**In the**
**SUPREME COURT OF MISSOURI**

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**SC85513**

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**EMERSON ELECTRIC CO.,**
**Appellant,**

**v.**

**DIRECTOR OF REVENUE,**
**Respondent.**

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**ON PETITION FOR REVIEW FROM THE**
**MISSOURI ADMINISTRATIVE HEARING COMMISSION,**
**THE HONORABLE KAREN WINN, COMMISSIONER**

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# BRIEF FOR RESPONDENT

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## RESPONSE TO APPELLANT'S STATEMENT OF FACTS

**Appellant Emerson candidly concedes that the Administrative Hearing Commission found that the aircraft "is not used in Emerson's common carriage operations." Appellant's Brief ("App. Br.") at 6; *see* Respondent's Appendix at A-3.[1] Emerson neglects to mention some other facts that further explain its operations:**

- **Of Emerson's entire operations, the only portion that engages in the business of a common carrier is "the Emerson Transportation Division (ETD)." *Id*. at A-2.**
- **ETD "uses trucks" to transport "property for Emerson's affiliates as well as third-party customers' property." *Id*. at A-3.**
- **"ETD accounts for approximately 2% of both Emerson's gross sales and gross profits." *Id*.**

[1] **The copy of the Administrative Hearing Commission decision included in the Appellant's Appendix is missing a page. The appendix to this brief includes a complete copy. Citations to the Appendix are thus to the Appendix herein.**

## ARGUMENT

**That a small portion of Emerson Electric's business is as a common carrier does not make Emerson a "common carrier" within the meaning of § 144.030.2(20).**

**Purchases by Emerson Electric and others in Missouri are subject to tax – sales, if the purchase is from someone in Missouri; or use, if the purchase is from someone outside Missouri. Because Emerson purchased the aircraft from "a non-Missouri vendor" (Appendix at A-2), the purchase is subject to the use tax imposed by § 144.610.1:**

> **A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. . . .**

**Not all tax statutes are crystal clear. Ambiguities are generally construed in favor of the taxpayer. *E.g.*, *Mary S. Reithmann Trust v. Director of Revenue*, 62 S.W. 2d 46, 48 (Mo. banc 2001). At least with respect to Emerson's purchase of the aircraft, though, there is no ambiguity in § 144.610.1. Here, as at the AHC, "Emerson presents no argument that its purchase of the aircraft does not come within the scope of the use tax set forth in § 144.610.1." Appendix at A-5.**

**Not every purchase that falls "within the scope of the use tax set forth in § 144.610.1" is actually taxed, of course. The General Assembly has "specifically**

**exempted" a long series of transactions. § 144.030.1. Such exemptions are construed strictly against the taxpayer. *E.g., Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W. 3d 462, 465 (Mo. banc 2001); *Herman v. Director of Revenue*, 47 S.W.3d 362, 365 (Mo. banc 2001). Emerson relies on that portion of § 144.610.2(2) that exempts from use tax "sales of aircraft to common carriers for storage or use in interstate commerce."**

**There is no question here that the purchase at issue was that of an "aircraft." Nor is there any question that the aircraft was for "use in interstate commerce." The sole question is whether the purchase by Emerson of an aircraft is a sale to a "common carrier" even though the purchaser never offers carriage to the public on that aircraft.**

**Chapter 144 does not include a definition of "common carrier." And though that term is defined elsewhere, those definitions are specifically limited to their contexts. Emerson cites § 390.020, which defines "common carrier" as "any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon the public highways and airlines engaged in intrastate commerce" (§ 390.020.6), but specifically limits use of that definition to "this chapter." Emerson also cites § 622.600(4), which defines not "common carrier," but "Registered property carrier," and only for "use[] in sections 622.600 to 622.620." It defines a "Registered property carrier" as "a person who is entitled pursuant to subdivision (3) of this subsection to engage in**

**the transportation by motor vehicle of property, except household goods, for hire or compensation in intrastate commerce on the public highways in this state." It then cross references § 390.020, thus including a "registered property carrier" "within the term 'common carrier' as defined in section 390.020, RSMo."**

**These provisions are inapposite by their own restrictive terms. Thus we are left without a pertinent statutory definition of "common carrier." "The plain and ordinary meaning of statutory language is generally derived from the dictionary when no definition is provided."** ***State ex rel. Karpierz*****, 105 S.W.3d 487, 490 (Mo. banc 2003), citing** ***Curry v. Ozarks Elec. Co.*****, 39 S.W. 3d 494, 496-97 (Mo. banc 2001). We turn, then, as we must, to dictionary definitions.**

