

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. SC93900**

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**SOUTHWESTERN BELL TELEPHONE COMPANY AS SUCCESSOR IN  
INTEREST TO SOUTHWESTERN BELL TEXAS HOLDINGS, INC.,**

**RESPONDENT,**

**v.**

**DIRECTOR OF REVENUE,**

**APPELLANT.**

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**BRIEF OF RESPONDENT**

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## STATEMENT OF FACTS

Respondent Southwestern Bell Telephone Company as Successor in Interest to Southwestern Bell Texas Holdings, Inc. (“Holdings”) is dissatisfied with the accuracy and completeness of the Director’s Statement of Facts, and in particular the Director’s erroneous assertion that Holdings is employing assets in Missouri (Dir. Br. 8). Accordingly, Holdings files this Statement of Facts. Rule 84.04(f).

During the 2003-2005 Missouri franchise tax periods (“Tax Periods”), Holdings owned no real property, inventory or tangible personal property (L.F. 205; App. 4). Rather, Holdings owned intangible equity interests in various entities (L.F. 205; App. 4). All of Holdings’ business decisions were made in Texas where its officers and directors were located (L.F. 205; App. 4). Through these officers and directors, Holdings engaged in no activity in any state other than Texas (L.F. 205; App. 4).

During the Tax Periods:

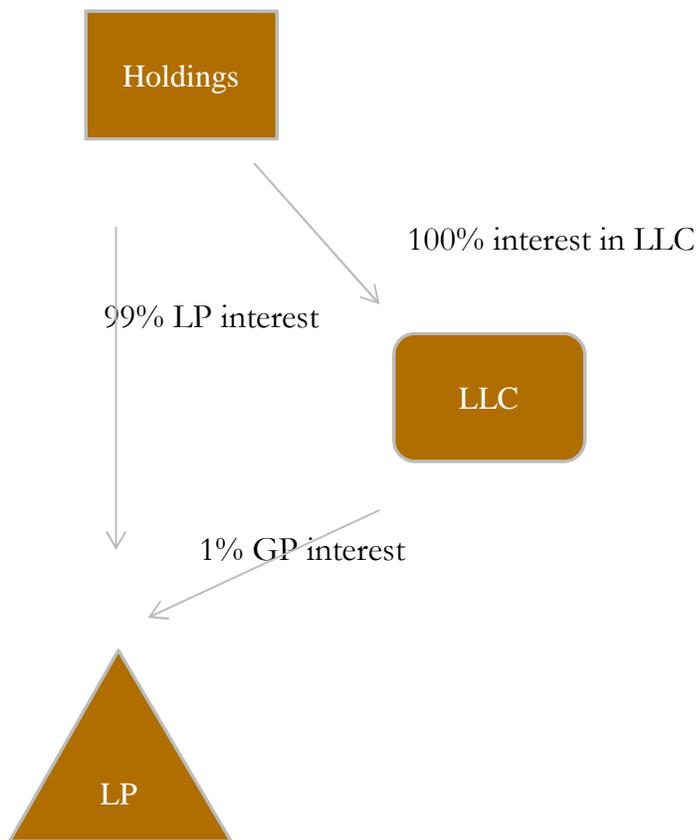
- (1) Holdings did no business in Missouri, had no property or payroll in Missouri, and had no certificate of authority to do business in Missouri;
- (2) Holdings rendered no services to or for any person or entity in Missouri;
- (3) Holdings had no offices, employees, independent contractors, agents or other representatives in Missouri;
- (4) Holdings did not buy, sell or procure any property in Missouri;
- (5) Holdings did not buy, sell or procure any services in Missouri;

- (6) Holdings did not maintain any bank accounts at banks located in Missouri;
- (7) Holdings did not maintain its books or records in Missouri and made no management decisions in Missouri;
- (8) Holdings did not conduct any board meetings in Missouri; and
- (9) Holdings filed no tax returns in Missouri, but was part of a consolidated Missouri income tax return filed by Holdings' parent (L.F. 205-206; App. 4-5).

During the Tax Periods, Holdings held a 99% limited partnership interest in Southwestern Bell Telephone, L.P. ("LP"), a limited partnership (L.F. 206; App. 5). LP provided landline telephone services in a number of states, including Missouri, during the Tax Periods (L.F. 206; App. 5).

