IN THE MISSOURI SUPREME COURT

NO. SC86347

KIRKWOOD GLASS CO., INC.,

Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Respondent.

Appeal from the Administrative Hearing Commission of Missouri

The Honorable June Striegel Doughty, Commissioner

APPELLANT'S REPLY BRIEF

McCARTHY, LEONARD, KAEMMERER, OWEN, McGOVERN & STRILER, L.C.
James C. Owen, #29604
Katherine S. Walsh, #37255
16141 Swingley Ridge Rd., #300
Chesterfield, MO 63017
(636) 532-7100
(636) 532-0857 (Facsimile)

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHRORITIES

Cases

Statutes

Regulations

ARGUMENT

I. INTRODUCTION

The Respondent Director of Revenue ("DOR") ignores the facts and misapplies the law in an attempt to sustain a local use tax system that is contrary to established constitutional law. The current sales/use tax in Missouri favors in-state purchases over out-of-state purchases in certain instances such as the one stipulated to by the parties. (L.F. 33) This violates the "strict rule of equality adopted in *Silas Mason*.[1]" *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73, 83 S.Ct. 1201, 1206, 10 L.Ed.2d 202 (1963). When Kirkwood Glass orders goods from a Missouri vendor located in Williamsburg, for delivery to Kirkwood Glass in Kirkwood, Kirkwood Glass pays sales tax at a rate of 4.725%. If it orders the same goods from an out-of-state vendor for delivery to Kirkwood Glass in Kirkwood, Kirkwood Glass pays tax at the rate of 5.475%. Indeed, if Kirkwood Glass orders the goods from any Missouri vendor located in a jurisdiction imposing a lower local sales tax rate than Kirkwood's local use tax rate, Kirkwood Glass will pay less tax. That is precisely the type of discrimination that the Commerce Clause prohibits.

---

[1] *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584, 57 S.Ct. 524, 527, 81 L.Ed. 814 (1937) ("When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.")

Missouri's use tax system discriminates on its face and in practical effect. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 801 (1992). Sales that are subject to the state and local *sales* taxes are exempt from the Missouri state and local *use* tax. *See* §§ 144.615(2) and 144.757.3, RSMO 2000.[2] For that same state and local *sales* taxes, an in-state sale is deemed consummated at the Missouri retailer's place of business. *See* § 32.087.12(1).[3] That is why Kirkwood Glass owes no Missouri state or local *use* tax on its purchase from the Williamsburg vendor; it owes the 4.725% *sales* tax, and it owes that sales tax based on the rate applicable to the retailer. Kirkwood Glass would pay that rate regardless of where in Missouri Kirkwood Glass takes delivery of the goods.

Conversely, as the DOR correctly notes, the Missouri state and local *use* taxes normally attach at the place where a Missouri customer takes delivery of tangible personal property from the out-of-state vendor. *See* § 144.610.1. As a result, Kirkwood Glass would be required to remit the higher tax of 5.475%, the Missouri state and local use taxes, on its purchases from the out-of-state vendor. This disparity violates the

---

[2] All statutory references are to RSMo 2000 unless otherwise indicated.

[3] Section 32.087.12(1), provides that: "[f]or the purposes of any local sales tax imposed by an ordinance or order under the local sales tax law, all sales, except the sale of motor vehicles, trailers, boats, and outboard motors, shall be deemed to be consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer or his agent to an out-of-state destination." (Emphasis added.)

Commerce Clause. The remedy for this is simple. If, instead of providing an exemption from use tax on in-state purchases, Missouri provided a credit against use tax for sales tax paid, Missouri's tax system would pass constitutional muster. This credit mechanism, approved by the United States Supreme Court, is what the Georgia law provides (*see* discussion *infra* at p. 22).

It is wholly irrelevant that Missouri's system favors out-of-state purchases in other instances. This in-state favoritism is a violation of the Commerce Clause. The fact that the DOR has managed to devise a method for a taxpayer to "hypothetically" avoid paying higher local use taxes by setting up some type of "Pony Express" hand-off delivery of goods in the lower local use tax jurisdictions does not make it a constitutional law. The DOR's far-reaching theory, which was not even raised below, simply means that it acknowledges that the law is unconstitutional and now strives to find ways to avoid that result.

