

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC95029**

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**OFFICE DEPOT, INC.**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE,**

**Appellant.**

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**Appeal from the Administrative Hearing Commission**

**The Honorable Sreenivasa Rao Dandamudi, Commissioner**

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**BRIEF OF RESPONDENT OFFICE DEPOT, INC.**

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## **JURISDICTIONAL STATEMENT**

This case arises from a claim for refund which was denied by the Director of Revenue. Respondent sought review of that decision of the Director of Revenue at the Administrative Hearing Commission. The Administrative Hearing Commission issued its decision overturning the refund denial by the Director of Revenue and the Director sought review before this Court.

The question posed on appeal is whether Missouri law authorizes the Director to impose Missouri use tax on a foreign entity when catalogs are mailed, via the United States Post Office, from an outside location into Missouri under Section 144.610, RSMo. This question requires the construction of a revenue law of the State of Missouri and thus this Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

## STATEMENT OF FACTS

### Office Depot is a Foreign Corporation Doing Business in Missouri

Office Depot, a Delaware corporation that is headquartered in Boca Raton, Florida, operates a national retail business selling office products and services in person at its retail locations and over the Internet. Record on Appeal, 10 (“ROA” hereafter).<sup>1</sup> Office Depot operates twenty-four retail stores in the State of Missouri. ROA, 11. Office Depot engages unrelated third party businesses to develop and produce catalogs for customers located across the country, including Missouri. *Id.*

### Printing and Mailing of Catalogs and Other Advertising Materials

Office Depot engaged R.R. Donnelly & Sons (“R.R. Donnelly”), to print its catalogs. *Id.* Office Depot purchased the paper for the catalogs, but such paper was never in Missouri. *Id.* The catalogs were published in locations outside of Missouri. *Id.* R.R. Donnelly delivered the catalogs to the United States Postal Service. *Id.* The United States Post Office then distributed such catalogs to Office Depot’s Missouri customers from locations originating outside of the State of Missouri. *Id.* Office Depot paid \$746,739.57 for the raw paper and \$652,500.83 to R.R. Donnelly for printing and mailing charges. *Id.*

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<sup>1</sup> The Administrative Hearing Commission certified the record of proceedings (the Record on Appeal) to this Court on June 3, 2015. Since there was no hearing, the Record does not include a transcript.

Office Depot accrued and paid Missouri use tax, in the amount of \$83,954.43, on the cost of the printed materials (paper and printing charges) that were shipped into the state during the period in question. ROA, 12.

### **Refund Claim with the Director of Revenue**

On January 20, 2012, Office Depot filed its Application for Sales/Use Tax Refund or Credit with the Director of Revenue. *Id.* This refund claims covered the periods December, 2008 through December, 2010 and amounted to \$83,954.43. *Id.* After almost two years and ten months (October 15, 2012), the Director denied the refund claim. The denial stated no basis for the denial, except a generic “the transactions are subject to tax.” ROA, 5-6.

### **Proceedings before the Administrative Hearing Commission**

Office Depot timely filed a Petition with the Administrative Hearing Commission on December 10, 2012. ROA, 1 and 12. The parties stipulated to all the facts and waived an evidentiary hearing. ROA, 13.

On April 30, 2015, Commissioner Dandamudi issued his Decision finding that the Director’s denial of Office Depot’s refund claims was not well taken and ordered the Director to pay the refund along with statutory interest. ROA at 90. The Director appealed that Decision.

**POINT RELIED ON**

**THE ADMINISTRATIVE HEARING COMMISSION'S DECISION IS CORRECT AND SHOULD BE SUSTAINED BY THIS COURT IN THAT OFFICE DEPOT'S FACTS ARE CONSISTENT WITH THE FACTS IN *MAY DEPARTMENT STORES V. DIRECTOR OF REVENUE*, 748 S.W.2D 174 (MO. BANC 1988) WHICH IS CONTROLLING BECAUSE OFFICE DEPOT DOES NOT HAVE ANY POWER OF OWNERSHIP OR CONTROL IN MISSOURI OF THE PRINTED MATERIALS ONCE THE PRINTER DELIVERS IT TO THE UNITED STATES POST OFFICE FOR DELIVERY TO THE ULTIMATE CONSUMER.**

