IN THE
SUPREME COURT OF MISSOURI

SC88943

GREAT SOUTHERN BANK, Appellant,

v.

DIRECTOR OF REVENUE, Respondent.

Appeal from the Administrative Hearing Commission of Missouri

The Honorable John J. Kopp, Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Appellant Great Southern, a banking corporation, purchased a Beechcraft C90B airplane in March 2002, paying Missouri use tax on the purchase price. Appellant's Appendix (App.) at A4. Great Southern later decided to upgrade its airplane.

On June 18, 2003, Great Southern entered into an agreement to sell the Beechcraft to Jet 1, Inc. for $1,025,000. App. A4. Nine days later, Great Southern entered into a "Purchase Agreement" to purchase a 1993 Cessna Citation Jet 9 (C-525) airplane from Scag Engineering, LLC for $1,925,000. App. A4. The date of delivery was "to be determined." *Id.*

On July 9, 2003, Great Southern entered into a series of interlocking agreements with Wachovia Bank, National Association. App. A5-A7.

The closing on Great Southern's sale of the Beechcraft and acquisition of the Cessna occurred on July 16, 2003. Jet 1 paid for the Beechcraft; its payment went first to Insured Aircraft Title, then to Wachovia. Great Southern made its own payment to Insured Aircraft Title, which also flowed to Wachovia. Wachovia then sent $1,925,000 for the Cessna to Scag Engineering. App. A8.

Great Southern paid use taxes on $900,000 – the difference between the sale price of the Beechcraft ($1,025,000) and the purchase price of the Cessna ($1,925,000). *Id.*

After an audit, the Director of Revenue assessed $57,400 in use tax, plus interest, based on the conclusion that Great Southern owed use tax on the full price of the Cessna. App. A8. Great Southern filed a complaint with the Administrative Hearing Commission ("AHC"), challenging that assessment. *Id.* The AHC upheld the assessment, finding that the sale of the Beechcraft to Jet 1 and purchase of the Cessna from Scag Engineering, despite the use of a single intermediary, did not qualify Great Southern for the "taken in trade" exemption. App. A13.

ARGUMENT

This is a use tax case, to be decided pursuant to the laws and subject to the precedents in the sales and use tax arena. It is not an income tax case, so income tax concepts – particularly ones in federal, not state law – are not dispositive. Indeed, they are relevant here only to explain why Great Southern did what it did.

Great Southern claims that this is a trade-in case – *i.e.*, Great Southern implicitly concedes that it would owe use tax on the purchase price of its new airplane, but for the exemption allowed for items "taken in trade," § 144.025, RSMo[1].

The question here is whether an item is "taken in trade" when the person selling that item and buying another contracts for the sale and the purchase with two different persons, and then enlists a third party to act as a go-between, *i.e.*, as the nominal buyer of the old item and seller of the new one. As discussed below, the "taken in trade" exemption – which must be strictly construed – simply does not go that far.

Legal Standards

Great Southern correctly characterizes the standard of review for decisions of the Administrative Hearing Commission. But it errs in

[1] All statutory references are to RSMo 2000.

describing the rule of construction that applies to the purely legal question presented by this appeal.

"Exemptions for taxation are strictly construed against the taxpayer and, as such, it is the burden of the taxpayer claiming the exemption to show that it fits the statutory language exactly." *Ronnoco Coffee Co. v. Director of Revenue*, 185 S.W.3d 676, 677 (Mo. banc 2006); *Midwest Acceptance Corp. v. Director of Revenue*, 183 S.W.3d 579, 580 (Mo. banc 2006). Great Southern does not dispute that conclusion. Instead Great Southern argues that this isn't an exemption case at all – that it is merely a taxation case, and thus that the statute is to be read to favor the taxpayer. But that makes no sense given the structure and content of the law.

At issue is the use tax, which is imposed by § 144.610:

> 1. tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020.
>
> …

That provision establishes the coverage of the use tax: it is imposed on "any article of tangible personal property" purchased outside the state. And were this a case in which the scope of that provision were at issue, Great Southern

would have a good claim to construction in its favor. But the scope of that provision is not at issue here.