The DOR's primary misconception, which undercuts its entire argument, is that Kirkwood Glass must travel to Williamsburg or any other location to make its purchases in order to take advantage of the lower local sales tax in that jurisdiction. *See*, § 32.087.12(1) ("any local sales tax … shall be deemed to be consummated at the place of business of the retailer….) The parties' Joint Stipulation did not mention anything about Kirkwood Glass traveling to Williamsburg to make the purchase in question. (L.F. 33) The DOR is apparently assuming such travel in its hypothetical #3 (DOR Brief at p. 18) in order to make it appear that a purchaser would be incurring the same costs in traveling to another jurisdiction to take advantage of a lower sales tax rate. However,

§ 32.087.12(1) makes it clear that the premise for the DOR's assumption is wrong. For that reason, her hypothetical that assumes Kirkwood Glass travels to Williamsburg is not a fair comparison to the DOR's hypothetical #4, where Kirkwood Glass assumedly travels to Williamsburg to take some ephemeral delivery of the goods (DOR Brief at pp. 18-19).

Further, the DOR's hypothetical #4 is unrealistic and not pragmatic, as any reasonable purchaser would have a common carrier deliver the goods to them rather than traveling distances to pick up the goods and incurring even greater costs. Also, the DOR's requirement that the taxpayer-purchaser travel to another jurisdiction to accept delivery would, in and of itself, run afoul of the Commerce Clause. *See General Motors Corporation v. Director of Revenue*, 981 SW2d 561, 565 (1998)("The fact that a corporation could avoid a discriminatory tax by changing either [its] domicile . . . or organizational form does not render a statute constitutionally sound." *Citing Kraft General Foods, Inc. v. Iowa Depart. of Revenue*, 505 U.S. 71, 78, 112 S.Ct. 2365 (1992).

II. BACKGROUND

A. Brief History

Appellant's initial brief outlined the history of the Local Use Tax in great detail, but suffice it to say that Missouri has long imposed a state use tax for the privilege of storing, using or consuming tangible personal property within Missouri. *See* § 144.610.1. Problems began when Missouri attempted to authorize political subdivisions to impose a

local use tax, such that it literally created a "patchwork scheme"[4] (§ 144.747, RSMo Supp. 1990), then a tax declared unconstitutional *ab initio* (§ 144.748), and now returns to the same patchwork scheme that existed under the previously rejected §144.747, RSMo 1990 under the current local use tax law (§ 144.757.3).

Although cases involving the Commerce Clause are legion and varied, this case involves the "compensatory tax doctrine" under the negative, or dormant, Commerce Clause, which forbids states from discriminating against interstate trade. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 646-47, 114 S.Ct 1815, 1820, 128 L.Ed.2d 639 (1994) *("AIM II"), citing Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 98, 144 S.Ct. 1345, 1349 (1994).

> The Clause prohibits economic protectionism - - that is "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." 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, and have applied a 'virtual *per se* rule of invalidity' to provisions that patently discriminate against interstate trade."

[4] *Associated Industries of Missouri v. Director of Revenue*, 918 S.W.2d 780, 785 (Mo. banc 1996), *as mod. on denial of r'hrg ("AIM III").*

Id. 511 U.S. at 647, 144 S.Ct. at 1820. [Citations omitted.] [5]

The DOR also makes it appear as though this Court must inquire into the state's reasons for implementing the new local use tax. However, when the U.S. Supreme Court rendered its decision on Missouri's prior Local Use Tax law, it made it clear that a "court need not inquire into the purpose or motivation behind a law to determine that it actually discriminates against interstate commerce." *AIM II*, 511 U.S. at 653, 114 S.Ct. 1815. Finally, although the DOR argues that the discrimination here may involve only a small number of transactions, "[t]he magnitude and scope of the discrimination have no bearing on the determinative question whether the discrimination has occurred." *AIM II*, 511 U.S. at 650, 114 S.Ct. 1815.

B. The Nuance of Local Jurisdictions

The parties agree that the legal question in this appeal is whether the State of Missouri has discriminated against interstate commerce by authorizing local jurisdictions

[5] The Amici's brief concentrates on the test under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), which originated and is most often cited in connection with privilege taxes such as gross receipts license taxes. The "compensatory tax doctrine," which is at issue here, only involves the issue of whether the compensatory tax is discriminatory on its face or as applied. The other three prongs of that test are not at issue.

to impose use taxes at higher rates on interstate purchases than the taxes imposed on like in-state purchases. The answer to this question is YES.