The 1% general partner of LP was Southwestern Bell Telephone Texas LLC ("LLC"), a limited liability company (L.F. 206; App. 5). During the Tax Periods, LLC elected to be treated as a disregarded entity for federal income tax purpose (L.F. 206; App. 5).

The relationship between Holdings, LP and LLC can be represented graphically as follows:



While Holdings owned a 99% limited partnership interest in LP, LP's assets were not Holdings' assets (L.F. 206; App. 5). LP's limited partnership agreement provided at all relevant times, "[t]he legal title to its real and personal property or interest therein now or hereafter acquired by the Partnership, shall be owned, held or operated by the Partnership, and no Partner, individually shall have any ownership of such property." (L.F. 206-207; App. 5-6). Likewise, while LLC owned a 1% general partnership interest

in LP, LP's assets were not LLC's assets (L.F. 207; App. 6). Finally, while Holdings owned LLC, Holdings did not own the assets of LLC (L.F. 207; App. 6).

Prior to the Tax Periods and the formation of LP on December 30, 2001, Southwestern Bell Telephone Company ("SWBT"), Southwestern Bell Texas, Inc. and LP sought approval from the Missouri Public Service Commission "to convert SWBT, through a series of transactions ... from a Missouri corporation to a Texas limited partnership." (L.F. 203-204; App. 2-3). Specifically, they stated that the "purpose of this conversion is to achieve an overall tax savings, and "this conversion will have no effect on the tax revenues of the State of Missouri or its political subdivisions in which [SWBT's property is located] ... nor will the restructuring affect the ultimate owners of SWBT, which will continue to be owned by SBC Communications Inc. ("SBC")." (L.F. 204; App. 3). The application also stated that after the conversion, LP would apply for the fictitious name "Southwestern Bell Telephone Company," and the conversion would be "transparent to SWBT's Missouri customers." (L.F. 204; App. 3).

As a result of the conversion of SWBT from a corporation to a limited partnership, the amount of Missouri income tax paid by the consolidated group during the Tax Periods increased, and it increased by more than the amount of Missouri franchise tax assessed by the Director in this case (L.F. 176-177, 183-184). Specifically, the taxable income for the consolidated group increased by approximately \$35 million because Texas franchise tax was no longer due (L.F. 177, 183).

Likewise, as a result of the conversion of SWBT from a corporation to a limited partnership, the amount of property tax due on property employed by LP in Missouri was

higher during the Tax Periods than it would have been without the conversion because the telephone network operating property is centrally assessed by the Missouri State Tax Commission and its value is primarily determined based upon income (L.F. 177, 180). The telephone operation income increased as a result of the conversion due to the absence of Texas franchise tax (L.F. 177, 180).

## ARGUMENT

**I. The Administrative Hearing Commission Correctly Ruled that Section 147.010<sup>1/</sup> Does Not Impose the Missouri Franchise Tax upon a Foreign Corporation That Does Not Operate in Missouri, Has No Property, Payroll or Sales in Missouri, and Whose Only Connection with Missouri is Its Ownership of an Interest, both Directly, and Indirectly through a Limited Liability Company, in a Limited Partnership That Employs Its Assets in Missouri (Response to Point Relied On)**

The issue in this case is simple and straightforward. May the Director impose the Missouri franchise tax upon a foreign corporation that does not do business in Missouri, does not employ assets in Missouri and whose only connection with Missouri is its ownership of a passive interest, both directly and indirectly, in a limited partnership that does business in Missouri? The Administrative Hearing Commission reviewed the language of the applicable statutes and regulations and concluded that the Director may not do so.

Nonetheless, the Director continues to assert his right to substitute his policy judgment for that of the General Assembly in attempting to establish the right to tax foreign corporations like Holdings, and invites this Court to do likewise. However, in reaching this conclusion, the Director would require this Court to disregard: (1) the

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

applicable statutes and the Director's own regulations governing administration of the Missouri franchise tax; (2) the rule that taxing statutes are to be strictly construed against the Director; and (3) the facts of the case and the form of Holdings and related business entities.