*May Department Stores v. Director of Revenue*, 748 S.W.2d 174 (Mo. banc 1988)

*Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388 (Mo. banc 2002)

Section 144.610, RSMo



## ARGUMENT

**THE ADMINISTRATIVE HEARING COMMISSION’S DECISION IS CORRECT AND SHOULD BE SUSTAINED BY THIS COURT IN THAT OFFICE DEPOT’S FACTS ARE CONSISTENT WITH THE FACTS IN *MAY DEPARTMENT STORES V. DIRECTOR OF REVENUE*, 748 S.W.2D 174 (MO. BANC 1988) WHICH IS CONTROLLING BECAUSE OFFICE DEPOT DOES NOT HAVE ANY POWER OF OWNERSHIP OR CONTROL IN MISSOURI OF THE PRINTED MATERIALS ONCE THE PRINTER DELIVERS IT TO THE UNITED STATES POST OFFICE FOR DELIVERY TO THE ULTIMATE CONSUMER.**

### Standard of Review<sup>2</sup>

This case arises on the question of whether the transactions in question by Office Depot are included or excluded from the ambit of the Missouri use tax imposed under Sections 144.610, RSMo. Since this case involves the imposition of tax, the statutes involved are to be strictly construed against the Director of Revenue and in favor of the taxpayer, Office Depot. Section 136.300.1, RSMo. This Court reviews statutory determinations of the Administrative Hearing Commission *de novo* and factual

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<sup>2</sup> Appellant Director of Revenue failed to state the standard of review in her Brief of Appellant in contravention to Rule 84.04(e), thus Respondent’s standard of review is uncontradicted.

determinations are upheld if supported by substantial evidence on the whole record. *Bunker Missouri, Inc. v. Director of Revenue*, 319 S.W. 3d 433, 435 (Mo. banc 2010).

### **Introduction**

This case arises from the improper denial by the Director of Revenue of a refund claim for use taxes paid by Office Depot. Office Depot purchased paper in another state and arranged for catalogs to be produced in another state and then mailed, via the United States Postal Service, to customers across the nation, including in Missouri. Office Depot accrued and paid Missouri use tax on the paper purchased for those catalogs and the printing services, but neither the paper nor the catalogs were ever stored, used or consumed by Office Depot in the State of Missouri. For these reasons, Office Depot filed for a refund claim relying upon the plain language of Section 144.610, RSMo, and this Court's decision in *May Department Stores v. Director of Revenue*, 748 S.W.2d 174 (Mo. banc 1988). The Director erroneously denied the refund claim and the Administrative Hearing Commission correctly reversed that improper denial. This Court should uphold the decision of the Administrative Hearing Commission and order the refund and statutory interest be paid to Office Depot.

### **A.**

#### **Taxing Statutes Must Be Construed in Favor of Taxpayer**

This case is not an exemption case, but instead is the interpretation of how a tax is imposed. This difference is critical since this Court has, time and again, determined that taxing statutes are construed in favor of the taxpayer and against the Director (exemption

statutes have the presumption reversed). See, e.g., *Cook Tractor Co., Inc. v. Dir. of Rev.*, 187 S.W.3d 870, 872 (Mo. banc 2006) (citing *Six Flags Theme Parks, Inc. v. Dir. of Rev.*, 102 S.W.3d 526, 529 (Mo. banc 2003)). Section 136.300.1 states in part:

With respect to any issue relevant to ascertaining liability of a taxpayer all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer.

In the instant case, the question is whether Section 144.610, RSMo, applies to the current facts. Section 144.610 imposes a tax, so the burden is on the Director. This Court has stated:

Section 144.610 taxes the privilege of “storing, using or consuming within this state any article of property” and as a taxing statute must be strictly construed in favor of the taxpayer and against the taxing authority.

*Smith Beverage Co. of Columbia v. Reiss*, 568 S.W.2d 61, 63 (Mo. banc 1978) (emphasis added) (citing *Wiethop Truck Sales, Inc. v. Spradling*, 538 S.W.2d 585 (Mo. 1976)).

