

SC93048

IN THE SUPREME COURT OF MISSOURI

LES FEATHERSTON,

Respondent (Petitioner below),

vs.

DIRECTOR OF REVENUE,

Appellant (Respondent below).

**Appeal from the Administrative Hearing Commission of Missouri
The Honorable Nimrod T. Chapel, Jr., Commissioner**

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This case came before the Administrative Hearing Commission on a complaint filed by Les Featherston challenging the assessment of use tax on his purchase of an airplane. The question posed by this Petition for Review is whether Featherston was required to pay use tax on that purchase, made within the State of Missouri. This Court has never the addressed the question of whether the use tax applies to goods purchased in Missouri when those goods are purchased from an in-state seller not required to collect and remit sales tax. To answer that question the Court will construe revenue laws. Thus the petition is appropriately filed in this Court. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

In 2002, Juanita Bridges liquidated her deceased husband's estate. Administrative Record ("A.R.") 7. She sold an airplane, an American Champion 7FC, to respondent Les Featherston. *Id.* She did not collect nor remit sales tax on the sale. *Id.*

"Featherston stores and uses his airplane in Missouri." A.R. 8. But he did not pay use tax on the airplane—neither when he first stored or used it in the State, nor afterwards.

The Director, having discovered the airplane was in Missouri, calculated that based on Featherston's location (Mount Vernon), Featherston should have paid \$1,590.49 in use tax. A.R. 4. On August 6, 2010, the Director sent Featherston an assessment for that amount plus \$606.40 in interest, for a total of \$2,196.89. *Id.*; A.R. 8.

Featherston sought review at the Administrative Hearing Commission. A.R. 1, 7. The Commission held an evidentiary hearing, at which the facts stated above were not disputed. *See* Transcript ("Tr."). The evidence presented by Featherston focused instead largely on Featherston's interaction with Department of Revenue employees (*e.g.*, Tr. at 12-13), and on how the Department handled airplane purchases by another taxpayer (*e.g.*, Tr. at 18-19).

On November 30, 2012, the Commission ruled that because the Director had not proven that Featherston purchased the airplane out-of-state, Featherston owed no use tax on the airplane. A.R. 10-11. The Director promptly moved for reconsideration. A.R. 12. On December 24, 2012, the Commission denied that motion. A.R. 19.

POINT RELIED ON

The Administrative Hearing Commission erred in holding that the airplane purchased by Featherston from a person not required to collect and remit sales tax was exempt from use tax because Featherston was required to pay use tax in that he used or stored the airplane in Missouri and none of the use tax exclusions apply to the airplane.

§ 144.010

§ 144.020

§ 144.610

§ 144.615

ARGUMENT¹

Missouri broadly imposes a use tax, then excludes some property from that tax. Featherston's airplane does not fit within any of the exclusions, so once it was stored or used in Missouri, it was subject to Missouri use tax.

Section 144.610 defines the scope of Missouri's use tax broadly to cover all items stored or used in the State—not just items purchased elsewhere and brought into the State:

1. A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased ... in an amount equivalent to the percentage imposed on the sales price in the sales tax law... .

§ 144.610. Here, there is no dispute that the airplane purchased by Featherston was stored and used in the State of Missouri. Under the plain language of § 144.610, it is subject to the use tax, absent some exclusion or exception.

¹ The question here is a question of law, which this Court considers *de novo*. *E.g., American Airlines, Inc. v. Director of Revenue*, 389 S.W.3d 653, 656 (Mo. banc 2013).

Read alone, § 144.610 applies even to goods purchased where sales tax was paid, resulting in double taxation. But that is not the General Assembly's intention. Sales and use taxes are "complementary." *Dyno Nobel Inc. v. Director of Revenue*, 75 S.W.3d 240, 243 (Mo. banc 2002). Thus the General Assembly has taken into account instances where one tax is paid to ensure that a second tax is not required.

The General Assembly accomplished that, with respect to the purchase of goods, by excluding from the use tax transactions in which the sales tax is owed:

There are specifically exempted from the [use] taxes levied in sections 144.600 to 144.745:

...

(2) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed pursuant to the Missouri sales tax law;

§ 144.615. Most in-state purchases, are, of course, subject to sales tax. This exclusion removes from the use tax those goods that are purchased in Missouri in transactions in which sales tax is owed, thus avoiding double taxation.

When Featherston purchases a good, then, in a transaction the "gross receipts" of which are required to be subjected to the sales tax, the good is not

subject to the use tax. Responsibility for collecting and remitting the sales tax falls on the seller. If the seller fails to collect the tax, it is the seller, not the purchaser, who violates the law and remains liable for payment. Here, however, that exclusion does not relieve Featherston of paying use tax.

