



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**CITY OF KANSAS CITY, MISSOURI** )  
**AVIATION DEPARTMENT,** )  
**Respondent,** )  
)  
**v.** ) **WD71019**  
)  
**DIRECTOR OF REVENUE,** ) **FILED: February 9, 2010**  
**Appellant.** )

**Appeal from the Administrative Hearing Commission**

**Before Division One: Lisa White Hardwick, P.J., and James M. Smart, Jr. and  
and Alok Ahuja, JJ.**

The Director of Revenue appeals from a decision of the Administrative Hearing Commission which found that the Respondent City of Kansas City, Missouri Aviation Department “is not liable for sales tax on electricity provided to its lessees,” based on the Commission’s conclusion that “the City is not engaged in the business of selling electricity” within the meaning of §§ 144.010 and 144.020.<sup>1</sup> We conclude that resolution of this appeal requires construction of the State’s revenue laws, which is within the exclusive appellate jurisdiction of the Missouri Supreme Court under article V, § 3 of the Missouri Constitution. We accordingly order the case to be transferred to the Supreme Court. Mo. Const. art. V, § 11.

---

<sup>1</sup> All statutory cites are to RSMo 2000 and Cum. Supp. 2009, unless otherwise indicated.

## **Factual Background**

The relevant facts are largely undisputed. Pursuant to § 406 of its Charter, the City owns, and through its Aviation Department manages, the Charles B. Wheeler Downtown Airport. It leases facilities at the Airport to a variety of tenants, at least one of whom, Executive Beechcraft, sub-leases some of its leased space.

The Airport is served with electricity by two substations. One substation, located on Richards Road, is owned and maintained by the City and Kansas City Power & Light Company (“KCP&L”). Power from this substation energizes a high-voltage distribution line owned and maintained by the City, which primarily serves buildings on the Airport’s west side. KCP&L provides the City with electricity at the substation, and bills the City for the electricity supplied. Buildings on the west side of the Airport are equipped with meters, owned and maintained by the City, that measure electricity usage. Tenants in those buildings are billed for electricity by the City on a monthly basis, based on their metered electricity usage. Buildings on the east side of the Airport are served by a distribution line extending from the Broadway Bridge substation; both the distribution line and substation are owned by KCP&L. Executive Beechcraft, which leases hangars 2 and 3 on the east side of the Airport, is billed by the City on a monthly basis based on its metered electricity usage, like the tenants on the west side. Because the electricity usage of tenants in the terminal building on the Airport’s east side is not individually metered, however, they are not separately billed for electricity; instead, the estimated cost of these tenants’ electricity usage is embedded in their rent. Finally, certain facilities located on the east side of the Airport receive electricity directly from KCP&L, and are billed by KCP&L for their usage.

KCP&L collects sales tax from those Airport tenants to which it directly sells electricity; no sales tax is collected with respect to the City’s supply of electricity to those tenants who pay no separate electricity charge. As to those tenants receiving separately-metered, City-supplied

electricity, the City reported the amounts collected from these tenants for their electricity usage as taxable prior to August 2007. The City stopped paying sales tax on the sale of this electricity in August 2007, however. In response, the Director issued sales tax assessments to the City, relating solely to the City's supply of electricity to the separately-metered tenants, for the months of August, September, and October 2007.

The City appealed the Director's assessments. On April 22, 2009, the Commission issued a Decision finding that the City was not liable for sales tax on electricity provided by the City to the separately-metered tenants. The Director now appeals.

### Analysis

The Director argues that the Commission erroneously interpreted §§ 144.010 and 144.020 in concluding that the City was not engaged "in the business of selling electricity."<sup>2</sup>

Before addressing the merits, however, we must address the City's contention that this appeal falls within the Supreme Court's exclusive jurisdiction. "The Missouri Supreme Court has exclusive appellate jurisdiction in all cases involving 'the construction of the revenue laws of this state.'" *ABB C-E Nuclear Power, Inc. v. Dir. of Revenue*, No. WD65820, 2006 WL 1792704, at \*1 (Mo. App. W.D. June 30, 2006)(quoting Mo. Const. art. V, § 3)).<sup>3</sup> Neither party

---

<sup>2</sup> Section 144.020.1 provides that "[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." "Business" is defined in § 140.010.1(2) to include "any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect." The City falls within the statutory definition of a "person" under § 144.010.1(6). The taxing statutes specify that "the term 'sale at retail' shall be construed to embrace . . . [s]ales of electricity [and] electrical current," § 144.010.1(10)(b), and provide for "[a] tax equivalent to four percent of the basic rate paid or charged on all sales of electricity or electrical current." § 144.020.1(3); *see also Kansas City Power & Light Co. v. Dir. of Revenue*, 83 S.W.3d 548, 550 (Mo. banc 2002) ("Missouri statutes . . . make clear that sales of electricity can qualify as sales at retail, even though electricity is not tangible personal property . . .").

<sup>3</sup> The City also contends that the Supreme Court's exclusive jurisdiction is invoked by the City's claim that article III, § 39(a) of the Missouri Constitution prevents the imposition of the sales tax at issue. On the view we take of the case we need not address this additional jurisdictional argument.

disputes that this case involves “the revenue laws of this state”; the only question is whether we would be required to “construe” those revenue laws to decide this appeal.

