welders, are simply "materials" and not machinery or equipment under § 144.030.2(5). (App. Br. p. 21). The plain language of the statute, the surrounding statutory provisions, and caselaw do not support such a conclusion. Alberici cannot satisfy the burden to show that it fits the statutory exemption at all, much less exactly. Accordingly, the Commission's decision to deny a refund should be affirmed.

A. The Plain Language of the Statute Distinguishes Between Machinery or Equipment and Materials.

As with any statutory provision, "the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect.

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Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Hyde Park Hous. P'ship v. Dir. of Revenue,* 850 S.W.2d 82, 84 (Mo. banc 1993).

The critical language of § 144.030.2(5) provides an exemption from use taxes for:

> 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 . . . .

Alberici claims that the industrial cranes and welders it rented are "materials" under § 144.030.2(5). To reach this result, however, Alberici is forced to use a definition of a definition, and to ignore the rest of the statutory language surrounding the term "materials." This hardly constitutes fitting the statutory language exactly.

Although the term "materials" is not defined in § 144.030.2(5), its meaning in this context can be easily ascertained. "In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary . . . and by considering the context of the entire statute in which it appears." *State ex rel. Burns v. Whittington*, 219 S.W.3d

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224, 225 (Mo. banc 2007) (citing *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999) and *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995)).

The dictionary provides the following potentially applicable definitions for the noun "materials":

> [2]**Material** \"\ *n* -s **1a(1):** the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made . . . **(2):** the finished stuff of which something physical (as an article of clothing) is made; *esp* : cloth . . . **b(1):** the whole or a notable part of the elements or constituents or substance of something physical or not physical . . . **2a:** apparatus (as tools or other articles) necessary for doing or making something . . . .

Webster's Third New International Dictionary 1392 (1993). The primary definitions of the term "material" describe the type of basic building materials used (and most often incorporated) into a larger and more complex structure. In fact, the dictionary notes that "a machine" is made up of materials, and not the other way around.

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In contrast to the definition of "materials," cranes and welders are defined as follows:

> **Crane** . . . **a :** a machine for raising and lowering heavy weights and transporting them through a limited horizontal distance while holding them suspended . . .
>
> **Welder** . . . **b :** a machine used in welding

Webster's Third New International Dictionary, 529 & 2594 (1993). There is no suggestion in the dictionary that cranes or welders are merely "materials." Instead, they are specifically identified as "machines" and appropriately described as such. The dictionary is not alone in this common-sense description. In the very contracts at issue, cranes and welders are repeatedly referred to as "equipment" or "machines." (Exs. D, E, F, G, H, & 16-A). The cranes and welders are not described as merely "materials." *Id.* Likewise, witnesses before the Commission called the cranes and welders equipment, not materials. (Tr. 35-42).

Instead of relying on the primary and most common-sense definitions of the term "materials," and in contrast to its own descriptions, Alberici turns to a secondary definition describing "materials" as an "apparatus." But this is not enough to support their claim in this case. Alberici is forced to take yet another step, turning to the definition of "apparatus" to finally arrive at a

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definition that assists their argument. While it is true that one of the definitions of apparatus includes the term "machinery," this type of straining for a definition of a definition is not the type of construction permitted for a tax exemption.[2/] This is particularly true when there is a perfectly logical and appropriate definition available for the term "materials."

The words in the statute immediately surrounding the term "materials" also support the primary definition and meaning of the term as adopted by the Commission. "[W]ords used in proximity to one another must be considered together." *Brinker,* 319 S.W.3d at 437 (citing *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 431 (Mo. banc 2009)).

In the same provision of the statute, the legislature used the terms "machinery" and "equipment," both of which would more aptly describe what Alberici itself calls "massive" industrial cranes and welders. (App. Br. p. 21). By using the terms "machinery" and "equipment" in the same provision with (and only 4 words apart from) the term "materials," it is clear that the legislature intended that "materials" not constitute "machinery and

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[2/] Alberici reaches to describe hammers, wrenches, and ratchets as apparatuses, in an effort to use a letter ruling that has no application here. (App. Br. p. 17). The letter ruling did not deal with the type of large industrial equipment and machinery at issue in this case.

equipment." Of course, "materials" in its most basic and generic of definitions – *i.e.* matter – could include machinery and equipment because they are made up of materials or matter. But that is not a reasonable, much less strict, interpretation of the provision.

