IN THE
SUPREME COURT OF MISSOURI

No. SC86347

KIRKWOOD GLASS CO., INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The few facts required to decide this appeal were stipulated and are contained in the Administrative Hearing Commission's decision.

The principal office of Kirkwood Glass Co., Inc., is in the City of Kirkwood, Missouri. L.F. [2].

Kirkwood Glass purchased tangible personal property for use in its business. *Id*. During the period at issue – the second quarter of 2002, April 1 through June 30 – Kirkwood Glass purchased tangible personal property in the City of Kirkwood, on which it paid a 3.10% local sales tax. *Id*.[1] It purchased tangible personal property in the City of Williamsburg, Missouri, on which it paid a 0.50% local sales tax. *Id*. And it purchased tangible personal property from out-of-state

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[1] This consists of a 1.85% county sales tax and a 1.25% city sales tax. The City of Kirkwood has imposed a use tax – statutorily set, as discussed below, at the same rate as the local sales tax. But St. Louis County has not adopted a local use tax. Local use tax rates are provided at the Department of Revenue web site. *See* http://www.dor.mo.gov/tax/business/sales/#stris (visited Feb. 8, 2005).

vendors, delivered to the Kirkwood Glass location in the City of Kirkwood, on which it paid a 1.25% local use tax. L.F. [3].

Kirkwood Glass filed a timely request for refund of all the local use tax it paid for purchases made during a period that included the 2nd quarter of 2002. *Id*. The Director denied the claim. *Id*.

Kirkwood Glass filed an appeal to the Administrative Hearing Commission, L.F. [1], which upheld the Director's denial, L.F. [15].

Kirkwood Glass filed a petition for review in this Court.

ARGUMENT

INTRODUCTION

The only issue in this appeal is one of law: whether § 144.757, RSMo. 2000 and the local use taxes imposed pursuant thereto violate the Commerce Clause of the U.S. Constitution, Art. I., § 8, cl. 3. Appellant Kirkwood Glass claims that in some instances the application of the local use tax law results in higher taxes for out-of-state than for in-state purchases – a form of discrimination that, it says, would violate the rule declared by the U.S. Supreme Court when it addressed a prior version of Missouri's local use tax authorization statute in *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1994).[2]

Kirkwood Glass's argument here, like the argument made by Associated Industries, is founded in the "dormant commerce clause,"

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[2] There, the Supreme Court reversed this Court's decision in *Associated Indus. of Mo. v. Director of Revenue*, 857 S.W.2d 187 (Mo. banc 1993). On remand, this Court applied the rule of law declared by the U.S. Supreme Court and held the prior local use tax authorization law unconstitutional. *Associated Indus. of Mo. v. Director of Revenue*, 918 S.W.2d 780 (Mo. banc 1996) .

i.e., the constitutional doctrine that "embodies a negative command forbidding the States to discriminate against interstate commerce." *Id*. at 646. The Supreme Court has repeatedly "characterized the fundamental command of the [dormant Commerce] 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.'" *Id*. at 647, quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

Kirkwood Glass's claim fails at the outset, for under the Missouri scheme, no one – neither the State of Missouri nor its political subdivisions, to whom § 144.757 grants taxation authority – is taxing a transaction more heavily when it crosses state lines than when it occurs entirely within Missouri. When goods follow the same path to the same purchaser, they are taxed in the same way – except for instances where an interstate purchase is taxed at a *lower* rate than is an intrastate purchase.

A. The constitutional question is whether the local use tax impermissibly discriminates against interstate commerce.

At issue here is the constitutionality of the local use tax, which is authorized by the State in § 144.757.1: "Any county or municipality ... may, by a majority vote of its governing body,

impose a local use tax if a local sales tax is imposed as defined in section 32.085, RSMo, at a rate equal to the rate of the local sales tax in effect in such county or municipality...." A "use tax" taxes "the privilege of storing, using or consuming within this state any article of tangible personal property." § 144.610.1. Use taxes are "compensatory" taxes, a means of taxing interstate purchases that would be subject to sales tax if completed within the state. *See Associated Indus. v. Lohman*, 511 U.S. 641, 647 (1994). Use taxes have long been recognized as constitutional – indeed, as "a necessary complement to [a] sales tax." *Williams v. Vermont*, 472 U.S. 14, 24 (1985), quoted in *Associated Industries*, 511 U.S. at 648. Use taxes may, however, "run[] afoul of the basic requirement that, for a tax system to be 'compensatory'" – and thus not to discriminate unconstitutionally, against interstate commerce – "the burdens on interstate and intrastate commerce must be equal." *Id*.