Prior cases have “distinguish[ed] . . . between cases involving the *construction* of a revenue law versus those requiring only the *application* of a revenue law.” *J.H. Berra Constr. Co. v. Holman*, No. ED84012, 2004 WL 1158046, at \*2 (Mo. App. E.D. May 25, 2004) (emphasis added). To distinguish cases requiring “construction” from those involving mere “application,” the decisive factor is whether the Supreme Court has previously addressed the relevant legal issue: “If the Supreme Court has already decided an issue, we can apply the precedent. We have jurisdiction for application of [prior Supreme Court] precedent because it does not require construction of a revenue law.” *Id.*; *see also, e.g., ABB*, 2006 WL 1792704, at \*2 (transferring case to Supreme Court given “the absence of Missouri Supreme Court precedent to apply”); *Equitable Life Assurance Soc’y of the U.S. v. State Tax Comm’n*, 852 S.W.2d 376, 383 (Mo. App. E.D. 1993) (“when an appeal can be disposed of by the application of a prior supreme court construction, the supreme court does not have exclusive jurisdiction”); *Walter-Kroenke Props. v. State Tax Comm’n*, 742 S.W.2d 242, 243 (Mo. App. E.D. 1987) (“where our Supreme Court has previously addressed an issue, the intermediate appellate courts have jurisdiction to apply the law”). Where “uncertainty” remains despite prior Supreme Court decisions involving a particular area of law or legal principle, “this uncertainty may properly be said to give rise to problems of statutory construction” invoking the Supreme Court’s exclusive jurisdiction under article V, § 3. *ABC Fireproof Warehouse Co. v. Clemans*, 658 S.W.2d 28, 30 (Mo. banc 1983).

Here, the Director argues that two prior Supreme Court decisions establish the erroneous nature of the Commission’s Decision: *City of Springfield v. Director of Revenue*, 659

S.W.2d 782 (Mo. banc 1983); and *St. Louis Country Club v. Administrative Hearing Commission of Missouri*, 657 S.W.2d 614 (Mo. banc 1983). In *City of Springfield*, the Supreme Court held, without extended discussion, that the City of Springfield was liable for sales tax on the “sales of items at concessions standards, fees charged for admission to softball games [and] the zoo,” and similar activities arising out of the City’s operation of parks, playgrounds, and other recreational facilities. 659 S.W.2d at 783. The Director emphasizes that *City of Springfield* found these transactions to be taxable even though the City was operating its recreational facilities for a public purpose pursuant to its charter, and despite the Court’s recognition that the fees at issue in that case “seldom exceed and often do not meet the direct costs of the program,” and that “most programs receive subsidies from property taxes.” *Id.* In *St. Louis Country Club*, on which *City of Springfield* relied, the Court held that fees and charges incurred by guests at private country clubs, for use of the clubs’ facilities, were subject to sales tax. The Court emphasized that the definition of covered “business” “is very broad, and is surely designed to make transactions which might not otherwise be covered taxable.” *St. Louis Country Club*, 657 S.W.2d at 617. Further, while the statutory definition of a “business” requires that an activity be “engaged in . . . with the object of gain, benefit or advantage, either direct or indirect,” *St. Louis Country Club* held that “[t]he director does not have to show that the taxpayer has a purpose of maximizing revenue, or of deriving income from the general public.” *Id.*

While *City of Springfield* and *St. Louis Country Club* undoubtedly establish principles which are highly relevant to the resolution of the issues presented by this appeal, the Commission’s decision relies, at least in part, on circumstances absent in those earlier cases. Here, electricity is supplied only to entities in a landlord-tenant (or landlord-sub-tenant) relationship with the City. The Commission’s decision emphasizes that, in this case, “[t]he City

provides a public service with its airport, and the provision of electricity is a necessary incident to that service. The use of the electricity is for the purpose of furthering the City’s governmental interest in leasing the airport facilities” (a transaction not itself subject to sales tax). The Commission also emphasized that the tenants at issue are only charged separately for electricity usage because the particular buildings or spaces they lease happen to be separately metered. Other tenants of the same airport facility, who occupy space where electricity service is not separately metered, do not pay a separate charge, but instead receive electricity purchased by the City from KCP&L as part of their rent. No sales tax is paid on the provision of electricity to those tenants, even though they are arguably receiving precisely the same service from the City as the separately-metered tenants.<sup>4</sup> Notably, the Director conceded at oral argument that her ability to collect sales tax on the provision of electricity to those *other* tenants would present an issue triggering the Supreme Court’s exclusive jurisdiction.

While we express no opinion on the issues presented, we conclude that the considerations described above sufficiently distinguish this case from *City of Springfield* and *St. Louis Country Club* that we would be compelled to go beyond merely applying existing Supreme Court precedent in order to resolve this appeal. This would constitute “construction” of the revenue laws, which is the Supreme Court’s sole province under article V, § 3 of the Missouri Constitution.

### **Conclusion**

This case is ordered transferred to the Missouri Supreme Court pursuant to article V, § 11 of the Missouri Constitution.

---

<sup>4</sup> There is, of course, yet a *third* category of tenants, who are supplied individually-metered electricity directly by KCP&L, and who pay sales tax on their electricity purchases.

---

Alok Ahuja, Judge

All concur.