

FILED

FEB 18 2010

WD71019

Thomas F. Simon
CLERK, SUPREME COURT

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

THE CITY OF KANSAS CITY, MISSOURI
AVIATION DEPARTMENT,

90710

FILED

Respondent,

FEB 18 2010

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

CLERK, SUPREME COURT

Appellant.

Appeal from the Administrative Hearing Commission,
The Honorable John J. Kopp, Commissioner

REPLY BRIEF OF APPELLANT

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SCANNED

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JURISDICTIONAL STATEMENT

The City disputes the jurisdiction of this Court, arguing that the case is “not controlled by prior cases of the Supreme Court” or alternatively that the “appeal presents a [constitutional] question.” Respondent’s Brief, p. 3. These arguments fail, and jurisdiction is appropriate in this Court. As set forth below, the Missouri Supreme Court’s decisions in *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782 (Mo. banc 1983) and *St. Louis Country Club v. Admin. Hearing Comm’n*, 657 S.W.2d 614 (Mo. banc 1983) are controlling. Even the constitutional argument the City now claims deprives this Court of jurisdiction was specifically rejected by the Missouri Supreme Court in *City of Springfield*. *See id.* 659 S.W.2d at 784 (rejecting a challenge under Article III, § 39(10)). Therefore, the case is properly before this Court.

ARGUMENT

The City attempts to uphold the judgment of the Administrative Hearing Commission (“AHC”) in this case on the basis of two arguments: a new and unsupported interpretation of the statute, and a claim – already rejected by the Missouri Supreme Court – that imposing a sales tax on the City would be unconstitutional. Both arguments fail.

A. The Controlling Test is Whether There is a “Gain, Benefit or Advantage,” and Not a Profit Motive or a Classic Mercantile Activity.

The entire case comes down to whether the City sells electricity to its commercial airport tenants “with the object of gain, benefit or advantage.” § 144.010.1(2), RSMo (2008 Cum. Supp.). Even the City acknowledges that this is “the focus of this appeal.” Respondent’s Brief, p. 15. Predictably, the City adamantly denies that its sale of electricity is made with the object of “gain, benefit or advantage.” Yet, the City’s own arguments and language defy its summary denial.

The City argues that it “is not motivated by profit or commercial gain or advantage.” *Id.* p. 16. The City even tries to define gain as merely profit. *See id.* p. 17. However, this is not the test, and misses the point entirely. It is certainly true that gain can include profit, but there is much more to gain than

just turning a profit. Furthermore, the statute includes terms entirely ignored by the City; namely “benefit or advantage.”

In its brief, the City repeatedly uses words demonstrating that the object of its sale of electricity to commercial airport tenants is a “gain, benefit or advantage.” The following are a few examples, in the City’s own words, of the “gain, benefit or advantage”:

- “Modern airports, and the facilities at such airports, require the convenience of electrical power.” Respondent’s Brief, p. 15 (emphasis added).
- “The City has incurred considerable expense in offering a power supply” *Id.* (emphasis added).
- “[T]he use of the electricity is for the purpose of furthering the City’s governmental interest in leasing the facilities.” *Id.* pp. 15-16 (emphasis added).
- “Providing electricity . . . *fosters* the City’s interest in leasing the properties” *Id.* p. 16 (emphasis in original).
- Electricity is “crucial to operation of an airport.” *Id.* (emphasis added).
- “[O]ne of many utilities that a tenant would need for productive use of leased facilities.” *Id.* (emphasis added).

- “The electricity supplied is integral to the lease transaction.”

Id. (emphasis added).

The message in the City’s own words is that its supply of electricity is not only a “gain, benefit or advantage” to itself and its commercial tenants, but it is absolutely essential to the fulfilling of its purposes as set forth in its Charter. And since the City admits there is a “governmental interest in leasing the facilities” then the sale of electricity is certainly a “gain, benefit or advantage” in accomplishing that governmental interest. *Id.* One need only imagine the difficulty in leasing the commercial facilities at the airport if there were no electricity made available. Of course, electricity could be obtained from another source (such as on the East side of the airport where the tenants pay taxes), but the City and its commercial tenants have not done so because the sale of electricity by the City is the most advantageous approach. *See id.* p. 23 (stating that another alternative is “not a truly advantageous alternative”).

If the sale of electricity is “integral to the lease transaction” and “fosters the City’s interest in leasing the properties” it is unquestionably a benefit or advantage to the City. The Supreme Court also made clear in *City of Springfield v. Dir. of Revenue*, 659 S.W.2d 782 (Mo. banc 1983), that these types of activities by municipalities “seldom exceed and often do not meet the direct costs of the program” and that “most programs receive subsidies from property

taxes.” *Id.* at 783. Thus, profit motive is not the test for determining a “gain, benefit or advantage.” *Id.* at 785.