The legislature could have easily addressed the issue if it really intended to exempt the use of machinery and equipment as argued by Alberici. The statute *could* have provided: "Machinery and equipment, and parts and the machinery, equipment, materials, and supplies solely required for the installation or construction of such machinery and equipment . . . ." But the legislature did not. Instead, the legislature distinguished between machinery and equipment on the one hand and materials on the other.

B. The Surrounding Statutory Provisions Also Distinguish Between Machinery or Equipment and Materials.

Not only does the plain language of the statutory provision at issue distinguish between machinery or equipment and materials, but multiple provisions surrounding the provision at issue do likewise. "[S]tatutory provisions are 'not read in isolation but [are] construed together, and if reasonably possible, the provisions will be harmonized with each other.'" *Brinker,* 319 S.W.3d at 437 (quoting *Bachtel v. Miller Cnty. Nursing Home Dist.,* 110 S.W.3d 799, 801 (Mo. banc 2003)).

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The following is a sampling of surrounding statutory provisions that are compelling on this point:

> § 144.030.2(2) "Materials, manufactured goods, machinery and parts . . . ."
>
> § 144.030.2(3) "Materials, replacement parts and equipment . . . ."
>
> § 144.030.2(5) "Replacement machinery, equipment, and parts and the materials and supplies . . . machinery and equipment, and the materials and supplies . . . ."
>
> § 144.030.2(15) "Machinery, equipment, appliances and devices . . . and materials and supplies . . . ."
>
> § 144.030.2(16) "Machinery, equipment, appliances and devices . . . and materials and supplies . . . ."
>
> § 144.030.2(41) ". . . materials, replacements parts, and equipment . . . ."

§ 144.030, RSMo Supp. 2013

Over and over again the legislature distinguished between "machinery" and "equipment" on the one hand and "materials" on the other.[3/] It would be improper now to lump them together on the basis that "materials" has a definition that can mean "apparatus," and "apparatus," in turn, has a definition that can mean "machinery."

Moreover, this Court has repeatedly defined "materials" to constitute components or ingredients that are typically consumed or used as part of a final product, and not as machinery or equipment temporarily used in the process. *See, e.g., Overland Steel, Inc. v. Dir. of Revenue,* 647 S.W.2d 535, 539 (Mo. banc 1983) ("These materials were not resold by Overland but were consumed by the corporation in its capacity as a contractor."); *Al-Tom Invest., Inc. v. Dir. of Revenue,* 774 S.W.2d 131 (Mo. banc 1989); *Doe Run Resource Co. v. Dir. of Revenue,* 982 S.W.2d 269 (Mo. banc 1998).

[3/] Similarly, § 144.054.2 references and treats "machinery, equipment, and materials" separately. One or more of these terms would be superfluous if "materials" simply included "machinery" and "equipment." *Saint Charles Cnty. v. Dir. of Revenue*, 407 S.W.3d 576, 579 (Mo. banc 2013) (it is presumed that the "legislature did not insert superfluous words into a statute") (citing *Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993)).

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No decision has ever concluded that an apparatus, as defined as machinery, constitutes "materials." Even the Director's efforts to apply the secondary "apparatus" definition of materials was rejected in *E & B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314 (Mo. banc 2011). In its discussion of "materials" in *E & B Granite, Inc.,* the Court rejected the use of apparatus as "not persuasive" and noted that prior courts did not "use the term 'material' to refer to an apparatus." *Id.* at 318 (citing *Blevins Asphalt Const. Co. v. Dir. of Revenue,* 938 S.W.2d 899, 901 (Mo. banc 1997); *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue,* 94 S.W.3d 388, 391 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue,* 45 S.W.3d 880 (Mo. banc 2001).

