SC93448

IN THE SUPREME COURT OF MISSOURI

COMMERCIAL BARGE LINE COMPANY and AMERICAN COMMERCIAL BARGE LINE LLC,

Appellant

v.

DIRECTOR OF REVENUE,

Respondent

On Petition for Review from the Administrative Hearing Commission

Hon. Karen A. Winn, Commissioner

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

JURISDICTIONAL STATEMENT

Commercial Barge Line Company ("CBL") and American Commercial Barge Line LLC ("ACBL") filed complaints with the Administrative Hearing Commission challenging the imposition of Missouri sales and use taxes on sales of food and supplies to line haul towboats operated by ACBL on the Mississippi River. Louisiana Dock Company LLC ("Louisiana Dock"), a related Missouri limited liability company, and third party sellers from Illinois and Kentucky sold the goods to ACBL. Both ACBL and Louisiana Dock are single-member limited liability companies, with CBL as their single member (owner).

The taxpayers contended that the imposition of such taxes violated the Commerce and Due Process Clauses of the Constitution of the United States, that the imposition of the taxes was prohibited by Section 5(b) of the Maritime Security Act of 2002, 33 U.S.C. § 5(b), and that, in any event, certain of the taxes were barred by the statutes of limitations, §§144.220.3 and 144.720, RSMo.

The Commission concluded that the taxpayers were liable for sales and use taxes on sales made to towboats in Missouri waters, based in part upon the effect of § 347.187.2, RSMo, which requires that a single member limited liability company and its single member (or 100% owner) are treated as one entity for Missouri sales and use tax purposes, even though a single-member limited liability company is a separate legal entity apart from its member for most other state law purposes.

The resolution of this appeal requires the Court to decide whether the imposition of Missouri sales and use taxes in these circumstances violates the Constitution of the

United States, federal statutes, or both. It also requires the construction of § 347.187.2, RSMo as applied to sales and use taxes imposed on the transactions of single-member limited liability companies. Therefore, the Court has jurisdiction over this appeal under art. V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

A. The Taxpayer Parties

There are three entities involved in this case: Commercial Barge Line Company ("CBL"), a Delaware corporation, is the single member (or owner) of two limited liability companies, American Commercial Barge Line LLC ("ACBL") and Louisiana Dock Company LLC ("Louisiana Dock"). Although § 347.187.2, RSMo purports to require that all three entities be treated as one entity for sales and use tax purposes, they will be referred to separately because each fulfilled different functions in the transactions at issue that are crucial to the disposition of this appeal.

ACBL is a Delaware single member limited liability company with its principal place of business in Indiana. L.F. 250. ACBL operates line haul towboats that transport cargo in barges in interstate commerce on the Mississippi, Tennessee, Illinois, Cumberland and Ohio Rivers (but not on the Missouri River), and in the Gulf of Mexico. Tr. 21-23. The towboats never stop, but continuously move up and down the rivers. Tr. 23. ACBL is not registered to do business for any purpose in Missouri, and ACBL has no property, offices or employees located within Missouri. Tr. 23–24. ACBL's towboats do not receive any services directly from Missouri. L.F. 251. The Mississippi River is a major navigable waterway of the United States and all of the facilities on the Mississippi River, such as

the locks and the terminals, are maintained by the United States Government. Tr. 26 - 27, L.F. 256. ACBL is wholly-owned by its single member, American Commercial Lines LLC ("ACL"). ACL is also a single-member limited liability company. Tr. Exhs. 75, 76; L.F. 250.

Prior to January 11, 2005, ACLines LLC owned ACL. ACLines was wholly-owned by Danielson Holding Corporation. Tr., 17, Exh. 75, L.F. 251. After January 11, 2005, as part of the Chapter 11 bankruptcy plan of reorganization, CBL became the owner of ACL. Tr. 19, Tr. Exh. 76. ACBL and ACL are disregarded entities for federal tax purposes pursuant to §7701 of the Internal Revenue Code. Their federal taxable income is included in the federal taxable income of, and reported by, CBL. L.F. 252. Neither CBL nor ACL has offices, property or employees in Missouri, nor is either entity registered to do business in Missouri. L.F. 251.

Louisiana Dock was, during the audit period, a single member limited liability company, wholly-owned by ACL, and registered to do business in Missouri. Tr. Exh. 78; L.F. 250-252. Louisiana Dock had shore facilities and, during the audit period, had six employees in Missouri. It was also a disregarded entity for federal income tax purposes pursuant to §7701 of the Internal Revenue Code. Accordingly, its federal taxable income was also included in the federal taxable income of, and reported by, CBL. L.F. 252.

B. The Sales And Use Tax Transactions At Issue

There are three categories of transactions at issue: (1) sales by Louisiana Dock to ACBL of goods delivered to its line haul towboats while mid-stream in the Mississippi in the St. Louis Harbor; (2) sales by a Kentucky company to ACBL where the goods were

delivered by a common carrier trucking line to Louisiana Dock and then delivered by Louisiana Dock to ACBL's line haul towboats while mid-stream in the Mississippi in the St. Louis Harbor; and (3) sales by an Illinois vendor to ACBL where the goods were delivered by the Illinois vendor to ACBL's line haul towboats while mid-stream in the Mississippi in the St. Louis Harbor. (Some of the goods were sent by the Illinois vendor to Louisiana Dock for delivery to ACBL's line haul towboats in the southern part of the St. Louis Harbor. They fall within the second category and thus, are not further distinguished here.)

