SC92663

IN THE SUPREME COURT OF MISSOURI

PF GOLF, LLC,

Respondent (Petitioner below),

vs.

DIRECTOR OF REVENUE,

Appellant (Respondent below).

From the Administrative Hearing Commission of Missouri,
The Honorable Sreenivasa Rao Dandamudi, Commissioner

BRIEF OF APPELLANT DIRECTOR OF REVENUE

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JURISDICTIONAL STATEMENT

The issues before the Court in this matter involve the construction of § 144.020.1, RSMo (2012 Cum. Supp.),[1/] a revenue law of the State of Missouri. Therefore, this Court has exclusive jurisdiction over this matter pursuant to Article V, § 3 of the Missouri Constitution.

[1/] All references to the Missouri Revised Statutes are to the 2012 Cumulative Supplement unless otherwise specified.

STATEMENT OF FACTS

PF Golf, LLC owns the Golf Club at Pevely Farms. (LF 84; Appellant's Appdx. A1). Pevely Farms is an 18-hole golf course located in St. Louis County. (LF 1; 85). The golf course is open to the public. (LF 1). The public can pay a fee for either a daily pass or an annual pass. (LF 85). The fee for playing on a daily basis fluctuates depending on the season, the day of the week, the weather, and the demand. (*Id.*). An annual pass, however, entitles a golfer to play anytime throughout the year without any additional charge. (*Id.*). The golf course also holds competitive events such as high school, college, or other events. (*Id.*).

The golf course at Pevely Farms is a difficult course, with many hills and long distances between tees. (*Id.*). As such, all golfers use golf carts. (*Id.*). Indeed, only four customers in 2011, out of over 20,000 rounds of golf, even requested to walk the course. (*Id.*). The only other exception involved competitive events such as "high school, college, or other events where the rules prohibit the use of golf carts." (*Id.*). PF Golf purchased or leased golf carts and paid sales tax on the purchases or leases. (*Id.*). The golf carts were then used by PF Golf for the golf course and their customers. (LF 85-86).

PF Golf advertises a single rate for both a round of golf and a golf cart rental at Pevely Farms. (LF 86). There is no such thing as a fee for a round of golf when walking and a different fee for a round of golf with a golf cart. It

is a single rate. (*Id.*). PF Golf does not have a sign anywhere in its clubhouse that displays what it costs to play a round of golf without a cart. (Tr. 83). And nowhere is a cart fee listed separately – golfers would only be quoted a single price if asked. (Tr. 82). The website for Pevely Farms lists a single rate regardless of whether a golf cart is requested or used. (LF 86). The single rate is for a round of golf and the website lists that the rate applies walk or ride. (*Id.*). The website also has a frequently asked question section that provides as follows:

> 1. Can you walk at Pevely Farms Golf Club?
>
> Answer: Yes, you can walk any time for the same fee.

(*Id.*).

According to the golf club management company, the golf cart rental was $22.50 per round. (LF 85). This amount was printed on receipts issued to customers after they paid for a round of golf. (LF 86). Because PF Golf separated the fees on the receipt for the golf cart and the greens fees, it did not collect or charge sales tax on the golf cart portion, resulting in unpaid tax assessments totaling over $120,000.00, plus interest, in a three-year period. (LF 85, 87-89). But this separate listing of golf cart fees on a customer's receipt does not tell the whole story, much less the true story, of golf cart "rentals" by PF Golf.

The head golf professional at the golf course testified that if two

customers came to play and indicated that they would ride together in the same golf cart, they would still pay the full price for a round of golf as if each had rented a separate golf cart. (*Id.*). Specifically, the testimony was as follows:

> Q: Can I share a golf cart? Like if I take Ms. Kiefer and I come in to play a round of golf and we're going to be a twosome, do we each have to get a golf cart?
>
> A: If you two come together to play, no, you would ride in the same cart.
>
> Q: Okay. And what's the price for that?
>
> A: Um, if each person would pay, would pay their green fee and the cart fee.
>
> Q: So, we'd each pay forty-seven fifty – again, assuming that's the optimum number – we'd pay forty-seven fifty to play a round of golf?
>
> A: Yes.
>
> Q: Even if we only get one golf cart?
>
> A: Correct.