## B.

### Section 144.610, RSMo

The Director focuses on what the Director claims is the “broad” definition of use in Section 144.605(13), but Section 144.605(13) must be read in conjunction with Section 144.610.1. The Director conveniently ignores the most important language in this statute:

A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property.

The statutory language and *May Department Stores v. Director of Revenue*, 748 S.W.2d 174 (Mo. banc 1988) makes clear there must be a taxable incident within Missouri for the use tax to apply.

**C.**

***May Department Stores v. Director of Revenue* is controlling in that a taxpayer who ships tangible personal property into the state from outside the state is not required to pay tax on the property pursuant to Section 144.610 where the taxpayer did not store, use or consume the property in the state.**

The Director is presenting arguments that have already been addressed and rejected by this Court in *May Department Stores v. Director of Revenue*, 748 S.W.2d 174 (Mo. banc 1988). This Court specifically opined that the catalogs produced and mailed in another state are not in the possession of the taxpayer and are not subject to use tax:

The case bears some similarity to *R&M Enterprises, Inc. v. Director of Revenue*, — S.W.2d — (Mo. banc 1988) (No. 69557, decided today). We need not repeat the general discussion of the use tax found in that case. There is, however, a controlling difference between that case and this one. Here the catalogs are not in the possession of the taxpayer in Missouri, even for an instant, after printing is complete. They go from the printer to the post office to the addressees. They do not come to rest in Missouri and are not “commingled with the general mass of property of this state” until delivered to the various addresses. (Section 144.610-1, last sentence.)

The use tax is imposed “for the privilege of storing, using, or consuming within this state any article of tangible personal property . . . .” The appellant does not exercise any of the privileges listed in the statute, and so does not owe a tax levied on those privileges.

*Id.* at 174-175 (emphasis added). The Director, in her Brief of Appellant, is not presenting any new facts to this Court. The decision by the Court in *May Department Stores* is controlling and the arguments presented by the Director are wholly without merit and Office Depot is entitled to a refund of the use tax paid.

The Director asks this Court to overrule *May Department Stores*. When rejecting the Director’s request to overrule another tax case, this Court reminded the Director that, under the doctrine of *stare decisis*:

[A] decision of this Court should not be lightly overruled, particularly where the opinion has remained unchanged for many years and is not clearly erroneous and manifestly wrong.

*Eighty Hundred Clayton Corp. v. Dir. of Rev.*, 111 S.W.3d 409, n. 3 (Mo. banc 2003) (citing *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 391 (Mo. banc 2002)). The Director has articulated no basis or rationale for this Court to overrule and reverse its precedent in *May Department Stores*.

**D.**

**The Director of Revenue's reliance on *Southwestern Bell Yellow Pages, Inc., v. Director of Revenue*, 94 S.W.2d 388 (Mo. banc 2002) is erroneous and inconsistent due to the critical differences in the facts of the current case.**

The Director also asserts that the Court should look to *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388 (Mo. 2002) to decide that use tax is due as Office Depot exercised some sort of control over the tangible personal property in Missouri. The Director appears to ignore that critical facts in *Southwestern Bell* are distinguishable from this Court's decision in *May Department Stores* and from Office Depot's specific facts in this case.

In *Southwestern Bell*, the taxpayer had its agents in Missouri, under the taxpayer's direction and control, take possession of and deliver the yellow page books to customers. *Id.* at 389. As a result, in *Southwestern Bell*, the taxpayer employed and directed an independent agent inside Missouri to distribute the publications. This Court determined that the taxpayer established control over the printed materials once they were delivered into Missouri and thus tax was due. *Id.* at 391.

The current case is different in a key set of critical facts: Office Depot has no agents in Missouri that distribute its printed materials. The printer, R.R. Donnelley, shipped the materials into Missouri from outside the state utilizing the United States Postal Service. With respect to the catalogs (and the paper) there is no use or possession in Missouri by Office Depot.

The factual differences between the current case and *Southwestern Bell* also include the fact that Southwestern Bell “fulfilled advertising contracts with Missouri businesses” *Id.* at 392. Office Depot does not sell advertising to Missouri businesses, but instead is a national corporation which has a national catalog.