The ACBL towboats are constantly operating on the Mississippi River. They travel from the north to St. Louis and leave tows for southbound boats to take from there. The boats pick up northbound barges and return to destinations north of St. Louis. ACBL boats also operate from the south to St. Louis. They leave their barges in the St. Louis Harbor, and pick up southbound barges for the trip back. ACBL also has towboats that pick up loaded coal barges in St. Louis, deliver them to a power plant in Arkansas, and return the empty barges to St. Louis for loading. The ACBL line haul boats do not dock in St. Louis. Both the shifting of barges between the northbound and southbound line haul boats, and the transfer of coal barges to and from the St. Louis coal dock, are done by harbor boats. Tr. 21-23, Exh. 77.

During the audit period (quarterly periods commencing October 1, 2001 and ending on December 31, 2006), Louisiana Dock purchased various supplies for resale to ACBL. ACBL did not pay sales or use taxes on the purchases. ACBL issued an "in commerce" exemption certificate with respect to these purchases. L.F. 253. The Director said that the

exemption certificate was issued in bad faith, and assessed sales taxes of $9,809.63 against CBL and ACBL. L.F. 253. (The total amount assessed at various times also included interest and additions to tax; because these amounts vary with the amount of taxes due and the time at which the calculation is made, we refer only to the amount of sales and use taxes assessed to simplify the facts.)

ACBL also bought various supplies and food items from The Henry A. Petter Supply Company ("Petter"), a vendor located in Paducah, Kentucky, for use on its towboats. ACBL ordered the goods from Petter electronically, either directly from the towboats or through its Indiana office. Tr. 30; L.F. 253–254. Petter shipped the supplies on shrink-wrapped pallets by a common carrier trucking line to Louisiana Dock in St. Louis. Tr. 31; L.F. 254. Louisiana Dock delivered the pallets unopened to ACBL's line haul towboats in mid-stream between Illinois and Missouri on the Mississippi River. Tr. 31–32; L.F. 254-255. Louisiana Dock made the deliveries with its harbor boats' towboat, while performing other services, such as picking up or delivering barges to ACBL's towboats. L.F. 254. Occasionally, the deliveries were made on behalf of Louisiana Dock by harbor boats operated by Lewis and Clark Marine, an unaffiliated company. L.F. 254-255. Louisiana Dock did not pay a separate delivery charge for these services. L.F. 255.

ACBL purchased the remainder of the goods and supplies from Economy Boat Store ("Economy"), a vendor in Wood River, Illinois. Economy occasionally delivered the goods and supplies to Louisiana Dock in St. Louis. Louisiana Dock did not accept the goods, but — as with the Petter items — delivered the goods and supplies (unopened) to

ACBL's towboats. On most occasions, Economy delivered the goods or supplies directly to ACBL's towboats using Economy's own harbor boats. Tr. 36; 255.

After delivery to the towboats by either outside vendors or Louisiana Dock, ACBL's towboat crews opened, inspected and accepted the goods or supplies on board. After inspecting the supplies, ACBL's towboat captain approved acceptance of delivery of the goods and supplies while in mid-stream, and authorized payment of the invoices. L.F. 253 – 254.

ACBL had the right to reject the goods and supplies until after ACBL's towboat crew had inspected and approved them. If the items were damaged or defective and of more than *de minimis* value, the crew would "bag it and tag it" to be returned at the next opportunity. Tr. 32-33; L.F. 255. Once the crew accepted the supplies, the captain notified ACBL's office in Indiana, which then paid the invoices electronically. The crew used the goods or supplies on the towboats that continued on their interstate journeys on the Mississippi River. L.F. 255.

ACBL issued "in commerce" exemption certificates for the transactions with Petter and Economy, but the Director rejected them as he did with the ones issued by Louisiana Dock. After the audit, the Director assessed use taxes of $78,775.60, plus interest and additions, on these transactions. Exh. 1-33, 81.

The sales and use tax assessments against ACBL were the result of an audit of all of the taxpayer's affiliated companies, including ACBL, CBL, and Louisiana Dock, conducted in 2007-2008.

At the conclusion of the audit, the Director wrote a letter to CBL stating that CBL had no sales or use tax liability for the audit period. L.F. 257, Tr. 48; Exh. 36.

When No. 09-723 RS was on the verge of trial the Director sought and received a continuance on the basis that CBL, not ACBL or Louisiana Dock, was liable for the taxes because the latter two companies were single-member limited liability companies whose tax liability accrued to CBL. On July 20, 2010, the Director issued sales and use tax assessments against CBL for the same transactions as previously assessed against ACBL identical in amounts, except for the interest and additions assessed. Tr. Exh. 34 – 66, L.F. 257.