The City also attempts to distinguish the holding in *City of Springfield* on the basis that it involved sales activities that were “classically mercantile and . . . occurred over the counter.” Respondent’s Brief, p. 19. The City provides no citation or authority that such distinction makes any difference in the analysis. That is because it is not the law and is inconsistent with the statute. In fact, in *St. Louis Country Club v. Admin. Hearing Comm’n*, 657 S.W.2d 614 (Mo. banc 1983), the Missouri Supreme Court held exactly the opposite. The Court in *St. Louis Country Club* did not make a special exception for classic mercantile or over the counter activities, but held that activities which are covered by the statute are “not limited to ordinary commercial enterprises.” *Id.* at 617 (holding that the statute is “surely designed to make transactions which might not otherwise be covered taxable”).

The City also attempts to distinguish the controlling Supreme Court decision in *St. Louis Country Club*, but in doing so only supports the Director’s arguments. The City argues that there is a difference between safely maintaining an airport as in this case, and the purpose in *St. Louis Country Club*. Respondent Brief, pp. 22-23 (claiming that the supposed purpose in *St. Louis Country Club* was “the improvement of a guest’s golf swing or potential club membership”). In making this assertion, the City admits that “the

operation of a modern airport is imbued with benefits to the public at large.” *Id.* (emphasis added). “Benefit,” of course, is one of the terms specifically used in the statute and the City’s admission should resolve the case. This is not the only critical admission made by the City. Later in its brief the City states that it has “committed airport properties to their highest and best use, yielding optimum benefits and advantages for itself, its constituency and its tenants.” *Id.* p. 25 (emphasis added). Thus, the City openly admits “benefits and advantages,” two of the specific terms in the statute.

Because the City’s sale of electricity to its airport tenants has the admitted object of “gain, benefit or advantage,” the City was engaged “in the business” of selling electricity to its commercial tenants within the meaning of the statute and the sale is subject to tax.

B. The Supreme Court Has Rejected the City’s Constitutional Argument.

In its final effort to uphold the AHC’s decision, the City argues that imposing a tax on its sale of electricity to commercial airport tenants is unconstitutional under Article III, § 39(10) of the Missouri Constitution. Once again, the City provides no support or authority for its argument, nor does it attempt to distinguish the controlling authority. Indeed, had the City closely read the Supreme Court’s decision in *City of Springfield*, it would have discovered that this argument had already been rejected.

The Court in *City of Springfield* was presented with the question: “Is the sales tax sought to be imposed violative of Mo. Const. Art. III, § 39(10) as being a prohibited ‘tax upon the use, purchase, or acquisition of property paid for out of the funds’ of the City?” *Id.* at 784. Responding to the question, the Court held:

It is clear that there is no constitutional prohibition to the sales tax here imposed. The sales tax is nothing more than a tax on gross receipts from the selling of goods or providing services at retail. It is evident that there is no tax on the use, purchase or acquisition of property paid for from the City funds.

Id. (citing *State ex rel. Arenson v. City of Springfield*, 332 S.W.2d 942 (Mo. banc 1960)). The sales tax in this case is no different. The City is not using, purchasing, or acquiring the electricity from the City’s funds. Instead, its commercial tenants are paying for the electricity. Thus, there can be no violation of Art. III, § 39(10) since the City does not use, purchase or acquire the electricity from its funds. Accordingly, this argument also fails.

CONCLUSION

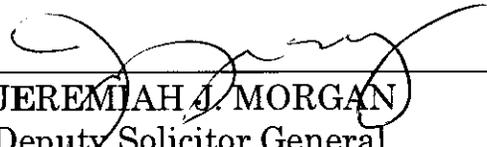
For the reasons stated above, as well as those set forth in the Director’s opening brief, the judgment of the Administrative Hearing Commission should be reversed and judgment entered in favor of the Director of Revenue.

Respectfully submitted,

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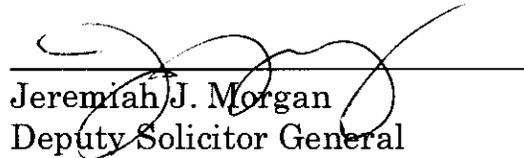
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing brief, and an electronic disk with the brief were mailed, postage prepaid, via United States mail, on October 7, 2009, to:

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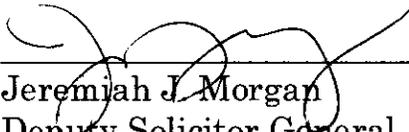


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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 1,631 words.

The undersigned further certifies that the labeled disk simultaneously filed and served with the hard copies of the brief has been scanned for viruses and is virus-free.



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