That the burden must be "equal" is a bit of a misstatement. The U.S. Supreme Court cases on this point have all addressed state taxes that impose a *greater* burden on interstate commerce. The Court itself recognized that its precedents "have not suggested that lesser burdens on interstate trade are impermissible; that is, [they] have not

demanded equality *and nothing but equality* in compensatory tax cases." *Id*. at 652 n. 4 (emphasis in original).

The ultimate question here, then, is whether the State of Missouri has discriminated against interstate commerce by authorizing local jurisdictions to impose use taxes on interstate purchases that are higher than taxes they impose on similar purchases within the state.

B. Local use tax is imposed at the place in Missouri where the tangible personal property purchased elsewhere is delivered to the purchaser.

On its face, § 144.757 does not discriminate. In fact, it allows local governments to establish a use tax *only* at the precise rate of an existing local sales tax. *See* § 144.757.1. If the city or county lowers the sales tax rate, the use tax rate is automatically lowered.

Kirkwood Glass's claim is based on the fact that not all cities and counties impose local sales taxes at the same rate, and that many do not have local use taxes at all. To understand the impact of those differences, however, it is critical to consider what local use tax rate (if any) applies to each piece of tangible personal property that someone like Kirkwood Glass might purchase.

As noted above, pursuant to § 144.610, the use tax is imposed on "the privilege of storing, using or consuming within this state any article of tangible personal property purchased." "Storage" is defined as "any keeping or retention in this state of tangible personal property purchased from a vendor." § 144.605(10).[3] And "use" is defined as "the exercise of any right or power over tangible personal property incident to the ownership or control of that property." § 144.605(13). Use taxes, then, are statutorily imposed when and where an item of tangible personal property is first kept in the state, or when and where a purchaser exercises control over personal property that arrives in the state. Generally, that is the point of delivery.

In addressing what local use tax applies to a particular piece of tangible personal property, the Director's regulations regarding local use tax embody that plain-language reading of the statute. In 12 C.S.R. 10-117.100(1), the Director explains that use tax is due where

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[3] The statute then excludes "property for sale or property that is temporarily kept or retained in this state for subsequent use outside the state." § 144.605(9). The same exclusion is found in § 144.605(13). Kirkwood Glass does not suggest the exclusion applies to the property involved in this case.

the personal property is delivered: "When a transaction is subject to state use tax, the transaction is also subject to the local use tax adopted by the county or municipality *where the tangible personal property is first delivered in Missouri*." (Emphasis added.) The Director's local use tax example is consistent with that regulation:

> (D) A sign manufacturer accepts an order at its office outside Missouri from a customer in Missouri. The customer takes title and possession of the sign at the manufacturer's location outside Missouri and has the sign delivered to the customer's Missouri location. The purchase is subject to the local use tax in effect *where the sign is first delivered in Missouri*.

12 C.S.R. 10-117.100(4). That is true even though the sign may ultimately be installed at some other location.

The regulation and the example are consistent with – indeed, required by – the statutory mandate. Normally (and nothing here suggests that the Kirkwood Glass purchases weren't normal in this respect), before or when the property is delivered in Missouri, the purchaser has title (*see* 12 C.S.R. 10-113(3)(A)). Once the purchaser directs the placement or movement of the property and has title, the purchaser has "exercise[d a] right or power over" that property (§ 144.605(13)). If the purchaser directs delivery to a particular place in

Missouri, and the personal property stays in that place until the purchaser picks it up, no matter how briefly, the property has been "stored" – *i.e.*, kept or retained – or "used" – *i.e.*, subjected to the purchaser's control – at that location. The purchaser thus incurs responsibility for payment of the local use tax at the delivery point – again, at the place in Missouri where the purchaser first stored, used, or consumed the property.

C. Missouri's local use tax scheme does not discriminate against interstate commerce.

The practical impact of the concepts described above may be best described by setting out two pairs of hypotheticals – each involving one purchase from an in-state vendor and a parallel purchase from an out-of-state vendor. Both of the hypotheticals in the first pair parallel the facts found below, as does the first hypothetical in the second pair. The second hypothetical in the second pair demonstrates the error of Kirkwood Glass's analysis.