(Tr. 141).

A supervisor for the Missouri Department of Revenue also called and

spoke with PF Golf to determine how fees are charged. (LF 86-87). He asked PF Golf the price of a round of golf and was quoted a certain price – that included a golf cart. (LF 87). He then asked what the price of a round of golf was without a golf cart, and he was told the exact same price. (*Id.*). In short, PF Golf requires its customers to rent a golf cart and neither advertises nor provides any alternative. (LF 85-87). As such, the Administrative Hearing Commission concluded that "the price of a round of golf . . . includes a mandatory golf cart rental in this case." (LF 93).

Despite concluding that the price of a round of golf includes a mandatory golf cart rental in this case, the Commission believed that it should follow the decision in *Westwood Country Club v. Dir. of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), a case involving golf carts. (LF 94) (concluding that "we go with *Westwood*, which is more on point with the facts of this case in that it concerns golf cart rentals"). According to the Commission, even though the purchase of a golf cart was not mandatory in *Westwood*, this Court "made no distinction between mandatory and non-mandatory golf cart rentals in *Westwood*." (LF 94). The Director appeals the Commission's decision.

POINT RELIED ON

The Administrative Hearing Commission Erred in Holding That PF Golf is Not Subject to Sales Tax, Because It Charged Fees for "Entertainment or Recreation, Games and Athletic Events" and Not Rentals, In That PF Golf Sold Rounds of Golf Instead of Separate Green Fees and Golf Cart Rentals.

§ 144.020.1(2 &) (8), RSMo (2012 Cum. Supp.)

Southern Red-E-Mix Co. v. Dir. of Revenue,

894 S.W.2d 164 (Mo. banc 1995)

Westwood Country Club v. Dir. of Revenue,

6 S.W.3d 885 (Mo. banc 1999)

SUMMARY OF THE ARGUMENT

When a golfer chooses to rent a golf cart there is an essential element – choice. If, instead, the golfer has no choice and must pay for a golf cart along with a round of golf, then it is not truly a "rental," but is "simply one of the costs factored into the companies' sales price." *Southern Red-E-Mix v. Dir. of Revenue*, 894 S.W.2d 164, 167 (Mo. banc 1995). Under these circumstances, the cost of a golf cart is subject to tax as part of the "the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events." § 144.020.1(2).

PF Golf does not dispute that fees for a round of golf are subject to tax under § 144.020.1(2), but it argues that a portion of the fees it charges meet the exclusion for a "rental" under § 144.020.1(8), and are therefore tax free. The undisputed facts and the law, however, do not support PF Golf's argument. A rental arrangement for a golf cart requires that a person have the option to play golf without a golf cart, which is not permitted in this case. Even the Administrative Hearing Commission ("Commission") acknowledged that "the price of a round of golf . . . includes a mandatory golf cart rental in this case." (LF 93). A golfer pays for a golf cart as part of their fees whether they are walking or riding, and regardless of whether they are already sharing a golf cart with another golfer.

The plain language of the exclusion in § 144.020.1(8), which PF Golf has the burden to establish, requires an actual "rental" and not a mandatory cost that is merely itemized on a receipt for purposes of avoiding taxes. In addition, the caselaw, regulation, letter ruling, and surrounding provisions support the same conclusion. For these reasons, this Court should reverse the decision of the Commission and hold that the rental exclusion in § 144.020.1(8) requires an actual "rental" and not a mere sham to avoided taxes.

ARGUMENT

Standard of Review

The only issues in this case are legal issues, and they involve the interpretation of a revenue law – § 144.020.1. This Court reviews the Commission's interpretation of revenue laws *de novo*. *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 436 (Mo. banc 2010) ("Statutory interpretation is an issue of law that this Court reviews *de novo*."); *see also Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 930 (Mo. banc 2008).