**A. The Director's Reliance Upon the "Aggregate Theory of Partnership" Is a Red Herring That Does Not Alter the Fact that Holdings Does Not Employ Assets in Missouri**

The Director takes two approaches in support of his position. First, the Director surprisingly asserts, "there is no dispute that 'property and assets' are being employed ... by a foreign corporation ... to operate in Missouri." (Dir. Br. 8). This assertion is patently false. As set forth in the Statement of Facts, Holdings did not employ assets of any kind in any state other than Texas, and therefore was not subject to the Missouri franchise tax. If it were undisputed that Holdings employed assets in Missouri, the Commission would not have ruled in Holdings' favor in the first place obviating the need for the remainder of the Director's brief. That the brief continued after page 8 demonstrates that the Director does not believe this assertion himself.

Second, the Director attempts to avoid the fact that Holdings does not own (and does not employ) the assets of LP or LLC for purposes of the Missouri franchise tax by arguing a red herring, that Missouri allegedly adheres to the "common law aggregate theory of partnership." This assertion is not correct, and moreover, even if it were, it would not alter the fact that Holdings does not own or use the assets of LP.

The Director begins by disingenuously stating “[a]s the AHC observed, ‘Missouri adheres to the common law ‘aggregate theory of partnership’” (Dir. Br. 11). In fact, the Commission was describing the Director’s arguments below:

The primary basis for the *Director’s argument* that Petitioner should be taxed on the value of LP’s assets is that Missouri adheres to the common law “aggregate theory of partnership[.]”<sup>2/</sup> (L.F. 206; App. 15).

Further, the Commission expressly noted on the same page, “We have not found a Missouri case that discusses the aggregate theory of partnership in relationship to tax laws.” (L.F. 206; App. 15). Indeed, the only issue upon which the Director has presented authorities suggesting that Missouri has adopted the aggregate theory of partnership is as to whether a general partnership may sue or be sued in its own name. *See Unifund CCR Partners v. Kinnamon*, 384 S.W.3d 703, 705-06 (Mo. App. 2012); *N.E. & R. Partnership v. Stone*, 745 S.W.2d 266 (Mo. App. 1988) (noting that the rule that a partnership has no authority to sue in its own name is in fact subject to change by statute).

Moreover, the Director’s citation of *Acme Royalty Company v. Director of Revenue*, 96 S.W.3d 72 (Mo. banc 2002) actually undercuts his position that Missouri courts have allowed the business activities of one entity to be attributed to another entity, even where the entities were under common ownership. As recognized by the Commission’s decision in *Acme*, the Director, as in this case, attempted to apply attributional nexus to impose Missouri income tax on an entity that did no business in

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<sup>2/</sup> Emphasis added here and throughout unless otherwise noted.

Missouri. In that case, Acme Royalty Company had an exclusive licensing contract with Acme Brick Company (“ABC”), which produced bricks in Missouri and elsewhere and paid a trademark royalty to the purported taxpayer that did no business in Missouri. For some periods, ABC paid the royalty directly to the purported taxpayer, and in other years it paid the royalty to a limited partnership in which the purported taxpayer was a 99% limited partner.

In reaching its conclusion that the purported taxpayer was not subject to Missouri income tax, this Court did not distinguish between the payments to the corporation and to the limited partnership. The Director asserts that the failure to distinguish between the two supports his arguments to disregard the separate nature of a partnership from a corporation owning an interest in that partnership. Of course it does no such thing. As set forth succinctly by the Commission:

But [the Director] ignores the larger point: the fact that in *Acme Royalty*, the court rejected an attribution theory similar to the one he advocates in this case, to find that an out-of-state company whose income was largely generated in Missouri through an affiliated company was not subject to tax on that income. (L.F. 208; App. 17).

In short, this Court merely held that the taxpayer did no business in Missouri and, therefore, was not subject to Missouri income tax.<sup>3/</sup> The fact that the royalty was later

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<sup>3/</sup> As a result, the Court was not required to address the purported taxpayer’s arguments that the Director’s attempted imposition of tax upon an entity that had

paid to a limited partnership rather than the purported taxpayer meant only that the Director sought to disregard the existence of two entities in *Acme*.

In any event, even if Missouri courts had adopted the common law aggregate theory of partnership, such “adoption” would be irrelevant because Missouri statutes clearly provide that partners do not own any interest in specific partnership property (and therefore cannot employ such assets in business within the meaning of the Missouri franchise tax). *See* Section 1.010 (stating that the common law is overridden by statutes enacted by the General Assembly).

