

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC88943**

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**GREAT SOUTHERN BANK,  
Appellant,**

**v.**

**DIRECTOR OF REVENUE,  
Respondent.**

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**Petition For Review From The Administrative Hearing Commission,  
The Honorable John J. Kopp, Commissioner**

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT

### 1. Introduction

The dispositive issue in this case is whether Appellant’s Beechcraft aircraft was “taken in trade” in its purchase of the Cessna aircraft. Respondent’s Brief (“Resp. Br.”) at 8. The parties agree that the other requirements of § 144.025, RSMo<sup>1</sup>, are met. The Director of Revenue (the “Director”) also concedes that § 144.025 applies to transactions that are subject to the Missouri use tax. Resp. Br. at 9, 26-27. The dispute in this case thus focuses on whether the Beechcraft that was owned by Appellant was “taken in trade” as a portion of the purchase price of the Cessna acquired by Appellant.

### 2. The Beechcraft was “taken in trade” for the Cessna

The Director concludes that “taken in trade” as used in § 144.025 means that the seller of the item “actually takes property in trade, rather than cash, for a portion of the purchase price.” Resp. Br. at 12. As explained in Appellant’s opening brief, this is exactly what occurred in Appellant’s transaction. It is apparent from the undisputed facts of this case that the Beechcraft was “taken in trade” as a part of the purchase price of the Cessna. Otherwise, Appellant would have owed the full purchase price of the Cessna at the time of the sale. Instead, Appellant paid only the difference in price between the two planes—in other words, it received an “actual allowance” for the Beechcraft, precisely as § 144.025 requires.

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<sup>1</sup> All statutory citations are to the Revised Statutes of Missouri (2000) unless otherwise noted.

The Director does not dispute that Appellant made a payment for the Cessna, which was remitted to Wachovia. Resp. Br. at 3. The Director fails to note the amount of Appellant’s payment, which was \$900,000. *See* Resp. Br. at 3; Appellant’s Ex. 5. The full purchase price of the Cessna was \$1,925,000. Appellant purchased the Cessna by paying only \$900,000 because of the credit it received for the Beechcraft. Under the Exchange Agreement with Wachovia, Appellant was entitled to this credit but was precluded from receiving any cash from its sale. *See* Joint Exhibit 1 at ¶ 4.2 (c). These facts place this transaction squarely within the scope of § 144.025, and demonstrate that Appellant owed Missouri use tax “only on that portion of the purchase price which exceeds the actual allowance made for the article traded in,” that is, \$900,000.

### **3. Wachovia was the “seller” of the Cessna**

The Director asserts that Wachovia did not have possession or full legal title of either aircraft included in the transaction, and for this reason, Wachovia cannot be considered the seller of the aircraft purchased by Appellant and § 144.025 does not apply to this transaction. Resp. Br. at 20-21. The Director’s arguments ignore the plain language of the Missouri sales and use tax statutes which define a “sale” as “**any transfer . . . of the ownership of or title to, tangible personal property**” or “**any transfer, barter or exchange of title or ownership of tangible personal property.**” Sections 144.010.1(10) and 144.605(7). Under this language, the transfer of any ownership interest in property—even temporarily, is considered a sale. *See McDonnell Douglas Corporation v. Director of Revenue*, 945 S.W.2d 437 (Mo. banc 1997). In *McDonnell Douglas Corporation*, this Court concluded that the transfer of “undivided

portions of title” to materials purchased for use in performing government contracts constituted a sale. *Id.* at 441-442. McDonnell Douglas’ contracts provided that title to the property vested in the government, notwithstanding the fact that possession of the property was never transferred to the government. *Id.* at 440. Moreover, in some instances title to the property later re-vested in the company. *Id.* at 441. Nonetheless, this Court ruled that the transfer from the company to the government was a sale. *Id.* Similarly, in *Fall Creek Construction Company v. Director of Revenue*, 109 S.W.3d 165, 170 (Mo. banc 2003), this Court ruled that under the terms of a contract that conveyed a 1/16<sup>th</sup> undivided interest in an aircraft to a company, the company “purchased” an ownership interest in the aircraft for use tax purposes. As these cases demonstrate, a sale may occur for Missouri sales and use tax purposes where there is no transfer of possession or full legal title to the property.