The DOR claims that "[w]hen 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 an intrastate purchase." (DOR's Brief at p. 10) This statement is belied by the facts in the record. For instance, using a more concrete example, if Kirkwood Glass ordered $1,000,000 of widgets from an out-of-state vendor for delivery in Kirkwood, it would pay $54,750 in Missouri state and local use tax (5.475% use tax rate Missouri and Kirkwood combined). If, instead, Kirkwood Glass ordered the same amount of widgets from a vendor in Williamsburg, Missouri for delivery in Kirkwood, it would pay $47,250 in Missouri state and local sales tax (4.725% sales tax rate Missouri and Williamsburg combined). Kirkwood Glass would owe no use tax on the in-state transaction because it is exempt from use tax by §§ 144.615(2) and 144.757.3. The tax saving from ordering from the Williamsburg vendor is $7,500. Indeed, if Kirkwood Glass orders the widgets from any Missouri vendor located in a Missouri tax jurisdiction having a combined sales tax rate below 5.475%, Kirkwood Glass will pay less tax. Both the out-of-state and in-state vendors are similarly situated. **The goods are following the same path to the same purchaser. The only difference is that the interstate transaction is taxed more heavily**.

Discrimination against interstate commerce was demonstrated in Appellant's opening brief. The overall effect of the current local tax is "direct discrimination" against interstate commerce. The inequality exists between the local taxing jurisdictions. The

fact that these local jurisdictions may have control within their own borders does not provide a guarantee that interstate commerce is free from discrimination. To simply state, as the DOR has, that there is equality within each taxing jurisdiction, is to turn control of the Commerce Clause of the United States over to the **local** governments, something that past opinions have been careful to instruct against. While Kirkwood Glass certainly does not object to local jurisdictions being able to tax, those taxes must be constitutionally imposed. As the Court stated in *AIM II*: "What a State may not do is appeal to decentralized decision making to augment its powers: It may not grant its political subdivisions a power to discriminate against interstate commerce that the State lacked in the first instance. … The State remains free to authorize political subdivisions to impose sales or use taxes, as long as discriminatory treatment of interstate commerce does not result." 511 U.S. at 653, 114 S.Ct. at 1824. [Emphasis added.]

The DOR simply ignores this admonishment. She also ignores the underlying basis for the Court's holding in *AIM II*, where the Court stated that the Commerce Clause imposes:

> the "strict rule of equality adopted in *Silas Mason*," *Halliburton,* 373 U.S., at 73, 83 S.Ct., at 1206, a rule that has controlled compensatory tax cases for over half a century. In *Silas Mason*, Justice Cardozo was explicit in explaining for the Court that the compensatory tax doctrine requires precision to ensure that, upon the "reckoning" of "account[s]," the "sum" on the interstate side of the ledger is "the same" as that on the intrastate side. 300 U.S., at 584, 57 S.Ct., at 527. More recently, we have reiterated

> that strict parity is demanded by the compensatory tax doctrine as we have explained that a compensatory tax leaves a consumer free to make choices "without regard to the tax consequences"; if he purchases within the State he may pay a tax, but if he purchases from outside the State he will pay a 'tax of the *same amount*.' *Boston Stock Exchange, supra*, 429 U.S., at 332, 97 S.Ct., at 608 [Emphasis added].

511 U.S. at 652, 114 S.Ct. at 1823.

It does not matter that Missouri empowered the local jurisdictions to discriminate against interstate commerce; the mandate is for the taxpayer to be free to make purchases from out-of-state without suffering a higher tax than if that same taxpayer purchased the goods in-state. Currently, a taxpayer in St. Louis City, Missouri need only order goods from certain retailers in St. Louis County (L.F. 44)[6] to escape a higher local use tax burden on the purchase of the same goods than if that taxpayer purchased those same goods from an out-of-state retailer. (L.F. 61) This is patently unconstitutional as St. Louis County does not have any county local use tax and St. Louis City has one of the highest local use taxes.

III. "EQUALITY" HAS NOT BEEN MET

The DOR argues that the burdens on interstate and intrastate commerce do not necessarily have to be "equal" as the burden on interstate commerce can be less than the burden on intrastate commerce. (DOR's Brief at p. 11) As noted at the outset, within these very loose guidelines that the DOR has established for herself, she maintains that

the sales/use system in Missouri is "equal" based on the fact that the local use tax is only imposed one time when the goods are delivered into the jurisdiction. (DOR's Brief at p. 13) Unfortunately, the DOR completely ignores the fact that the fundamental command of the Clause is 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." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S.Ct. 2620, 2622, 81 L.Ed.2d. 540 (1984). Equal treatment for all taxpayers, within and without the state, is the condition precedent for a valid use tax (*Halliburton*, 373 U.S. at 69), not merely equal treatment for taxpayers residing in the same local taxing jurisdiction.