**Webster's Third New International Dictionary (1993), at 458, defines a "common carrier" as "one that undertakes for hire the carrying of goods, persons, or messages treating its clientele without individual preference or discrimination," or "in federal regulatory use, a carrier offering its services to all comers for interstate transportation by railroad, motor vehicle, ship, aircraft, or pipeline."**

**Black's Law Dictionary (7th ed., 1999), at 205, defines a "common carrier" as a "carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid." It differentiates a "common carrier" from a "private carrier," which "is not bound to accept business from the general public."** ***Id*****. "Carrier," in turn, is defined as an "individual or organization (such as a railroad or an airline) that transports passengers or goods for a fee."** ***Id*****.**

**Merged, these definitions restrict "common carriers" to the "one[s]" (Webster's) or the "individual[s] or organization[s]" (Black's) that offer to and actually do transport passengers or goods. Nothing in either definition suggests that a common carrier could be some broader organization of which the carrier is only a small part.**

**Emerson does not fit within the merged definition, nor within the individual definitions provided by Webster's and Black's. To use Webster's federal regulatory definition, Emerson does not – at least in the context of this case – "offer its services to all comers for interstate transportation by . . . aircraft." Indeed, the AHC found that Emerson's common carrier activities are carried out only by its Transportation Division, that the Division "uses trucks to transport Emerson's and third-party customers' property," and that the Division "has not used and does not use the aircraft or any other aircraft as part of its common carriage operations." Appendix at A-3.**

**The vast majority of the references to common carriers in Missouri statutes are entirely consistent with the dictionary reading of the term; they tie the term not to a legalism like corporate form or the name on a common carrier certificate, but to the transportation of passengers and goods. *See, e.g.*, § 149.045 (carriage of unstamped cigarettes); § 196.825 (delivery of dairy products); § 196.060 (transportation of human bodies); § 537.250 (liability for damage to property carried). Indeed, it is unlikely that Emerson would even want the broad definition of**

**common carrier it demands here to be applied to the myriad statutes that regulate how common carriers undertake tasks that the non-common carrier portion of Emerson undertakes. For example, it seems unlikely that Emerson would like its asserted status as a common carrier to impose upon it the "duty" to "permit any agent of" the Conservation Commission "to examine any package" in Emerson's possession. § 252.090.1.**

**Emerson might, however, like the result of reading its broad definition into other Missouri statutes. For example, § 238.402(7) bars transit agencies from taking land from "any common carrier engaged in interstate commerce . . . without first obtaining the written consent and approval of such common carrier." If Emerson is deemed in its entirety to be a "common carrier," then all of its property, no matter how far removed from common carriage, may be exempt from transit authority condemnation. *See also* § 70.373.7 (same as to condemnation by bi-state agencies). And Emerson might evade the motor vehicle financial responsibility law by extending the "common carrier" exemption in § 303.050 to cover motor vehicles it owns, regardless of their connection – or lack of connection – to Emerson's transportation division.**

**Emerson, again, directs the court's attention to § 390.020. But in addition to inappropriately minimizing the limited scope of that provision, Emerson ignores its separate treatment of those who operate airplanes. The Chapter 390 definition of "common carrier," § 390.020(6), includes two separate categories: (1) "any person**

**which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire...."; and (2) "airlines engaged in intrastate commerce." Emerson is not, of course, an airline engaged in commerce, intra- or interstate.**

**The distinction between airlines and other carriers is carried over into the tax code – a distinction that, for a time at least, may have contributed to keeping a major airline based in Missouri. Thus airlines are, under certain conditions, given a break on taxes for "aviation jet fuel." § 144.805.1. They are given an exemption from local sales taxes. § 144.807. And, of course, they are exempt from sales and use taxes on the purchase of aircraft. § 144.030.2(20). There is no rational explanation for extending such beneficial treatment to companies that are not airlines, merely because they include among their businesses a small motor carrier operation. Moreover, in Emerson's view, an airline would be deprived of such benefits if it didn't adopt a corporate structure that ensured all the tax exempt purchases are made by the entity that actually possesses the common carrier certificate – a result that would elevate, as Emerson wishes, form over substance.**