C. The Definition of Materials Proposed by Alberici Would Produce Absurd Results.

Not only is the Commission's application of the term "materials" consistent with the plain language of the statute, the surrounding statutory provisions, and caselaw, but to adopt the definition proposed by Alberici would produce an absurd result. "[I]f the proposed interpretation or plain language produces an absurd or illogical result, the court will not adopt that interpretation or meaning." *See Akins*, 303 S.W.3d at 565 ("A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.") (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998)).

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Under the definition proposed by Alberici, anything could constitute "materials." Even a work truck used by employees while constructing some machinery or equipment would constitute materials exempt from sales and use tax. There would hardly be any end to this type of application. And it is not some isolated or speculative argument. Numerous taxpayers have already seized upon an alleged expansion of the manufacturing exemption in § 144.030 to file refund claims. Cases with this identical issue concerning alleged "materials," currently before the Commission, include:

Case Title[4/]	Case No.	Complaint File	Amount of Tax Refund
Kirby Smith Machinery, Inc. v. Director of Revenue	11-0650 RS	April 13, 2011	$8,525.63
Maxim Crane Works, LP v. Director of Revenue	11-0651 RS	April 13, 2011	$187,498.58
John Fabick Tractor Co. v. Director of Revenue	11-0652 RS	April 13, 2011	$17,277.27

[4/] Each of these Administrative Hearing Commission cases, and their claims for refunds, can be located at: http://ahc.mo.gov/ahc/. *See, e.g.*, http://168.166.15.111/Clients/MOAHC/Public/Case_Details.aspx?&EntityID=10036301. The Director also cited to these cases in its briefing before the Commission.

Case Title[4/]	Case No.	Complaint File	Amount of Tax Refund
Lifting Gear Hire Corporation v. Director of Revenue	11-0653 RS	April 13, 2011	$29,400.96
Red D'Arc, Inc. v. Director of Revenue	11-0682 RS	April 15, 2011	$21,230.03
United Rentals North America, Inc. v. Director of Revenue	11-0713 RS	April 21, 2011	$317,381.39
Midwest Aerials & Equipment, Inc. v. Director of Revenue	11-1132 RS	June 7, 2011	$75,316.06
Total Refunds Claimed			$656,629.92

The plain language of the statute, the surrounding statutory provisions, and caselaw, all support the conclusion that "large industrial cranes" and welders are machinery or equipment and not merely "materials" under § 144.030.2(5). Accordingly, the Commission's decision should be affirmed and Appellant's Part I denied.

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II. The Shipping Charge in the Contract Was Properly Subject to Tax Because the Commission Correctly Concluded – Based on the Contract and Extrinsic Evidence – That it Was the Parties' Intent to Include the Charge in the Sale – Responding to Appellant's Part II.

In its second attempt to overturn the Commission and obtain a refund, Alberici argues that its contractual payment for shipping a crane is tax exempt. The basis for Alberici's claim is that one of the delivery charges was supposedly not part of the services included in the total amount of the sale price. *See* § 144.010.1(3). The Commission, however, reviewed the contract and the extrinsic evidence, heard the testimony of the witnesses, and correctly determined that "the parties intended at the time of contracting that Alberici would purchase transportation services [and] the charge for those services was part of the sale price, and therefore subject to use tax." (Resp'd Appdx. p. 12).

Standard of Review

Construction of a contract, including the determination of whether the contract is ambiguous, is a legal issue determined by the court. *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 846 (Mo. banc 2012). If a contract is ambiguous, then "the parties' intent can be determined by use of parol evidence." *Id.* (citing *Graham v. Goodman,* 850 S.W.2d 351, 354 (Mo. banc

1993)). And if the court must utilize parol or extrinsic evidence, "a fact issue exists." *Spirtas Co. v. Div. of Design and Const.*, 131 S.W.3d 411, 417 (Mo. App. W.D. 2004).