Nor is the scope of the provision that sets the use tax rate – *i.e.*, § 144.020, which sets the sales tax rate, imported into the use tax by § 144.610:

> 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:
>
> (1) Upon every retail sale in this state of tangible personal property, including but not limited to motor vehicles, trailers, motorcycles, mopeds, motortricycles, boats and outboard motors, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025; …

That statute levies a four percent sales tax against all purchases – notably including those made by "the exchange of property" rather than money. It, like § 144.610, is a taxation statute.

The provision at issue here, by contrast, is an exemption statute. It can be characterized in three different ways: (1) as a partial exemption from the "tax the value of the property given in exchange" portion of § 144.020.1(1); (2) as a partial exemption from the coverage of "retail sale … of tangible personal property" in § 144.020.1; or (3) as a partial exemption from the use tax under § 144.610. But like the "sale for resale" exemption at issue in *Ronnoco Coffee*, *see* 185 S.W.3d at 679-80, it cannot be fairly characterized as something other than an exemption because it exempts from taxation, in part, something that falls within the sales or use tax.

I. Because the Beechcraft was not taken in trade by the seller of the Cessna, Great Southern cannot invoke the "taken in trade" exemption to the use tax.

a. The "taken in trade" provision

As noted above, Missouri imposes a sales tax on the entire amount paid in any "retail sale … of tangible personal property." § 144.020.1(1). That includes purchases made through the "exchange" of property. *Id.*

Missouri also imposes a use tax on the value, as shown by the full purchase price, of tangible personal property purchased out of state.

§ 144.610.1. Coverage of the sales and the use tax is co-extensive; the statutory exemptions to the sales tax also apply to the use tax, which is designed to go precisely as far as the sales tax and no further. *See Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 169 (Mo. banc 2003).

Here, Great Southern relies on a partial exemption to the sales and use taxes that applies to a particular kind of exchange: when a seller takes in trade for one item another on which the purchaser of the new item had paid (or was exempt from) sales or use tax. The most common use of that exemption, found in § 144.025, is in the purchase of motor vehicles: it relieves the person who trades in one automobile for another from paying sales tax on the full purchase price of the new vehicle. It provides that the purchaser who "trades-in" pays sales tax only on the money they put into the deal, *i.e.*, the difference between the price they pay for new car and the price they get for the old one. The "taken in trade" exemption statute specifically addresses motor vehicles (which does not include aircraft). But it begins by addressing trade-ins generally:

> … [W]here any article on which sales or use tax has been paid, credited, or otherwise satisfied or which was exempted or excluded from sales or use tax is taken in trade as a credit or part payment on the purchase price of the article being sold, the tax imposed by sections 144.020

> and 144.440 shall be computed only on that portion of the purchase price which exceeds the actual allowance made for the article traded in or exchanged, if there is a bill of sale or other record showing the actual allowance made for the article traded in or exchanged. …

§ 144.025.1. For items other than motor vehicles, trailers, boats, outboard motors, and manufactured homes, the exemption is available pursuant to this general statement when a seller takes in trade as a credit or partial payment on the purchase price of the article being sold, an item for which the purchaser paid (or was exempt from) sales or use tax.

Here, the parties stipulated that Great Southern paid use tax on the purchase of the Beechcraft. Filing of Stipulated Facts and Exhibits, ¶6.[2] The dispute is over whether the Beechcraft was "taken in trade" for the Cessna, and thus whether the purchase of the Cessna qualifies for the "taken in trade" exemption.

"Taken in trade" is not defined in the statute. "Trade," of course, has a common meaning: "to give in exchange for another commodity." WEBSTER'S

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[2] The Filing of Stipulated Facts and Exhibits, which we will refer to as "stipulation," is attached to the transcript in the Administrative Record certified by the AHC.

