SC95785

IN THE SUPREME COURT OF MISSOURI

TRACFONE WIRELESS, INC.,

Appellant,

v.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review from the Administrative Hearing Commission

Hon. Sreenivasa Rao Dandamudi, Commissioner

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Director of Revenue ("Director") asks this Court to conclude that a sale "made from Miami, Florida," to Missouri is not "made in commerce between this state and another state of the United States." § 144.030.1, RSMo. To reach that unusual conclusion, this Court would need to disregard the plain and ordinary meaning of § 144.030.1 and overrule its own unbroken line of decisions recognizing that sales made from other states to Missouri are made between the states. This dispute presents no basis for such a radical departure from either Missouri's primary rule of statutory construction or this Court's precedent.

The Director has also failed to articulate a persuasive basis for declining to find Missouri's Use Tax applicable to TracFone Wireless, Inc. ("TracFone"). The sale of telecommunications service made between the states is the interstate complement of telecommunications sales made within Missouri. Because Article X, § 3 of the Missouri Constitution requires uniform taxation of telecommunications sales, this Court should construe the Use Tax to apply to TracFone's interstate telecommunications sales.

ARGUMENT

I. BECAUSE TRACFONE'S SALES ARE ADMITTEDLY "MADE FROM MIAMI, FLORIDA," THEY ARE NECESSARILY "MADE IN COMMERCE BETWEEN THIS STATE AND ANY OTHER STATE OF THE UNITED STATES."

The Administrative Hearing Commission ("Commission"), the Director, and TracFone all agree that TracFone's "sales of Airtime and handsets were **made from Miami, Florida**." Resp. Br. at 6. (emphasis added). Section 144.030.1 exempts retail sales "made in commerce between this state and any other state of the United States" from the Missouri Sales Taxes. Florida is an "other state of the United States." Thus, sales that are made from Florida to customers in this state are necessarily made "between this state and any other state of the United States." § 144.030.1, RSMo. *Accord Curtis Publishing Co. v. Bates*, 250 S.W.2d 521, 522-24 (Mo. 1952) (finding magazine sales made from Pennsylvania exempt under § 144.030.1); *American Bridge Co. v. Smith*, 179 S.W.2d 12, 13 (Mo. 1944) (finding steel sales made from Pennsylvania exempt); *Binkley Coal, Co. v. Smith*, 179 S.W.2d 17, 19 (Mo. 1944) (finding coal sales made from Indiana and Illinois exempt).

The only way to find that retail sales of telecommunications services "made from Miami" to Missouri are not exempt from the Missouri Sales Tax under § 144.030.1 is to find that the exemption does not apply to the retail sale of telecommunications services. The plain language of § 144.030.1 precludes such a finding.

II. THE INTERSTATE COMMERCE EXEMPTION APPLIES TO THE RETAIL SALE OF TELECOMMUNICATIONS SERVICES UNDER § 144.0201(4).

Under § 144.030.1, retail sales made between the states are "specifically exempted from the provisions of sections 144.010 to 144.525 and from the computation of the tax levied, assessed or payable pursuant to sections 144.010 to 144.525." Section 144.020.1(4), which addresses telecommunications service, falls within § 144.010 to § 144.525. Thus, under § 144.030.1, interstate sales of telecommunications service are "specifically exempted" from any tax levied, assessed or payable pursuant to § 144.020.1.

Just as it would be absurd to read "the numbers 1 to 5" to exclude the number 3, it would be absurd to read an exemption that applies to "sections 144.010 to 144.525" to exclude § 144.020.1(4). *Accord J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. banc 2000) (recognizing that statutes should be given "a reasonable reading rather than an absurd or strained reading"). As discussed below, the Director has not identified any reason for this Court to adopt an absurd reading of § 144.030.1.

III. THE DIRECTOR HAS ARTICULATED NO BASIS FOR DISREGARDING THE PLAIN AND ORDINARY MEANING OF § 144.030.1.

In support of his contention that TracFone's retail sales made from Florida to Missouri are not made "between this state and any other state of the United States" under § 144.030.1, the Director invokes (1) the "true object" test for distinguishing the sale of services from the sale of products and (2) this Court's decision in *Six Flags Theme Parks,*

Inc. v. Director of Revenue, 102 S.W.3d 526 (Mo. banc 2003). Neither invocation can sustain his argument.

A. The "true object test" is irrelevant because whether or not TracFone sells services does not alter the admitted fact that its sales are "made from Miami, Florida."

This Court has recognized that there is no need to look to the "true object" test when the plain language of the tax statute resolves the dispute. *Bartlett Int'l, Inc. v. Director of Revenue*, 487 S.W.2d 470, 475-76 (Mo. banc 2016). The plain language of § 144.30.1 resolves the dispute because the parties agree TracFone's sales are made from Florida. There is thus no need to look to the true object test here.