Here, the Commission concluded that the contract was ambiguous and it relied on extrinsic evidence to determine the parties' intent. In accordance with § 621.193, this decision "shall be upheld when authorized by law and supported by competent and substantial evidence upon the whole record." The Commission's decision in this case is authorized by law and is supported by competent and substantial evidence.

A. The Parties' Contract Was, at a Minimum, Ambiguous as to the Shipping Charge.

As with any issue of contract interpretation, the cardinal principle is to "ascertain the intention of the parties and to give effect to that intent." *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995) (citing *Royal Banks of Mo. v. Fridkin,* 819 S.W.2d 359, 362 (Mo. banc 1991)). Specifically, "[i]n determining whether a service is 'a part of the sale' the intention of the parties is the guiding factor." *May Dept. Stores Co. v. Dir. of Revenue*, 791 S.W.2d 388, 389 (Mo. banc 1990) (quoting *Kurtz Concrete, Inc. v. Spradling,* 560 S.W.2d 858 (Mo. banc 1978)).

"In order to determine the intent of the parties, it is often necessary to consider not only the contract between the parties, but 'subsidiary

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agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties.' " *Id.* And it is not just the intent of the parties, but the intent *at the time of contracting* that matters. *See Golden Rule Ins. Co v. R.S.*, 368 S.W.3d 327, 334 (Mo. App. W.D. 2012).

In the signed contract here, it lists not only the rental rate, but the rate for transportation – both inbound and outbound. (Exs. F & G). The contract rate is $15,000 for transportation each way, and Alberici paid that exact rate under the contract immediately after receiving the service under the contract. Alberici now claims that half of the delivery charge was separate from the contract and therefore tax free. While the contract certainly suggests that delivery may be accomplished by a third-party, the delivery was, in fact, done under the contract, for the price listed in the contract, and between the same parties to the contract.

After reviewing the contract, the Commission concluded that "there is an ambiguity within the four corners of the contract whether Alberici *agreed* to pay Bulldog Erectors for transporting the crane." (Resp'd Appdx. P. 11) (emphasis in original). Thus, the Commission turned to extrinsic evidence to resolve the ambiguity.

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B. The Extrinsic Evidence Establishes the Parties' Intent to Include the Shipping Charge in the Contract.

Even if the contract itself were not sufficient to support the parties' intent in this case, the Commission concluded that the extrinsic evidence established the parties' intent to make the transportation cost part of the rental agreement. The Commission properly noted, for example, that the parties' actual performance of the contract was conclusive evidence of the parties' intent. Alberici, after all, paid the exact charge for shipping set out in the contract. And it did so 16 days after the date of the contract. It was not until 18 months later that a belated sales/use tax exemption certificate was issued suggesting for the first time that the delivery charge might be considered separately. This revisionist construction of the contract was properly rejected by the Commission and should be rejected by this Court.

In support of their claim, Alberici cites to *Brinson Appliance, Inc. v. Dir. of Revenue*, 843 S.W.2d 350, 352 (Mo. banc 1992), and the Department's regulation. *Brinson* recognized several factors as critical to its determination, including the fact that the seller derived no financial benefit from the delivery. In this case, in contrast, the sellers or lessors unquestionably received a financial benefit from the delivery. Indeed, the exact financial benefit is set out specifically in the contract. Moreover, the department's

"basic application" in the regulation does not consider all of the relevant factors, including all of the factors acknowledged by Alberici and recited by this Court. *See, e.g., S. Red-E-Mix Co. v. Dir. of Revenue*, 894 S.W.2d 164, 167 (Mo. banc 1995); App. Brief, p. 23.

Interestingly, it appears that among all of the various cranes that were shipped for the project, Alberici is only claiming a tax exemption for one half of one delivery. The Commission correctly interpreted the contract and assessed the evidence to determine the intent of the parties at the time of the contract. There is competent and sufficient evidence to support that conclusion, and the Commission's decision should, therefore, be upheld.

CONCLUSION

For the foregoing reasons, the decision of the Administrative Hearing Commission should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was electronically via Missouri CaseNet e-filing system on the 21st day of May, 2014, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,566 words.

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