SC93448

IN THE SUPREME COURT OF MISSOURI

COMMERCIAL BARGE LINE COMPANY and AMERICAN COMMERCIAL BARGE LINE LLC,

Appellants

v.

DIRECTOR OF REVENUE,

Respondent

On Petition for Review from the Administrative Hearing Commission

Hon. Karen A. Winn, Commissioner

APPELLANTS' REPLY BRIEF

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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 Director contends that the "fairly related" element of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) is satisfied because line haul boats owned or operated by American Commercial Barge Line LLC ("ACBL") benefit, albeit "indirectly," from highways, dock facilities, legal systems and emergency services in Missouri. But his argument depends – without acknowledging it – upon the application of § 347.187.2. RSMo, which collapses the legal distinction between single-member limited liability companies and their single member for sales and use tax purposes.[1]

[1] The Director notes that Louisiana Dock previously claimed that the goods and supplies delivered to the line haul boats in the mid-stream of the Mississippi River were delivered outside the State of Missouri. Resp. Br. at 5. This is true, and until the 2006 audit in this case, the Director took *exactly the same position* – indeed, going so far as to *stipulate* to it in *Patton-Tully Transportation Co. v. Director of Revenue*, 1987 WL 51199

Without this essential connection, i.e., a "fictional unitary structure,"the evidence shows that ACBL's line haul boats neither use Missouri's state highways or roads (they operate exclusively on the navigable waters of the United States), nor do they dock in Missouri. The Director offered no evidence at all as to any emergency services that the line haul boats have used. Even if they have used such services, Respondent's argument falls far short of justifying the kind of connection required to satisfy the Commerce Cluase under *Complete Auto*.

The Director tries to distinguish *American River Transportation Co. v. Bower*, 351 Ill.App.3d 208, 813 N.E.2d 1090 (2004)("*ARTCO*") on the basis that the fuel at issue there was purchased and loaded onto the line haul boats in St. Louis, rather than in Illinois. Resp. Br. at 16-17.[2] But this ignores the fact that the harbor boats in that case

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(Admin. Hrg. Comm., Nov. 25, 1987) at *3. The final decisions in this case are stark departures from the Director's prior interpretation of the tax laws. If the new interpretation is upheld, the assessments should be reversed under § 32.053 RSMo, which provides: "Any final decision of the department of revenue which is a result of a change in policy or interpretation by the department affecting a particular class of person subject to such decision shall only be applied prospectively."

[2] If the location of where the goods originate on the river portion of their journey is controlling, then none of the taxes on Economy sales are valid because that company shipped its goods from Illinois. That would result in setting aside all of the so-called St.

were owned by the same company that owned the line haul boats and moved barges between the line haul tows and Illinois ports – just as Louisiana Dock Company did here. Thus, even without a state statute that purported, through a legal fiction, to make the owner of the harbor boats and the lne haul boats the same entity, the Illinois court found that such a connection was insufficient to satisfy *Complete Auto*. The key fact in *ARTCO* was that Illinois provided no services to the line haul boats. All services provided to the line haul boats were provided by the United States government. *See id*. at 351 Ill.App.3d at 212, 813 N.E.2d at 1093. As for the benefits from Illinois roads, Illinois police protection and the Illinois legal system, the court held that "ARTCO did not receive any such benefit from Illinois *in relation to its line haul boats*." *Id.* (emphasis in original).

Although it is the cornerstone of the Director's case, the Director scarcely acknowledges §347.187.2. The Director merely assumes the validity of "deeming" the existence of benefits to ACBL without answering the fundamental question of whether a state has the power to create fictitious benefits for the purpose of imposing taxes on an entity that does not *in fact* enjoy them. Apparently, the Director has no answer. And certainly, *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995) strongly suggests that the state's attempt to create an independent legal status by legislation that "determine[s] the constitutional rights of citizens" is invalid.

Charles and City of St. Louis taxes attributable to Economy sales, or a total of $30,397.50. *See* Ex. 81, App. A63.