The DOR's primary argument is that it, even though a taxpayer with a local use tax in its home jurisdiction greater than the local sales tax in another jurisdiction has an incentive to avoid purchasing in interstate commerce in its home jurisdiction, that taxpayer can control the place of delivery for out-of-state purchases. Moreover, since the DOR alleges that delivery, "no matter how briefly" (DOR's brief at p. 17), is the situs for local use taxation, taxpayers who are willing to travel from one jurisdiction to another to take advantage of a lower local sales tax (which is not necessary under §144.610.1) could likewise complete the same travel and accept delivery in that other jurisdiction that has no local use tax.

In other words, the DOR makes a perplexing argument that Missouri's discriminatory tax scheme is not really discriminatory because Missouri purchasers can circumvent the local use tax entirely by changing the way that they do business in

[6] Cool Valley's sales tax of .06075 verses St. Louis City's local use tax of .06950.

Missouri. Under the DOR's theory, any Missouri purchaser who wishes to avoid local use tax on out-of-state purchases can simply set up a bogus delivery point "somewhere" in a jurisdiction having no local use tax. While this "solution" to discrimination may give rise to a whole new industry devoted to exploiting Missouri use tax havens, it provides little solace to out-of-state vendors since they have no control over their potential Missouri buyers' willingness to engage in such shady transactions. Likewise, that "solution" is little solace to the honest Missouri buyers and/or to Missouri buyers who do not wish to incur the additional expense involved in creating a delivery point.

As authority for this proposition, the DOR cites to 12 CSR 10-113.200(3)(A). However, that regulation is not helpful to its argument, as it provides that: "Title transfers when the seller completes its obligations regarding physical delivery of the property, unless the seller and buyer expressly agree that title transfers at a different time. A recital by the seller and buyer regarding transfer of title is not the only evidence of when title passes. The key is the intent of the parties, as evidenced by all relevant facts, including custom or usage of trade." [Emphasis added.] First, this regulation not only refers to the final "completion" of the delivery process, which will be in Kirkwood not some bogus" delivery point in some foreign jurisdiction where the taxpayer has no business office. Second, although the regulation has a provision for the delivery to be effectuated according to the parties' agreement, this will not often be the place of the purchaser's business for many logistical reasons, including risk of loss and other financial considerations. Surely "custom and trade" would not be construed to be a delivery point to an unknown place in a foreign jurisdiction.

The DOR also cites to 12 CSR 10-117.100(1), which provides: "When a transaction is subject to state use tax, the transaction is also subject to local use tax adopted by the county or municipality where the tangible personal property is first delivered in Missouri." Again, the DOR states that this "first delivery" can take place "no matter how briefly." This argument fails for at least three reasons.

First, the only case law which supports the DOR's argument that a delivery can be considered as the place of taxation arises from cases involving challenges of whether the State of Missouri had sufficient "nexus" to tax books or aircraft that were in the state for a brief period of time. *Fall Creek Const. Co., Inc. v. Director of Revenue,* 109 S.W.3d 165, 172-174 (Mo. banc 2003); *R & M Enterprises, Inc. v. Director of Revenue,* 748 S.W.2d 171, 173 (Mo. banc 1988), *overruled on other grounds by House of Lloyd, Inc. v. Director of Revenue,* 884 S.W.2d 271 (Mo. banc 1994). Kirkwood Glass does not challenge those rulings, as again, they do not relate to this matter. The question here is not whether the local use tax could be validly imposed if delivered into one of many places in the state. The question here is which location, among several choices, will a good be deemed to be delivered for purposes of local use taxation.

The DOR ignores all of the language in § 144.610.1, which provides that "the use tax does not apply until *the transportation of the article has finally come to rest within the state* or until the article has become commingled with the general mass of property of this state." [Emphasis added.] The tangible personal property would not "finally come to rest" in this instance until "the transportation of the article" is ultimately received in Kirkwood. If the goods were delivered in Williamsburg and subsequently transported to

Kirkwood where they finally came to rest before resale, there is no question that § 144.610.1 would deem Kirkwood as the place of delivery as between these two locations.