Alternatively, the Director wants to add the word “distribution” to Section 144.610, RSMo. However, the plain language of Section 144.610.1, RSMo, does not specifically mention distribution of tangible personal property as being a taxable use. The statute provides that use tax only applies to storing, using or consuming tangible personal property in the state, which this Court found did not occur in *May Department Stores*. “Distributing” is not subject to Missouri use tax, which is the controlling component in the instant case. The Director’s contention that the paper is taxable “because they are articles of tangible personal property that were purchased by Petitioner for use in this state,” should also be rejected by this Court. The key facts in both the instant case and in *May* are analogous. In both cases, the only event occurring in the State of Missouri was distribution, which does not constitute a taxable event. For the Director to suggest that Office Depot somehow has direction and control of the goods because the U.S. Postal Service, a federal agency, was acting as an independent contractor on their behalf, has no support in any fact or Missouri law.<sup>3</sup>

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<sup>3</sup> Again, the construction of Section 144.610 is against the Director and thus all inferences must be in favor of a refund. Section 136.300.1, RSMo.

If there is a need to make a change in Section 144.610, RSMo, it is the prerogative of the Legislature to revise any purported statutory defect with new legislation, if it so chooses. The fact that the Legislature, subsequent to the ruling in *May Department Stores*, has not revised Section 144.610 to the Director's liking, is a fact that cannot be overridden by the Director with denying valid refund claims submitted by taxpayers and forcing several years of unnecessary litigation.

In her brief, the Director faults this Court's decision in *May Department Stores* for its failure to cite the definition of "use," calling it "curious." Director's Brief at 11. The court's efficiency should not be mistaken for faulty reasoning. This Court's decision in *May Department Stores* states:

The case bears some similarity to *R & M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171 (Mo. banc 1988) (decided). **We need not repeat the general discussion of use tax found in that case.**

748 S.W.2d at 174 (Mo. Banc 1988) (emphasis added). Indeed, in *R&M Enterprises*, this court set forth the general use tax statute (Section 144.610) **and** the definition of "use." *R & M Enterprises, Inc. v. Dir. of Revenue*, 748 S.W.2d 171, 172 (Mo. banc 1988) (overruled on other ground by *House of Lloyd, Inc. v. Dir. of Revenue*, 884 S.W.2d 271 (Mo. Banc 1994)).

In *May Department Stores*, this Court definitively concluded that the taxpayer did not "exercise any of the privileges [storing, using or consuming] listed in the statute, and so does not owe a tax liveried on those privileges." *Id.* at 175. And while the Director



criticizes that the case gives “only the briefest reference to the facts” (Director’s Brief, p. 11), the case appropriately sets for the material facts:

[The taxpayer] causes catalogs describing its merchandise to be printed in Illinois. It supplies mailing labels to the printer, who mails the printed catalogs directly to the addresses.

*Id.* at 174. This Court noted the “controlling” fact is that “the catalogs are not in the possession of the taxpayer in Missouri even for an instant, after printing is complete.” *Id.* at 175.<sup>4</sup>

#### E.

#### **Foreign Jurisdictions do not serve as a basis to override this Court’s Decision in *May Department Stores***

This Court, in *May Department Stores*, also explained that its position was consistent with at least three other jurisdictions:

Our position is supported by *Hoffmann–LaRoche, Inc. v. Porterfield*, 16 Ohio St.2d 158, 243 N.E.2d 72 (Ohio 1968); *Bennett Brothers Inc. v. State*

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<sup>4</sup> The Director has also argued that purchasing paper out of state is of some import. But the statute still requires an action to occur “in this state.” Section 144.610, RSMo. To paraphrase what this Court found in *May Department Stores*, 748 S.W. 2d at 175: “the paper is not in possession of the taxpayer in Missouri even for an instant.” The Director’s novel argument regarding the paper purchases carries no weight.

*Tax Commission*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (1978); and *District of Columbia v. W-Bell & Company, Inc.*, 420 A.2d 1208 (D.C.App.1980).