Finally, the Director suggests that the taxpayers have nothing to complain about because Economy collects Illinois sales tax on goods delivered to northbound boats, and there is no evidence that the taxpayers ever sought a refund of the Illinois sales tax. Resp. Br. at 7. The relevancy of this point to the appeal is not apparent. That Economy collects unconstitutional taxes on sales to ACBL in contravention of Illinois Appellate Court decisions does not excuse Missouri from its unconstitutional actions. And the evidence *was* clear that the ACBL paid taxes to Economy only because it was the excluisve retailer of goods and services to towboats in that area. Tr. 36-37. Economy has no stake in whether the Illinois sales taxes are validly imposed because the tax is merely a "pass-through" charge as far as Economy is concerned.

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

The Director claims there is no support in the language of § 5(b) of the Maritime Security Act of 2002, 33 U.S.C. § 5(b), for the taxpayers' position that the statute prohibits the collection of sales and use taxes from vessels operating on the navigable waters of the United States. Resp.Br. at 20. The statute, however, is very clear: "*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." (Emphasis added).

The notion that the taxes levied upon ACBL are not taxes on the vessel is simply a refusal to acknowledge the facts.

The Director claims that the exemption from the federal prohibition in § 5(b)(2)(C) applies. But once again, the Director ignores the plain statutory language. To fall within the exemption of § 5(b)(2), *all three* requirements of that subsection must be met. The most glaring lack here is that charges must be "reasonable *fees*" – not taxes – and that they are used solely to pay for the cost of a service to the vessel. *See* Appendix at A52. Sales and use taxes, of course, meet neither condition.

The Director also dismisses the legislative history and subsequent attempts to amend § 5(b) with no explanation. But these matters are helpful, if not decisive. The legislation's sponsor was clear about the meaning of the statutory language: § 5(b) of the Act provides "the *sole circumstances when a local jurisdiction may impose a tax or fee on vessels*. . . . Generally, *taxes will not be allowed under this section.* The *sole exceptions* are stated in Section [5(b)]." 148 *Cong. Rec.* at E2144 (Emphasis added). And just a few years later, the Chairman of the House Transportation Committee introduced a bill that would have exempted from § 5(b) "sales taxes on goods and services provided to or by vessels." H. Rep. 111-303, Part 1, § 301, to H.R. 3619, Coast Guard Authorization Act of 2010. The amendment was deleted from later versions of the bill without explanation, and never

enacted. Certainly, there was concern in Congress that § 5(b) means exactly what it says as applied to sales and use taxes.

The Director says that Hawaii's general excise tax levied on all businesses, discussed in *Reel Hooker Sportfishing, Inc. v. State Department of Taxation*, 123 Haw. 494, 236 P.3d 1230 (2010), is closer to Missouri's sales and use taxes than the "privilege" tax found to violate § 5(b) in *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). Resp. Br. at 22.

That claim cannot withstand scrutiny. Unlike a sales or use tax, Hawaii's general excise tax is levied on the taxpayer's annual gross receipts for the privilege of doing business in the state, is in lieu of an annual tax on "net income," and is not tied to any specific transaction or boat involved in a transaction.

The Director perceives a difference between the Tennessee "privilege tax" and Missouri's sales and use taxes, but fails to explain what that difference may be. There is, in fact, no difference. The Tennessee statute authorized the county to levy a tax "upon the privilege of a consumer participating in an amusement for which an admission fee is charged." An "amusement" was defined to include whitewater rafting, and the operator of the rafting service was required to add the tax to the admission charge. *High Country v. Polk County*, 2008 WL 4853105 at *1-*2.

The Missouri sales tax imposes a tax "upon the privilege of engaging in business, in this state, of selling tangible personal property and those services listed in section

144.020." § 144.021 RSMo. Among the items subject to sales tax are tickets to ride boats "engaged in the transportation of persons for hire." § 144.020.1(7) RSMo.

The Court found that Missouri's sales tax applied to tickets sold for excursion boats on the Missouri River – this situation is no different in principle from Tennessee's "privilege tax" imposed on rides on a whitewater raft. *See Lynn v. Director of Revenue*, 689 S.W.2d 45, 46-48 (Mo. banc 1985). *See also* § 144.010.1(11)(a) RSMo ("sale at retail" includes sales of admission tickets to places of amusement, entertainment and recreation). The supposed distinction between the Tennessee "privilege tax" and Missouri's sales and use taxes does not exist.