A taxpayer has the burden to prove that it is not liable for the tax amounts provided for in the statute and assessed by the Director of Revenue. *See J.C. Nichols Co. v. Dir. of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990). PF Golf sought to meet its burden in this case by claiming an exclusion as a renter of golf carts. However, PF Golf cannot meet its burden because the law, as well as the facts found by the Commission, simply do not support its claims. Therefore, the decision of the Commission should be reversed.

The Administrative Hearing Commission Erred in Holding That PF Golf is Not Subject to Sales Tax, Because It Charged Fees for "Entertainment or Recreation, Games and Athletic Events" and Not Rentals, In That PF Golf Sold Rounds of Golf Instead of Separate Green Fees and Golf Cart Rentals.

As with any statutory provision, "the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family Partnership v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). Statutory language is given its "plain and ordinary meaning." *United Pharm. Co. of Mo., Inc. v. Mo. Bd. of Pharm.*, 208 S.W.3d 907, 910 (Mo. banc 2006).

Furthermore, "[n]o portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Utility Serv. Co., Inc. v. Dep't of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011). Indeed, "[a]scertaining and implementing the policy of the General Assembly requires the court to harmonize all provisions of the statute." *20th & Main Redevelopment Partnership v. Kelley,* 774 S.W.2d 139, 141 (Mo. banc 1989). Here, the plain language of § 144.020.1 provides that PF Golf's total fees for rounds of golf are subject to tax under subdivision (2)

as "entertainment or recreation, games and athletic events," instead of partially excluded as rentals under subdivision (8). Case law, the agency's regulation and letter ruling, and the surrounding provisions of the statute support this same conclusion.

A. The Plain Language of § 144.020.1 Subjects Rounds of Golf to Sales Tax as "Entertainment or Recreation, Games and Athletic Events."

Section 144.020.1(2) imposes a sales tax on "the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events." There is no dispute that a golf course is a place of amusement, and golfing is entertainment or recreation and constitutes games and athletic events as described in § 144.020.1. The public paid PF Golf to play rounds of golf either on a daily basis or by purchasing an annual pass.[2/] In this way, PF Golf is no different than any other place of amusement offering entertainment, recreation, and games.

[2/] Section 144.010.1(4) also defines gross receipts as "the total amount of the sale price of the sales at retail including any services." Payment of taxes under §§ 144.010 to 144.525 is based on gross receipts, which in this case should include greens fees and golf cart "rentals."

Not only does PF Golf satisfy the language in § 144.020.1(2) specifically relating to places of amusement, entertainment, or recreation, but it also meets the language relating to "games and athletic events." The golf course holds "competitive events such as high school, college, or other events." (LF 85). For these reasons, PF Golf again perfectly meets the plain language of § 144.020.1(2). There can be no dispute concerning this point. Instead, the dispute is about whether PF Golf meets an exclusion for taxes in § 144.020.1(8). It does not.

B. The Exclusion From Sales Tax in § 144.020.1(8) for Renting Golf Carts Does Not Apply to PF Golf.

In subdivision (8) of § 144.020.1, the legislature provided for an exclusion under certain limited circumstances. The exclusion provides that "if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of 'sale at retail' or leased or rented the property" and if "the tax was paid at the time of purchase, lease or rental" then the "lessor, sublessor, renter or subrenter shall not apply or collect the tax on the subsequent lease, sublease, rental or subrental receipts from that property." § 144.020.1(8)

PF Golf purchased or leased golf carts for use at its golf course in this case. It also paid sales tax on its purchase or lease of golf carts. Thus, PF Golf meets the first part of the exclusion under § 144.020.1(8). It is the

second part of the exclusion – whether PF Golf actually rents golf carts to their customers – that is the issue. They do not, and they are not entitled to claim the exclusion.

1. The undisputed evidence is that PF Golf does not separately rent golf carts but sells rounds of golf.

The Commission repeatedly found that the evidence supported that PF Golf did not rent golf carts but instead charged a single rate for a round of golf. The following, in summary form, is the undisputed evidence found by the Commission:

- PF Golf "requires its customers to rent golf carts."
- Only four customers out of 20,000 rounds of golf requested to walk the course – and even those four were required to "pay" for a golf cart.
- PF Golf "advertises a single rate for both a round of golf and a golf cart rental." It is impossible to only pay for a round of golf without a golf cart rental.
- The "web site lists a single rate" for a round of golf "that applied to both walk and ride."