*Id.* Still, the Director claims this Court's decision in *May Department Stores* was criticized in three other jurisdictions: The New Jersey Tax Court, the Arizona Court of Appeals, and the Nebraska Supreme Court. (Director's Brief, p. 12).<sup>5</sup>

The New Jersey Tax Court made note of the split in cases, but sided with those imposing tax, in part, because they were "more harmonious than the economic objectives of the New Jersey Sales and Use Tax." *Comfortably Yours, Inc. v. Director, Div. of Taxation*, 12 N.J. Tax 570, 578 (1992). In *May Department Stores*, this Court expressly rejected an economic objectives argument made by the Director:

[The Director] argues that the purpose of the use tax statutes will not be fulfilled if the taxpayer is able to benefit by causing its printing to be done outside the state. This may be so, but the director must still point to a statutory incident which causes the tax to attach. This he has not done.

*May Department Stores*, 748 S.W.2d at 175. The New Jersey Tax Court pointed to an additional two jurisdictions consistent with *May Department Stores*, in addition to the three cited in the *May Department Stores* decision:

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<sup>5</sup> The Director also makes a passing reference to *J.C. Penney Co., Inc. v. Olsen*, 796 S.W.2d 943, (Tenn. 1990), (Director's Brief, p. 12) but that case is clearly not on point as Tennessee's use tax law (T.C.A. §67-6-102(4)) expressly uses the term "distribution."

*Modern Merchandising, Inc. v. Dept. of Revenue*, 397 N.W.2d 470 (S.D.Sup.Ct.1986); *Wisconsin Dept. of Revenue v. J.C. Penney Co.*, 108 Wis.2d 662, 323 N.W.2d 168 (App.Ct.1982).

*Comfortably Yours, Inc. v. Dir., Div. of Taxation*, 12 N.J. Tax 570, 577-78 (N.J.Tax 1992).

The Director also relies on *Service Merchandise Co., Inc. v. Arizona Department of Revenue*, 937 P.2d 336 (Ariz. 1995). In that case, the court construed the word “use” more broadly than Missouri courts have done, explaining “the power to decide which customers will receive a catalog or flier is a power exercised ‘incidental to owning the property.’” *Id.* at 339. While the Director urges this Court to reject its previous “narrow” reading of the word “use” in *May Department Stores*, this Court’s construction of the word “use” is dictated by Section 136.300.1, RSMo (emphasis added). That provision states:

With respect to any issue relevant to ascertaining the tax liability of a taxpayer **all laws of the state imposing a tax shall be strictly construed against the taxing authority in favor of the taxpayer.**

Finally, the Director points to *J.C. Penney Co. v. Balka*, 577 N.W.2d 283 (Neb. 1998) to support her position. On the basis that “J.C. Penney placed its catalogs in the stream of commerce and directed to whom they were to be delivered,” the court concluded that J.C. Penney “used” the catalogs. *Id.* at 527. The court relied on a previous Nebraska decision summarizing the “general theory” behind its sales and use tax. *Id.* This Court has previously rejected the “purpose” of taxation argument. See *May Department Stores*, 748

S.W.2d at 175. The *Balka* court cited two additional cases to add to the litany of cases “refusing to impose a use tax under similar circumstances”:

*Mart Realty, Inc. v. Norberg*, 111 R.I. 402, 303 A.2d 361 (1973); *Sharper Image v. Dep't of Treasury*, 216 Mich.App. 698, 550 N.W.2d 596 (1996), appeal denied 454 Mich. 867, 560 N.W.2d 636 (1997).

*J.C. Penney Co., Inc. v. Balka*, 577 N.W.2d 283, 286 (Neb. 1998).

On the same day that *May Department Stores* was decided, this Court issued two other opinions with essentially the same holdings: *Automobile Club of Missouri, v. Director of Revenue*, 748 S.W.2d 178 (Mo. banc 1988) and *Service Merchandise Company No. 46, Inc. v. Director of Revenue*, 748 S.W.2d 177 (Mo. banc 1988). Specifically, *Automobile Club*, adds flavor to the court’s decision in *May Department Stores*. In *Automobile Club*, the court stated there was no taxable use despite the fact the “magazines are carried into Missouri and travel the Missouri highways before being delivered to the post office.” *Id.* at 179. The court also rejected the tax policy argument:

It makes no difference that this result may discriminate against Missouri printers, who would have to collect sales tax and Illinois printers, who apparently do not. There still must be a taxable incident on which to found the tax.