The Commission rejected the taxpayers' federal constitutional and statutory arguments, and their statute of limitations arguments. L.F. 292 – 294. The Commission determined as a matter of fact that the taxable sales did not occur until the shrink-wrapped pallets were opened, inspected and approved by the line haul boat crews. The Commission further found as a matter of fact that the transactions involving deliveries to the line haul boats when they were southbound, and thus west of the boundary line between Missouri and Illinois, occurred in Missouri. L.F. 293-294. Finally, the Commission found as a matter of fact that one-half of the transactions at issue were southbound sales. L.F. 294.

Accordingly, the Commission held that the taxpayers were liable for one-half of the assessments for sales tax made on the southbound sales between Louisiana Dock and ACBL, or $4,904.82; and also held that the taxpayers were liable for the use tax

assessments on the Economy southbound sales and one-half of the use tax assessments on the Petter sales (representing southbound sales), or $53,610.33. L.F. 294.

The taxpayers duly filed this petition for review.

POINTS RELIED ON

I.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales Because The Taxes Are Not Fairly Related To The Line Haul Boats' Activities In The State As Required By The Commerce And Due Process Clauses Of The United States Constitution In That The Boats Receive No Direct Services From The State And Missouri Cannot Create A Relationship That Makes "Indirect" Services Sufficient To Satisfy The Constitutional Requirements

United States Constitution, art. I, § 8, cl. 3 and amend XIV

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

American River Transportation Co. v. Bower, 351 Ill.App.3d 208, 813 N.E.2d 1090 (2004)

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995)

II.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales Because The State Lacks The Power To Tax Sales To Line Haul Boats In That Section 5(b) Of The Maritime Security Act Of 2002 Provides That "No Taxes . . . Shall Be Levied Upon Or Collected From Any Vessel . . . By Any Non-Federal Interest, If The Vessel Is . . . Operating On" Any Of The Navigable Waters Of The United States.

Maritime Security Act of 2002, 33 U.S.C. § 5(b)

High Country Adventures, Inc. v. Polk County, 2008 WL 4853105 (Tenn. App., Nov. 10, 2008)

Moscheo v. Polk County, 2009 WL 2868754 (Sept. 2, 2009)

III.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales For Quarters Ending December 31, 2005 And Earlier, Because The Assessments Are Barred By The Statute Of Limitations In That The Assessments Were Made More Than Three Years After The Taxes Were Allegedly Due (Including Valid Extensions)

§ 144.220.3, RSMo

§ 144.720, RSMo

§ 347.187.2, RSMo

12 CSR 10-104.030(3)(C).

SUMMARY OF THE ARGUMENT

The State of Missouri lacks the authority under the Commerce and Due Process Clauses of the Constitution of the United States and federal statutes to impose sales and use taxes on goods sold to line haul towboats operating on the Mississippi River while they are on the side of the Mississippi River west of the boundary between Missouri and Illinois. The Commission found that transactions involving goods sold to line haul boats operating east of the boundary were sales in Illinois, and thus not subject to Missouri tax under any circumstances. The Director has not appealed that ruling, and thus, the Director is bound by it.

The Commerce and Due Process Clauses prohibit taxation of these transactions because the tax is not "fairly related" to the services provided by the state. The line haul boats operate exclusively on the navigable waters of the United States, and the facilities they use are operated and maintained by the federal government, not the State of Missouri. Moreover, the Missouri statute that provides for treating single-member limited liability companies as a single entity for tax purposes cannot be used to create the constitutionally required "fair" relationship where it would not factually exist in the statute's absence.

The Maritime Security Act of 2002 further prohibits any "non-federal interest," *i.e.*, the State of Missouri, from imposing any taxes on a vessel operating on the navigable waters of the United States. The federal government presumably could have, but has not, authorized the imposition of sales and use taxes under these circumstances. (The U.S. Congress rejected an attempt to do so in 2010.)

Regarding these specific taxes, all of the sales and use tax assessments, except those for 2006, are barred by the statute of limitations. Under Missouri's statutory scheme (and by express agreement of the Director), Louisiana Dock LLC filed all sales and use tax returns on behalf of all of the companies involved in this case on a timely basis – itself, American Commercial Barge Lines LLC (the line haul boats' operator) and Commercial Barge Line Company and its predecessors (the single member of each limited liability company).

All of the waivers signed by the taxpayers expired before March 27, 2009 – the date of the original assessments. Because Louisiana Dock filed on behalf of all of the companies, the Director had three years from the due date of each return to make an additional assessment against any of them, as extended by valid waivers. Some of the waivers were signed after the three-year period expired and were thus invalid from the beginning. Other waivers expired before the additional assessments were made. The only assessments that were timely made were for the sales and use taxes assessed for the year 2006 on southbound sales. Thus, even if the Director had the constitutional and statutory power to tax these transactions, he could do so only in the amount of $1,615.28 (sales taxes) and $11,026.39 (use taxes), plus additions to tax and interest.