Specifically, Section 358.250.1 provides that a partner in a partnership is a co-owner with his partners of specific partnership property holding as a tenant in partnership. The incidents of tenancy in partnership set forth in Section 358.250.2 (*e.g.*, that a partner has no right to possess specific partnership property, no right to assign specific partnership property, and that specific partnership property is not subject to attachment or execution except on a claim against the partnership, etc.) demonstrate that a tenant in partnership has no right to specific assets owned by the partnership. Indeed, the Director’s citation of *Wills v. Wills*, 750 S.W.2d 567 (Mo. App. 1988) undercuts,

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no contact with Missouri other than the ownership of an interest in an entity doing business with Missouri violated the Due Process and Commerce Clauses of the United States Constitution. For the same reasons argued by the taxpayer in *Acme*, the imposition of Missouri franchise tax upon Holdings would likewise violate the Due Process and Commerce Clauses of the United States Constitution.

rather than supports, his argument. In *Wills*, the court cited, with approval, the Official Comment to the Uniform Partnership Act, adopted by Missouri in Chapter 385, as follows:

One of the present difficulties in the administration of the law of partnership arises out of the difficulty of determining the exact nature of the rights of a partner in specific partnership property. That the partners are co-owners of partnership property is clear, but the legal incidents attached to the right of each partner as co-owner are not clear.

When the English courts in the early common law began to discuss the legal incidents of partners in partnership property, the concepts of joint tenancy and tenants in common were familiar. But these tenancies were not precisely applicable to partnerships. The attempt of the courts to escape inequitable results of applying the legal incidents of these tenancies to business partnerships produced “very great confusion.” The Uniform Partnership Law therefore ended this confusion by creating a new type of tenancy—tenancy in partnership. Under this tenancy, a partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership and his interest is his share of the profits and surplus.... ***In short, a partner owns no personal specific interest in any specific property of the partnership***, the partnership owns the property and the partner’s interest is an undivided interest as co-tenant in all partnership property as a

‘tenant in partnership.’ *Id.* at 572-73, *citing* The Official Comment to the Uniform Partnership Act, 6 U.L.A. 327.

Thus, it is not apparent, as the Director alleges (without any supporting authority) on page 11 of his brief, that a general partner employs the assets of a partnership such that the partner is subject to Missouri franchise tax. As set forth above, even if Missouri had adopted the aggregate theory of partnership, which it has not, Section 358.250 demonstrates that partners have no right to own or employ specific partnership property. *See also Matter of Hunt*, 154 B.R. 1016 (M.D. Ga. 1993) (applying Missouri statutes to conclude that a transfer of partnership property by a partnership having a bankrupt partner could not be set aside because the bankrupt partner had no specific right to any specific partnership property).

The statutes are likewise clear that LP’s general partner, LLC, is separate from Holdings. Section 347.187.2 provides that an LLC will be treated as a disregarded entity *solely* for Missouri income tax, sales and use tax and employment tax matters (Chapters 143, 144 and 288). Therefore, LLC shall not be disregarded for purposes of the Missouri franchise tax (Chapter 147). Likewise, the property of LLC is not the property of its member, Holdings. Section 347.061.1 provides that “[p]roperty transferred to or otherwise acquired by a limited liability company becomes the property of the limited liability company. A member has no interest in specific limited liability company property.” Thus, LP’s property cannot be attributed to its partner, LLC, much less to Holdings as the Director asserts.

Consequently, Holdings did not (and does not) have any specific interest in any property held by LP. As a result, Holdings did not (and could not) employ LP's assets in Missouri within the meaning of Section 147.010. For this reason alone, the Court must affirm the decision of the Commission.

**B. The Director's Position in this Case is Contrary to His Own Franchise Tax Regulation<sup>4/</sup>**

The Director's citation of regulation 12 CSR 10-9.200(2)(c)(C) does not support his position that he may disregard the separate existences of LP and LLC. It provides:

(C) Assets invested in or advanced to subsidiary corporations (line 2b) are considered to be employed by the subsidiary. Any portion of a corporation's surplus so invested may be deducted from its base on line 2b of the franchise tax form, with the following conditions: a) The corporation claiming the deduction must own more than fifty (50%) of the voting stock of the subsidiary, and b) The subsidiary must be a corporation.