*Id.* Prior to *May Department Stores*, six other jurisdictions had refused to impose a use tax on substantially similar facts. Since this Court decided *May Department Stores*, *Automobile Club*, and *Service Merchandise Company*, in 1988, the Michigan Court of Appeals has joined the ranks.

In *Sharper Image Corp. v. Department of Treasury*, 550 N.W.2d 596 (Mich. App. 1996), the Michigan Court of Appeals explained “When there is doubt, tax laws are to be construed in favor of the taxpayer.” *Id.* at 702 (citing *Michigan Bell Telephone Co. v. Dep’t of Treasury*, 518 N.W.2d 808 (Mich. App. 1994)). With this in mind, the court stated:

[W]e find no provision in the statutory definition of “use” to allow defendants to tax the distribution of catalogs. Had the Legislature intended for distributions to be taxed, it could have easily done so by expressly providing it in the definition of use

*Id.* at 598. This same line of reasoning is found in the pre—*May Department Stores* cases:

The department contends that it is inconsistent to impose use tax on catalogs printed and delivered in Wisconsin but not on catalogs printed outside Wisconsin and delivered to Wisconsin consumers. **This contention is more appropriately directed to the legislature.**

*Wisconsin Dept. of Revenue v. J. C. Penney Co., Inc.*, 323 N.W.2d 168, 170 (Wis. Ct. App. 1982) (emphasis added). In South Dakota, the argument that “distribution” should be taxable was brought to the Legislature and prevailed:

Following the decision in *Modern Merchandising*, the [South Dakota] Legislature altered the definition of ‘use’ to include ‘the delivery or causing delivery into this state of tangible personal property intended to advertise products or services or promote or facilitate sales to South Dakota

residents.’ 1987 SDSessL ch 108, § 1. This change is now codified in SDCL 10-46-1(13).

*W. Wireless Corp. v. Dep't of Revenue*, 665 N.W.2d 73, 76 (S.D. 2003). The Director here is urging this Court to change Missouri law. That argument, as has been done in other states, should be addressed to the Legislature. This Court is bound by the doctrine of *stare decisis*.

### Conclusion

The Administrative Hearings Commission, after reviewing the facts of this case and taking into careful consideration this Court’s decision in *May Department Stores*, and Missouri Statutes, weighed against the Director’s reliance with *Southwestern Bell Yellow Pages, Inc.* which contain critical facts dissimilar to Office Depot, came to the correct decision in deciding in Office Depot’s favor. Office Depot has demonstrated that its use tax refund claim is valid under Missouri law and consistent with this Court’s ruling in *May Department Stores*.

This Court’s decision in *May Department Stores* demonstrates that the cost of paper purchased by Office Depot, which was delivered to a printer outside Missouri to manufacture catalogs and subsequently deliver the finished product to customers in Missouri at no charge, is not subject to Missouri use tax. The burden to show storage, use or consumption in Missouri is on the Director and she has failed to do so before the Commission or before this Court. Further, the charges for printing services performed in Illinois by the printer that transformed raw paper into finished catalogs are also not subject to the tax imposed by Section 144.610, RSMo. For the reasons stated above, the

decision of the Commission should be sustained and the tax and statutory interest refunded promptly to Office Depot.

**WHEREFORE**, Respondent prays that this Court affirm the decision of the Administrative Hearing Commission finding that the Director's denial of the refund claim was in error, reverse that denial, order the refund and interest to be paid to Respondent, and for such other relief as this Court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

The undersigned counsel certifies that on this 2<sup>nd</sup> day of November, 2015, a true and correct copy of the above brief was served on the following by eService of the eFiling System and a Microsoft<sup>®</sup> Office Word 2010 version was e-mailed to:

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

- (1) contains the information required by Rule 55.03;
- (2) complies with the limitations in Rule 84.06(b) and contains 4,499 words, determined using the word count program in Microsoft<sup>®</sup> Office Word 2010; and
- (3) the Microsoft<sup>®</sup> Office Word 2010 version e-mailed to the parties has been scanned for viruses and is virus-free.

/s/ Marc H. Ellinger