The decision of the Administrative Hearing Commission should be reversed in part to abate the sales and use taxes, additions to tax and interest imposed on sales to the southbound boats.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission will be affirmed "'if (1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not contrary to the reasonable expectations of the General Assembly.' " *Eilian v. Director of Revenue*, 402 S.W.3d 566, 567-568 (Mo. banc 2013), *quoting Custom Hardware Engineering & Consulting, Inc. v. Director of Revenue*, 358 S.W.3d 54, 56 (Mo. banc 2012), and *citing* § 621.193 RSMo. The Court reviews the Commission's interpretation of the law and its application of the facts to the law *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

I.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales Because The Taxes Are Not Fairly Related To The Line Haul Boats' Activities In The State As Required By The Commerce And Due Process Clauses Of The United States Constitution In That The Boats Receive No Direct Services From The State And Missouri Cannot Create A Relationship That Makes "Indirect" Services Sufficient To Satisfy The Constitutional Requirements

The Commerce Clause of the Constitution of the United States, art. I, § 8, cl. 3, bars the imposition of sales or use taxes on sales of goods to ACBL's southbound line haul

towboats because those boats did not receive any benefits from the State of Missouri.[1] Tr. 27. They ply the Mississippi River while in this state. That river is part of the navigable waters of the United States. The federal government, not Missouri, maintains the Mississippi River and provides any governmental benefits that the line haul towboats receive. Tr. 26-27.

To sustain a sales or use tax on vessels operating in interstate commerce, the tax must satisfy four criteria: (1) the vessel must have a substantial nexus with the state; (2) the tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). All four criteria must be met to uphold the validity of the tax.

In an *identical* fact pattern, the Illinois Appellate Court held that the imposition of use taxes by that state ran afoul of the Commerce Clause. *See American River Transportation Co. v. Bower*, 351 Ill.App.3d 208, 813 N.E.2d 1090 (2004)("*ARTCO*"). In *ARTCO*, the taxpayer operated both harbor and line haul boats. The harbor boats were

[1] The analysis under both the Commerce Clauses and the Due Process Clause, amend. XIV, is identical for this case. For simplicity's sake, further references in the text are to the Commerce Clause only. Moreover, the only transactions at issue are sales made to southbound line haul boats operated by ACBL. The Commission found that sales to northbound boats occurred in Illinois because those boats were east of the boundary between the two states. L.F. 292-294.

based in Illinois. The company paid sales and fuel tax for the goods and fuel used by those boats. The harbor boats delivered goods and fuel to the line haul boats located in the midstream of the Mississippi River. The taxpayer challenged the imposition of use taxes on these transactions — identical in all respects to the transactions at issue here.

The Illinois appellate court found that the first three *Complete Auto* criteria were met, including the requirement that the line haul boats had more than a slight presence in Illinois. The court noted, however, that the nexus criterion is closely related to the fourth requirement — that the tax be fairly related to the services provided by the state. The Illinois appellate court held that this requirement was not met because the use tax

> indeed, run[s] afoul of the commerce clause because it has no relation to any services provided by this state. While ARTCO's line haul boats plied the waters of this state, Illinois provided no services to those tugboats, The waters are all navigable waters of the United States and are maintained by the United States, not Illinois.

Id., 351 Ill.App.3d at 212, 813 N.E.2d at 1093.

The court rejected Illinois' claims that Illinois provided sufficient services to justify the tax. The state's environmental activities to protect the waterways from pollution were

too slight to qualify as "fairly related" to the tax.[2] And, as the court noted, ARTCO did pay taxes on its harbor boat operations that received the benefits of Illinois services. *See id*., 351 Ill.App.3d at 212, 813 N.E.2d at 1094.

The court compared the operation of the line haul boats on the Mississippi River to aircraft that merely fly over Illinois without landing in the state. In the latter instance, the imposition of the Illinois sales tax would be a Commerce Clause violation because the taxpayer does not have a substantial nexus with the state. This is true even though the aircraft uses fuel in Illinois airspace, and receives (or is eligible to receive) services provided by the state to keep the air clean, emergency services, and other indicia of a "civilized society." *See id*., 351 Ill.App.3d at 212-213, 813 N.E.2d at 1094, *citing United Airlines, Inc. v. Mahin*, 49 Ill.2d 45, 273 N.E.2d 585 (1971), *vacated and remanded*, 410 U.S. 623 (1973), *on remand*, 54 Ill.2d 431, 298 N.E.2d 161 (1973).

ACBL's line haul boats — like United Airlines' airplanes — merely pass through waters on which Missouri and Illinois enjoy concurrent legal jurisdiction on part of their interstate journeys to and from St. Louis. The services they receive, as in *ARTCO*, are from the United States government, not Missouri or Illinois. Furthermore, the Director offered no evidence of any services Missouri provided to the line haul boats, let alone

[2] Missouri has also rejected the imposition of use taxes where the services provided to the taxpayer failed to meet the "fairly related" element of *Complete Auto*. *See Burke & Sons, Inc. v. Director of Revenue*, 757 S.W.2d 278, 281 (Mo. App., W.D. 1988).

even a minimal amount sufficient to satisfy the "fairly related" aspect of the *Complete Auto* test.

The Commission rejected *ARTCO*, despite its identical factual pattern. L.F. at 279-280. The Commission said that *ARTCO* was not identical to this case because of the physical presence of Louisiana Dock in Missouri. The Commission also said that, unlike *ARTCO*, where the company paid the taxes owed by the harbor boats it operated, the taxpayers here seek to avoid all taxes owed to the State of Missouri.

