

Summary of SC93771, *Alberici Constructors Inc. v. Director of Revenue*

Petition for review from the administrative hearing commission, Commissioner Marvin O. Teer Jr.

Argued and submitted September 2, 2014; opinion issued January 13, 2015

Attorneys: Alberici was represented by Edward F. Downey and Carol L. Iles of Bryan Cave LLC in Jefferson City, (573) 556-6622; and the director was represented by Deputy Solicitor General Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321.

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: A construction company seeks review of the administrative hearing commission's decision that it does not qualify for an exemption from use taxes for rentals of industrial cranes and a welder and for delivery of the cranes. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the commission's decision. Substantial evidence supports the commission's decision. The term "materials" in the statute does not include machinery such as cranes and welders. Additionally, evidence supports the commission's conclusion that the parties intended the delivery service to be part of the crane rental, subjecting the delivery charge to use tax.

Facts: Under a joint venture agreement with Holcim (US) Inc., Alberici Constructors Inc. was responsible for installing and constructing the steel supports and cement manufacturing equipment provided by Holcim. To install and construct the equipment, Alberici rented five massive industrial cranes from three out-of-state vendors. Each rental agreement described the cranes as "equipment." Alberici also rented a welder; this invoice was styled "machine rentals." Alberici paid more than \$440,000 to rent the cranes and welder. Included in this cost was a \$15,000 charge Alberici paid separately to Bulldog Erectors Inc. to transport a crane Alberici rented from Bulldog to the manufacturing site. Alberici paid nearly \$18,600 in Missouri and local use taxes for the period March 2008 through March 2009 on the rentals and delivery charge. In May 2010, Holcim executed an exemption certificate for rental cranes used solely for installing and constructing manufacturing machinery and equipment. Later that month, Alberici relied on this certificate to seek a use tax refund for the nearly \$18,600 in use taxes paid on the rentals and delivery charge. The director of revenue denied the request, and Alberici sought review from the administrative hearing commission. The commission affirmed the director's decision, finding that large industrial cranes and welders are not "materials" exempt from use taxes and that Alberici and Bulldog intended at the time of contracting that Bulldog would provide the delivery service as part of the crane rental. Alberici now seeks this Court's review.

AFFIRMED.

Court en banc holds: (1) Because cranes and welders are not "materials" under section 144.030.2(5), RSMo, Alberici is not entitled to an exemption. Although section 144.030 does not define "materials," the dictionary defines it as including "apparatus ... necessary for doing or making something." Although the dictionary further defines "apparatus" to include machines, the

rental agreements refer to the cranes and welder as “equipment” or “machines,” and both Alberici and the director agree they are “machines,” they nonetheless are not what the legislature intended by “materials” in section 144.030. The legislature uses the term “materials” – not “machinery” – multiple times in section 144.030.2(5), the legislature intended for “materials” to mean something different from “machinery.” In contrast, another subdivision of the statute exempts both “materials” and “machinery.” If the legislature meant for “materials” to include “machinery,” its use of both terms in the other subdivision would be unnecessary. The phrase in section 144.030.2(5) at issue here provides exemption for “parts and the materials and supplies solely required for the installation or construction of such machinery and equipment.” The nature of this phrase conflicts with the nature of machinery such as cranes and welders.

(2) Because the delivery service was part of the crane rental, the delivery charge was subject to use tax. Taxability does not depend on whether the parties intended the charge for the service to be part of the sales price; taxability depends on whether the parties intended the provision of the service to be part of the sales transaction. The legislature intended the charge for the service to be taxable if the service is part of the sale. Determining the parties’ intention is a primary factor in determining whether a delivery charge is part of the sale transaction. Substantial and competent evidence supports the commission’s finding that the parties did not intend the delivery service to be separate from the crane rental. Alberici did not present any evidence that the parties actually negotiated the delivery service separately from the crane rental or otherwise intended the service to be separate. Rather, the \$15,000 charge for the delivery service was included in the preprinted language on the rental agreement between Alberici and Bulldog, and within 16 days after the date of the agreement, Bulldog delivered the crane and Alberici paid the \$15,000 charge.