THIRD NEW INTERNATIONAL DICTIONARY (1993) at 2421. "Exchange," in turn, means, "The act of giving or taking one thing in return for another," or "the process of reciprocal transfer of ownership (as between persons)." WEBSTER'S at 792. *See also* BLACK'S LAW DICTIONARY (7th Ed. 1999) (defining "exchange" as "the act of transferring interest, each in consideration for the other" (p. 585)). The key element is that two parties act reciprocally, each giving a thing to the other. That contrasts with a "sale": "transferring … the ownership of property from one person … to another for a price." WEBSTER'S at 2003. *See also* BLACK'S at 1337 ("The transfer of property or title for a price."). A "trade," then, contemplates that the two parties have title to or ownership of their respective items, and exchange or trade them.

That conclusion is reinforced by the legislature's decision not to speak just of a "trade," but of an item being "taken in trade." That phrase fits the concept of the sales tax. Although technically a tax on the purchaser, the obligation to collect and remit the sales tax is placed on the seller. *See* § 144.021. So the sales tax law is phrased to look at the transaction from the seller's point of view. The "taken in trade" exemption fits that mold. It excuses the seller from collecting and remitting sales tax for that portion of the purchase price that was covered by the value of an item that the seller accepts is full or partial payment. Thus if Great Southern had purchased the Cessna from an in-state dealer, and the seller had taken the Beechcraft in

trade, the seller would have been responsible for collecting and remitting sales tax covering only that portion of the price of the Cessna that exceeded the value of the Beechcraft. If the seller did not take the Beechcraft in trade, however, it would have been responsible for collecting and remitting the sales tax on the full amount of the Cessna price.

Moving the transaction out of state may mean that the use tax, rather than the sales tax, applies. And it often changes who is responsible for remitting the tax. The obligation to remit use tax is sometimes placed on the "vendor." §§ 144.635, 144.655.1. But where the transaction does not include a seller who qualifies as a "vendor," *see* § 144.600(14), the use tax places responsibility directly on the purchaser. § 144.655.4. The fact that sometimes the person who gives, rather than the person who takes, in trade is required to remit the tax does not change the analysis. The use tax obligation is defined as the precise parallel of sales tax exemptions; there is no separate statute setting out the scope of or exemptions from the use tax. Thus "taken in trade" must mean for use tax precisely what it means for sales tax: that the seller actually takes property in trade, rather than cash, for a portion of the purchase price.

Though the meaning of "taken in trade" is an issue of first impression in Missouri, the Director's reading of the term is consistent with decisions in other states. Most notably, the Supreme Court of Tennessee addressed the

same words in *Hutton v. Johnson*, 956 S.W.2d 484 (Tenn. 1997) – as applied to facts that are remarkably similar to those here.

Mr. Hutton "owned a twin engine, propeller-drive airplane, a Beech Model F 90." *Id.* at 485. He decided to replace it – and to do so "in a manner that would enable him to defer, for federal income tax purposes, the gain he would realize upon the disposition of the propeller-driven plane." *Id.* To accomplish that, he enlisted the help of a third party, Bell Aviation, Inc., "an aircraft brokerage firm." *Id.* Bell Aviation purchased the Beech from Hutton. *Id.* Hutton contracted to purchase a new plane from Cessna Aircraft Company. *Id.* at 486. He "purported to assign his rights under the Cessna Agreement to Bell Aviation, Inc." *Id.* at 487. Bell Aviation directed that funds from the Beech sale – held in escrow – be transmitted to Cessna and that Cessna deliver title to Hutton. *Id.*

The Tennessee law, like Missouri's, addresses items "taken in trade." Tenn. Code Ann. § 67-6-510(a), quoted, 956 S.W.2d at 488. The Tennessee Supreme Court held that the two sales, despite the common involvement of Bell Aviation, did not constitute a "trade." Rather, the transactions, between Hutton and a buyer and between Hutton and a different seller, were "independent."