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<sup>4/</sup> Neither Holdings nor the Director have asserted that the franchise tax regulations promulgated by the Secretary of State were not a proper regulatory exercise by the Secretary of State nor that the franchise tax regulations are inconsistent with Section 147.010. Consequently, the franchise tax regulations are entitled to a presumption of validity under *Union Electric Company v. Director of Revenue*, 425 S.W.3d 118, 124 (Mo. banc 2014).

The regulation provides that with respect to a corporation liable for Missouri franchise tax, “assets invested in or advanced to” or from a *subsidiary corporation* are treated as employed by a subsidiary corporation. The regulation expressly excludes non-corporations (*i.e.*, LLCs and partnerships) from this attribution of assets (“The subsidiary must be a corporation.”). Thus, contrary to the Director’s position in this case, the regulation: (1) specifically acknowledges that “subsidiaries” can include legal entities other than corporations (such as LLCs or partnerships); and (2) assets of such legal entities are employed by those entities and not their owners. The Director’s position in this case effectively rewrites this regulation,<sup>5/</sup> and the applicable tax imposition statute, to impose tax on a limited partnership. *See also* 12 CSR 10-9.150(1)(E) (providing that for Missouri franchise tax purposes, “the term ‘foreign corporation’ does not include: an unincorporated sole proprietorship, a partnership, a limited partnership, a limited liability company, a trust, a business trust or a municipal corporation”).

The Director argues the regulation’s omission of non-corporate entities is “logical” (Dir. Br. 13-14), but that argument is misplaced. Specifically, the Director cites cases that stand for the unremarkable proposition that the Missouri and Texas franchise taxes are imposed for the privilege of doing business, which includes the right to the protection

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<sup>5/</sup> In this case, the Director is not only attempting to rewrite his own regulation, he is attempting to rewrite a regulation originally promulgated by the Secretary of State during the period in which the Secretary of State possessed enforcement authority of the Missouri franchise tax .

of local law. *See TSI Holding Company v. Director of Revenue*, 118 S.W.3d 597 (Mo. banc 2003); *Bullock v. National Bancshares Corporation*, 584 S.W.2d 268 (Tex. 1979). This fact does not allow the Director to disregard the separate nature of non-corporate entities, and there is no “logic” to the Director’s argument that they provide support for his position.

**C. The Tenancy in Partnership Interests Are Not Employed in Business in Missouri**

The Director’s brief spends several pages citing cases reflecting that a tenancy in partnership constitutes an “asset” for numerous purposes (Dir. Br. 16-18). Holdings does not dispute that its tenancy in partnership is an asset. A foreign corporation is only subject to Missouri franchise tax if it employs its assets in Missouri. The Director skips this step, merely asserting “[b]ecause the partnership is Holdings’ asset, Holdings is utilizing its ‘assets or property’ in the State, thus making it subject to the franchise tax even if partnership aggregation principles did not apply because Holdings and Southwestern Bell chose to use a limited rather than a general partnership.” (Dir. Br. 18). There is no authority for the proposition that ownership of an interest in an entity which employs its separate assets in Missouri constitutes employment of an asset in Missouri by the passive owner; and the Director has cited none. Given that the standard of review, as acknowledged by the Director (Dir. Br. 5) requires construction of Section 147.010 strictly in favor of Holdings and against the Director, the Director’s unsupported argument must be rejected. *See also Leavell v. Blades*, 237 Mo. 695, 700, 141 S.W. 893,

894 (1911) (“When the tax gatherer puts his finger on the citizen, he must also put his finger on the law permitting it.”).

Furthermore, a recent decision of the Louisiana Court of Appeals, *Utelcom, Inc. and Ucom, Inc. v. Bridges*, 77 So.3d 39 (La. App. 2001), rejected the Director’s arguments in a case under the Louisiana franchise statute, LSA-R.S. 47:601, which is the same as Section 147.010 in all material respects, and is provided below in relevant part:

A. Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or ***actually doing business in this state, or owning or using any part or all of its capital, plant, or any other property in this state***, subject to compliance with all other provisions of [1 Cir. 6] law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of \$3.00 for each \$1,000.00 or major fraction thereof ***on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided***; the minimum tax shall not be less than \$10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term “doing business” as used herein shall mean and include each and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature

of such organizations, as well as, the buying, selling, or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within this state.