The Commission misunderstood both *ARTCO* and the taxpayers' position. In *ARTCO*, the *same* company operated *both* the line haul boats and the harbor boats. ARTCO therefore had the same physical presence in Illinois that Louisiana Dock has in Missouri, although the latter is relevant to the line haul boats only because of the operation of § 347.187.2, RSMo.

ARTCO successfully challenged the imposition of the Illinois fuel tax on fuel sold to its line haul boats even though the taxpayer owned other harbor boats that had nexus with Illinois. The taxpayer conceded that it owed (and paid) the Illinois fuel tax for the other harbor boats. Exactly the same situation obtains here. The taxpayers do not owe use taxes for the goods delivered to the line haul boats because that violates the Commerce Clause. However, the taxpayers *do* owe and pay sales and use taxes incurred by Louisiana Dock on Louisiana Dock's purchases that are for its own use. The notion that the fact pattern is different, let alone fundamentally different, from that in *ARTCO*, is simply not true.

And the Commission's decision creates the situation where the taxability of the transaction under the Constitution of the United States depends upon the direction and location of the boat when the boat receives the goods. West of the boundary between Missouri and Illinois (while traveling southbound), the transactions are taxable, but east of the boundary (while traveling northbound), they are not.[3]

Instead of relying upon a decision with identical facts involving identical federal constitutional issues, the Commission relied on *TECO Barge Line, Inc. v. Wilson*, 2010 WL 2730591 (Tenn. App. 2010), which reached the opposite result for a case involving property taxes, not sales and use taxes. The *TECO* court compared the use of the navigable waters of the United States to a trucking company's use of the state's highways or a railroad's use of land in the state. *See id*. at *7. It held that a taxpayer can be required to contribute to the cost of governmental services, even those from which it does not receive a direct benefit. *See id*.

Here, the only *evidence* presented at trial on this issue came from Judy Hupp, who testified that ACBL, *i.e.*, the operator of the line haul boats, received *no* direct benefits

[3] Judy Hupp testified that Economy charged Illinois sales tax on goods sold to northbound boats, Tr. 36-37, even though the *ARTCO* case holds that no sales tax is due. ACBL paid Illinois sales tax to Economy because Economy is the only source of food and other goods in that area. And of course, it makes no difference to Economy whether the sales tax is constitutional because Economy collects it from its customers. If its customers want food and other goods, they will pay the tax. Economy's customers have no other choice.

from the State of Missouri. Tr. 26-27. While the State builds and maintains highways, and provides services to railroads, such as paying for crossing protection (and, in the case of Amtrak, direct subsidies), only the federal government maintains the Mississippi River and its facilities. Tr. 21-23, 26-27. The Director offered no evidence – not even evidence of the character found wanting in *ARTCO* – that Missouri provided any benefits at all to ACBL's line haul boats.

Rather, the Commission relied upon the benefits provided to Louisiana Dock – not any alleged benefits provided to ACBL – as the basis for applying *TECO*. Because Louisiana Dock received direct benefits from the State, ACBL receives "indirect" benefits. But this is true only by virtue of the operation of § 347.187.2, RSMo. The statute provides that, for sales and use tax purposes, "a limited liability company and its members shall be classified and treated on a basis consistent with the limited liability company's classification for federal income tax purposes."[4] For almost all other state

[4] Both Louisiana Dock and ACBL are limited liability companies with only a single member. Under federal law, they are disregarded entities treated as unincorporated divisions of their "parent" by default. Thus, for sales and use tax purposes Missouri statutes say that Louisiana Dock, ACBL, and CBL (and its predecessor single members) are one company.

purposes,[5] ACBL is a separate "legal" entity. Moreover, ACBL had no offices, employees or property in Missouri other than the line haul boats that operate on the waters of the Mississippi River as they flow through the state.

The State cannot, consistent with the Constitution of the United States, create "benefits" to a taxpayer that would not otherwise exist by "deeming" them to be the same company. Under the Commerce Clause, the benefits that are "fairly related" must actually exist for the entity upon which the state seeks to impose the tax. There cannot be a fictitious legal construct erected just for state tax purposes that overrides federal constitutional protection. For every other non-tax purpose under Missouri law, ACBL and Louisiana Dock are separate legal entities.[6] And, indeed, the reasoning of the Commission's Decision – depending as it does on the effect of § 347.187.2 – does not convert state benefits that Missouri provides to Louisiana Dock (with offices and employees located in Missouri) into benefits provided to ACBL, a separate barge company that has no connection to Missouri, other than use of the west side of the Mississippi River, which is controlled and maintained by the federal government.

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[5] Under this statute, Missouri law treats single member limited liability companies as disregarded entities solely for purposes of Missouri income taxes, Missouri sales and use taxes and Missouri withholding taxes.

[6] *Id.*

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the U.S. Supreme Court held that Congress could not insulate Amtrak from constitutional claims affecting the rights of citizens by passing a statute that disclaimed its existence as a governmental agency, even though it is a government-controlled corporation. Congress *could* remove Amtrak from being "subject to statutes that impose obligations or confer powers on Government entities. . . . But it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Id*. at 392.