Second, if the Court had to choose between the plain and ordinary meaning of the terms "storing, using and consuming" as between a spot on the highway and the purchaser's principal place of business, one can only hope that the choice will be one that avoids an absurd result. This Court is bound to construe statutes in a way that will not lead to an absurd or unreasonable result. *State ex rel. McNary v. Hais,* 670 S.W.2d 494, 495 (Mo. banc 1984)(the legislature is presumed not to pass absurd laws and courts favor constructions that avoid unjust and unreasonable results). The Court can gain insight into the legislature's intent by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of the enactment. *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003). In this case, one doubts that the legislature intended to create a loophole that would allow taxpayers to avoid paying local use tax.

Third, there are the very practical, common sense considerations which dictate that a taxpayer can only accept delivery in a place in which it has some connection. In this case, Kirkwood Glass only has an office in Kirkwood to accept delivery of its goods. It can be charged use tax when it accepts delivery of items at its store in Kirkwood. It can only be charged sales tax in any jurisdiction where it happens to go and purchase merchandise because someone is physically standing at the counter when it purchases the items. It cannot, however, "accept delivery" of items from an out-of-state vendor in

Williamsburg, or any place else where it has no facilities for accepting merchandise. There cannot be a sale from out-of-state to a spot on the highway.

Thus, while Kirkwood Glass agrees that the taxable incident occurs at the time of delivery, this Court must examine each of the DOR's four examples with the above considerations in mind, including when, where and to whom the delivery is actually made. In the first of the DOR's examples, the widget is sent to a vendor in Kirkwood and Kirkwood Glass pays state sales tax and Kirkwood local sales tax. (DOR's brief at p. 16) In the second example, Kirkwood orders a widget from out-of-state to be sent directly to its store in Kirkwood. Delivery again occurs in Kirkwood but this time Kirkwood Glass pays state use tax and Kirkwood local use tax. (DOR's brief at p. 17) In the third example, a Williamsburg vendor purchases the widget and then sells it to Kirkwood Glass, which then pays state sales tax and Williamsburg local sales tax. (DOR's brief at p. 18) In the final, key example, the DOR states:

> 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.

(DOR's brief at p. 18, emphasis supplied.)

As discussed previously, the DOR ignores the mandate of § 32.087.12(1), which states that "under the local sales tax laws, all sales … shall be deemed consummated at the place of business of the retailer.…" Thus, the third hypothetical, that requires

Kirkwood Glass to travel to Williamsburg to pay the lower sales tax, is faulty, and the fourth hypothetical, which requires similar travel, thereby fails to make a fair comparison.

Further, when the hypothetical is examined, it is interesting to note that the DOR provides no details of how exactly the widget "arrives" in Williamsburg or from whom the Kirkwood Buyer retrieves it to bring back to Kirkwood. These details are missing because this situation is impossible. Goods that are shipped from out-of-state into Williamsburg (or any other jurisdiction in this state) by an in-state purchaser like Kirkwood Glass would be shipped to a vendor in Williamsburg and Kirkwood Glass would pay sales tax, not use tax. Additionally, even if there was use tax such use tax would not apply until the transportation of the widget finally came to rest in Kirkwood pursuant to § 144.610.1.

The DOR apparently assumes that the Commerce Clause requires purchasers who are subject to direct discrimination under a local taxing law to affirmatively avoid that discrimination by opening a new store or some type of operation in the other jurisdiction with the more favorable local sales tax rate for the sole purpose of accepting delivery of its goods from out of state. If this was even plausible for most businesses, it is certainly not the test under Commerce Clause jurisprudence.

The question comes down to the DOR's concept of what steps a taxpayer must go through in order to make an unconstitutional law constitutional by stretching the limits of the term "delivery." Can goods be delivered to a place where the taxpayer has absolutely no connection? Contrary to the DOR's assertions, the unconstitutional taxing scheme

cannot be saved simply by having in-state purchasers substantially alter their business practices by arranging to have goods shipped to Williamsburg. *See General Motors Corp. v. Director of Revenue*, 981 S.W.2d at 565 *citing Kraft General Foods, Inc. v. Iowa Dept. of Rev.*, 505 U.S. at 78. In *Kraft*, the Iowa Department of Revenue argued that the tax scheme was not unconstitutional because Kraft could have avoided the discriminatory tax by reorganizing its corporate structure. The U.S. Supreme Court rejected that argument, stating: "The fact that a corporation could avoid a discriminatory tax by changing either [its] domicile … or organizational form does not render a statute constitutionally sound." *Id*.