Moreover, *Reel Hooker* cites H.R. Rep. No. 108-334 at 180, but misdates it as being issued in 2002. *See id.*, 123 Haw. at 499, 236 P.3d at 1235. House Report No. 108-334 was issued by the next Congress and is actually dated October 29, *2003* — nearly a year *after* the 2002 Act was passed by the 107th Congress. The 2003 amendment was part of a broader statute that added § 5(b)(3), which allows *property* taxes to be imposed on vessels that were not primarily engaged in foreign commerce if those taxes are permissible under the Constitution.

Reel Hooker also quotes from the 2003 House Report where it says that the 2003 amendment did "not affect whether sales or income taxes are applicable with respect to vessels." *See id.*, 123 Haw. at 499, 236 P.3d at 1235, *quoting* House Rep. 108-334 at 180 (2003). There are two things to note. First, the 2003 amendment addressed only *property* taxes. Accordingly, the statement that it did not deal with sales or income taxes is true. Second, the 2003 Report addressed *only* the 2003 amendment — § 5(b)(3) — not the

2002 Act which enacted § 5(b) — the provision at issue here. Moreover, the 2003 legislative history cannot "clarify" the 2002 statute because Congress cannot create legislative history after the fact. *Cf. Pierce v. Underwood*, 487 U.S. 552, 567-568 (1988)(rejecting a committee report's interpretation of a statute enacted by prior Congress as an authoritative statement of meaning of statute); *Weinberger v. Rossi*, 456 U.S. 25, 35-36 (1982)("[P]ost enactment remarks of legislators, however explicit," are merely personal views of the legislator).

Missouri's sales and use taxes seek to impose a tax upon transactions engaged in by specific vessels in specific transactions. They are thus a tax upon ACBL's vessels, and, accordingly, prohibited by the plain language of § 5(b).

III.

The Administrative Hearing Commission Erred In Holding That The Taxpayers Were Liable For Sales And Use Taxes On Southbound Sales For The 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)

The Director claims that the statutes of limitation found in § 144.220.3 and § 144.720 RSMo are not a bar to most of the assessments because no tax return was filed. His premise is wrong.

The Director's theory is that CBL, ACBL and Louisiana Dock are to be treated as the same company for sales and use tax purposes by the terms of § 347.187.2 RSMo. The evidence is undisputed that Louisiana Dock filed sales and use tax returns throughout the

audit period at issue here, on behalf of itself and all of the other single member limited liability companies of which Commercial Barge Line Company was the single member. Judy Hupp, then the companies' Director of Tax, testified as follows:

Q: Can you identify [Exhibit 78], please?

A: This was the tax registration for Louisiana Dock in 1998, when they became a single member limited liability company, registering with the State of Missouri.

Q: Was this for the purpose of sales and use tax?

A: Yes.

Q: Did the company files sales and use tax returns?

A: Yes.

Q: Did Louisiana Dock file sales and use tax returns throughout the audit period that's at issue here?

A: Yes.

Tr. 28.

Thus, sales and use tax returns *were filed*. Under § 347.187.2 RSMo, those returns were deemed to be filed for all three taxpayers; Louisiana Dock, ACBL, and CBL. *See* Exhibit 78. Sections 144.220.3 and 144.720 RSMo require that notices of additional assessments be mailed within three years after the returns were filed. As discussed in detail in the Opening Brief, a number of waivers were signed. Some of these waivers were invalid because the three years had already run, and others expired before the Director actually sent the assessments. *See* Appellants' Opening Brief at 28-32. The

Director does not dispute in his brief the analysis in Point III of the Opening Brief, other than to claim (incorrectly) that the taxpayers did not file sales and use tax returns. The Director accepted Louisiana Dock's request to file on behalf of all of Commercial Barge Line Company's single member affiliates, which was clearly disclosed on Louisiana Dock's application. *See* Exhibit 78.

Therefore, only the sales taxes assessed for the first three quarters of 2006 and the use taxes assessed for the four quarters of 2006 survive the bar of the statute of limitations.

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

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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 2,583 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 27th day of December, 2013 upon the following:

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