Thus, while Missouri can pass a statute such as § 347.187.2, RSMo that disregards the separate legal status of single-member limited liability companies for sales and use tax purposes, it cannot through this statute create a fictitious or "deemed" relationship between ACBL and Missouri sufficient to satisfy the Commerce and Due Process Clauses where such a relationship does not, *in fact*, exist.

Similarly, the Commission's reliance on *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) is misplaced. That case involved a Montana severance tax that was imposed on coal that was actually mined in Montana. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977) is likewise inapplicable because it involved a situation in which a single taxpayer with substantial nexus in California was deemed to be taxable on its California sales, even though the taxpayer's nexus creating activity had nothing to do with the taxpayer's California sales. That factual situation is inapplicable to a situation in which an Indiana company makes purchases from Kentucky and Illinois companies where the property is delivered, and title and ownership of the

property pass, to the Indiana taxpayer in navigable waters that are maintained and controlled solely by the United States government.

Accordingly, the Director's attempt to impose use taxes on ACBL's purchases of goods in the navigable waters of the United States violates the Commerce and Due Process Clauses of the United States Constitution. The Commission's Decision upholding the invalidation of the exemption certificates for sales made to ACBL's towboats should be reversed because the sales were exempt from taxation as discussed above. The Court should further reverse the Commission's Decision in part by abating the assessments and all additions to the tax and interest erroneously assessed against the taxpayers, and grant such other relief as the Court deems proper under the circumstances.

II.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales Because The State Lacks The Power To Tax Sales To Line Haul Boats In That Section 5(b) Of The Maritime Security Act Of 2002 Provides That "No Taxes . . . Shall Be Levied Upon Or Collected From Any Vessel . . . By Any Non-Federal Interest, If The Vessel Is . . . Operating On" Any Of The Navigable Waters Of The United States.

Apart from the constitutional bar on these taxes, § 5(b) of the Maritime Security Act of 2002, 33 U.S.C. § 5(b), prohibits the imposition of any taxes by Missouri or any other non-Federal interest on vessels operating on the navigable waters of the United States. The Mississippi River is, of course, one of the principal inland waterways of the United

States. Thus, even if the Commerce Clause otherwise permitted taxation of these transactions, Congress has prohibited it by statute.

Section 5(b) provides: "No taxes . . . or any other imposition whatsoever shall be levied upon or collected from any vessel or other watercraft, or from its passengers or crew, by any non-Federal interest, if the vessel . . . is operating on any navigable waters subject to the authority of the United States." There are exceptions, but none applies here. The first is for certain fees authorized by the Water Resources Development Act of 1986, 33 U.S.C. § 5(b)(1). The second covers certain fees that may be charged by non-Federal interests, but only if the fees satisfy three conditions — most pertinent here, that the fees are used solely to pay the cost of services provided to the vessel. *See* § 5(b)(2)(B). The third, enacted in 2003, covers property taxes.

The Decision quotes, but does not consider, the plain meaning of the statute. "No taxes" means *no taxes*. Its meaning was made clear by the legislative history of the statute when it was passed in 2002.

The statute's sponsor, Rep. Don Young, said that Section 445 in Senate Bill 1214, § 5(b) of the Act, provides "the *sole circumstances when a local jurisdiction may impose a tax or fee on vessels*. Local governments, and other non-Federal interests, may impose taxes or fees only under an existing exception under the Water Resources Development Act or under extremely limited circumstances in which reasonable fees can be charged on a fair and equitable basis for the cost of service actually rendered to the vessel." 148 *Cong. Rec.* at E2144 (Emphasis added). Most importantly, he noted: "Generally, *taxes*

will not be allowed under this section. The *sole exceptions* are stated in Section 445." *Id.* (Emphasis added).

Subsequently, Congress added § 5(b)(3) to clarify that the broad language of the statute does not prohibit the imposition of property taxes on vessels that were not primarily engaged in foreign commerce if those taxes are permissible under the Constitution. In 2010, yet another amendment was offered to §5(b) that would have explicitly allowed an additional exception for "sales taxes on goods and services provided to or by vessels or watercraft (other than vessels or watercraft primarily engaged in foreign commerce." H. Rep. 111-303, Part 1, § 301, to H.R. 3619, Coast Guard Authorization Act of 2010. The amendment was, however, dropped from later versions of the bill and was never enacted. If § 5(b) did not bar such taxes, then there would have been no need for such an amendment.

Two decisions of the Tennessee Court of Appeals applied § 5(b) to invalidate a county "privilege tax" on passengers participating in whitewater rafting on the Ocoee River. *See High Country Adventures, Inc. v. Polk County*, 2008 WL 4853105 (Tenn. App., Nov. 10, 2008) and *Moscheo v. Polk County*, 2009 WL 2868754 (Sept. 2, 2009). A privilege tax is one levied "upon the privilege of a consumer participating in an amusement." *See Moscheo v. Polk County*, 2009 WL 2868754 at * 1.

