

Summary of SC90714, *City of Kansas City, Missouri Aviation Department v. Director of Revenue*

Review of an administrative hearing commission decision

Argued and submitted May 4, 2010; opinion issued June 29, 2010

Attorneys: The director was represented by Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321, and the city was represented by Mark W. Comley of Newman, Comley & Ruth PC in Jefferson City, (573) 634-2266, and Melody L. Cockrell of the city of Kansas City, (816) 243-3037.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The director of revenue seeks review of an administrative hearing commission decision that a city's sales of electricity to tenants and subtenants at its downtown airport are not subject to sales tax. In a unanimous decision written by Judge Michael A. Wolff, the Supreme Court of Missouri reverses the commission's decision and enters judgment in favor of the director. The city is engaged in the business of selling electricity to its tenants and subtenants and, therefore, is required to pay sales taxes on those sales pursuant to Missouri's revenue laws.

Facts: Kansas City owns and, through its aviation department, manages the downtown airport. It leases airport facilities to a variety of tenants, some of whom sublease some of their leased space. Two substations provide electricity to the airport facilities. At issue here is electricity provided by Kansas City Power & Light, which bills the city about 6 cents per kilowatt hour. The city then bills each tenant and subtenant about 9 cents per kilowatt hour. The city does not profit from this additional 3 cents per kilowatt hour, which apparently is not sufficient to cover the city's expenses in providing electricity to its tenants. Before August 2007, the city reported the amounts it collected from its metered tenants for their electrical usage as taxable. Beginning in August 2007, however, the city stopped paying sales tax returns for this electrical usage leading the director of revenue to assess sales taxes to Kansas City for August through October 2007. The amounts assessed – totaling more than \$4,000 – were estimated based on the city's previous tax returns. Kansas City appealed the director's assessments to the administrative hearing commission, which found that the city was not subject to sales tax on its provision of electricity to these tenants because it was not "in the business" of selling electricity. The director seeks review of the commission's decision.

REVERSED.

Court en banc holds: (1) The commission erred in finding Kansas City's provision of electricity to its airport tenants is not "in the business" of selling electricity and, therefore, is not subject to sales tax. Section 144.020, RSMo 2000, levies and imposes a tax on all sellers engaging in the business of selling tangible personal property or rendering a taxable service at retail in Missouri. Under section 144.020.1(10)(b), a "sale at retail" includes the sale of electricity and electrical current. Section 144.010.1(2) defines "business" to include any activity engaged in with the object of gain, benefit or advantage, either direct or indirect. To be engaged in "business," the

taxpayer need not have a purpose of maximizing revenue or deriving income, nor must the taxpayer recover a profit or even break even. Here, the city receives an indirect benefit from providing electricity to its tenants and subtenants because the use of the electricity furthers the city's governmental interest in leasing its airport facilities. As such, it is engaged in a "business" under section 144.020. It is immaterial that the city's provision of electricity is part of its charter-mandated ownership and management of an airport; it chooses to buy electricity from KCP&L and then sell the electricity to its tenants and subtenants so they may enjoy their leaseholds fully.

(2) The commission properly found the director's tax assessment here is on the city's sales of electricity to its tenants and not on the city's purchases of electricity from KCP&L. Because there is no tax here on the city's use, purchase or acquisition of property paid for from city funds, there is no violation of article III, section 39(10) of the Missouri Constitution.