Although it applies a statute using a different term, and involves automobiles rather than airplanes, the Colorado Court of Appeals reached

the same conclusion in *Sternal v. Fagan*, 989 P.2d 200 (Colo. Ct. App. 1999). The Colorado statute uses the term found in § 144.020.1(1), "exchange." Unlike § 144.020.1(1), however, the Colorado statute applies only to "exchanged" vehicles. Colo. Rev. Stat. § 39-26-104, quoted, 989 P.2d at 202. Had the taxpayer in *Sternal* transferred title of the old car to the dealer from which he purchased the new one, he would have completed an "exchange" and thus avoided use tax on the portion of the total price covered by what he received for the old car. But instead, he contracted to sell his brother the old Audi upon purchase of a new one, purchased a new one from a dealer, then sold the old one to his brother. *Id.* at 201. The transactions were roughly simultaneous and, for the taxpayer (but not the seller of the new Audi on which tax was owed), connected. The court had to determine whether that was sufficient to constitute an "exchange."

The Colorado Court concluded that it was not. It looked, of course, to the plain language of the statute, finding that "the General Assembly intended for the qualifying 'exchange' to transpire in a single transaction, in which one vehicle is transferred to another person or entity as all or part of the purchase price of another vehicle." The court then referred to the dictionary: "This interpretation is consistent with the common understanding of the word 'exchange,' which is defined as 'the act of giving or taking one thing in return for another,' or 'the act of substituting one thing

for another.'" *Id.* at 202-203, quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (9th Ed. 1991) at 432. The court held that buying a new car from one person and simultaneously selling an old one to another person was not an "exchange" and did not qualify for a partial exemption from sales or use tax.

Both the Tennessee and Colorado courts resolved the legal question based on the plain language of the statute – language that requires a real trade, not merely related or simultaneous transactions. Nothing in the language of the Missouri statute makes room for a different result. The statute requires that the person who provides the new item actually to be the old one in "trade" or "exchange."

Great Southern, of course, reads the statute differently, arguing that what the Director has done is to insert a new requirement – "that the party receiving the item being traded in be the 'seller' of the article being purchased" (App. Br. at 19) – that does not appear in the statute. But that assertion leaps right past the plain meaning of the terms, "taken in trade." In Great Southern's view, "taken in trade" can mean "sold to someone else in a related transaction." Great Southern thus reads, at least in part, "taken" and "trade" out of the law – *i.e.*, it would apply the exemption to transactions where the seller of the new vehicle did not take the old one at all. It is Great Southern, not the Director, who wants to rewrite the law.

In essence, Great Southern wants to expand the application of what follows the general "taken in trade" language in § 144.025.1. The subsequent language is specific to the purchase "of a motor vehicle, trailer, boat, or outboard motor." As to those purchases, the statute does not require that the old item be "taken in trade" for the new one. Rather, it expressly applies any time the "seller purchases or contracts to purchase a subsequent motor vehicle, trailer, boat, or outboard motor within one hundred eighty days before or after the date of the sale of the original article." In other words, it divorces the exemption from the sale and purchase. What Great Southern wants for aircraft is what the General Assembly has given to sellers and purchasers of motor vehicles, trailers, boats, and outboard motors. But Great Southern cannot obtain that benefit without doing violence to the language of the statute.

Again, there is no dispute here that Scag Engineering did not take the Beechcraft in trade for the Cessna, as § 144.025.1 requires for aircraft. Thus, when the term "taken in trade" is properly read, the question here becomes whether Wachovia's involvement gave Great Southern a benefit under the Missouri sales and use tax law that it would not have had without hiring a third party. The answer to that question must be, "No." But before addressing it, we turn briefly to Great Southern's reliance on federal income tax law.

b. Relationship of the federal income tax law

Great Southern inserted Wachovia into the transactions, of course, in order to assure a benefit under the federal income tax law – to invoke the "like-kind exchange" provision, found in 26 U.S.C. § 1031, the same benefit that motivated the Tennessee taxpayer in *Hutton*. We do not claim to know more about federal tax law than does Great Southern. We do not question that the use of Wachovia as a "qualified intermediary" to simultaneously implement the two sales qualified for the federal tax benefit. But that is entirely irrelevant here, for the question is not whether the sales qualified as a single transaction under federal law, but only whether the Beechcraft was actually "taken in trade" for the Cessna as required by Missouri sales and use tax law.