(3) The owning or using any part or all of its capital, plant, or other property in this state in a corporate capacity.

B. It is the purpose of this Section to require the payment of this tax to the state of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges, and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.

C. (1) As used herein the term 'domestic corporation' shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights, or immunities not possessed by individuals or partnerships.

(2) The term 'foreign corporation' shall mean and include all such business organizations as hereinbefore described in this Paragraph which are organized under the laws of any other state, territory or district, or foreign country.

In *Utelcom*, the two corporate taxpayers were affiliated with Sprint Corporation. The taxpayers owned limited partnership interests in three limited partnerships that provided telephone services in Louisiana and elsewhere. Like Holdings in Missouri, the two taxpayers did no business in Louisiana. As the Director has here, the Louisiana Secretary of Revenue sought to attribute the activities of the partnerships to the corporations in order to impose franchise tax. The Louisiana court directly rejected this claim, as set forth below:

The Department emphasizes the fact that the companies are wholly-owned subsidiaries of Sprint Corporation and that the companies, along with US Telecom, Sprint Communications LP's general partner, acted in unison and with a common purpose, controlled by their common parent. According to the Department, it is significant for franchise tax purposes that Sprint Corporation chose to carry out its telecommunications business in Louisiana through Sprint Communications LP and that it chose to direct that partnership through the companies and US Telecom, which were wholly-owned subsidiaries.

The Department does not provide any examples of how Sprint Corporation directed the activities of Sprint Communications LP or of the companies, other than to suggest that they were united in their purpose. However, 'unity of purpose' does not appear anywhere as an incident of taxation in LSA-R.S. 47:601(A). Furthermore, Sprint Corporation, US Telecom, Sprint Communications LP, and the companies are all separate

juridical entities under the law. *The Department has provided no Louisiana codal, statutory, or jurisprudential authority to explain how the actions of these other entities are to be attributed to the companies, and nothing in LSA-R.S. 47:601 authorizes any such attribution.*

*The Department also contends that the actions of US Telecom, as the general partner for Sprint Communications LP, should be attributable to the companies, because US Telecom carried out its actions on behalf of all partners.* Thus, it appears that the Department is contending that US Telecom acted as the agent for the companies. This argument has no basis in the law. *As the only general partner, US Telecom has the authority to bind the partnership, but it has no authority to act as the agent for the limited partners, namely the companies.*

Accordingly, the Department's argument that US Telecom's actions can be attributed to the companies is without merit.

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*Under the provisions of LSA-R.S. 47:601(A)(3), the franchise tax is imposed only on a corporation 'owning or using any part or all of its capital, plant, or other property in [Louisiana] in a corporate capacity.'*

*No mention is made of the use of capital through a partnership or in any other indirect capacity.* Indeed, LSA-R.S. 47:601(B) states that the purpose of the franchise tax is to require the payment of the tax by both foreign and domestic corporations 'for the enjoyment, under the protection

of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation.’ *Id.* at 49 (internal citations omitted).

The Director seeks to do exactly what the Louisiana Secretary of Revenue sought to do, namely to impose the franchise tax upon a foreign corporation based solely on its ownership interest in a limited partnership that did business in the State. Section 147.010, just like its Louisiana counterpart, simply does not impose the franchise tax on a limited partnership, nor does it impose the tax on a partner of a limited partnership by virtue of its interest in the limited partnership. Consequently, this Court must affirm the Commission’s decision.

**D. Operation of a Business Through a Partnership Rather than a Corporation is Not a Tax “Loophole” for this Court to Close**

The underlying theme of the Director’s brief is that a decision by this Court applying the Missouri franchise tax as written would improperly reduce the Missouri treasury such that this Court should legislate from the bench. *See, e.g.*, Dir. Br. 8-9 (“Having chosen to use a partnership rather than a corporate form for its subsidiary, Holdings has not created a barrier between it and the assets it uses in Missouri that is sufficient to avoid the franchise tax.”); Dir. Br. 10 (“Had Holdings or its corporate predecessor continued to operate in Missouri without the use of subsidiary partnerships, it would have continued paying substantial Missouri franchise taxes.”); Dir. Br. 12 (“In other words, the very same business that the corporation was operating in Missouri directly is still being operated by the corporation created unilaterally (and presumably can

abolish unilaterally—and may do so once the Missouri franchise tax has expired ....”);<sup>6/</sup> Dir. Br. 16 (“Ultimately, there is no way to read the franchise tax statute to suggest that the General Assembly intended to give corporations what the AHC thinks corporations have: the unfettered ability to unilaterally exempt themselves from the franchise tax by moving their assets into wholly-owned and controlled partnerships.”).