“The gross receipts from the sale” of the airplane to Featherston were not subject “to the Missouri sales tax law”—not because of the nature or location of the transaction, but because of the nature of the seller. The seller, an individual, was merely liquidating her husband’s estate. A.R. 7. She was not engaged in the “business of selling tangible personal property.”

§ 144.020.1; A.R. 7. Rather, she made an “isolated or occasional sale of tangible personal property.” § 144.010.1(2). Her “gross receipts” were not “required to be included in the measure of the tax imposed pursuant to the Missouri sales tax law.” § 144.615.2. Thus the exclusion from use tax of transactions subject to sales tax does not apply to Featherston’s airplane purchase.

Nor does the exclusion of “liquidation” sales found in § 144.617. That section only applies to the liquidation of a business, and then only when the business is operated in particular business forms:

1. For purposes of section 144.440 and sections 144.600 to 144.745, and the taxes imposed thereby,

the definition of “storing”, “using” or “consuming” shall not be construed to include any of the following:

...

(2) The transfer of tangible personal property incident to the liquidation or cessation to a taxpayer’s trade or business, conducted in proprietorship, partnership or corporate form, except to the extent any transfer is made in the ordinary course of the taxpayer’s trade or business;

There is not even a hint in this record that the airplane Featherston bought was owned by or used in a business, much less that it was owned or used by a business that was run in any of the listed forms. The airplane appears to be of a recreational variety, owned and used for personal purposes. And the omission of evidence is dispositive: Featherston, as the taxpayer, bore the burden of showing at the Commission that the airplane qualifies for the exclusion. *American Airlines, Inc. v. Director of Revenue*, 389 S.W.3d 653, 656 (Mo. banc 2013).

The business liquidation exclusion is not, of course, the only exclusion or exemption from the use tax. But none of the others apply to Featherston’s airplane purchase. Applying the use tax to the purchase is not prohibited by federal law. § 144.615.1. The purchase is not subject to a specific exemption.

§ 144.615.3; *see also* § 144.030.1. Featherston did not purchase any “[m]otor vehicles, trailers, boats, [or] outboard motors. § 144.615.4; *see also* § 144.440. The purchase was not taxed by another state. § 144.615.5. The airplane was not held for resale. § 144.615.6. And the airplane was not purchased by Featherston while he was a resident of another state, then brought to Missouri. § 144.615.7. Because none of the use tax exclusions or exemptions apply, the plain language of the statute imposes the tax on Featherston’s purchase.

The Commission held otherwise—not based on the language of any statute, but on a common misperception: that the use tax applies only to purchases made out of state. The source of the misperception is obvious: by far the most frequent application of the use tax is to out-of-state purchases. Use tax litigation thus deals, perhaps exclusively (until now), with out-of-state purchases. When a court or the Administrative Hearing Commission describes the use tax as a tax “on out-of-state purchases of tangible personal property by Missouri resident” (A.R. 10, citing *Kirkwood Glass Co., Inc. v. Director of Revenue*, 166 S.W.3d 583, 585 (Mo. banc 2005), the description is accurate but incomplete.

As unambiguously written, the use tax applies to all “storing, using or consuming within this state any article of tangible personal property

purchased” (§ 144.610), unless there is an applicable exclusion or exemption. As to Featherston’s airplane, there is no applicable exclusion or exemption.

There is an excellent reason for the General Assembly to have written the use tax law without the kind of exclusion or exception Featherston claims and the Commission supposed. The Commission concluded, in essence, that the General Assembly imposed a use tax that would apply to an airplane that is purchased elsewhere in an estate liquidation, but that the General Assembly did not impose a comparable use or a sales tax on the purchase of an airplane from an estate being liquidated in Missouri. Under the United States Constitution, Missouri cannot impose a tax on goods purchased out-of-state that is higher than the tax it imposes on similar purchases in comparable transactions within the state. *See Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994) (“Thus, we have characterized the fundamental command of the Clause as being that ‘a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,’” quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S.Ct. 2620, 2622, 81 L.Ed.2d 540 (1984)). Fortunately, the General Assembly steered clear of the constitutional problem that the Commission’s version of the law would create.

CONCLUSION

For the foregoing reasons, the decision of the Administrative Hearing Commission should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served via U.S. Mail, postage pre-paid, on May 20, 2013, to:

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and that a true and correct copy of the foregoing was mailed, inter-agency, to:

Administrative Hearing Commission
Truman State Office Building Room 640
P.O. Box 1557
Jefferson City, MO 65101

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 1,804 words.

/s/ James R. Layton
Solicitor General