The opinions discuss extensively the standing of the taxpayers to raise § 5(b) as a reason to prohibit the tax (*High Country*, 2008 WL 4853105 at *5-*9), and whether the Ocoee River is a navigable waterway of the United States (*Moscheo*, 2009 WL 2868754 at *7-*12). Neither is an issue here. The taxpayers clearly have standing to challenge the

imposition of sales and use taxes under Missouri law, even though the statutory basis for the challenge is the pre-emptive effect of a federal statute. And there is no question that the Mississippi River is a navigable waterway of the United States.

Both decisions had little difficulty in concluding that there was a direct and irreconcilable conflict between the county's attempt to levy a privilege tax on the taxpayer's customers for using the whitewater rafts and the explicit federal prohibition on such taxes. *See High Country v. Polk County*, 2008 WL 4853105 at *12-*13; *Moscheo*, 2009 WL 2868754 at *16. Both decisions note that although there is a concurrent right of legislation in the states and Congress, when the latter exercises its power, the state legislation must give way. *See High Country v. Polk County*, 2008 WL 4853105 at *12-*13; *Moscheo*, 2009 WL 2868754 at *16.

The Commission relied instead on a third decision by the Hawaiian Court of Appeals in *Reel Hooker Sportfishing, Inc. v. State Department of Taxation*, 123 Haw. 494, 236 P.3d 1230 (2010). *Reel Hooker* found that § 5(b) did not pre-empt a state excise tax on the apportioned part of the annual gross receipts of a sports fishing business. The court distinguished *High Country* as involving a transactional tax on a consumer's participation in whitewater rafting, while the Hawaiian excise tax is imposed on the applicable portion of its entire annual gross receipts for the privilege of doing business in the state regardless of the nature of the business or which transactions gave rise to the tax. *See Reel Hooker*, 123 Haw. at 500, 236 P.3d at 1236. But *Reel Hooker* is not relevant here because Hawaii's excise tax on gross receipts is in the nature of an income tax, not a use

tax, although the tax base is the "gross proceeds" from the business operations rather than the "net income" from such operations.

The Decision also distinguishes this case from *Moscheo* and *High Country* because of the nature of the tax: "privilege" taxes versus sales and use taxes. L.F. 286 - 288. But the Tennessee privilege tax on customers participating in whitewater rafting is no different in substance from the Missouri sales tax imposed on the sale of tickets for excursions on riverboats. *See Lynn v. Director of Revenue*, 689 S.W.2d 45, 46-48 (Mo. banc 1985); § 144.010.1(11)(a) RSMo ("sale at retail" includes sales of admission tickets to places of amusement, entertainment and recreation). The statute is clear and requires no resort to legislative history anyway. *Cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). The state is preempted from imposing "any tax" on ACBL's line haul vessels that are operating on the Mississippi River. It does not matter whether the tax is classified as a "privilege tax" or a sales or use tax.

Section 5(b) pre-empts Missouri's use tax in these circumstances. Accordingly, the taxpayers request that the Court reverse the Decision with respect to the southbound sales, abate all additions to the tax, interest and other assessments erroneously assessed against them, and grant such other relief as the Court deems proper under the circumstances.

III.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales For Quarters Ending December 31, 2005 And Earlier, Because The Assessments Are Barred By The Statute Of Limitations In That The Assessments Were Made More Than Three Years After The Taxes Were Allegedly Due (Including Valid Waiver Extensions)

If the Court upholds the constitutionality of taxing the southbound sales under the Commerce Clause and holds that such taxation is not prohibited by the Maritime Security Act, most of the assessments on the southbound sales are barred by the statute of limitations under Missouri law. The Commission's decision only considered whether the 2010 assessments against CBL were time-barred. L.F. 289 - 292.

If CBL, Louisiana Dock and ACBL were to be treated as a single taxpayer (CBL) for sales and use tax purposes under the provisions of § 347.187.2, RSMo, *all* of the assessments against CBL — Exhs. 34-66 — are barred by the statute of limitations because the assessments against CBL were not issued until July 20, 2010 — well after all of the statutes of limitation for the entire audit period had expired, including the valid waiver extensions.

Assuming, as this section does, that the constitutional and federal statutory bars are inapplicable, then Missouri has the power to treat CBL, ACBL and Louisiana Dock as a taxpayer for sales and use tax purposes. Thus, whether the Commission correctly found that that statute of limitations did not run on the assessments against CBL in 2010 is irrelevant to the ultimate disposition of the statute of limitations issue. The appropriate

analysis is to use the date of the first assessment, March 27, 2009. Even then, all but seven assessments are barred by the statute of limitations (Exhs. 10-12 and 43-45 for sales taxes, and Exhs. 30-33 and 63-66 for use taxes) regardless of which company is considered the taxpayer.

After the audit, the Director assessed sales taxes totalling $9,809.63 and use taxes totalling $78,775.50.[7] The Commission upheld the sales tax assessments on southbound sales, all of the use tax assessments for purchases from Economy because the auditor only assessed use taxes against southbound sales, and the use taxes assessed on the southbound sales from Petter. L.F.293-294. The Commission held sales taxes of $4,904.82, and use taxes of $53,610.33 were due. L.F.294.