- The web site also answered the question – "Can you walk at Pevely Farms Golf Club?" with the answer – "Yes, you can walk any time for the same fee."
- If "two customers who came together to play would ride in the same golf cart and each would still pay the full golf cart rental fee as if each had rented a separate golf cart."
- When customers inquired they were given the same price for a round of golf with or without a golf cart.
- "At the time of payment, customers were not informed of separate greens fees and golf cart rental fees."

The undisputed evidence is that there are not actually any golf cart rental fees charged by PF Golf. Otherwise, a golfer would pay a different amount to walk. Indeed, if a golfer decided to walk the course they would pay the same amount as a golfer who rides in a cart, begging the question – what is the golf cart rental fee for since it is not actually for the rental of a golf cart? PF Golf's supposed "rental" of golf carts is merely a sham intended to avoid payment of taxes.

2. The decision in *Westwood Country Club v. Dir. of Revenue*, does not support an exclusion in this case.

Although the Commission could not deny the undisputed evidence that PF Golf was charging a supposed "rental" as a sham to avoid sales taxes, the Commission applied the exclusion because it felt it should follow the decision in *Westwood Country Club v. Dir. of Revenue*, 6 S.W.3d 885 (Mo. banc 1999). But the decision in *Westwood Country Club* is distinctly different than the circumstances in this case.

In *Westwood Country Club*, the members of the country club paid their membership fees, which entitled them to many benefits. One such benefit was the use of the golf course free of charge. They did not have to pay for green fees. That was not the case, however, with golf cart rentals. Even members of the country club, if they wanted to ride in a golf cart, had to pay separately for the rental of the golf cart. *Id.* at 886 ("Westwood charges a fee for the use of golf carts to its members and their guests."). And because the country club had already paid sales tax when it purchased or leased the golf carts, they did not have to charge or collect sales tax when they rented them to their members. *Id.* at 888 (noting that "Westwood previously paid sales tax on its purchases and leases of the carts").

Unlike *Westwood Country Club*, PF Golf does not even offer the

possibility of walking for a different charge or avoiding in any way the charge for a golf cart. Instead, PF Golf charges everyone the same fee for playing a round of golf. This arrangement is not a rental of golf carts necessary to invoke the exclusion in § 144.020.1(8), but fits squarely within the provisions of § 144.020.1(2) for charges at "any place of amusement, entertainment or recreation, games and athletic events."

3. The decision in *Southern Red-E-Mix Co. v. Dir. of Revenue*, is the controlling case.

This Court considered similar issues in *Southern Red-E-Mix v. Dir. of Revenue*, 894 S.W.2d 164 (Mo. banc 1995); albeit involving concrete and delivery charges and not golf courses and golf carts. Even the Commission saw the "strong correlation in facts and circumstances" between *Southern Red-E-Mix* and this case. (LF 93).

The issue in *Southern Red-E-Mix* was whether the company could deduct delivery expenses from gross receipts for purposes of sales tax. Like the supposed "rental" of golf carts, the Court concluded that "delivery expense was simply one of the costs factored into the companies' sales price for the concrete." *Southern Red-E-Mix*, 894 S.W.2d at 167. Therefore, the entire sale price of the concrete was subject to tax.

To reach this conclusion, the Court looked to the "intention of the parties [as] the guiding factor in determining whether services are to be

included as part of the sale." *Id.* at 166 (citing *May Department Stores Co. v. Dir. of Revenue*, 791 S.W.2d 388, 389 (Mo. banc 1990)). Citing a string of cases, including *May Department Stores*, *Oakland Park Inn v. Dir. of Revenue*, 822 S.W.2d 425 (Mo. banc 1992), and *Brinson Appliance, Inc. v. Dir. of Revenue*, 843 S.W.2d 350 (Mo. banc 1992), the Court concluded that one of the critical factors was whether the charge was mandatory. *Southern Red-E-Mix*, 894 S.W.2d at 166-67. If, for example, the parties intended for the charges – such as delivery, shipping, or gratuities – to be mandatory as a part of a larger sale, then the charges were not something that could be separated and excluded from taxes. *Id.* And even if – "on the rare occasion" – the customer was permitted to separate the charges, it did not undermine the intent of the parties to bundle the charge together with the larger sale for purposes of taxes. *Southern Red-E-Mix*, 894 S.W.2d at 167.