Even if Kirkwood Glass could drive to Williamsburg, accept delivery of its out-of-state order, transport the order back to Kirkwood and pay the Williamsburg use tax rate - - a dubious proposition at best - - this fact is irrelevant to the Court's analysis. The proper focus should remain whether "upon the 'reckoning' of 'accounts,' the 'sum' on the interstate side of the ledger is the 'the same' as that on the intrastate side." *AIM II,* 511 U.S. at 652, 114 S.Ct. at 1823 *citing Henneford v. Silas Mason Co., supra*, 300 U.S. at 584. The ability to devise situations where there is no unconstitutional burden or to point to some cases where the burden is equal was not enough to save the statutory scheme at issue in AIMUS; it is not enough to save the system at issue here. "A state statute may not favor in-state businesses over out-of-state businesses for no reason other than the geographic location of the businesses." *General Motors Corp. v. Director of Revenue*, 981 S.W.2d at 565, *citing American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 286, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987).

Kirkwood Glass also notes that the DOR has based its entire defense of this case on hypotheticals. Kirkwood Glass, on the other hand, was aware of the warnings in the *AIM II* decision not to rely on "a hypothetical possibility" in proving the discriminatory effect of the tax under § 144.757. For that reason, it worked hard to forge Stipulations of Fact to present concrete evidence of discrimination. Kirkwood Glass has carried its evidentiary burden and the DOR should not be permitted to rely entirely on "a hypothetical possibility" to rebut the evidence. The Court in *AIM II* is the governing law on this matter and should forbid the DOR's attempt to base its case on rank speculation:

> [W]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in "effect," *see, e.g., Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 270, 104 S.Ct. 3049, 3054, 82 L.Ed.2d 200 (1984), and we have emphasized that "equality for the purposes of ... the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton,* 373 U.S., at 70, 83 S.Ct., at 1204. *See also Gregg Dyeing Co. v. Query,* 286 U.S. 472, 481, 52 S.Ct. 631, 635, 76 L.Ed. 1232 (1932) ("Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries").

AIM II, 511 U.S. at 654.

Finally, does the DOR truly mean to suggest that certain jurisdictions should be established as "no local use tax" jurisdictions where businesses could all "receive deliveries" and pay no local use tax to their resident jurisdictions? If so, one of the ultimate ironies of the DOR's brief is that it argues against the interests of the parties filing Amici briefs. The cities of Kansas City and St. Louis stand to lose an alleged $55 million each year because of the DOR's "Pony Express" scheme devised to save the new Local Use Tax from being declared unconstitutional, because if this Court approves this scheme, taxpayers from the City of St. Louis would be crazy not to at least travel to St. Louis County for purchases, where local sales tax is much lower. (L.F. 61) Moreover, jurisdictions surrounding Kansas City could arrange some loopholes for at least some businesses to avoid the much higher tax rate.

IV. STATUTES IN OTHER STATES

A. Georgia

The DOR and Amici brief correctly cited the Supreme Court's approval of the Georgia sales and use tax law in *AIM II*, but apparently neither of them actually closely examined Georgia's sales and use tax law to see exactly how it operated. Initially, Georgia imposes state sales and use tax of 4%. (Ga. Code Ann. §48-8-30(b) (1) and

(c.1)(1)).[7] Georgia Code Ann. § 48-8-82 further authorizes counties and municipalities to levy joint sales and use taxes, as it provides, in pertinent part:

> When the imposition of a joint county and municipal sales and use tax is authorized according to the procedures provided in this article within a special district, the county whose geographical boundary with that of the special district and each qualified municipality located wholly or partially within the special district **shall levy a joint sales and use tax at the rate of 1 percent**. [Emphasis added.]

The 1% sales and use tax must be passed by a majority vote in a referendum election. Ga. Code Ann. § 48-8-85. Thus, like Missouri, there may be local sales and use taxes in some jurisdictions and not in other jurisdictions, although in Missouri the county and municipality need not levy the tax jointly.