That the federal law permits use of a legal fiction is apparent from language in Great Southern's own brief:

- The qualified intermediary is merely "*considered* to have acquired an ownership interest in the replacement property …";
- "Wachovia was *deemed* to have acquired and transferred the relinquished property and the replacement property"; and

- "'An intermediary is *treated as* acquiring and transferring replacement property'" (quoting Treas. Reg. § 1.1031(k-1(g)(4)(iv)).

App. Br. at 24, 25, (emphasis added). Since the federal law permits use of a legal fiction, it provides no factual or legal basis for Great Southern's claim – just an explanation for its choice.

Moreover, Great Southern cannot and does not argue that the federal tax law or regulations are binding on Missouri, absent some act of the General Assembly making that so. This is not a Supremacy Clause case; nothing in the federal law conflicts with or overrides the Missouri law. Though Missouri has chosen to incorporate federal tax concepts into our income tax, it has not incorporated them into our sales and use tax.

Nonetheless, Great Southern closes its Point II with an unsupported assertion that looks suspiciously like a Supremacy Clause argument: "If by its terms, a transaction must be a property for property ***exchange*** for federal and state income tax purposes, it certainly follows that the transaction at issue is an ***exchange*** of properties (***i.e.***, a 'trade-in') for purposes of the Missouri use tax law." App. Br. at 31 (emphasis in original). That is most certainly not true. Nothing in any law or precedent that Great Southern cites says that the universe of qualifying like-kind exchanges under the income tax law is co-extensive with the universe of "taken in trade" transactions

qualifying under the sales and use tax law. And why should they be? The two bodies of law are entirely distinct, sometimes imposing taxes that arise from or touch upon the same transaction, but taxing very different aspects of that transaction in very different ways. Moreover, if the General Assembly wanted the two to be treated the same, wouldn't it have given some hint – perhaps by using the like-kind exchange language instead of referring to property "taken in trade"?

Those wishing to obtain the benefit of the like-kind exchange provision of the income tax law must structure that transaction in a qualifying way – as both Great Southern and Hutton apparently did. Certainly some transactions that qualify under the like-kind exchange rules also qualify for the trade-in exemption. But Great Southern's blithe assertion is not enough to support the conclusion – an illogical one, given the significant differences between the income and sales and use tax laws – that all do.

c. The role of Wachovia

Great Southern cannot dispute that if "taken in trade" means what it says, the role of Wachovia becomes critical. After all, Great Southern has no way of arguing that Scag Engineering took the Beechcraft in trade for the Cessna; Scag Engineering had no connection to the Beechcraft sale at all. But in Great Southern's view, Wachovia's role was sufficient.

Great Southern details, of course, what Wachovia actually did – *i.e.*, that Wachovia accepted assignment of the sales agreements and handled the monetary transfers. In doing so, Great Southern carefully omits mention of what Wachovia did not do.

That begins with physical possession of the aircraft. There is nothing in the record to suggest that Wachovia ever took possession of or otherwise had physical control over either airplane. The record does not tell us precisely how the airplanes themselves got to and from Great Southern, but the conclusion most consistent with the nature of the Wachovia arrangement and the contracts between Great Southern and Jet1 and Scag Engineering is that the airplanes were either delivered to or picked up by Great Southern. Nothing even hints at a role for Wachovia. Similarly, the record does not tell us who corrected "any and all airworthy deficiencies as [were] noted and mutually agreed upon" following "the pre-purchase inspection" of the Beechcraft. Exh. B to Exh. 1 to Stipulation. But again, there is no apparent physical connection between Wachovia and the airplanes themselves. Indeed it was a Vice President of Great Southern, not someone from Wachovia, who signed indicating that the Cessna had been inspected. App. A5.