Here, just as in *Southern Red-E-Mix*, the parties intended that the supposed "rental" of a golf cart was simply part of paying for a round of golf and therefore could not be separated for purposes of tax treatment. As such, PF Golf fails to meet its burden of establishing the exclusion under § 144.020.1(8), and its entire charges for a round of golf fall under the tax for "places of amusement," "entertainment or recreation," and "games and athletic events." § 144.020.1(2).

C. The Regulation and Letter Ruling Support the Imposition of Sales Tax in This Case.

In addition to the plain language of the statute at issue, as well as case law, the agency regulation and letter ruling support the same conclusion. The regulation at 12 CSR 10-108.700 provides that "[w]hen a lessor purchases tangible personal property for the purpose of leasing, the lessor may pay tax on the purchase price or claim a resale exemption based on the intended lease of the tangible personal property." The regulation then gives an example: "A taxpayer purchases seven lawnmowers and pays tax on the purchase price. The subsequent rental of the lawnmowers is not subject to tax." This regulation and the example fit perfectly with this case.

Had PF Golf purchased the golf carts, paid the sales taxes, and simply rented those to its customers that wanted to use the golf carts, then the rentals would not be subject to tax just as the lawnmowers were not subject to tax. Instead, they did not actually rent the golf carts but sold rounds of golf with a single rate regardless of whether the golfer wanted the golf cart, and regardless of whether the golfer was already riding with another golfer. Applying this scenario to the example in the regulation, it would be like the lawnmower company selling lawn maintenance – in which a lawnmower was required – and then trying to artificially separate the rental of the lawnmower in order to take advantage of a sales tax exclusion.

"When determining the merits of revenue cases, it is important to look beyond legal fictions and academic jurisprudence in order to discover the economic realities of the case." *Scotchman's Coin Shop, Inc. v. Administrative Hearing Commission*, 654 S.W.2d 873, 875 (Mo. banc 1983). It is as equally important to look beyond the artificial arrangements and labels assigned by a seller to discover the real intention of the parties. *Southern Red-E-Mix*, 894 S.W.2d at 166-67.

Similarly, in the letter ruling cited by the Commission, the Director indicates that "the lessor or renter of the tangible personal property has the option to pay tax at the time of the rental or lease or to collect tax on his subsequent rental or lease of the property." LR 1349 (emphasis added) (LF 91). But this applies only if there is an actual rental of the property. There is no rental of the property in this case. There is only a charge for playing a round of golf. As such, the regulation and letter ruling are consistent with the plain language and the case law.

D. The Surrounding Statutory Provisions Also Support the Director's Interpretation of § 144.020.1.

Not only does the plain language of the statute, the case law, the regulation, and the letter ruling support the Director's interpretation in this case, but the surrounding provisions in § 144.020.1 also support the same conclusion. For example, in § 144.020.1(8) the statute uses the same

language as subdivision (2) dealing with "places of amusement, entertainment or recreation."

The statute provides that "[i]n no event shall the rental or lease of boats and outboard motors be considered a sale, charge, or fee to, for or in places of amusement, entertainment or recreation nor shall any such rental or lease be subject to any tax imposed to, for, or in such places of amusement, entertainment or recreation." § 144.020.1(8). Neither golf carts nor other motor vehicles are included in this provision. Accordingly, the legislature contemplated that they may be used for or in places of amusement, entertainment or recreation – such as at a golf course – and thereby subject to tax.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Administrative Hearing Commission in favor of the Director of Revenue and against PF Golf, LLC.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that on the 31st day of December, 2012, the foregoing brief was filed electronically via Missouri CaseNet and served electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,418 words.

/s/ *Jeremiah J. Morgan*
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