Moreover, the "true object" test was developed by this Court and codified in 12 CSR 10-103.600 to determine whether to treat a given sale as the sale of a service or the sale of tangible personal property. *See* 12 CSR 10-103.600. *See also Bartlett Int'l, Inc.*, 487 S.W.2d at 475-76. Here the parties agree that, whatever it sells, TracFone's sales are made from Florida. That the true object of TracFone's sales is the sale of telecommunications services tells one nothing about whether or not those sales "are made in commerce between this state and any other state of the United States."

B. A finding that the state where purchases are used somehow overrides the state where sellers are located under § 144.030.1 would overrule this Court's prior decisions involving out-of-state sellers.

In *American Bridge*, the subject sales of steel were made from Pennsylvania "to customers **for use or consumption in this state**." 179 S.W.2d at 13. (emphasis added).

Binkley Coal involved "foreign corporations engaged in the business of selling coal from mines located without the territorial limits of Missouri to customers **for use or consumption within this state**." 179 S.W.2d at 18 (emphasis added). And in *Curtis Publishing Co.*, this Court addressed magazine sales made from Pennsylvania and "mailed directly to the subscriber within this state." 250 S.W.2d at 524.

The Director's suggestion that under § 144.030.1 the state where purchases are used somehow overrides the state from which sales are made would necessitate a different result in each of these cases.

C. This Court's determination that a Missouri amusement park's sale of Missouri services was not interstate commerce has no application to the sale of nationwide service "made from Miami" by a Florida seller.

In *Six Flags Theme Parks, Inc. v. Director of Revenue*, this Court addressed a transaction "between the customer and an amusement park in Missouri for admission to the amusement park in Missouri." 102 S.W.3d at 526. The core of the dispute in *Six Flags* was whether certain Six Flags' customers should be treated as out-of-state customers or Missouri customers.

Six Flags sought a refund on sales taxes remitted on tickets and passes purchased by mail or telephone and sent to non-Missouri mailing addresses. It suggested that those tickets and passes were tangible goods sold from Missouri to other states. This Court rejected that suggestion: "The true object of the transaction in this case is the service of amusement, not the sale of tangible personal property." Instead of mailing tickets, Six Flags could have simply charged customers at the gate in Eureka, Missouri. Moreover, it

was not possible for Six Flags' customers to consume the subject amusement services anywhere but in Eureka, Missouri. Whatever their mailing address, this Court treated Six Flags' customers as Missouri customers buying a Missouri service from a Missouri seller. Thus, the Court found the transaction was "essentially a local transaction" and was not a sale made from Missouri to any other states.

Here, TracFone sells national service. R. Ex. R, p. 1; R. Ex. 5, p. 6, R. Ex. T, p. 3; Tr. 40:18-23. TracFone's Missouri customers do not need to make a single telephone call to or from Missouri. R. Ex. T, p. 3. And the parties all agree that TracFone's sales are "made from Miami, Florida."

In *Six Flags*, this Court did not find that § 144.020.1(2) was not included among "sections 144.010 to 144.525." It did not suggest that *American Bridge*, *Binkley Coal*, and *Curtis Publishing* were no longer good law. And it did not hold that § 144.030.1 does not apply to the sale of services by non-Missouri sellers. Thus, *Six Flags* provides no support for the Director's contention that retail sales made from Florida to Missouri are not "made in commerce between this state and any other state of the United States."

IV. TRACFONE'S SALES ARE SUBJECT TO MISSOURI'S USE TAX BECAUSE THE MISSOURI CONSTITUTION REQUIRES THE UNIFORM TAXATION OF TELECOMMUNICATIONS SERVICES.

The sale of telecommunications service that is not made in commerce between the states is subject to Missouri's Sales Tax. Missouri's Use Tax was enacted "to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 647 (1994). Article X, § 3 of the Missouri

Constitution requires uniform taxes on telecommunications services. Thus, a constitutional construction of § 144.610, RSMo. would necessarily include the sale of telecommunications services. *Accord Missouri Pac. RR. Co. v. Director of Revenue*, 345 S.W.2d 52, 59 (Mo. banc 1961) (severing and striking down Use Tax exemption under Article X, § 3 of the Missouri Constitution).

CONCLUSION

The Director has articulated no basis for this Court to (1) disregard the fact that TracFone's sales are "made from Miami, Florida," (2) disregard the fact that sales made from Florida to Missouri are between this state and another state, or (3) disregard the fact that § 144.020.1(4) of the Missouri Revised Statutes is included among "sections 144.010 to 144.525." Likewise, the Director has identified no reason for this Court to overrule its decisions in *American Bridge*, *Binkley Coal*, or *Curtis Publishing*. Therefore, TracFone asks that this Court reverse the decision of the Administrative Hearing Commission and order Respondent Director of Revenue to refund to TracFone the difference between the sales taxes erroneously remitted and the use taxes that TracFone should have been collecting and remitting.

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 1,666 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/ John S. Kingston

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served through the Missouri CaseNet electronic filing system this 28th day of November, 2016, upon the following:

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