The key difference in the laws is that Georgia does, **unlike Missouri**, have an **intrastate credit** procedure, to wit:

> Where a local sales or use tax has been paid with respect to tangible personal property by the purchaser either in another local tax jurisdiction within the state or in a tax jurisdiction outside the state, the tax may be credited against the tax authorized to be imposed by this article upon the

[7] The Georgia state use tax is subject to a credit for like taxes previously paid in another state. Missouri completely exempts from state and local **use** tax any transaction subject to Missouri **sales** tax. *See* §§ 144.615(2) and 144.757.3.

same property. If the amount of sales or use tax so paid is less than the amount of the use tax due under this article, the purchaser shall pay an amount equal to the difference between the amount paid in the other tax jurisdiction and the amount due under this article. The commissioner may require such proof of payment in other local tax jurisdiction as he deems necessary and proper. No credit shall be granted, however, against the tax imposed under this article for tax paid in another jurisdiction if the tax paid in such other jurisdiction is used to obtain a credit against any other local sales and use tax levied in the special district or in the county which is coterminous with the special district; and taxes so paid in another jurisdiction shall be credited first against the tax levied under this article and then against the tax levied in Article 3 of this chapter, if applicable.

Ga. Code Ann. § 48-8-90. [Emphasis added.]

Georgia's law is, therefore, not comparable to Missouri's. Georgia has a uniform sales and use tax rate across the state and an intrastate credit system. Missouri does not have a uniform local sales and use tax rate nor does it employ an intrastate credit system. The only common trait is that the local use tax has to be approved by a majority vote of the people. The system approved by the Supreme Court in Georgia was and is constitutional, unlike Missouri's system.

B. Ohio

In Ohio, prior to 1978, all property was taxed the same within each county but not necessarily from county to county – much the same as Missouri's current system. The

Ohio Supreme Court determined that the system was unconstitutional in *American Modulars Corp. v. Lindley*, 376 N.E.2d 575 (Ohio 1978), *cert. denied* 439 U.S. 911, finding:

> Because goods used in taxing counties and purchased in non-taxing Ohio counties are not subject to a four and one-half percent tax even though identically used goods purchased out of state are so taxed, R.C. 5741.021 provides a direct commercial advantage to local purchases which impedes the free flow of trade between the states. Indeed, R.C. 5741.021 discriminates against out-of-state acquisition as invidiously as it would if it subjected those purchases to unfavorable tax bases or if there were no county tax at all. Finally, the fact that R.C. 5741.021 discriminates against interstate commerce only in its practical effect does not bar a finding that it is unconstitutional. We, therefore, hold that R.C. 5741.021 is unconstitutional insofar as its application imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state.

Id. at 577-78. [Citations omitted.] Ohio addressed this problem legislatively by adding subsection (D) to R.C. 5741.021, which provides:

> The tax levied pursuant to this section shall not be applicable to any benefit of a service realized or to any storage, use, or consumption of property not within the taxing power of a county under the constitution of the United States or the constitution of this state or to property or services on which a

> tax levied by a county or transit authority pursuant to this section or section 5739.021, 5739.023, 5739.026, 5741.022 or 5741.023 of the Revised Code has been paid, if the sum of the taxes paid pursuant to those taxes is equal to or greater than the sum of the taxes due under this section and sections 5741.022 and 5741.023 of the Revised Code. If the sum of the taxes paid is less than the sum of the taxes due under this section and sections 5741.022 and 5741.023 of the Revised Code, the amount of the tax paid shall be credited against the amount of the tax due.

Without any authority, the DOR states that "use" is different in Ohio, therefore, the decision in *American Modulars* and the changes to its local use tax law should not even be considered. In Ohio, "use" is defined as "the exercise of any right or power incidental to the ownership of the thing used." R.C. 5741.01(C). This definition is nearly identical with Missouri's definition of "use," which is "the exercise of any right or power over tangible personal property incident to the ownership or control of that property." § 144.605(13).

The DOR misunderstands *American Modulars*. The credits suggested, and ultimately passed by the legislature, were not based on how many times the goods were being delivered as the DOR appears to suggest, but whether the goods would be taxed

higher if they were delivered in one place rather than they would had they been sold locally in another, exactly as in Missouri. [8]

V. SIMPLE, NON-DISCRIMINATORY ALTERNATIVES ARE AVAILABLE TO REMEDY THE PROBLEM

There is no reason for Missouri to fight so hard for this unconstitutional system when simple nondiscriminatory alternatives exists. *See e.g., New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives). Both Georgia (which the DOR and the Amici both appear to approve) and Ohio's new taxing scheme illustrate the logical and nondiscriminatory alternative to Missouri's local use tax system. Rather than exempting in-state purchases from the state and local use tax, Missouri could easily provide a credit against the Missouri and local use tax for any Missouri and local sales tax paid. This