Without any evidence that Wachovia had a physical connection to the airplanes themselves, we look next for a legal one. Here, too, evidence of a substantive role for Wachovia is missing. Nothing in the record suggests that

Wachovia ever had or registered title to either airplane. *See* 14 C.F.R. Part 49, "Recording of aircraft titles and security document." The record does not contain a bill of sale to Wachovia or comparable document for either airplane – despite the provision in the sales agreement between Scag Engineering and Great Southern that "Seller's Bill of Sale shall convey title to the aircraft to purchaser …." Exhibit 3 p. W2. And despite the fact that the Federal Aviation Administration regulations contemplate the existence of such documentary evidence of the transfer of title. *See*, *e.g.*, 14 C.F.R. § 47.35(a) (an "[a]ircraft last previously registered in the United States" may be registered by a new owner "who submits with his application an Aircraft Bill of Sale, AC Form 8050-2, signed by the seller or an equivalent conveyance, or other evidence of ownership authorized by Sec. 47.11."). In fact, the agreement between Great Southern and Wachovia contemplates that title may move directly from Great Southern to the purchaser of the Beechcraft and to Great Southern from the seller of the Cessna. Exh. 1 to Stipulation at 4 ("For purposes of this Agreement, a conveyance by Owner [Great Southern] to Wachovia, or by Wachovia to Owner, includes, respectively, a direct conveyance from Owner to Purchaser [Jet1], or from third party seller [Scag Engineering] to Owner, at the direction of, and in satisfaction of the obligations of, Owner or Wachovia, as the case may be.") There is simply nothing in the record to suggest that Wachovia ever had title to or a bill of

sale for either airplane, or that it could have registered either airplane with the Federal Aviation Administration – a prerequisite to their use.

Nor does the record suggest that Wachovia ever, even momentarily, had any of the legal responsibilities that the owner might bear in relation to the purchaser, or assume from the seller. Rather, the record establishes that despite the assignment of the purchase contracts to Wachovia, "Great Southern Bank [remained] solely liable to [Scag Engineering] regarding any and all indemnities, representations, warranties, covenants, and other obligations under the contract[s]." Exh. C and G to Exh. 1 to Stipulation.

What was Wachovia's role, then? For a fee, Wachovia performed a set of precise tasks. Wachovia had no discretion. It could not change its mind and keep the Beechcraft or the Cessna, nor sell the Beechcraft to someone other than Jet1, even for a higher price. Wachovia merely performed the duties assigned in its agreement with Great Southern. In essence, Wachovia acted as Great Southern's "agent."

The term "agent" is not defined in Chapter 144. But in another context, this Court has cited precedent and the Restatement (Agency) to provide guidance regarding the common law meaning of that term:

> … Missouri courts have defined "agent" as "a person authorized by another to act for him, one intrusted with another's business." *State ex rel. Pagliara v. Stussie*, 549

S.W.2d 900, 903 (Mo. App. 1977), quoting Black's Law Dictionary 85 (4th ed. 1968); *State ex rel. Cameron Mutual Ins. Co. v. Reeves*, 727 S.W.2d 916, 918 (Mo. App. 1987). Consistent with this definition, but more comprehensive, is the definition from *§ 1* of the *Restatement (Second) of Agency*. That section states: "[Agency is] the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Under the *Restatement*, essential characteristics of the agency relation are:

1) that an agent holds a power to alter legal relations between the principal and a third party; *Restatement (Second) of Agency § 12*;

2) that an agent is a fiduciary with respect to matters within the scope of the agency; *Restatement (Second) of Agency § 13*;

3) that a principal has the right to control the conduct of the agent with respect to matters entrusted to the agent; *Restatement (Second) of Agency § 14*.

State ex rel. Elson v. Koehr, 856 S.W.2d 57, 60 (Mo. banc 1993). All three of these criteria apply to Wachovia's role here.