The Director’s consistently repeated concerns in this regard are misplaced for at least two reasons. First, to the extent the Director believes that limiting the Missouri franchise tax to corporations employing their assets in Missouri constitutes a “loophole” with respect to other forms of entity, it is clear such concerns should be addressed to the General Assembly rather than this Court. In this regard, this Court’s decision in *Alpha One Properties, Inc. v. State Tax Commission*, 887 S.W.2d 390 (Mo. banc 1994) is instructive. In *Alpha One*, numerous taxing authorities sought to impose property taxes at the commercial rate upon operators of apartment complexes who had filed condominium declarations pursuant to statute. In denying the ability of the taxing authorities to impose the tax, this Court stated:

Respondents also contend that it would be unreasonable to allow taxpayers to avoid having apartment buildings assessed at the commercial rate merely

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<sup>6/</sup> As noted in the Statement of Facts, the conversion of SWBT from a corporation to a limited partnership was consummated to minimize Texas franchise tax. Consequently, the sunset of the Missouri franchise tax is irrelevant to the structure of Holdings, LP and LLC.

by filing condominium declarations pursuant to § 448.2-101.1. While the argument is not without merit, this Court must presume that the legislature did not intend to pass an absurd law.... The possibility that “clever apartment developers” such as the taxpayers in the present case may obtain residential classification of their property by dividing complexes into condominiums does not require a different result. If the assessment system has “loopholes,” as respondents allege, this Court cannot judicially legislate them away, but rather, must presume either that the legislature so intended or, if not, that it is the function of the legislature, not the courts, to look for abuses and evasions of the governing principle and to take action if deemed appropriate.<sup>7/</sup> (citations omitted).

Moreover, even if it were appropriate for this Court to “look for abuses and evasions of the governing principle and to take action if deemed appropriate,” in this case the treatment of Holdings, LP and LLC as separate entities has *increased* the total tax revenue to Missouri. As noted in the Statement of Facts, as a result of the conversion of SWBT from a corporation to a limited partnership, the amount of Missouri income tax paid by the consolidated group during the Tax Periods increased by more than the amount of Missouri franchise tax assessed by the Director in this case. Because \$35 million of Texas franchise tax was no longer due, the Missouri income tax deduction for income

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<sup>7/</sup> In fact, the General Assembly amended the statute at issue in *Alpha One* in the following year.

taxes paid to other states was likewise reduced, resulting in a higher Missouri income tax burden (L.F. 177, 183). For the same reason, the amount of property tax due on property LP employed in Missouri was higher during the Tax Periods than it would have been without the conversion. That is because the telephone network operating property is centrally assessed by the Missouri State Tax Commission and its value is primarily determined based upon income, which increased during the Tax Periods due to the absence of paying the Texas franchise tax (L.F. 177, 180).

The Director has been happy to receive the increased income tax and have local jurisdictions collect higher property tax resulting from the respect of the separate entities by the parties and the Texas Comptroller's Office. Effectively, the Director asks this Court to permit him to regard (in the case of income and property taxes) or disregard (for franchise tax purposes) the form of entities for Missouri tax purposes based upon the Director's whim or discretion (undoubtedly to be exercised to maximize State revenues). Even if the Court's duties included a duty to "look for abuses and evasions of the governing principle and to take action if deemed appropriate," it should not accede to the Director's request to have his cake and eat it too.

### **CONCLUSION**

For all of the foregoing reasons, Holdings is not subject to Missouri franchise tax under Section 147.010, and the Director's assessment is improper. The decision of the Commission should be affirmed.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE AND COMPLIANCE**

I hereby certify that the foregoing was electronically mailed to James R. Layton, Missouri Attorney General's Office, Supreme Court Building via [James.Layton@ago.mo.gov](mailto:James.Layton@ago.mo.gov) on July 22, 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 5,964 words.

/s/ Edward F. Downey