In each hypothetical, a company located in Kirkwood, Missouri ("Kirkwood Buyer") purchases a widget, originally manufactured in "State X" by "Widget Manufacturer." The differences among the hypotheticals are the locations of purchase and delivery.

1. A buyer taking delivery in Kirkwood pays a *lower* tax when purchasing from out-of-state seller.

The first pair of hypotheticals involves delivery to Kirkwood Buyer in Kirkwood – *i.e.*, Kirkwood Glass taking delivery and title at its home base.

1. Kirkwood Seller purchases widget from Widget Manufacturer and has it shipped to Kirkwood.[4] Kirkwood Buyer purchases widget from Kirkwood Seller in Kirkwood. Kirkwood Buyer pays the 4.225% state sales tax, as well as local sales tax at the Kirkwood rate (3.10%). See Appellant's Brief at 7. So when Kirkwood Buyer purchases and receives the widget in Kirkwood – a sale occurring entirely within the State – it pays sales tax of 7.325%. *See id*.

2. This time, instead of walking down the street, Kirkwood Buyer orders a widget directly from Widget Manufacturer in State X. Kirkwood Buyer instructs Widget Manufacturer to ship the widget directly to Kirkwood. Once the widget arrives in Kirkwood,

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[4] That wholesale purchase is not taxable, as the widget was purchased for resale as tangible personal property. See § 144.010.1(10) and 144.020.1(1).

Kirkwood Buyer owes the 4.225% state use tax, as well as local use tax at the Kirkwood rate (1.25%). See Appellant's Brief at 7. So when Kirkwood Buyer purchases the widget out of state and receives it in Kirkwood – again, a sale that does not take place entirely within the State – it pays sales tax of 5.475%. *See id*. That is, of course, less than what Kirkwood Buyer pays when it buys a widget in Kirkwood.[5]

The first pair of hypotheticals, then, demonstrates that Missouri tax law and local tax ordinances combine to give an advantage – if any – to the out-of-state purchase. There is no discrimination against out-of-state sellers or interstate commerce, and thus no constitutional violation.

2. A buyer taking delivery in Williamsburg pays a *lower* tax when purchasing from out-of-state seller.

Kirkwood Glass finds its alleged violation in the facts reflected in the first of the next two hypotheticals. Both require that Kirkwood Buyer drive to Williamsburg, get the widget, and bring it back to Kirkwood. The last hypothetical sets out a scenario – precisely

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[5] As noted in n. 1, *supra*, the difference results from the absence of a St. Louis County use tax.

parallel to the facts in the first, but for the interstate purchase – that Kirkwood Glass chooses to ignore.

3. Williamsburg Seller, located in Williamsburg, Missouri, purchases a widget from Widget Manufacturer. Widget Manufacturer ships the widget to Williamsburg. This time, instead of walking down the street to Kirkwood Seller, Kirkwood Buyer drives to Williamsburg and buys the widget from Williamsburg Seller. Kirkwood Buyer pays the 4.225% state sales tax, as well as local sales tax at Williamsburg rate (0.50%). See Appellant's Brief at 7. So when Kirkwood Buyer purchases and receives the widget in Williamsburg – again, a sale occurring entirely within the State – it pays sales tax of 4.725%. *See id*.

4. Kirkwood Buyer orders a widget directly from Widget Manufacturer, but this time Kirkwood Buyer instructs Widget Manufacturer to ship the widget to Williamsburg. Once the widget arrives in Williamsburg, Kirkwood Buyer drives to Williamsburg, picks up the widget, and brings it back to Kirkwood. This time, Kirkwood Buyer pays no local use tax because Williamsburg – the point of delivery, where Kirkwood Buyer first "stores" or "uses" the widget (*see* pp. 11-12, *supra*) – has not adopted such a tax (*see* Appellant's Brief at 8). So when Kirkwood Buyer purchases the

widget out of state and receives it in Williamsburg, it pays the state use tax of 4.225% and no local use tax at all. In this hypothetical the widget follows precisely the same path as in hypothetical 3 – but Kirkwood Buyer, despite making the same trip and getting the widget in the same jurisdiction, obtains a *lower* tax by making an interstate purchase.