The agreements between the parties in the instant case clearly provided that there would be a “conveyance” of an interest in the Beechcraft to Wachovia, and that in turn, Wachovia would convey an interest in the Cessna to Appellant. *See* Joint Exhibit 1 at ¶ 2.1. Under the Exchange Agreement, Appellant’s rights in the contracts to acquire the Cessna and to sell the Beechcraft were assigned to Wachovia. Joint Exhibit 1 at ¶ 1.1. Jet 1, the ultimate purchaser of the Beechcraft was notified of the assignment of its contract with Appellant, and it consented to the assignment. Joint Exhibit 1, Exhibit C. Likewise, Scag Engineering, LLC, who had contracted to sell the Cessna to Appellant, agreed that Appellant’s interests in the sales contract could be assigned to Wachovia. Joint Exhibit 1, Exhibit F. This transfer of rights to Wachovia, while temporary, was

nonetheless sufficient to give Wachovia an interest in the property that allowed it to be considered the seller of the Cessna for the purposes of the Missouri sales and use tax statutes, including § 144.025. *See McDonnell Douglas Douglas Corporation v. Director of Revenue, supra; Fall Creek Construction Co Company v. Director of Revenue, supra; see also, Treas. Reg. § 1.1031(k)-1(g)(4)(iv)* (explaining that a qualified intermediary is “treated as acquiring and transferred the relinquished property” in a transaction like the one at issue in the instant case). Moreover, there is no dispute that the consideration for the Cessna was paid to Wachovia by Appellant. The Director’s assertion that Wachovia merely “completed paperwork and managed funds” for Appellant ignores the terms of the agreements between the parties, and the facts surrounding this transaction. Resp. Br. at 25. The undisputed facts demonstrate that Wachovia conveyed the Cessna to Appellant in return for the Beechcraft and \$900,000.

The Director cites cases from Colorado and Tennessee in support of its arguments. Unlike the instant case, the Colorado case did not involve a transfer of interests to an intermediary. Instead, it involved two entirely separate sales transactions: (1) the purchase of an automobile from a dealership by a taxpayer; and (2) the sale of another automobile to the taxpayer’s brother-in-law. *Sternal v. Fagan*, 989 P.2d 200 (Colo. App. 1999). This case is clearly inapposite here.

In the Tennessee case cited by the Director, the court did not consider the arguments set forth here. *Hutton v. Johnson*, 956 S.W.2d 484 (Tenn. 1997). The Tennessee court concluded that the sale and subsequent purchase of aircraft in a like kind exchange under I.R.C. § 1031 were two separate transactions that could not be considered

a “series of trades” under the Tennessee statute, nor could they be viewed as a single transaction under the “step transaction doctrine.” *Id.* at 488-489. The court was apparently not asked to consider whether the qualified intermediary accepted one aircraft as partial payment for the other. In addition, the transaction at issue in the Tennessee case did not involve a simultaneous trade of property like the instant case. Instead, the taxpayer sold an aircraft on June 25, 1993, and purchased the replacement property nearly six months later on December 20, 1993. *Id.* at 486-487.

**4. Section 144.025 is subject to strict construction against the State**

Finally, it should be noted that the Director is incorrect in asserting that § 144.025 should be strictly construed against Appellant. Resp. Br. at 6. The Director concedes that § 144.610 is a taxing statute that is subject to construction in favor of Appellant. The Director fails to note, however, that § 144.610 imposes the use tax “in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020.” Thus, § 144.610 incorporates by reference the provisions of § 144.020. Section 144.020, in turn, states that the “rate of tax shall be . . . four percent of the purchase price paid or charged . . . except as otherwise provided in section 144.025,” and thereby incorporates § 144.025 by reference. It follows that the use tax is imposed through the provisions of all three of these statutes: §§ 144.020, 144.610 **and** 144.025. As statutes imposing a tax, all three of these sections are subject to strict construction against the Director. *See Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999) (noting the distinction between an exclusion from tax set out in a taxing statute and an exemption).

## CONCLUSION

Appellant purchased the Cessna by paying Wachovia \$900,000. The full price of the Cessna was \$1,925,000. Appellant was required to pay only \$900,000 in cash to acquire the Cessna because Wachovia also accepted Appellant's Beechcraft in trade. As a result of this trade-in, Appellant was given an "actual allowance" of \$1,025,000, which is not subject to use tax under § 144.025. Consequently, Appellant owed use tax on \$900,000, which it has paid. No additional state or local use tax or associated interest is due in connection with Appellant's purchase of the Cessna. For these reasons, the decision of the Administrative Hearing Commission should be reversed by this Court, and the Director's assessment against Appellant should be abated in full.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on June \_\_\_\_, 2008, two true and correct copies of the foregoing brief, as well as a labeled disk containing the same, were mailed postage prepaid to:

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The undersigned further certifies that the foregoing brief complies with Rule 55.03 and with the limitations contained in Rule 84.06(b) in that it contains 2,042 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix.

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

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Scott R. Riley