During the audit, Judy Hupp signed waivers of the statute of limitations for sales and use taxes on behalf of Louisiana Dock on October 20, 2006, March 26, 2007 and on October 11, 2007. Exh. 79. She declined to sign waivers of the statute of limitations for sales and use taxes on behalf of ACBL. Exh. 80. Nonetheless, the Louisiana Dock waivers were effective for all of the companies under § 347.187.2, RSMo. Each of the waivers was effective to extend the statute of limitations for one year from the date signed by the taxpayer. Exh. 79.

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[7] The auditor, and later the Commission, also assessed additions to the taxes and interest. Additions and interest are based upon the amount of the taxes ultimately determined to be due. For simplicity's sake, these amounts are excluded from the text because they vary.

The sales tax assessments were for twelve quarters beginning with the fourth quarter of 2003 (ending on December 31, 2003), and ending with the third quarter of 2006 (ending September 30, 2006). The use tax assessments were for twenty-one quarters, beginning with the fourth quarter of 2001(ending December 31, 2001), and ending with the fourth quarter of 2006 (ending December 31, 2006).

The three-year statute of limitations begins to run when sales and use tax returns are filed or required to be filed — in the case of quarterly returns for sales and use taxes, on the last day of the following month. *See* §144.080(2), RSMo; 12 CSR 10-104.030(3)(C).

Hupp testified that Louisiana Dock filed all of its sales and use tax returns for the audit period on a timely basis. Tr. 28. Under § 347.187.2, the filing of sales and use tax returns by Louisiana Dock started the limitations period for all of the taxpayers. The Director first issued assessments for both sales and use taxes on March 27, 2009. Thus, any assessments for which the three-year period (or any valid extensions) expired prior to March 27, 2009, are barred by §§ 144.220.3 and 144.720, RSMo.

The waivers of the statute of limitations for the assessment of sales and use taxes in this case fall into three categories: (1) waivers that were invalid because they were signed after the statute of limitations had already expired; (2) waivers that were initially effective, but expired before the assessments were made; and (3) those that are not barred by the statute of limitations. Each will be explained in turn.

The waiver of the use tax statute of limitations executed on October 20, 2006, was not effective to extend the statute for periods where the limitations period had already expired. This covered the seven quarters beginning with the period ending December 31,

2001 (which expired on January 31, 2005), and ending with the quarter ending June 30, 2003 (which expired on July 31, 2006) — all well before the first waiver was signed. These assessments are Exhs. 13-19 and 46-52.

The sales tax assessments for the nine quarters beginning with the quarter ending December 31, 2003 and ending with the quarter ending December 31, 2005, needed waivers that were effective as of March 27, 2009. The last waiver was, as noted above, renewed on October 11, 2007, but it was good only for one year from the date it was signed, or until October 10, 2008. By that time, the three-year period expired on all of the quarters except the last one, and that one expired on January 31, 2009. Thus, the March 27, 2009, assessments came too late for these periods — Exhs. 1-9 and 34-42.

The waivers of the use tax assessments beginning with the quarter ending September 30, 2003, through the quarter ending December 31, 2005, were effective (with waivers) only until October 10, 2008 at the latest. Thus, the statute ran on these quarters before the filing of the first assessments against ACBL on March 27, 2009. These assessments, Exhs. 20-29 and 53-62, were barred by the statute of limitations.

The sales tax assessments for the quarters ending March 31, June 30, and September 30, 2006, needed no waivers, and were not barred by the statute of limitations as of March 27, 2009. These assessments in Exhs. 10-12 and 42-45, totaling $3,230.56, were not barred by the statute of limitations; because only one-half of the sales were southbound sales, L.F. 294, the sales tax assessments that are not barred total $1,615.28.

The use tax assessments for the same three quarters, plus the quarter ending December 31, 2006, were also not barred by the statute. The use tax on the southbound

sales by Economy during these four quarters totals $5,971.28. Exh. 81. The use tax on southbound sales by Petter totals $5,055.39. Exh. 81.[8] Thus, the *maximum* possible use taxes due (assuming the Court rejects all of the taxpayer's other claims) are $11,206.67.

To summarize, only the sales taxes assessed for the first three quarters of 2006 are not barred by the statute of limitations; only the use taxes assessed for the four quarters of 2006 are not barred by the statute of limitations. If the Court determines that Missouri may tax these transactions despite the provisions of the Constitution of the United States and federal law, then the taxes due would be $1,615.28 (sales tax) and $11,026.39 (use tax), plus additions to tax and interest. The Decision of the Commission should be reversed as to the transactions barred by the statute of limitations accordingly.

CONCLUSION

For these reasons, the taxpayers request that the Court reverse the Commission's Decision in part by abating all assessments, additions to the tax, and interest on the southbound sales; or, in the alternative, reverse the Commission's Decision in part on the statute of limitations and reduce their tax liability accordingly; and grant such other relief as the Court deems proper in the circumstances.

[8] The Decision says that the food and non-food purchases for sales in the St. Louis Harbor are not broken out by company, but that information is detailed in Exhibit 81.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations in Rule 84.06(b), and it contains 7,862 words, excluding the parts of the brief exempted; and has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman font.

/s/ James W. Erwin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served through the Missouri CaseNet electronic filing system this 21st day of October, 2013 upon the following:

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