As the hypotheticals show, when the movement and delivery of the widget are parallel, the system Kirkwood Glass attacks as discriminating against out-of-state purchases does not discriminate against interstate commerce. In fact, in the jurisdictions involved in the facts here – Kirkwood and Williamsburg – the scheme works to the *advantage* of interstate purchases. And again, that kind of discrimination is not constitutionally barred. *See Associated Industries,* 511 U.S. 652 n. 4.

3. The "use" addressed by the Ohio Supreme Court in *American Modulars* differs from "use" in Missouri.

In *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio), *cert. denied*, 439 U.S. 911 (1978), cited as authority by Kirkwood Glass, the Ohio Supreme Court declared unconstitutional a similar local-option use tax. The court presented four scenarios, *id*. at 277 n. 5, much as our four hypotheticals. But the court's analysis of those

scenarios suggests that the Ohio court had a different understanding of "use."

The first scenario in *American Modulars* parallels our hypothetical No. 2: "Goods sold out of state USED IN COUNTY A; county A levies the permissive tax," *i.e.* the local use tax. *Id*. The second parallels our No. 1: "Goods sold in Ohio in county A USED IN COUNTY A; county A levies the permissive tax." *Id*. In both instances, the total tax burden is precisely the same – just as it would be in Missouri, as shown in our hypotheticals 1 and 2.

The third scenario in *American Modulars* parallels our No. 4: "Goods sold out of state USED IN COUNTY B; county A (but not county B) has a permissive tax." *Id*.

The last scenario in *American Modulars*, the one where the Ohio court finds discrimination, is similar to our No. 3. It involves the payment of a sales tax, but inexplicably switches its focus to the location of "use": "Goods sold in Ohio in county B USED IN COUNTY A; county A but not county B levies the permissive tax." Under the Missouri scheme, the sales tax would be imposed in county B. But so would the use tax, if the goods were first "used," *i.e.*, delivered, in County B. That they are also used later in County A would not give County A the right to tax them; they are taxed only

once, at the first point where the buyer "exercise[s] any right or power over [them] incident to [the buyer's] ownership or control." § 144.605(13). Thus the discrimination that concerned the Ohio court would not occur in Missouri.

D. The Missouri scheme is consistent with one cited with approval in *Associated Industries*.

Kirkwood Glass's argument entirely ignores one aspect of the *Associated Industries* opinion: the Supreme Court's citation, with approval, of the Georgia sales and use tax law. *See id*. at 653-54, citing Ga. Code Ann. § 48-8-110 (Supp. 1994). The Court noted that the Georgia law "requir[ed] the enactment of a local use tax to be coupled with the adoption of an equivalent sales tax." 511 U.S. at 654. The Court distinguished the former Missouri statute, whose underpinnings it rejected, from the Georgia approach, which it impliedly approved.

Like Missouri, Georgia permits local jurisdictions to decide whether to impose such a tax. *See* Ga. Code Ann. § 48-8-110, 111 (2002 and Supp. 2004). So in Georgia, too, purchasers have the options that Kirkwood Glass has: to buy locally and pay the local sales tax; to buy in a Georgia jurisdiction that has not adopted a local sales tax; or to buy out of state, have the item shipped to some location in Georgia, and then pay the use tax that parallels the local sales tax at the point of delivery. If Kirkwood Glass were correct here, then the Supreme Court could not logically have cited the Georgia law as an appropriate model.

E. Kirkwood Glass ignores the significance of local choice.

The use of the Georgia models highlights another point that Kirkwood Glass ignores: this is a *local* tax. In both Missouri and Georgia, the State authorizes the tax, but local governments adopt it. It is thus unlike the statewide levy at issue in *Associated Industries*. *See* 511 U.S. at 644. When local governments adopt the currently authorized local use taxes in Missouri and Georgia, the use tax rate they impose is precisely the same as their local sales tax rate.

It is improper for Kirkwood Glass to imply that the statute is susceptible to a facial attack, for even the facts here demonstrate that out-of-state purchases are not always subject to higher taxes – indeed, as shown by the facts that form the basis for hypotheticals 1 and 3, Kirkwood Glass pays a use tax on purchases it makes out-of-state for shipment to Kirkwood at a *lower* rate than the sales tax rate for purchases made in Kirkwood. The challenge, then, must be to the tax adopted by Kirkwood.