**Emerson attempts to avoid entirely the question of its common carrier status by claiming that the "Director does not dispute that Emerson is a common carrier," and noting that the Director "has already reviewed and *approved* Emerson's status as a common carrier for purposes of Section 144.030.2(3) and (11)." App. Br. at 12 (emphasis in original). But the Director has never conceded that Emerson is in its**

**entirety a "common carrier" for purposes of § 144.020.2(20). And the Director's consideration of Emerson's position as to paragraph (3) and (11) of that section is inapposite.**

**Emerson supports its claim for prior approval by citing to the parties' stipulation (L.F. 24-25). But the pertinent paragraph (¶ 16, L.F. 25) is much more limited than Emerson's broad-brush statement suggests:**

> **[Emerson's] qualification for the common carrier exemption contained in Sections 144.030.2(3) and (11), RSMo, has been reviewed and approved by the [Department of Revenue] audit division. This approval was based solely on [Emerson's transportation division's] operations involving motor vehicles. [Emerson's] use of aircraft did not and does not support the approval for these exemptions.**

**The distinction made in the last sentence is compelled not just by the facts, both as stipulated and as found by the AHC, but by the terms of paragraphs (3) and (11) themselves. Paragraph (3) is by its terms limited to common carriage consistent with the traditional definition of "common carrier" discussed above, *i.e.*, the persons actually carrying passengers or goods. Thus it exempts from taxation not companies, "[m]aterials, replacement parts and equipment purchased for use directly upon . . . motor vehicles . . . or aircraft engaged as common carriers of persons or property." Paragraph (11) is a closer parallel to paragraph (20); it exempts "[r]ailroad rolling stock" and certain motor vehicles "used by common**

**carriers." Like paragraph (20), it does not expressly limit the exemption to motor vehicles used in common carriage. But as stated in the stipulation that Emerson cites, that is the limit on the Director's prior approvals. Nothing in the record suggests that Emerson has ever sought, much less received, an exemption under paragraph (11) that would parallel what it seeks here, *i.e.*, an exemption to cover vehicles that are used by Emerson outside of its transportation division.**

**Emerson insists that what the Director and the AHC have done is to add words to the statute – *i.e.*, to rephrase § 144.030.2(20) to apply only to aircraft that will actually be used for common carriage. App. Br. at 12-13. To go that far would require that the court answer a question not posed here: whether the exemption applies to aircraft that are used "in [Emerson's] common carriage business" (App. Br. at 12), but for management and for use by other parts of the company, not for common carriage. To restrict the exemption to aircraft that are themselves used in common carriage, as the AHC suggests, would certainly conform to the apparent purpose of the exemption.**

**Again, if § 144.030.2(20) is ambiguous, it must be construed against Emerson. To justify a construction in its favor, Emerson suggests two purposes, beyond and broader than the purpose discussed by the AHC, for the exemption here: "to encourage industry to locate in Missouri"; and to encourage "common carriers to locate their businesses, or to store aircraft, in Missouri." App. Br. at 15. Neither supports Emerson's conclusion as to this specific exemption.**

**The first, if given the weight Emerson wishes, would gut, as to taxes on businesses, the rule that exemptions are to be construed against the taxpayer. It would apply to every tax, demanding that the exemption be read broadly so as to reduce business taxes and encourage retention or relocation.**

**The second begs the question of what constitutes a "common carrier." Emerson's transportation division is, of course, a common carrier. By giving that division the benefits of § 144.030.2(3), (11), and – if it ever becomes applicable – (20), Missouri is fulfilling the policy objective Emerson states. Extending the benefits of those paragraphs beyond the scope of common carriage accomplishes nothing more.**

**Construed in favor of the general rule that purchases are taxed, § 144.030.2(20) bars the refund Emerson seeks. The mere possession of a common carrier certificate, used by a division that is only a small part of a corporation's business, does not make the entire corporation a "common carrier" for purposes of § 144.030.2(20) and other Missouri statutes that use the term without restriction or definition.**

## CONCLUSION

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

**Respectfully submitted,**

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## CERTIFICATE OF SERVICE

**The undersigned hereby certifies that two copies of the foregoing were mailed, postage prepaid, via United States mail, on this 2nd day of January, 2004, to:**

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## CERTIFICATION OF COMPLIANCE

**The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.06, and that the brief contains 2,500 words.**

**The undersigned further certifies that the disk simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free.**

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**James R. Layton**

## APPENDIX