[8] The Amici reference a Virginia statute which imposes a local use tax at the rate of 1% to provide general revenue for the city or county imposing the use tax. The statute also prescribes the manner by which the local use tax may be imposed. The Amici argue that this is similar to Missouri's method and, therefore, speaks in favor of Missouri's local use tax. *See*, Va. Code Ann. § 58.1-606. The Virginia statute has never once been challenged. Based on a straight reading of the statute, Kirkwood Glass would argue that it is also unconstitutional. It is not, however, before this Court to review, nor is there any context for this Court to make a comparison.

would be similar to the credit Missouri now gives for purchases that have been subjected to another state's sales or use tax. *See* § 144.615(5). In the above example when Kirkwood Glass ordered $1,000,000 of widgets from a Williamsburg vendor for delivery in Kirkwood, Kirkwood Glass would still pay $47,250 in state and local sales tax to the vendor, but it would also have to pay an additional $7,500 in Kirkwood local use tax.

Another idea would be to attempt a flat sales and use tax statewide but without the burdensome local sales and use taxes. This system would require revenue-sharing agreements similar to those existing intra-county on automobile sales taxes, so that the local jurisdictions were not left without revenue, but it is a system that could work in a constitutional manner.

CONCLUSION

In *Director of Revenue v. Superior Aircraft Leasing Co.,* 734 S.W.2d 504 (Mo. banc 1987), this Court stated that the purpose of a use tax is to "complement, supplement, and protect the sales tax." *Id.* at 506 (quotation omitted). The Court further stated that the use tax "eliminates the incentive to purchase from out-of-state merchants in order to escape local sales taxes thereby keeping in-state merchants competitive with sellers in other states, and it also provides a means to augment state revenues." The difficulty with protectionism of the sales tax became clear in *AIM II*, when the United States Supreme Court held that favoritism, no matter how slight, and regardless of the fact that the *overall* effect of the taxing scheme favored interstate commerce, was still unconstitutional. The legislature did not find a remedy after *AIM II;* rather, it compounded the problem by leaving the choice of whether to pass the tax up to local jurisdictions. This inevitably led

to the result that any taxpayer with a higher local use tax rate can be punished for purchasing through interstate commerce when that purchaser stores, uses or consumes that good in its home jurisdiction.

For the foregoing reasons and those set forth in Appellant's Opening Brief, Appellant requests that this Court find that Missouri's local use tax discriminates against interstate commerce. This Court should declare it unconstitutional and remand this case to the Administrative Hearing Commission with instructions to grant Kirkwood Glass's refund claim.

Respectfully submitted,

McCARTHY, LEONARD, KAEMMERER, OWEN, McGOVERN & STRILER, L.C.

By:_____

James C. Owen, #29604
Katherine S. Walsh, #37255
16141 Swingley Ridge Rd., #300
Chesterfield, MO 63017
(636) 532-7100;
(636) 532-0857 (Fax)
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record hereby certifies that:

1. As required by Rule 55.03, counsel for Appellant are James C. Owen and Katherine S. Walsh, McCarthy, Leonard, Kaemmerer, Owen, McGovern & Striler, L.C., 16141 Swingley Ridge Road, Suite 300, Chesterfield, Missouri 63017, (636) 532-7100, (636) 532-0857 (fax).

2. The Brief to which this certificate is attached complies with the limitations contained in Rule 84.06(b).

3. This Brief contains 7,451 words in Microsoft Word 2002 format.

4. Also served and filed with this Appellant's Brief is a floppy disk containing the brief, which is double-sided, high density, IBM-PC compatible 1.44 MB, 3½" size, with an adhesive label affixed identifying the caption of the case, the filing party, the disk number, and the word processing format (Microsoft Word 2002). The disk has been scanned for viruses and it is virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of March, 2005, a true and accurate copy of the foregoing Appellant's Reply Brief, and one disk containing the same, was sent, via First-Class Mail, postage prepaid, to the following:

James R. Layton
State Solicitor
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (Fax)

Galen P. Beaufort, City Attorney
William D. Geary, Asst. City Attorney
28th Floor, City Hall
Kansas City, MO 64106
(816) 513-3118
(816) 513-3133 (Fax)

Ivan L. Schraeder
Crotzer, Ford, Omsby & Schraeder
222 S. Central, Suite 500
St. Louis, MO 63105
(314) 726-3040
(314) 726-5120 (Fax)

Patricia A Hageman, City Counselor
Edward J. Hanlon, Deputy City Counselor
314 City Hall
St. Louis, MO 63103
(314) 622-3361
(314) 622-4956 (Fax)

k:\donovan\localusetxiII\kirkwoodgl\supct\replybrief1.doc