And what has Kirkwood done wrong? It has adopted a local use tax of 1.25% – a rate that is fixed by Kirkwood's decision to set its local sales tax as 1.25%, and that will change only as Kirkwood changes its sales tax rate. Suggesting that Kirkwood has violated the Constitution by imposing precisely the same tax rate on inter- and

intrastate purchases makes no logical sense.[6] And suggesting that the City of Kirkwood is barred from imposing identical taxes on intra- and interstate purchases of goods picked up or delivered within its borders because someone can find a lower tax rate by driving elsewhere would be a novel proposition indeed.

F. Imposing the local use tax where the buyer is located, rather than the point of delivery, would be unreasonable, impractical, and inconsistent with the goal of creating a truly "compensatory" tax.

Ultimately, Kirkwood Glass's complaint could be valid only if it could eliminate from the analysis the fourth hypothetical, *i.e.*, to give the Missouri law the reading apparently given to the Ohio law in *American Modulars*. That would require the Court to accept the proposition (one which Kirkwood Glass never proposes – perhaps for fear that it could ultimately result in a *higher* tax rate) that even if it takes delivery in Williamsburg, it is obligated to pay use tax in

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[6] In fact, in *Associated Industries*, the Supreme Court rejected the Director's effort to aggregate the effect of the local sales and use taxes, insisting that they be considered for individual localities. 511 U.S. at 650-51.

Kirkwood – perhaps on the premise that a particular piece of tangible personal property would ultimately be used there. But as discussed above, "use" for purposes of the use tax is not defined as in common speech. Again, the tax applies to "storage" and "use," and both terms are defined in ways that bring the tax into effect the moment tangible personal property is delivered in Missouri and within purchaser's possession or control. *See* pp. 11-12, *infra*. A particular piece of tangible personal property may be "used" – *i.e.*, stored, kept, retained, etc. – in many different locations during its useful life. But again, under the Missouri scheme, it is taxed only in the first.

A "wait for actual use" rule would be unreasonable and impractical, for at least two reasons. First, it would preclude calculation for some indeterminate period of time. If significant, such delay could eliminate, to a notable degree, the "compensatory" purpose of the use tax, given that sales tax is imposed immediately upon purchase regardless of how long an item will then sit unused. That might not be true if "storing" is (as it must be) considered "use." But to conclude that some "keeping" or "retention" is so brief as not to be "storage" would leave that term without practical definition, open to constant dispute. And it would ignore the statutory definition of "use."

Second, it would require impossibly complex accounting. That is demonstrated by attempting to apply such a rule to the facts of a case recently decided by the Court of Appeals, *Lucent Technologies v. Director of Revenue*, 123 S.W.3d 290 (Mo. Ct. App. W.D. 2003). Most of the equipment purchased there was delivered to a single Lucent facility in Town and Country, Missouri. But it was ultimately "used" (giving that term its usual meaning, and not the statutory one) in various facilities elsewhere. If the point of delivery were not the point at which the use tax were paid, Lucent would be required to track each item, ascertain the time and place of its subsequent storage or use, and then pay use tax calculated for that time and place.

Similar complexity would be required under the facts before this Court in *Southwestern Bell Telephone Co. v. Director of Revenue*, No. SC86441. The purchases at issue there range from large switching equipment to miscellaneous supplies. Deferring use tax liability until the equipment was stored for some (ultimately arbitrary) period, or even until it is actually installed or the materials actually expended, then calculating local use tax rates according to the rate at that location, would be an accounting nightmare.

And it would partially defeat the goal of having a truly compensatory tax. To use our hypotheticals, it would let Kirkwood

collect use tax when a purchaser drives to Williamsburg, a scenario where Kirkwood could never collect sales tax. And were Williamsburg to adopt a local use tax, it would bar Williamsburg from collecting use tax when someone comes to pick up a shipment to Williamsburg, though Williamsburg could collect sales tax if the same item were purchased at the same location.

This Court, to create discrimination where none now exists, should not reinterpret the use tax law so as to prevent payment based on the point of delivery and thus partially deprive the use tax of its compensatory character. If Kirkwood Glass wants to obtain the benefit of the decision of some jurisdictions, like Williamsburg, not to impose a local use tax, it can do so by merely accepting delivery within such a jurisdiction. But so long as Kirkwood Glass wants the convenience of local delivery, it must pay the Kirkwood use tax, just as it pays the Kirkwood sales tax when it wants the convenience of buying goods down the street or around the corner.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 4,436 words.

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