The agreement between Wachovia and Great Southern does not, of course, refer to Wachovia as an "agent." But its use of the terms to describe other parties to the transactions demonstrates the limitation on Wachovia's role. The Agreement references an "owner": Great Southern; a "purchaser": Jet1, Inc.; and a "third party seller": Scag Engineering. Exh. 1 to Stipulation at 1, 4. Wachovia, rather than being an "owner," "purchaser," or "seller," was to be "a 'qualified intermediary' for purposes of Treas. Regs. § 1.1031(k)—1(g)(4)." *Id.* at 1. That is not enough, under Missouri sales and use tax law, to place Wachovia in the position of "taking in trade" the Beechcraft.

Great Southern's invocation of *Fall Creek Construction Co. v. Director of Revenue*, 648 S.W.3d 165 (Mo. banc 2003), *see* App. Br. at 28-29, is unavailing. There the court declined to extend its analysis beyond "the four corners of the purchase agreement." 648 S.W.3d at 170. But here, the agreements simply do not go as far as Great Southern claims. They do not assign Wachovia any role as owner, purchaser, or seller – merely a role as Great Southern's agent.

Ronnoco Coffee Co. v. Director of Revenue, 185 S.W.3d 676 (Mo. banc 2006), *see* App. Br. at 27, is inapposite. It is true that there can be a sale

without transfer of full title. But here there was full transfer – just not to Wachovia.

In the end, the key fact is that Wachovia never took the Beechcraft in trade for anything. It merely completed paperwork and managed funds for Great Southern. Here, as in *Hutton*, the sale of the Beechcraft and the purchase of the Cessna were two separate transactions. Though Great Southern sold the Beechcraft and bought the Cessna, no one took the Beechcraft in trade. The purchase agreement form that Great Southern used with Scag Engineering had blanks to be used if there had been a trade-in. But they were left empty (App. A4) – and for a simple reason: the Beechcraft was not traded to Scag Engineering.

II. Because the "taken in trade" exemption applies to the use tax, Missouri is not discriminating against interstate commerce.

Great Southern's second point addresses an alternative basis for the AHC holding – the AHC's conclusion that the "taken in trade" exemption does not apply to the general use tax, only to the use tax imposed pursuant to § 144.440 on motor vehicles purchased out of state. *See* App. A11. Great Southern claims that the AHC's interpretation of the statutes would create a constitutional problem: a violation of the Commerce Clause, U.S. Const. Art. I § 8, by imposing a use tax on out-of-state purchases at a higher rate than

the parallel sales tax on in-state purchases. But the AHC reads the statute contrary to the Director's interpretation and practice, which treats in-state and out-of-state purchases the same.

Key to the AHC's analysis is § 144.440, which imposes a use tax "on new and used motor vehicles, trailers, boats, and outboard motors purchased or acquired for use on the highways or waters of this state which are required to be registered under the laws of the state of Missouri." That tax was imposed in 1939 – at a time when Missouri did not otherwise have a use tax. Its impact was to ensure that taxes on those who used the public roads and waterways were the same regardless of whether their vehicles were purchased here or elsewhere. The AHC correctly points out that § 144.025 specifically refers to § 144.440 (App. A11) – in other words, that the "taken in trade" exemption applies to one who trades in a car to an out-of-state automobile dealer just as it applies to one who trades in a car to a Missouri dealer. And the AHC correctly concludes that the use tax imposed by § 144.440 does not apply to aircraft. App. A11.

That does not mean, however, that § 144.025 does not apply to the Great Southern transaction. That section applies, expressly, not just to § 144.440, but also to taxes imposed by § 144.020 – *i.e.*, to the sales tax. And because it applies to the sales tax, it is imported to the general use tax –

which was imposed by § 144.610 many years after the more limited motor vehicle use tax was imposed by § 144.440.

Thus the Director – as shown by the audit documents and results and in his brief to the AHC – agrees with Great Southern that the purchase of an airplane out-of-state could qualify for the "taken in trade" exemption. But the transaction would have to be one in which the seller of the item actually did take in trade something from the purchaser. And here, again, the seller of the Cessna, Scag Engineering, did not take anything in trade from Great Southern.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing brief were mailed, postage prepaid, via United States mail, on June 9, 2008, to:

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State Solicitor

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 5,809 words.

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

James R. Layton
State Solicitor